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

SIR FREDERICK POLLOCK, BART., LL.D.,

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

ASSISTED BY

R. CAMPBELL, OF LINCOLN'S INN, ESQ. AND O. A. SAUNDERS, OF THE INNER TEMPLE, ESQ.

BARRISTERS-AT-LAW.

VOL. XLIV.

1836–1838.

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PREFACE TO VOLUME XLIV.

Thomas v. *Dering*, p. 158, is a case of some interest on the principles which guide the Court in awarding or refusing specific performance with compensation where the vendor turns out to have only a limited interest. *Colyear* v. *Mulgrave*, p. 191, is important in the line of modern authorities which have now disallowed the supposed right of strangers interested in the performance of a covenant to sue on it in equity. With regard to *Gale* v. *Gale* (1877) 6 Ch. D. 144, 46 L. J. Ch. 809, which seems at first sight to extend one of the few remaining exceptions, see the observations of Lord Lindley (then L. J.) in *Att.-Gen.* v. *Jacobs Smith* [1895] 2 Q. B. 341, 349, 64 L. J. Q. B. 605.

Wedderburn v. *Wedderburn*, p. 331, illustrates the complicated claims which may arise from the retention of a testator's capital in trade by executors who are also his partners in the business. Further proceedings in this cause continued, and were reported, down to 1856: see the references noted, *l. c.*

We learn incidentally from a dictum in *Clayton* v. *Gregson*, at p. 435, that two different customary acres besides the statute acre were in use in Lancashire as late as 1836. Cp. Morgan, England under the Norman Occupation, p. 23.

In *Doe* v. *Suckermore*, p. 533, we have an elaborate discussion of the question, then very doubtful, whether proof of handwriting by comparison in Court with specimens

already admitted or proved, but not otherwise known to the witness to be the handwriting of the alleged writer, is admissible or not. In England the matter is now settled by statute. The affirmative opinion already prevailed in leading American jurisdictions at the date of this case: *Moody* v. *Rowell* (1836) 17 Pick. 490, Thayer, Cases on Evidence, 704.

Green v. *Chapman*, p. 652, is still useful to show what kind of criticism exceeds the bounds of fair comment; but the language about "*privilege* extended to fair criticism" is not consistent with the modern doctrine that fair comment is not in the position of a privileged communication, but is not a libel at all; and it is a question of fact whether criticism alleged to be libellous is fair or not: *Merivale* v. *Carson* (1887) 20 Q. B. Div. 275. It would seem also that a special plea such as was pleaded in the principal case was really bad as amounting to the general issue. In fact it had been held long before that under the general issue the defence of fair comment might be set up: *Tabart* v. *Tipper* (1808) 10 R. R. 698 (1 Camp. 350).

The opinions delivered by the Judges in *Miller* v. *Knox*, p. 771, are more valuable for the general discussion of the jurisdiction to commit for contempt than for any point specifically before them. As there was no final decision of the House of Lords (see at p. 819), it might be hard to define the authority of these opinions, but, so far as they are substantially unanimous, they may be taken as a trustworthy exposition of the law for all practical purposes.

A few cases of earlier date than the bulk of the volume will be found at the end. The reasons for now preserving them in the Revised Reports appear in the foot-notes at the beginning of each case.

In *Gluckstein* v. *Barnes*, [1900] A. C. at p. 252, Lord

Macnaghten cites the case of *Hichens* v. *Congreve* (1828—1831) from its latest stage before Shadwell, V.-C. The decision of Lord Lyndhurst on the demurrer, as reported in 4 Russ., is given in 32 R. R. 173. It appeared to the Editors of the Revised Reports that Lord Lyndhurst's judgment contained all the material facts and law, and it appears to them now that the subsequent report in 4 Sim. does not, at all events, contain anything material which is not either quoted or sufficiently stated in substance by Lord Macnaghten. If and so far as Lord Macnaghten's citation may be taken as intimating that Shadwell, V.-C.'s judgment does add anything to Lord Lyndhurst's, we should of course bow to his authority; but Lord Macnaghten himself has supplied our defect, if any, so fully that nothing remains to be done. A reference to Lord Macnaghten's judgment should be noted up in 32 R. R. 173.

A public announcement which has come to our notice makes it desirable to recall attention to the statement in our original introduction prefixed to 1 R. R. that the Revised Reports are an edition and not a selection.

F. P.

JUDGES

OF THE

HIGH COURT OF CHANCERY.

1836—1838.

(6 & 7 WILL. IV.—1 & 2 VICT.)

SIR CHARLES C. PEPYS, M. R.	*Commissioners*, 1835—1836.	*Lord Chancellors.*
SIR LANCELOT SHADWELL, V.-C.		
SIR JOHN B. BOSANQUET, J.		
LORD COTTENHAM, 1836—1841		
SIR CHARLES C. PEPYS, 1834—1836		*Masters of the Rolls.*
LORD LANGDALE, 1836—1851		
SIR LANCELOT SHADWELL, 1827—1850		*Vice-Chancellor.*

COURT OF KING'S BENCH.

LORD DENMAN, 1832—1850	*Chief Justice.*
SIR JOSEPH LITTLEDALE, 1824—1841	*Judges.*
SIR JOHN PATTESON, 1830—1852	
SIR JOHN WILLIAMS, 1834—1846	
SIR JOHN T. COLERIDGE, 1835—1858	

COURT OF COMMON PLEAS.

Sir N. C. Tindal, 1829—1846	*Chief Justice.*
Sir James Alan Park, 1816—1838	*Judges.*
Sir Stephen Gaselee, 1824—1837	
Sir John Vaughan, 1834—1839	
Sir John B. Bosanquet, 1830—1842	
Sir Thomas Coltman, 1837—1849	

COURT OF EXCHEQUER.

Lord Abinger, 1834—1844	*Chief Baron.*
Sir William Bolland, 1829—1839	*Barons.*
Sir John Gurney, 1832—1845	
Sir E. H. Alderson, 1834—1857	
Sir James Parke, 1834—1856	

Sir John Campbell, 1835—1841	*Attorney-General.*
Sir Robert M. Rolfe, 1834, 1835—1839	*Solicitor-General.*

TABLE OF CASES

REPRINTED FROM

1 & 2 KEEN; 5 ADOLPHUS & ELLIS; 1 NEVILE & PERRY; 4 BINGHAM, N. C.; 4 & 5 SCOTT.

Note.—Where the reference is to a mere note of a case reproduced elsewhere in the Revised Reports, or omitted for special reasons, the names of the parties are printed in italics.

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. XLIV.

CHANCERY.

MELLER (otherwise MELLOR) *v.* WOODS.

1836. *Feb.* 16, 17, 22.

(1 Keen, 16—23; S. C. 5 L. J. (N. S.) Ch. 109.)

Rolls Court. Lord LANGDALE, M.R.

Where a deposit of a lease was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee to have the lease sold, is entitled to the usual time to redeem. [16]

[The facts of this case are sufficiently stated in the judgment.]

Mr. Palmer, for the plaintiffs (equitable mortgagees by deposit, claiming foreclosure). [19]

Mr. Teed, contrà. [20]

Mr. Palmer, in reply. [21]

The Master of the Rolls: *Feb.* 22.

The plaintiffs in this case are commissioners of assessed taxes, and the bill prays for the sale of a lease which was deposited by way of equitable mortgage by the defendant William Woods, as a security for the sum of 1,800*l.*, in which sum that defendant was bound to the plaintiffs as surety for his son, a collector of taxes, who made default to that amount. The defendant

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William Woods, being called upon for payment by the commissioners, prevailed upon them to give him time, and, by way of inducing them to do so, deposited with them the lease in question, and at the same time signed a memorandum stating the purpose for which the deposit was made. From the nature of the transaction, it is admitted on both [*22] sides that the principal *sum secured was not to bear interest. The defendant Woods subsequently paid, in part satisfaction of the debt, the sum of 1,000*l.*, which he raised by a mortgage of the leasehold premises, subject to the lien of the commissioners, to the defendants Christopher Gabriel and Thomas Garner Gabriel. There remained the sum of 875*l.*, which is admitted by the answer of Woods to be due from him to the commissioners; and, that sum not having been paid, the present bill was filed to obtain the benefit of the equitable mortgage. The other defendants are not bound by the admission of Woods, but they admit that a considerable sum is due from Woods to the plaintiffs. Under these circumstances they insist, as they have a right to do, that an account should be taken; and further, that an equitable mortgagee cannot be in a better situation than a legal mortgagee, and, as against a legal mortgagee, the rule of the Court, is that the mortgagor is entitled to six months' notice to redeem.

The plaintiffs, partly upon the ground of the public inconvenience which, it was said, was likely to arise from delay; and partly upon the ground that, as the principal debt does not carry interest, there is no compensation, as in ordinary cases, for delay, claim a right to an order for an immediate sale of the estate. At the hearing, I intimated that the Court could not attend to any argument founded solely upon the inconvenience that might arise from delay; but, as the particular case appeared to be one of some hardship to the plaintiffs, who had no compensation, by way of interest, for the time which the rule of the Court allows to mortgagors, I wished to ascertain whether any authority could be found upon which this case could be excepted from the rule which has been laid down by the present LORD CHANCELLOR in

Parker v. *Housefield* (1). In many *cases the Court considers the payment of interest as a compensation for delay, and if I had found any authority for the application of that principle to the present case, I should have been inclined to accede to the prayer for an immediate sale. But I have not been able to find any case which would justify the Court in departing from the rule, which must be considered as established, as to the time allowed for redeeming mortgages whether legal or equitable. I have thought it right to consult the Lord Chancellor on this subject, who concurs with me in the conclusion to which I have come. I must, therefore, in this case, order an account to be taken of what is due to the plaintiffs from the defendant Woods; that six months' time be allowed to the defendant; and that, in default of payment in this time, the estate be sold. The plaintiffs are entitled to a receiver according to the prayer of their bill.

WILLIAM EVANS AND OTHERS *v.* HENRY STOKES AND OTHERS.

1836. *Jan.* 27.

Rolls Court. Lord LANGDALE, M.R. [24]

(1 Keen, 24—33; S. C. 5 L. J. (N. S.) Ch. 129.)

In a suit for the purpose of having the affairs of a dissolved joint stock company settled, and wound up under a decree of the Court, and praying for accounts of the partnership transactions, and that a sale of the partnership property by the directors might be declared fraudulent and void, all the members of the company, however numerous, must be parties to the suit.

IN November, 1828, the French Brandy Distillery Company, which had been established about three years, was dissolved in pursuance of the resolutions adopted by a majority of the shareholders at a special general meeting of the proprietors, held on the 27th of the previous month of October, and the partnership premises, plant, implements, and fixtures were sold upon certain conditions to the defendant John Thomas Betts, who had projected the Company, and who continued, after its dissolution, to carry on the business under the firm of Betts & Co.

(1) 2 My. & Keen, 419. Following a number of earlier precedents which had already completely settled the point.—O. A. S.

EVANS v. STOKES.

The plaintiffs were shareholders, and the defendants, with the exception of John Thomas Betts and Richard Cuerton the younger, were directors of the Company at the time of its dissolution. The bill alleged that the dissolution had been fraudulently procured by the defendants, Betts, Stokes, and
[*25] Cuerton the elder, and that the majority of the members *of the Company had been induced to consent to such dissolution by false representations as to the unprofitable state of the concern; and it prayed that the affairs of the partnership or Company might be wound up and settled by and under the decree and direction of the Court; that accounts might be taken of the partnership property received by the defendants the directors; that the sale of the business and premises, plant and effects to the defendant Betts might be declared to be fraudulent and void, as against the plaintiffs and the other members of the Company, and that the same might be set aside; that the said premises, plant, and effects might be resold under the direction of the Court, or that the defendants, John Thomas Betts, Henry Stokes, Richard Cuerton the elder, and Richard Cuerton the younger might be charged in account with the full value thereof at the time of the dissolution of the Company, and that the defendant John Thomas Betts might be decreed to pay what was due from him to the Company; that an account might be taken of the profits made by the last-named defendants in the business since the dissolution of the Company, and that they might be charged in account with the amount of such profits; that all the defendants might be charged with the profits made by them respectively from the sales of shares in the Company, and that a sum of 3,300*l.* paid by them to one Vetter, in discharge of his claims against the Company, might be disallowed to them.

The defendants, charged with having concerted the dissolution, denied the fraud alleged by the bill, and insisted that the dissolution had been *bonâ fide* recommended as the best proceeding that could be adopted for the interest of the shareholders under the existing circumstances of the concern, and that the terms
[*26] of the *agreement by which the partnership property had been sold to the defendant Betts were fair and equitable.

The pleadings having been opened, a preliminary objection for want of parties was taken to the suit.

Mr. Pemberton and *Mr. Purvis*, for the defendants, Cuerton the elder, Cuerton the younger, and Gore, in support of the preliminary objection:

* * There is nothing in this case to take it out of the general principle, which requires that all persons interested in the subject of a suit should be before the Court, and that, as this bill seeks to have the affairs of the partnership *settled [*27] in the absence of a great number of the shareholders, it is defective for want of parties.

[They distinguished *Gray* v. *Chaplin* (1), and cited *Van Sandau* v. *Moore* (2), *Blain* v. *Agar* (3), *Long* v. *Yonge* (4), and other cases, where the] same general principle is recognised; namely, [30] that in a suit of which the object is to adjust and wind up the concerns of a company or a partnership, and to obtain a decree by which the rights of all the partners are to be bound, all the partners, however numerous, must be before the Court. * * The plaintiffs desire to have the dissolution declared fraudulent, while a vast majority of the partners acquiesce in that dissolution as the most beneficial measure for the Company which, under all the circumstances, could have been adopted. But supposing the three plaintiffs to be right, and that, in insisting upon the impropriety of the dissolution, they take a sounder view of the interests of the partnership than the majority of the proprietors, how is it possible for the Court to determine that question in the absence of the majority? * * *

Mr. Kindersley, *Mr. W. C. L. Keene*, *Mr. Kenyon Parker*, [31] *Mr. Girdlestone*, jun., and *Mr. Campbell*, for other defendants.

Mr. Tinney and *Mr. Goodeve*, *contrà*:

* * In this case the plaintiffs seek relief against the [32] consequences of a dissolution, which relief—even if it be

(1) 26 R. R. 22 (2 Sim. & St. 267.)
(2) 25 R. R. 100 (1 Russ. 441).
(3) 27 R. R. 150 (1 Sim. 37).
(4) 29 R. R. 118 (2 Sim. 369).

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conceded, and the plaintiffs are willing to concede, that the dissolution should not be disturbed—cannot but be advantageous to all the members of the Company whose interests have been affected by the fraudulent transfer of their property.

THE MASTER OF THE ROLLS :

This is a bill in which it is sought that the affairs of the partnership may be wound up and settled by and under the decree of this Court, and that accounts may be taken of the partnership property. The bill also prays that a sale of part of the partnership property by the directors to the defendant Betts may be set aside. It is perfectly obvious that a suit, where all the accounts of the partnership are to be taken, and the rights of all the partners are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those partners. The cases in which suits have been permitted to be instituted by a few persons on behalf of
[*33] themselves and a numerous body of other *persons, have been cases in which there was plainly a community of interest between the plaintiffs and those whom they represented; but this is a case in which it is not disputed that there is a great diversity of interests as between different classes of the members of this partnership, and yet the Court is called upon to wind up the whole transactions of the partnership in the absence of a great number of the partners. The frame of the suit is plainly defective; and the cause must stand over, therefore, with liberty to the plaintiffs to amend by adding parties.

HEARDSON *v.* WILLIAMSON (1).

1836.
Feb. 17.

(1 Keen, 33—42; S. C. 5 L. J. (N. S.) Ch. 165.)

Rolls Court.
Lord LANGDALE, M.R.

Where an estate is devised, without any limitation of the quantity of interest, to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, and will vest in the persons beneficially entitled in remainder.

[33]

THIS was a bill for the specific performance of a contract for the purchase of an estate by the defendant.

The only question was as to the validity of the title, and it was agreed between the parties to take the opinion of the Court upon that point without a reference.

James Heardson, by his will dated 1st of September, 1819, devised to William Smith and Robert Maples, and the survivor of them, and the executors and administrators of such survivor, his ten acres, more or less, in Pinchbeck, in the county of Lincoln, and also his house or tenement in Surfleet, and the fixtures of his shop, in trust for sale, and with the money arising from such sale, after deducting expenses, in trust to pay off all such sums as at the time of his decease should be due and owing upon mortgage of all or any part of his real estates thereinafter mentioned, *except the house thereinafter given to his son James, and the house thereinbefore devised, and after payment and discharge thereof, if any surplus should remain in trust to pay the same to his wife Sarah Heardson, for her own use; and the testator thereby gave and devised to the said Sarah Heardson for her life, if she continued his widow, all and every other his messuages, lands, tenements, hereditaments, and premises whatsoever, situate in the parishes of Pinchbeck and Surfleet or elsewhere, subject to the payment of his sister Margaret King's annuity of 10*l.* for life thereinafter given, and also to the payment of 100*l.* yearly till the above mortgage debts directed to be paid by the sale aforesaid were discharged, in case the estate and effects thereinbefore

[*34]

(1) But under the Wills Act, 1837, ss. 30 and 31, trustees in such case now take the fee simple, unless the limited purpose is commensurate with an estate for life or (possibly) with a definite term of years absolute or determinable.—O. A. S.

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directed to be sold for that purpose should not thereto fully extend; and from and after the decease of his said wife, or her intermarriage again after his decease, in case the said mortgage debts so directed to be discharged should not then have been fully paid off, the testator gave and devised all such estate so devised to his wife to the said William Smith and Thomas Maples and the survivor of them, and the executors and administrators of such survivor, in trust to let the same for the best rents that could be obtained, and apply such rents for payment of the said mortgage debts, should any part still remain, until the whole should be fully paid off and discharged by the gradual receipt of such rents and profits of his, the testator's estate; and from and after the decease of his said wife, or her intermarriage again after his decease, or the final liquidation and payment of his mortgage debts as aforesaid, as the case might happen, the testator gave and devised to his son, John Guy Heardson, the plaintiff, and his assigns, for his life, subject to the payment of one fourth part of his said sister's annuity for life, his messuages or tenements, lands and hereditaments at Surfleet and Pinch-
[*35] beck therein described; *and after the decease of John Guy Heardson the testator gave and devised the said messuages or tenements, &c. to such child or children as the said John Guy Heardson should have lawful issue of his body, and to their, his, or her heirs or assigns for ever, to take as tenants in common, if more than one, and in default of such issue the testator gave and devised the same real estates to his sons, James, William, and Guy Heardson, their heirs and assigns, as tenants in common.

The testator died in January, 1820. At the time of his decease, a part of the real estate devised by his will was subject to two mortgages, one made by an indenture of demise, in the year 1804, for a sum of 700*l.*, and another made by an indenture of demise in the year 1811 for a sum of 600*l.*

In May, 1822, Sarah Heardson paid 200*l.* in part satisfaction of the mortgage secured by the indenture of 1811.

In the year 1825 the trustees sold the ten acres of land devised in trust for sale, and with the money arising from the

sale, amounting to 680*l.*, and a sum of 20*l.* paid by Sarah Heardson, paid off the mortgage for 700*l.* secured by the indenture of 1804.

Sarah Heardson died on the 27th of September, 1831, and the annual sum of 100*l.*, charged on the estate devised to her, not having been applied by her to the discharge of the mortgage debts of the testator, the trustees in January, 1832, with money arising from the sale of the testator's house at Surfleet devised in trust for sale, and other money arising from the personal estate of *Sarah Heardson, paid off the residue of [*36] the mortgage debt secured by the indenture of May, 1811.

By an indenture of release, dated the 3rd of February, 1835, between the plaintiff of the one part, and Charles Francis Bonner of the other part, the plaintiff, having no child living, with a view to destroy the contingent remainders, and acquire the fee-simple, conveyed the estates in question, discharged of dower, to Charles Francis Bonner and his heirs, to the use of the plaintiff and his heirs; and the question was, whether the contingent remainders to the children of the plaintiff, and, in default of children, to the brothers of the plaintiff, were effectually destroyed by that conveyance; or whether the trustees to whom the estate was limited after the life estate of Sarah Heardson for the purpose of paying off the mortgage debts, if those debts should not have been satisfied by the widow, took a fee, in which case the contingent remainders would be preserved.

Mr. Pemberton and *Mr. Metcalfe*, for the plaintiff:

* * The quantity of estate must be determined with refer- [37] ence to the purpose of the testator; and though a devise in fee might answer that purpose, the trustees will not take a fee, if a less estate is sufficient to carry the purpose of the testator into effect. * * *

The rule laid down in *Doe* d. *Player* v. *Nicholls* (1), in which [38] case Mr. J. BAYLEY says, that where an estate is devised to trustees for particular purposes, the legal estate is vested in

(1) 25 R. R. at p. 403 (1 B. & C. 342).

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them as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. * * *

Mr. Tinney and *Mr. Bellamy*, *contrà*:

The defendant is a willing purchaser, if a good title can be made; and the point before the Court, though in form it appears
[*39] to involve only a technical objection, *does in fact raise a substantial objection to the purchase; for, if the trustees have the legal fee, the children of the vendor, if he should have any, or the remaindermen, if he should have none, may bring ejectment, and the decree made in this suit will be no protection to the purchaser. * * A court of equity will rather incline to the inference that trustees should take an estate that will support all the purposes of the will, and preserve instead of destroying contingent remainders: [*Gibson* v. *Montford* (1); *Doe* d. *Tomkyns* v. *Willan* (2).]

[40] In the present case the testator gives his estates in trust to let the same for the best rents that can be obtained. There is no question as to this being an express trust, and not a power; and as the leases are to be made out of the interest of the trustees, which is indefinite, that interest must be the fee. * * *

[41] *Mr. Pemberton*, in reply. * * *

THE MASTER OF THE ROLLS (after stating the will):

The question here raised is, whether the trustees under this devise take the legal fee. There can be no doubt that the circumstance of the estate being limited to the trustees, their executors and administrators, and not to the trustees and their heirs, would not affect the vesting of the fee in the trustees, if the purposes of the will required it; and the question is, whether the purposes of the will did require that the trustees should take the fee. If the mortgage debts had been paid off in the lifetime of the widow, the trustees would have taken no estate after the decease of the widow; and in the event, which happened, of the

(1) 1 Ves. Sen. 491. (2) 20 R. R. 355 (2 B. & Ald. 84).

mortgage debts not *having been wholly paid off in her lifetime, they were to take only an estate until those debts were paid. I do not see the least necessity that, for that limited purpose, the trustees should have the reversion; and the debts having in fact been paid off, I am of opinion that the trust ceased, and that the legal estate vested in the plaintiff.

HEARDSON v. WILLIAMSON. [*42]

COOK *v.* HUTCHINSON.

1836. *Feb.* 10, 12.

(1 Keen, 42—53.)

Rolls Court. Lord LANGDALE, M.R.

By a deed between a father and son, reciting that the father was desirous of settling the property therein comprised, so as to make the same a provision for himself during his life, and for his wife and her children by him after his decease, he released and assigned the same and every part thereof to the son, upon the trusts thereinafter mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife, a daughter, and a niece, but no trust was declared as to the surplus: Held, that the surplus did not result to the grantor, but belonged to the son; and, the father having been maintained by the son for fifteen years, a bill filed after the son's death by the father, and revived upon the father's death by his representative, was dismissed with costs as to that part of it which sought an account of interest.

[42]

By an indenture of release and assignment, dated the 29th of March, 1817, and made between William Cook the elder, of the one part, and William Cook the only son of the said William Cook, of the other part, reciting the several mortgages and bonds by virtue of which William Cook the elder was, as sole executor and residuary legatee under the will of Michael Cook his brother deceased, seised of the mortgaged premises therein described subject to redemption, and possessed of or entitled to the several sums thereby secured, amounting together to the sum of 2,050*l.*, and interest due thereon, and also that he was possessed of or entitled to the several personal chattels, consisting of household furniture, linen, and china, and farming stock and other effects described in the several schedules annexed to the said indenture; and also reciting that William Cook the elder was desirous of settling the property to which he was so entitled in such *manner as to make the same a provision for himself during his life, and [*43]

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for his wife Margaret Cook and her children by him after his death; it was witnessed that William Cook the elder bargained, sold, and released to William Cook the younger and his heirs the said mortgaged premises subject to such equity of redemption as the same were subject to; and it was further witnessed that William Cook the elder bargained, sold, assigned, and transferred to William Cook the younger, his executors, administrators, and assigns, the several principal sums amounting in the whole to 2,050*l.* therein mentioned, so secured by the several mortgages and bonds as aforesaid, and the interest thereof respectively, to have, receive, and take the same upon to and for the trusts, intents, and purposes thereinafter declared concerning the same; and it was by the same indenture further witnessed that William Cook the elder bargained, sold, and delivered to William Cook the younger, his executors, &c. all the personal chattels specified in the schedules thereunto annexed, to hold the same personal chattels and all and singular other the premises thereinbefore bargained, sold, and assigned, and every part thereof to William Cook the younger, his executors, &c., upon, to, and for the trusts, intents, and purposes thereinafter declared concerning the same; that is to say, upon trust that he William Cook the younger, his executors, administrators, and assigns, should either permit and suffer the same several principal sums to remain in their then present state of investment, or should, with the consent in writing of William Cook the elder, during his life, and after his decease, then at the discretion of William Cook the younger, his executors or administrators, call in the same several principal sums or any part thereof, or sell, assign, or dispose of the same, as he or they should think fit, and, should with such consent or at such discretion as aforesaid, lay out *and invest the money which should come to his or their hands in his or their own name or names in the public funds, or upon Government or real or other good securities and subject thereto, should, during the life of William Cook the elder, permit and suffer, and authorise and empower William Cook the elder and his assigns, to receive the interest dividends and annual proceeds of the same trust monies, stocks, and securities for his and their own proper use and benefit, and immediately after the decease of William Cook,

[*44]

the elder, should, by conversion into money of all or a sufficient part of the trust monies, stocks, funds, and securities thereinbefore mentioned, pay and satisfy the funeral expenses of William Cook the elder, and all the sums of money in which he should be indebted at the time of his death, and also the sum of 20*l.* to Elizabeth Davison, niece of William Cook the elder, and subject thereto, should out of the interest dividends and annual proceeds of the remainder of the said trust monies, &c., pay the annual sum of 20*l.* unto Margaret the wife of William Cook the elder, during the term of her natural life, to be paid by equal quarterly portions, and upon further trust that he William Cook the younger, his executors, administrators, and assigns, should, one year after the decease of William Cook the elder, and subject to the other trusts thereinbefore declared, pay or cause to be paid the sum of 500*l.* unto Elizabeth the wife of John Davison and daughter of William Cook the elder, to and for her own sole and separate use, or to her executors or administrators, or to whom she or they should direct or appoint; and it was by the said indenture also witnessed that William Cook the younger, his executors, administrators, and assigns, should stand possessed of all and singular the personal chattels specified in the schedules thereunto annexed, upon trust, to permit and suffer William Cook the elder, during his life, to have the *free use and enjoyment of the same respectively, and immediately after his decease, upon trust that William Cook the younger, his executors, administrators, and assigns should permit and suffer Margaret Cook, so long as she should continue the widow of William Cook the elder, and be neither the wife nor widow of any other person, to have the free use and enjoyment of all the chattels specified in the first schedule thereunto annexed, and subject to the trusts thereinbefore declared concerning the same personal chattels, it was thereby declared and agreed, that William Cook the younger, his executors, administrators, and assigns, should be possessed of and interested in the same respectively for his and their own proper use and benefit.

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William Cook the elder, who was at the time of the execution of this deed upwards of eighty years of age, had two children, William Cook the younger, and Elizabeth, the wife of John

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the elder, should, by conversion into money of all or a sufficient part of the trust monies, stocks, funds, and securities thereinbefore mentioned, pay and satisfy the funeral expenses of William Cook the elder, and all the sums of money in which he should be indebted at the time of his death, and also the sum of 20*l.* to Elizabeth Davison, niece of William Cook the elder, and subject thereto, should out of the interest dividends and annual proceeds of the remainder of the said trust monies, &c., pay the annual sum of 20*l.* unto Margaret the wife of William Cook the elder, during the term of her natural life, to be paid by equal quarterly portions, and upon further trust that he William Cook the younger, his executors, administrators, and assigns, should, one year after the decease of William Cook the elder, and subject to the other trusts thereinbefore declared, pay or cause to be paid the sum of 500*l.* unto Elizabeth the wife of John Davison and daughter of William Cook the elder, to and for her own sole and separate use, or to her executors or administrators, or to whom she or they should direct or appoint; and it was by the said indenture also witnessed that William Cook the younger, his executors, administrators, and assigns, should stand possessed of all and singular the personal chattels specified in the schedules thereunto annexed, upon trust, to permit and suffer William Cook the elder, during his life, to have the *free use and enjoyment of the same respectively, and immediately after his decease, upon trust that William Cook the younger, his executors, administrators, and assigns should permit and suffer Margaret Cook, so long as she should continue the widow of William Cook the elder, and be neither the wife nor widow of any other person, to have the free use and enjoyment of all the chattels specified in the first schedule thereunto annexed, and subject to the trusts thereinbefore declared concerning the same personal chattels, it was thereby declared and agreed, that William Cook the younger, his executors, administrators, and assigns, should be possessed of and interested in the same respectively for his and their own proper use and benefit. [*45]

William Cook the elder, who was at the time of the execution of this deed upwards of eighty years of age, had two children, William Cook the younger, and Elizabeth, the wife of John

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Davison. The son entered into possession of the property, and carried on the business of the farm; and the father, with his wife and niece, lived in a house adjoining to that of the son, and was wholly supported by the son from the time of the execution of the deed until November, 1832, when the son died, having made a will, by which he appointed the defendants, Ralph Hutchinson, William Agnesby, and George Simpson, his executors. The stock on the farm was sold by the executors shortly after the death of their testator.

On the 29th of January, 1833, William Cook the elder, upon an application made to him by the defendants Agnesby and Simpson, signed by his mark the following receipt: "Received of Messrs. Ralph Hutchinson, William Agnesby, and George Simpson, executors of the last will and testament of my late son, [*46] the sum of *one pound in full of all demands to the 20th of November last, for the interest and yearly produce of the money and effects arising under or by virtue of a certain deed of settlement bearing date on or about the 29th of March, 1817, and made between me of the one part, and my said son of the other part; and I do hereby acknowledge that all arrears of the said annual interest and yearly produce, except the said one pound, hath been paid or accounted for to me by my said son up to the day of his death, which happened on the said 20th day of November last."

On the 2nd of August, 1833, William Cook the elder made his will, by which he bequeathed all his personal estate to his wife for life, and after her decease to his daughter, the plaintiff, Elizabeth Davison, and he appointed his wife Margaret Cook sole executrix of his will.

On the 15th of October, 1833, the original bill was filed by William Cook the elder, and Margaret his wife, John Davison, and Elizabeth his wife, and Elizabeth Davison, the niece of William Cook the elder, against the executors of William Cook the younger; and it prayed for an account of the principal monies and farming stock and other effects assigned by the indenture of March, 1817, and of the securities in which such principal monies were invested, and of the interest on such principal monies, and of the profits of the stock, and of the

monies produced by the sale of the stock and effects since the death of William Cook the younger; and that the defendants might be decreed to pay what should be found due to the plaintiff William Cook the elder, for the aforesaid interest and profits, after deducting the small payments made to him from time to time for his support.

William Cook the elder died on the 22nd of April, 1834; and [47] the suit was revived by his widow and executrix.

The bill charged that William Cook the elder did not understand the nature and effect of the receipt signed by him, and that the defendants, on the occasion when that receipt was signed, had taken advantage of the age and infirmities of William Cook the elder; but that charge was not supported by the evidence.

The questions raised in the cause were, whether there was a resulting trust to the grantor of the surplus of the property comprised in the deed of March, 1817, as to which no trust was declared; and whether the plaintiff Margaret Cook, as executrix of her deceased husband, was entitled to an account of interest and profits of the stock from the date of the deed to the death of William Cook the younger.

Sir Charles Wetherell and *Mr. Cooper*, for the plaintiffs:

* * There is no express indication, on the face of the instrument, of an intention to give an immediate beneficial interest to the son. * * *

But, whatever might be the settlor's intention as to the [48] surplus of the capital, it is clear that, by the express language of this deed, he intended to reserve to himself all the benefit arising from the interest and produce of his property during his lifetime, and his representative is consequently entitled to the account prayed by the bill of the interest of the sums secured by the mortgages and bonds, and of the profits of the farm from the time at which the son entered into possession of the property. * * *

Mr. Pemberton and *Mr. Purvis, contrà*:

Unless it can be shewn that the father, in making a settlement

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by way of provision for his family, intended his only son to take no beneficial interest under that settlement, but to be a naked trustee, liable to account for every shilling of the income received during his father's lifetime, and entitled to participate in no part of the capital after his father's death, the argument in support of a resulting trust must fail. The question whether there is or is not a resulting trust depends, in every case, upon the intention of the testator or grantor: *King* v. *Denison* (1), *Hill* v. *Bishop of*

[49] *London* (2). * * The claim to interest and to the profits of stock during the lifetime of the son is equally incapable of being supported. Out of an annual income of less than 100*l.* the son not only supplied the father, mother, and niece with every article of consumption, but paid their bills, and even furnished entertainment to a meeting of dissenting ministers which was held at short intervals in the father's house. * * The plaintiffs are of course entitled to an account of the capital, but there is no prayer for a decree in respect of any thing but payment of the interest; and as the bill charges fraud, which they have entirely failed to prove, they ought to pay the costs of the suit.

Sir C. Wetherell, in reply.

[50] THE MASTER OF THE ROLLS:

Upon this deed a question is made, whether there is or is not a resulting trust to the grantor as to the surplus, with respect to which there is no declaration of trust; and for the purpose of determining that question, it is necessary to look carefully to the language of the deed, and to the circumstances of the particular case. In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor; but that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect where a contrary intention, to be collected from the whole instrument, is indicated by the grantor. The distinctions applicable to cases of this kind are pointed out in the case of

(1) 12 R. R. 227 (1 V. & B. 260). (2) 1 Atk. 618.

King v. *Denison* (1) by Lord ELDON, who adopts the principles laid down by Lord HARDWICKE in *Hill* v. *The Bishop of London* (2). The conclusion to which Lord HARDWICKE comes is, that the question whether there is or is not a resulting trust must depend upon the intention of the grantor. "No general rule," he observes, "is to be laid down, unless where a real estate is devised to be sold for payment of debts, and no more is said; there it is clearly a resulting trust, but if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the Court to say it shall not be a beneficial interest."

Let us consider what was the intention of the grantor of this deed. The father, being upwards of eighty years of age, executes a deed, which recites, that he was desirous of settling the property to which he was entitled, therein described, in such manner as to make a *provision for himself during his life, and [*51] for his wife and children after his death, and for such other purposes as were thereinafter expressed. This was the object he had in view; this was his intention as expressed in the instrument. He proceeds to make a release and assignment of the property comprised in the deed, to his son, "upon the trusts thereinafter declared concerning the same;" and when he comes to declare those trusts, he does not exhaust the whole of the property. But I am of opinion that this is immaterial; for, after having carefully looked through the whole of this deed, I have come to the conclusion, considering the relation between the parties, and the object and purport of the instrument, that the father intended to part with all beneficial interest in the property, and that he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared.

After this deed was executed, the son took possession of the property, and carried on the business of the farm, the father occupying an adjoining cottage with his wife and niece. It is stated in the bill that, during the son's life, the father was supplied by his son with all necessaries; not only was he

(1) 12 R. R. 227 (1 V. & B. 260) (2) 1 Atk. 618.

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supplied with all necessaries, but it appears that the son supported his mother and the niece, and furnished accommodation for the numerous friends by whom his father was frequently visited. The Court will not decree an account of the arrears of the wife's pin-money, where the wife has been suitably maintained by her husband, on the presumption that she waived her claim in consideration of the support she received; and the present case admits of presumptions of the like kind. During a period of fifteen years and a half, until the death of the son, it does not [*52] appear that any account of interest was demanded *or given, or that there was the least dissatisfaction on the part of the father, or the least desire to have such an account. Under these circumstances, it is impossible that that part of the bill which seeks an account of interest, and of the profits of the farming business during the son's life, can be sustained.

The son died in November, 1832, and in January, 1833, the executors obtained from the father a receipt for the sum of one pound in full of all demands for arrears of interest upon the estate of the son. In August, 1833, the father made his will, by which he bequeathed all his personal property to his wife for her life, and after her decease to the plaintiff Elizabeth Davison; and shortly afterwards the original bill was filed, and upon the death of the father in April, 1834, the suit was revived. The transaction between the executors of the son and the father was, no doubt, an irregular proceeding; but, upon the whole of the evidence, and considering the rights of the parties at the time the receipt was signed by the father, nothing like a surprise, or attempt to take an unfair advantage of the old man, is established. On the contrary, the evidence of Margaret Davison, one of the witnesses for the plaintiff, though relied upon for a different purpose, shews that great care was taken to make the old man understand the nature of the transaction; and here it is impossible to pass over without observation the sort of evidence which has been resorted to on the part of the plaintiffs in this case. A boy, only fourteen years of age, was examined as to his opinion and belief upon matters on which men of mature age and experience could alone be capable of answering—on which it was impossible that any true or accurate answer could be

obtained—and which ought never to have been made the subject of interrogatories to that witness.

The bill, so far as it seeks an account of interest and the profits of the farm from the time of the execution of the deed till the death of the son, must be dismissed with costs; but the plaintiffs are entitled to an account of the capital, and to have their respective interests secured in respect of the property comprised in the deed, and to an account of the interest from the son's death to the death of the father, and of such property and farming stock as have been sold by the executors of the son.

MALCOLM *v.* CHARLESWORTH (1).

1836. *Feb.* 15, 16.

Rolls Court. Lord LANGDALE, M.R. [63]

(1 Keen, 63—74; S. C. nom. *Wilkinson* v. *Charlesworth*, 5 L. J. (N. S.) Ch. 172.)

An assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the Registry Acts. The registration of such an assignment, therefore, does not postpone a prior unregistered assignment of the same legacy.

EDWARD MANNERS, by his will, dated the 5th of March, 1801, devised all his manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever to Ann Stafford and her assigns for her life; and, after her decease, he devised all his real estates whatsoever unto his ten children therein named and their heirs, subject to the payment of 12,000*l.* thereinafter given and bequeathed to Roosilia Thorston and Harriot Thorston; and after providing for the event of his children dying under twenty-one, and without issue, the testator proceeded as follows: "I give and bequeath unto Roosilia Thorston and Harriot Thorston the sum of 12,000*l.*, to be equally divided between them, share and share alike; and in case either of them shall happen to die before they shall attain the age of twenty-one years, and unmarried, then my mind and will is that the share of her so dying shall go and be paid to the survivor of them. And I do hereby charge all

(1) Approved *Arden* v. *Arden* (1885) 29 Ch. D. 702, 54 L. J. Ch. 655, 52 L. T. 610.

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my messuages, farms, lands, tenements, and hereditaments in Goadby, otherwise Goadby Marwood, and Kirby Bellars, otherwise Kirkby Bellars, in the county of Leicester, and in the county of York, after the decease of Ann Stafford, with the payment of the said sum of 12,000*l.* by me given and bequeathed unto Roosilia Thorston and Harriot Thorston."

The testator died in the year 1811, leaving Ann Stafford, the ten children named in the will, who all lived to attain the age of twenty-one years, and Roosilia Thorston and Harriot Thorston, surviving him.

[64] Roosilia Thorston attained the age of twenty-one years, and afterwards intermarried with Edward Archdeacon. Harriot Thorston also attained the age of twenty-one years in 1810, and intermarried with John Byng Wilkinson, who was afterwards appointed paymaster of the 10th regiment of Royal Hussars.

On the appointment of John Byng Wilkinson to the office of paymaster, James Wilkinson entered into a bond for the payment of 1,000*l.* to secure the faithful discharge by John Byng Wilkinson of his duties in that office; and by an indenture dated the 2nd of August, 1813, between John Byng Wilkinson of the one part, and Thomas William Hill and James Wilkinson of the other part, reciting that James Wilkinson had entered into such bond, that John Byng Wilkinson was indebted to his father, John Wilkinson, in the sum of 561*l.* 14*s.*, and that his father was also surety for him in a bond for 500*l.*, and that John Byng Wilkinson was desirous of securing the payment of such monies, and also of making some provision for his wife, Harriot Wilkinson, and his two natural children therein named, it was witnessed that John Byng Wilkinson assigned to Hill and James Wilkinson, their executors, &c., the sum of 6,000*l.*, being the moiety of the sum of 12,000*l.* to which John Byng Wilkinson was entitled in right of his wife, under the will of Edward Manners, after the decease of Ann Stafford, in trust as an indemnity to James Wilkinson and John Wilkinson in respect of the bonds entered into by them respectively, and upon further trust to pay the sum of 561*l.* 14*s.* and interest to John Wilkinson, and such further sums as John Wilkinson might advance or pay on account of John Byng Wilkinson, not exceeding in the whole

the sum of 1,000*l.*, and interest from the time of advancing the same, and then as concerning the sum of 2,000*l.*, part of the said 6,000*l.*, upon trust to invest the *same in Government or real securities, and pay the annual proceeds of such securities into the proper hands of Harriot Wilkinson for her separate use during her natural life, or to such person as she by any note or writing signed by her, but without anticipation, and without the same being disposed of to any other purpose than her personal maintenance should direct; and after her decease in trust for Elizabeth Wilson and Frances Wilson, the two natural children of John Byng Wilkinson, in equal shares; and as to the residue of the 6,000*l.* for the absolute use and benefit of John Byng Wilkinson.

[*65]

In the year 1821 James Wilkinson was called upon to pay the sum of 1,000*l.* to make good deficiencies in the accounts of John Byng Wilkinson as paymaster; and he paid that sum. He died shortly afterwards, having made a will by which he appointed his wife, Caroline Wilkinson, his sole executrix.

Ann Stafford, the tenant for life, died in September, 1827; and shortly after her death the bill was filed by Caroline Wilkinson, the personal representative of James Wilkinson, against the several parties interested under the will of Edward Manners; and it prayed that the sum of 1,000*l.*, and interest due in respect of the bond, might be paid to her, and the residue applied in the manner directed by the indenture of the 2nd of August, 1813; or otherwise that the 12,000*l.* might be raised by sale or mortgage out of the devised estates, and that 6,000*l.*, part thereof, might be applied in satisfaction of what should be found due to the plaintiff, and upon the trusts of the indenture of the 2nd of August, 1813, and that the remaining 6,000*l.* might be paid to the defendants entitled thereto.

Caroline Wilkinson afterwards intermarried with Robert Malcolm, and the suit was duly revived.

Shortly after the marriage of John Byng Wilkinson with Harriot Thorston a separation took place, and Mrs. Wilkinson resumed her maiden name.

[66]

On the 30th of April, 1824, Mrs. Wilkinson executed an indenture, purporting to be between Harriot Thorston, of

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Jermyn Street in the parish of St. James, in the county of Middlesex, spinster, of the one part, and the defendants William Thompson, James Christian Clement Bell, and John Chapman, the trustees of the Reversionary Interest Society, of the other part, whereby, after reciting the will of the testator Edward Manners, and that Harriot Thorston had acquired a vested interest in a moiety of the 12,000*l.* expectant upon the death of Ann Stafford, who had attained her sixty-fifth year, and that the defendants had by their agent, at a public sale by auction, contracted and agreed with Harriot Thorston for the absolute purchase (free from all charges, except legacy duty) of her interest in the said sum of 6,000*l.*, it was witnessed that, in consideration of the sum of 3,350*l.*, paid by the defendants, Thompson, Bell, and Chapman to Harriot Thorston, she bargained, sold, and assigned to the said defendants all the said sum of 6,000*l.* bequeathed to her by the will of Edward Manners, and to which she was entitled in expectancy on the decease of Ann Stafford.

The sum of 3,350*l.* was paid to Mrs. Wilkinson by Messrs. Thompson, Bell, and Chapman, and a further sum of 67*l.* was afterwards paid to her by those defendants in consequence of its having been discovered that she was more nearly related to the testator than she had been represented to be by the particulars of sale, and that therefore a smaller legacy duty would be payable upon her legacy.

[67] The Reversionary Interest Society having afterwards discovered that Mrs. Wilkinson was a married woman, and that her husband, John Byng Wilkinson, was living at Calais, entered into a negotiation with John Byng Wilkinson; and by an indenture dated the 24th of July, 1826, and made between John Byng Wilkinson of the first part, the defendants Thompson, Bell, and Chapman of the second part, and George Stephen, the solicitor of the Society, of the third part, John Byng Wilkinson, in consideration of 500*l.* paid to him by the defendants, confirmed the assignment made by his wife, and released all his interest in the moiety of the legacy of 12,000*l.*

The defendants Thompson, Bell, and Chapman stated the above-mentioned facts in their answer; and they further stated

that, at the time of the assignment made by Mrs. Wilkinson, they had no notice or information that she was a married woman; and that, for the purpose of satisfying their solicitor that she was competent to assign her reversionary interest, she made an affidavit before one of the Masters of the Court, in which she described herself as Harriot Thorston, spinster, and swore that she had not directly or indirectly incumbered, or in any way disposed of the 6,000*l.*, or any part thereof, and that she was then a single woman and never had been married. The defendants further stated that they, by their solicitor, caused a search to be made for incumbrances in the North and West Ridings of York before the purchase was completed; and that, after the purchase, they caused a memorial of the indenture of the 30th of April, 1824, to be registered in the register office for the North Riding of the county of York, in which riding a great part of the testator's estates was situated, and also gave notice to Ann Stafford that Miss Harriot Thorston had assigned to them her *reversionary interest in the 6,000*l.* The defendants sub- [*68] mitted that the indentures under which they claimed were, by reason of such registration and notice, entitled to priority over the indenture of the 2nd of August, 1813, so far at least as the testator's lands in the North Riding of the county of York were concerned, and they insisted that the last-mentioned indenture was voluntary and without consideration, except so far as James Wilkinson and John Wilkinson respectively were interested therein.

The questions made in the cause were, whether the registration and notice relied upon by the Reversionary Interest Society had the effect of giving priority to the indentures under which they claimed over the indenture of the 2nd of August, 1813; and what, if any, interest Mrs. Wilkinson took under the last-mentioned indenture.

Mr. Pemberton and *Mr. Monro*, for the plaintiff, submitted that there was no ground whatever for the claim to priority set up by the answer of the defendants representing the Reversionary Interest Society. The doctrine as to the effect of notice in postponing an equitable incumbrance prior in point of date had

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already been carried very far, but this was the first attempt which had been made to claim priority on the ground of notice for an instrument in itself perfectly invalid. The defendants stated in their answer that they had given notice to the tenant for life of the assignment fraudulently made to them; but the tenant for life was in no manner interested in, or bound to act upon such notice. How could notice to the tenant for life of a subsequent fraudulent assignment affect the claims of persons interested, by virtue of a *bonâ fide* prior assignment, in a legacy charged upon the devised estates? As to the registration of the [*69] deed by the defendants, *that was no notice, even if the deed had been a proper subject of registration; but the registration of an assignment of a sum of money was an act perfectly nugatory, and could not possibly give any advantage to the defendants.

Mr. Beames and *Mr. Garratt*, for the trustees of the Reversionary Interest Society:

* * The question as between the plaintiff and the trustees of the Reversionary Interest Society is, whether the deed of the latter ought not, by reason of the registration, and the superior diligence of the trustees, to prevail against the incumbrance of the plaintiff. The assignment to the defendants was an assignment of a moiety of a legacy charged upon land; and, being therefore an assignment of an interest in land, it plainly required registration, so far as the land upon which the legacy was charged was situate in the North Riding of Yorkshire. The language of the Act of 8 Geo. II. c. 6 (1), is, that a memorial of all deeds and conveyances by which any lands in the North Riding of the county of York may be any way affected in law or in equity may be registered; and in *Scrafton* v. *Quincey* (2), where [*70] a question was made whether a deed executing a *power of appointment was such a deed as required to be registered, it was held to be a deed affecting land, and was postponed to a mortgage made subsequently to it and registered before it.

[They cited *Dearle* v. *Hall* (3), *Loveridge* v. *Cooper* (4), *Bushell*

(1) Repealed, 48 & 49 Vict. c. 54, s. 51.
(2) 2 Ves. Sen. 413.
(3) 27 R. R. 1 (3 Russ. 1).
(4) 27 R. R. 1 (3 Russ. 1).

v. *Bushell* (1), and other cases on the Irish Registry Acts to the same effect.]

Mr. Kindersley, for Mrs. Wilkinson, submitted that this suit raised no question between his client and the Reversionary Interest Society, and that as between Mrs. Wilkinson and the plaintiff the only question was whether she was not entitled to her equitable settlement *out of the fund. Nothing that had [*71] transpired in this suit could affect Mrs. Wilkinson's right to a settlement. The fraud imputed to her was not in evidence; it appeared only upon an answer which could not be used against her, and it was very possible that the transaction might be capable of a satisfactory explanation. At any rate, whatever might be the equities between Mrs. Wilkinson and the Reversionary Interest Society, the Court could not determine those equities in the present suit.

Mr. Tinney, for other defendants.

Mr. Pemberton, in reply:

* * In *Scrafton* v. *Quincey* the question was not whether an assignment of a sum charged upon land, but whether a deed of appointment affecting the land itself was to be the subject of registration. * * No question can ever arise between parties *having [*72] a registered and an unregistered deed, except where the subject of the registered deed is a direct immediate interest affecting the land. The assignment of a legacy charged upon land can never affect the land within the meaning of the Registration Acts, or by any possibility prejudice the title of a purchaser. There is no evidence before the Court of any actual notice having been given by the defendants, and it is unnecessary therefore to advert further to that part of the argument.

THE MASTER OF THE ROLLS (after stating the facts):

The bill is filed by the personal representative of James Wilkinson, for the purpose of having her claim satisfied out of

(1) 9 R. R. 21 (1 Sch. & Lef. 90).

MALCOLM v. CHARLESWORTH.

the sum of 6,000*l.*, being the moiety of the legacy charged upon the devised estates, and the residue of that sum applied upon the trusts of the indenture of the 2nd of August, 1813; and the plaintiff's claim is resisted by the defendants, the trustees of the Reversionary Interest Society, upon two grounds. First, it is said that the assignment of the legacy was a deed affecting the land upon which it is charged, and that, as a great part of that land is situate in the North Riding of the county of York, the want of registration affects the validity of the deed under which the plaintiff claims. Next, it is contended that the defendants are entitled to priority over the plaintiff, because they gave notice of their assignment to the tenant for life of the estates upon which the legacy is charged, and no such diligence was used by the plaintiff. I need not advert further to the argument founded upon notice, because, although the point is insisted upon by the defendants in their answer, there is no evidence of any notice having been given. As to the other point, the only question is, whether the land situate in the county of York—for [*73] the argument *cannot possibly be extended to the land in Leicestershire—is to be considered as affected by an assignment of a legacy charged upon the land. It appears to me that the deed under which the plaintiff claims is not a deed which affects the land; it is an assignment of the money charged upon the land, and of the money only; and if I were to hold that an instrument assigning money charged upon land situate in a register county required registration, I should lay down a rule which certainly has not hitherto been adopted. The plaintiff is entitled, therefore, to the payment of what is due to him out of this charge in priority to the Reversionary Interest Society.

The counsel for Mrs. Wilkinson claims, on her behalf, her right to a settlement out of this charge. It must be admitted that she has that right; for, though there is strong reason for believing, it cannot be considered as in proof in this suit that Mrs. Wilkinson, by a gross fraud, induced Messrs. Thompson, Bell, and Chapman to take from her the assignment under which they claim, and to pay to her a large sum of money upon a representation which was entirely false. If so gross a fraud were in proof, it would not require cases to shew that a married

woman will not be permitted in this Court to take advantage of her own fraud. Whatever inquiry may be asked on behalf of the Reversionary Interest Society, which is most likely to bring out the truth, I shall be most willing to accede to.

After some discussion, an inquiry was directed under what circumstances the deeds of the 30th of April, 1824, and the 24th of July, 1826, were executed, and a declaration was made that the plaintiff was entitled to payment out of the 6,000*l.* in priority to the Reversionary Interest *Society, and that Mrs. Wilkinson [*74] was entitled to a settlement out of the whole fund of 6,000*l.* without prejudice to the claim of the Reversionary Interest Society; and, inasmuch as the charge to which the plaintiff was entitled would not exhaust the whole fund, that Mrs. Wilkinson's claim to a settlement out of the residue should be also without prejudice to the claim of the Reversionary Interest Society.

WETHERELL *v.* WILSON.

1836. *Feb.* 16.

(1 Keen, 80—86; S. C. 5 L. J. (N. S.) Ch. 235.)

Rolls Court. Lord LANGDALE, M.R. [80]

A testatrix, under a power given by her marriage settlement, bequeathed a sum of stock to trustees in trust to pay the interest to her husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them; and if no children, or none that should live till their shares became assignable, she gave the interest of the fund to her husband for his life, and after his decease the principal to such person or persons as should be her next of kin. There was only one child of the marriage: Held, that this bequest was a trust for the benefit of the child, until the principal should become assignable to the child, and gave no beneficial interest so as to entitle trustees for creditors, to whom the husband had assigned all his personal property, to claim the income or any part of it.

By a settlement dated the 30th of December, 1811, and made previously to the marriage of the plaintiff Charles Wetherell and Charlotte Wilson, the sum of 6,369*l.* 8*s.* 5*d.* 4 per cent. Bank Annuities was declared to be invested in the names of the trustees, parties thereto, upon trust to pay the dividends to Charlotte Wilson during her life for her separate use, and after her decease for such person or persons as she should by will

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appoint, and in default of and subject to such appointment, and until the same should take effect, to the plaintiff for his life, and after the decease of the survivor of them to the children of the marriage as the plaintiff should by will appoint; and in default of such appointment, among the children equally.

[81] The marriage took effect, and there was issue of the marriage one child only, the defendant Mary Eliza Wetherell, an infant.

Mrs. Wetherell, in pursuance of the power reserved to her by the settlement, made a will by which she appointed the 6,369*l.* 8*s.* 5*d.* 4 per cent. Bank Annuities to the trustees of the settlement, and the survivors or survivor, &c., in trust for all and every the child or children living at her decease, equally to be divided between them, if more than one, and if but one, then the whole for such one child; and to be assigned or transferred to such of them as should be sons at their ages of twenty-one years, and to such of them as should be daughters at their ages of twenty-one years, or marriage, provided such marriage were with the consent of the trustees or trustee for the time being, and of her husband, if he should be living. Provided always, and it was her will and desire that if she should leave more than one child, and any of her children being a daughter or daughters should die under the age of twenty-one years without being or having been married with such consent as aforesaid, or being a son or sons should die under the age of twenty-one years, then the share of every such child of and in the said trust premises should go and accrue to the survivors or survivor, and upon trust that they the said trustees, &c., should in the mean time after her decease pay the income, or the interest, dividends, and annual produce of the share for the time being of each of her said children, whose share should not then be assignable or transferable as aforesaid unto her husband, if he should be living, in order the better to enable him to support, maintain, and educate each such child until his or her share should become assignable or transferable as aforesaid, or he or she should

[*82] previously die; but in case her *said husband should not be living, then upon trust that they the said trustees or trustee for the time being should, at their or his discretion, pay and apply all or so much of the income, or interest, dividends, and annual

produce of the share for the time being of each of her said children, whose share should not then be assignable or transferable for or towards his or her support, maintenance, and education, until such his or her share should become assignable, or transferable, or he, she, or they should previously die. Provided always that if in any year or years the said trustees or trustee for the time being should, in pursuance of the last-mentioned trust, pay and apply any sum or sums of money for the maintenance, education, and support of any such child or children which should be less than the interest, dividends, and annual produce to which he, she, or they should be respectively entitled, then the surplus thereof should accumulate and go in augmentation and be assigned and transferred at the same time with the original share or shares; yet so nevertheless that it should be lawful for such trustees or trustee for the time being to pay and apply the surplus and savings of the interest, dividends, and annual produce of the share of any such child in any one preceding year for or towards his or her maintenance, support, and education in any succeeding year; but in case the said testatrix should leave no child being a son who should live to attain the age of twenty-one years, or being a daughter should live to attain that age, or be married with such consent as aforesaid, then in trust to pay the dividends, interest, and annual produce to her said husband for his life, and after his decease in trust for such person or persons as would at the time of her decease have been entitled to her personal estate as her next of kin in case she had died intestate and unmarried.

[83]

Mrs. Wetherell died in September, 1830, leaving her husband, the plaintiff, and Mary Eliza Wetherell, her only child, surviving her.

By an indenture dated the 29th of May, 1833, the plaintiff assigned to Henry Tawney and James Mivart all his personal estate in trust for the benefit of his creditors. The infant Mary Eliza Wetherell was also entitled to a sum of 13,000*l.* under the will of her grandfather Thomas Wilson, and an order had been made, in a suit for the administration of the estate of Thomas Wilson, for an allowance of 630*l.* a year, to be paid to the plaintiff and applied by him according to a scheme to be

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approved by the Master, for the maintenance and education of his daughter.

The bill was filed by the plaintiff against the surviving trustees of the settlement, Mary Eliza Wetherell, the next of kin of the testatrix, and the trustees for the creditors of the plaintiff, and it prayed that the dividends of the sum of 6,369*l.* 8*s.* 5*d.* 4 per cent. Bank Annuities might be paid to the plaintiff during the minority, or until the marriage of his daughter; and the question was, whether the plaintiff was entitled to receive the dividends as a trustee for the benefit of his daughter only, or whether the dividends or any part of them belonged to him beneficially, and consequently passed to his creditors under the indenture of the 29th of May, 1833.

Mr. Pemberton and *Mr. Piggott*, for the plaintiff:

The dividends are to be paid by the trustees to the father, "in order the better to enable him to support, maintain, and educate" the child, until the capital shall become assignable. This is a [*84] gift for the benefit of the *husband, subject to the application of so much of the dividends as may be required for the maintenance and education of the child. In *Hamley* v. *Gilbert* (1), the testatrix directed the residue of the monies arising from her estate to be paid to her niece, and to be expended by her at her discretion for or towards the education of her (the niece's) son, and that she should not be liable at any time to account to her son, or any other person, for the disposal or application of such residue; and the Court held, that the niece was entitled to the residue, subject to the application of so much as the Court might think fit for the education of the son during his minority. The father is legally bound to maintain his child, and the object of this bequest is to relieve him from a part of the burthen of that legal liability. In the actual circumstances of the father, it may become necessary that the whole income of this fund should be applied to the maintenance and education of the child; and while the trust for the benefit of the child attaches upon it, the creditors can have no claim to it as part of the personal property of the husband.

(1) Jac. 354. See 38 R. R. 189, *n.*

Mr. Kindersley and *Mr. Cooper*, for the infant, cited *Andrews* v. *Partington* (1), *Brown* v. *Casamajor* (2), *Hammond* v. *Neame* (3), and *Benson* v. *Whittam* (4).

Mr. Spence and *Mr. Toller*, for the trustees under the will.

Mr. Tinney and *Mr. Parker*, for the trustees for the creditors of the husband:

This is an absolute gift of the interest for the benefit of the father, until the capital shall become assignable, *and not a gift for the benefit of the child. The expressed trust is for the father, though the motive assigned for the gift is the support of the children. * * A mere motive for a gift will not constitute a trust: *Benson* v. *Whittam* (4). The gift, therefore, in this case, must be considered as a bounty to the father, not a trust for the child. * * *

[*85]

Mr. Pemberton, in reply.

[86]

THE MASTER OF THE ROLLS (after stating the case):

Upon this will it is argued, that the testatrix intended to give the income of the fund to the father, not for the benefit of the children, but for his own use, and that the creditors of the father, for whose benefit he has assigned to trustees all his personal property, are consequently entitled to it. It is impossible for me to entertain any doubt that the testatrix intended the income to be applied to the benefit of the children. There is no occasion in this case to direct a reference to the Master to inquire into the ability of the father to maintain the child, or as to the manner in which the money is to be paid and applied, because the testatrix has sufficiently indicated her intention in that respect. Declare that the father is entitled to have the income paid to him by the trustees, and that he is bound to apply it for the benefit of the child; and that he is, therefore, not at liberty to assign it over to the creditors, or to any other persons or person without regard to the interests of the child.

(1) 3 Br. C. C. 60.
(2) 4 Ves. 498; see 35 R. R. at p. 116.
(3) 18 R. R. 15 (1 Swanst. 35).
(4) 35 R. R. 113 (5 Sim. 22).

1836.
March, 9, 10.

Rolls Court.
Lord
LANGDALE,
M.R.

MILES *v.* CLARK.

(1 Keen, 92—96; S. C. nom. *Miles* v. *Allen*, 5 L. J. (N. S.) Ch. 92.)

A testatrix made the following bequest: "I give to A. A. the sum of 400*l.*, to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between E. M. and A. M." A. A. took a life-interest only in the legacy.

[92]

CATHERINE LANE, by [a codicil to her will, dated the 14th of February, 1831, bequeathed the sum of 400*l.* "to Amelia Allen

[93] to] be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between Edward Payne Miles and Arthur Fellenberg Miles, the two youngest sons of Septimus and Amelia Miles, under the same restrictions, and subject to the same conditions as are contained in my will." * * *

[One question in the cause was whether Amelia Allen took an absolute, or only a life-interest.]

[94] *Mr. Pemberton*, for the plaintiffs:

* * Amelia Allen will take only a life interest under the bequest in that codicil. The events of the death of the legatee "at, before, or after the said period," are severally contingent events, but taken together they constitute a certain event, namely her death, which must happen at one of those times. The only question, therefore, is what the testatrix meant by the words "the said period." She manifestly refers to the period which she had just mentioned, namely, "when she (the legatee) attains twenty-one." Now, whether Amelia Allen die at twenty-one, or before or after she attain that age, is, in each case, a contingency, but one of those contingencies must happen, and therefore, in every event, the children of Mrs. Miles are entitled in remainder after the decease of Amelia Allen.

Mr. Witham, for the executors.

Mr. Kindersley, for Amelia Allen:

* * It is established by many cases, that the words, "in case of the death of A.," must be taken to mean "in case of the death of A. in the lifetime of the testator;" for the death of A. at some time or other is certain, and to give a sensible construction to the words, the contingency of A. dying in the testator's lifetime must be implied. Now, it is admitted that the contingencies of death at, before, or after a particular period, taken together constitute certainty; the words in the present case, therefore, amount to no more than if the testatrix had said "in the event of her decease," and will fall within the rule which refers them to the life-time of the testatrix. * * Amelia Allen, therefore, will be absolutely entitled to this bequest, upon the ordinary rule which restricts the contingency of the words "in the event of the decease of A.," or words equivalent to them, to A. dying in the lifetime of the testatrix. [95]

Mr. Pemberton, in reply. * * *

On the following day, the MASTER OF THE ROLLS gave judgment as to the point: [96]

In this case the testatrix revokes a bequest which she had made by her will to her brother, his wife, and children, with the exception of their youngest child, her godchild, Amelia Allen, to whom she bequeaths the sum of 400*l.*, "to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between Edward Payne Miles and Arthur Fellenberg Miles, the two youngest sons of Septimus and Amelia Miles, under the same restrictions, and subject to the same conditions as are contained in my will."

If the words were in the event of her decease, the case would fall within the class of cases which have been referred to in the argument; but the words are in case of her decease at, before, or after the said period. Now "the said period" is obviously to be referred to the period which the testatrix has just mentioned,

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namely, when the legatee attains the age of twenty-one years. It is, therefore, "at, before, or after the period of twenty-one years." The words "at, before, or after a particular time," involve all time, present, past, and future. The only construction to be put upon these words, therefore, is in the event of her decease, whenever that event may happen. The remainder over, therefore, will take effect after her decease.

1836.
Jan. 20, 22, 23.
April 13.

Rolls Court.
Lord LANGDALE, M.R.
[104]

ATTORNEY-GENERAL *v.* CULLUM.

(1 Keen, 104—119; S. C. 5 L. J. (N. S.) Ch. 220.)

The principal charge in an information was that certain alienations made by the trustees of the charity lands nearly 20 years before were not authorised by the Inclosure Act under which they purported to be made, and in particular that an improvident exchange had been made in order to favour one of the trustees; neither the exchange with the trustee nor any of the alienations were shewn to have been improvident or improper, and the information was dismissed with costs as to that part of it; and the information, as it was framed, not appearing to have been filed with a view to the benefit of the charity, and having been instituted and conducted in a manner to create great unnecessary expense, no costs were given to the relators up to the hearing, as to that part of the information which was not dismissed.

THE information was filed by the *Attorney-General* at the relation of Francis King Eagle, Esq., and James Cobbing, against the trustees of the Guildhall feoffment in Bury St. Edmunds, and it prayed that the charities, and other public trusts and purposes of the lands and premises constituting the feoffment, and comprised in an indenture dated the 20th of December, 1810, might be established; and that the management of the estates, and the application of the rents and profits, might be settled under the decree of the Court, and that the Master might approve of a scheme for that purpose. That it might be declared that certain alienations and pretended exchanges of the charity lands, and in particular an alienation to Thomas Cocksedge, were not authorised by an Inclosure Act under which they purported to be made, and were therefore void. That it might be referred to the Master, to inquire whether any proceedings ought to be taken with a view to set aside such alienations

and pretended exchanges, and whether any proceedings ought to be taken to set aside certain leases on the ground of their having been improperly and improvidently granted; and that it might be declared that the leases ought to be let by public tender. That it might be referred to the Master to approve of new trustees, either in exclusion of, or in conjunction with the defendants, the surviving trustees, as the *Court might deem expedient. And that, if necessary, an account might be taken of the rents received by the defendants, from such time as the Court might think proper. A.-G. v. CULLUM. [*105]

The original information had prayed a declaration, that the defendants, by reason of wrongful alienations, had been guilty of breaches of trust, and ought to be removed, and was in other respects different from the information as amended.

The information [alleged that] under colour of an Inclosure Act, passed in the 55th year of the reign of George III., for inclosing lands in the borough of Bury St. Edmund's, the trustees for the time being concerted certain alienations to some of their own body, in exchange for lands of theirs, in order to favour such persons; and that amongst these an alienation of fifty-eight acres was made to Thomas Cocksedge, a trustee, for twenty-three acres belonging to him, and taken in exchange, which alienation was alleged to be grossly improper, improvident, and disadvantageous to the charity, the land taken in exchange for the charity land being deficient in quantity and value, and having required a large expenditure for its useful occupation; and the land given in exchange being of peculiar value to Cocksedge, by reason whereof he ought to have given a larger consideration for it. It was moreover alleged that this exchange was conducted without any regard to the forms required by the Inclosure Act; and was on that account wholly void, and ought to be set aside. [106]

* * * * *

Much evidence of a very conflicting kind was read on the one hand to impeach the exchange with Cocksedge, and on the other hand, to shew that the exchange was not only not unfair or improvident, but advantageous to the charity. [110]

A.-G. v. CULLUM.

[The following judgment contains a sufficient statement of the case for the purpose of this report.]

[111] *Mr. Temple*, *Mr. Blunt*, and *Mr. O. Anderdon*, in support of the information.

Mr. Pemberton, *Mr. Lovat*, and *Mr. Elderton*, *contrà*.

April 13. THE MASTER OF THE ROLLS, after stating the object and substance of the information, [and making some general observations on the case, said:]

[112] The main charge in the information relates to the alienations, and particularly the alienation to Cocksedge.

It appears that part of the trust property consisted of lands and rights of common, in, over, or upon certain open and common fields, situate within the borough of Bury St. Edmund's. In the beginning of 1814 a bill for inclosing these common fields was in contemplation. There is nothing in the evidence to shew that the trustees originated the proposal for this purpose; but, the proposal being made, they appointed a committee to consider of the expediency of the inclosure so far as it affected the trust. This committee made a report on the 15th of February, 1814, and a resolution was made, that if the inclosure should be carried into effect, the trustees recommended only one commissioner to be appointed, and that commissioner to be Mr. Jocelyn.

The Act was passed in June, 1814, and Mr. Jocelyn was appointed sole commissioner. The only part of the Act which it seems necessary for me to notice, is that which gives the power to make exchanges at page 12.

[Here his Lordship read that part of the Act (1).]

After the Act had passed, the commissioner proceeded to the performance of the duty imposed on him, and the trustees appointed a committee to arrange and superintend the interest of the trustees under the Act; and it appears that, in October, 1815, the trustees had not only come to an understanding as to the allotments which they wished to be made to them, but had agreed with

(1) The passage here referred to is not set out in the original report.—O. A. S.

Cocksedge to exchange with him three parcels of their inclosure for part of his intended allotment of equal value; and, accordingly, on the 13th of October, 1815, the *trustees by their receiver request the commissioner to make the allotments to them in certain situations, and on the following day, Cocksedge and Steele the receiver for the trustees, by order of the committee, wrote to the commissioner and informed him that the trustees had agreed to give to Cocksedge three parcels of old inclosure for as much common land belonging to Cocksedge, as in the judgment of the commissioner should be of equal value. Other exchanges were at the same time in contemplation, and by a resolution of the 30th of October, 1815, the committee was empowered to agree to such exchanges as they might think necessary to carry into effect the inclosure. The agreement with Cocksedge already noticed, was to exchange old inclosure belonging to the trust for allotable common land belonging to Cocksedge: it had no relation to No Man's Meadow, an old inclosure belonging to Cocksedge, and the subject of much discussion in this case. But about the beginning of December, 1815, it appears that some arrangement for the transfer of No Man's Meadow to the trust had taken place; on the 8th of December, the trustees so far considered No Man's Meadow as being or likely to be their own, that they ordered an advertisement for proposals for hiring it to be inserted in the next Bury paper; and, on the 12th of December, Cocksedge and Steele, the receiver as agent of the trustees, wrote to the commissioner to inform him, that it was agreed that the trustees should give up to Cocksedge so much of Woodfield lying nearest to St. Edmund's Hill as the commissioner should judge to be equal in value to certain parcels of land called No Man's Meadow, in the occupation of Samber, which Cocksedge was to give up to them. This agreement did not interfere with the former, by which a part of Cocksedge's allotable common land was to be given to the trustees in exchange for old inclosures belonging to the trust; but it is clear that these were not the final *agreements between Cocksedge and the trustees, for on the 29th of August, 1816, the commissioner made his award. He thereby made twelve allotments to Cocksedge, and seventeen allotments to the feoffment;

[*113]

[*114]

A.-G. v. CULLUM.

and it appears from the evidence of Richard Payne, that of the twelve allotments made to Cocksedge, the first, second, third, fourth, fifth, and eighth, were made in exchange for the ninth of the seventeen allotments made to the feoffment. It further appears, that the first, second, and eighth allotments made to Cocksedge, were old inclosures previously belonging to the trust; and the same for which by the agreement of the 14th of October, 1815, the trust was to receive in exchange certain common land before belonging to Cocksedge, and that the ninth allotment made to the trust was old inclosure belonging to Cocksedge, and the same in denomination, though probably not in quantity, as is mentioned in the agreement of the 12th of December, 1815. How the final agreement which was acted upon by the commissioner was signed or evidenced does not appear, and I cannot assume it to have been done in a manner inconsistent with the provisions of the Act. But upon the best consideration which I can give to the subject, I am not satisfied that the directions of the Act of Parliament were strictly followed either by the trustees and Cocksedge, or by the commissioner. In making the exchange, the transaction was not distinctly treated as an exchange; but, the first, second, and eighth allotments to Cocksedge, though old inclosures belonging to the feoffment, and the ninth allotment, though an old inclosure belonging to Cocksedge, were treated as allotable land and dealt with accordingly, without reference to the forms required for exchanges.

But all this was done openly after treaty, and upon agreement between the parties; and the question here is *not, as in the case of *Wingfield* v. *Tharp* (1), and in another case recently before me, whether a purchaser shall be compelled to take a title under such a transaction, but whether, after a lapse of very nearly twenty years, and under all the circumstances of this case, it can be beneficial to the charity (the interest of which I have alone to attend to,) to make an attempt to set aside what has been done; and, in this consideration, I must look not merely to forms, or to the important fact that Cocksedge was

[*115]

(1) 10 B. & C. 785.

himself one of the trustees, but to all the evidence relating to the nature of the transaction and the value of the property.

In the first place, I find nothing in the evidence to warrant the allegation contained in this information, that the trustees, under colour of the Act, took occasion to concert alienations of the trust land to some of the trustees, or to any others, in order to favour such persons. I am of opinion that the evidence does not countenance the allegation in respect either to the exchange to Cocksedge, or to any other alienation which has been brought to my notice. * * *

[His Lordship after a minute examination of the evidence upon this point, said:]

Considering the parol evidence in conjunction with the documentary evidence on both sides, I have no hesitation in saying, that in my opinion, the evidence for the defendants greatly preponderates; and after a *careful consideration of the whole, [*116] I am satisfied that the exchange with Cocksedge, which is principally complained of, and the other exchanges adverted to in the pleadings, are none of them made out to have been improvident and improper; nor is there even such a *primâ facie* case on the part of the relators, as to induce me to think it for the interest of the charity that any further inquiry into the subject should be made.

[His Lordship then commented upon some minor defects in the constitution and administration of the charity, which was defined and governed by a deed dated the 28th of December, 1810, and said:]

Under these circumstances it appears to me, that the assistance of the Court is wanting for the administration of the income, and for the appointment of new trustees. But considering that this object, which appears to me the only one to be effected by the information, might have been obtained by a very simple proceeding, and at a small expense; and, considering that the complaint which appears to have been made the main purpose of the information has failed, I have hesitated whether I ought to make any decree. In the result, I think that I may subject the charity to a less burthen of costs by making a decree on this information, than by leaving the parties interested to [117]

A.-G. v. CULLUM.

commence a new proceeding. If I could have considered that the relators had procured this suit, framed as it is, to be instituted only for the purposes of the charity, I might have found it my *duty to allow them some part at least of their costs out of the charity estates. Circumstances have appeared which tend to make me suspect at least, that notwithstanding the respectability of the relators, which has not been impeached, some object besides the welfare of the charity has been in view. I cannot act upon that suspicion, but thinking, as I do, that the suit has been instituted and conducted in a manner to create a great deal of unnecessary expense, I think it right to frame my decree in terms to save the charity estate from costs to which I think it ought not to be subjected.

[*118]

I dismiss with costs so much of the information as prays for a declaration that the alienations, and particularly the alienation to Cocksedge, were not authorised by the Inclosure Act, and are therefore void, and that an inquiry may be made whether any proceedings ought to be adopted to set aside such alienations, and whether any proceedings ought to be adopted to set aside certain leases, and that it may be declared that the leases ought to be let by public tender.

I direct a reference to the Master to take an account of the estates and property vested in the defendants on the trusts of the indentures of the 28th day of December, 1810, and of the rents and profits thereof which have been received since the filing of the information, and of the application thereof. I refer it to the Master to approve of a scheme for the future management of the trust estate, and for the application of the rents and profits thereof, having regard, as near as may be, to the uses and purposes stated in the indenture of the 28th of December, 1810; and I refer it to the Master to approve of trustees to act in conjunction with such of the defendants as are now willing to act.

[119]

And as to the costs of that part of the information which is not dismissed, I give none to the relators up to this time.

The extra costs of the defendants, as to the part dismissed, they are to have out of the estates.

The other costs of the defendants up to this time, and the subsequent costs of the relators and the defendants, are reserved.

FELLOWS *v.* BARRETT (1).

1836.
March 21.

Rolls Court.
Lord
LANGDALE,
M.R.

(1 Keen, 119—120; S. C. 5 L. J. (N. S.) Ch. 204.)

The Court will not compel the next friend of an infant, on the ground of poverty, to give security for costs.

[119]

THE bill was filed by Lucy Fellows, as mother and next friend of the infant plaintiff, for the purpose of having secured for the infant plaintiff the share of the property to which he was entitled under the will of his grandfather, as one of the testator's next of kin.

Mr. Bilton, on the part of the defendants, the executors and the other next of kin, moved that Lucy Fellows might be ordered to find security for costs on the ground that she was a pauper, receiving weekly relief from the parish of Henley-upon-Thames, a fact supported by the affidavit of the overseer of that parish. He cited an *Anonymous* case in Mosely's Reports (1), and *Pennington* v. *Alvin* (2), in support of the application.

Mr. Dixon, contrà:

No authority can be produced to establish the proposition that the *prochein ami* of an infant can be compelled, *on account of poverty, to give security for costs. * * *

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The MASTER OF THE ROLLS said he was not aware of any instance in which a plaintiff, on the mere ground of poverty, whether suing in his own right or as *prochein ami*, had been compelled to give security for costs. In charity cases the relator must be a responsible person, and, if shewn to be in indigent circumstances, would not be allowed to sue. His Lordship, however, gave time to the counsel for the defendants to search for authorities.

The case was afterwards mentioned; but no direct authorities were produced.

(1) *Schjott* v. *Schjott* (1881) 19 Ch. Div. 94, 51 L. J. Ch. 368, 45 L. T. 333.

(2) Page 87.

(3) 1 Sim. & St. 264 (Leach, V.-C.), described by the VICE-CHANCELLOR as a gross case, for the next friend had been convicted of adultery with the *feme covert* who was suing her husband.—O. A. S.

STOKES v. HOLDEN.

Stokes the younger, all and singular his freehold messuages, lands, tenements, and hereditaments, and all his personal estate and effects whatsoever, to hold to him, his heirs, executors, administrators, and assigns, upon trust that out of the rents, issues, and profits given and devised to him, and by sale thereof he William Stokes the younger, his heirs, executors, or administrators, should pay and discharge all the testator's debts and funeral expenses, and all legacies and charges thereinafter given and chargeable; and the testator thereby gave and bequeathed to his grandson, William Holden, when he should attain the age of twenty-one years, the sum of 500*l.*, without interest; and, if the said William Holden should die before he attained the age of twenty-one years without lawful issue, the testator directed the same to be paid amongst the surviving children of the testator's daughter, Sarah Holden, in equal shares, as they respectively attained the age of twenty-one years; but if the said William Holden died before that time, leaving lawful issue, the same to be paid to such issue, in equal parts and proportions; and the testator thereby gave and bequeathed to the children of his daughter, Sarah Holden, then living, or who might thereafter be born of her body, and the survivors of them, the sum of 1,000*l.*, to be divided between them in equal shares, when they should respectively attain the age of twenty-one years, without interest, [*146] to be paid to them in manner therein mentioned, *to their separate use. Provided always, that if any of the said children should die before he, she, or they attained the age of twenty-one years, having lawful issue, the share of such children so dying to be divided amongst such issue. And the testator further directed, that if his daughter, Sarah Holden, should die during the minority of her children, the said William Stokes the younger should appropriate the sum of 40*l.* a year towards their support and maintenance during their minorities, as he or they should in their own judgment think proper, reducing such allowance in proportion as they severally attained the age of twenty-one years, and their legacies became payable and vested. And the testator appointed John Hart, Simon Stokes, and William Stokes the younger, executors of his will.

The testator died in July, 1819, leaving William Stokes the

younger, his only son and heir-at-law, and three children of his daughter, Sarah Holden, namely, Ann Holden, William Holden, and Emma Holden, surviving him; and his will was proved by the executors named therein. The personal estate of the testator was exhausted in the payment of his debts.

In February, 1829, William Stokes the younger died intestate, leaving Mary Stokes, his widow, and the plaintiffs, Ann Stokes, and Mary Stokes the younger, his only daughters and coheiresses-at-law.

In January, 1833, William Holden, being then under age, was tried at the Quarter Sessions for the county of Stafford, and convicted of felony, for stealing a goose. He was sentenced to one month's imprisonment for the offence, and underwent that punishment.

William Holden attained his age of twenty-one years on the 17th of July, 1834, and upon his claiming the legacies of 500*l.*, and the third part of the 1,000*l.* given by the will of William Stokes the elder, doubts being entertained as to the effect of the felony upon his right to the legacies, the present bill was filed by the coheiresses of William Stokes the elder, against William Holden, Ann Holden, and Emma Holden, for the purpose of raising the legacies bequeathed to the defendants, and the *Attorney-General* was made a party for the purpose of having the question decided, whether the legacies given to William Holden when he should attain the age of twenty-one, did or did not pass by forfeiture to the Crown upon his conviction. [147]

Mr. Tinney and *Mr. Daniel*, for William Holden:

* * In none of the books is it laid down that any interest, except a present interest, either in possession or in action, can pass by forfeiture to the Crown. In *Bullock* v. *Dodds* (1) it was held that the felon's incapacity to acquire property continued until the expiration of the whole period of his punishment, when the statutory pardon operated; but this is the first attempt which has been made to extend the operation of the forfeiture beyond the period at which the felon recovered his civil rights. [149]

(1) 20 R. R. 420 (2 B. & Ald. 258).

STOKES v. HOLDEN.

Mr. Wray, for the Crown:

[150] * * The form of the inquisition for ascertaining what goods a felon may have died possessed of is as general as possible, comprehending all trusts, possibilities, &c. * * The Crown was as much entitled to the contingent interest of the felon as it would have been to a bond payable at a future period, which period might not accrue until after the expiration of the punishment; or as the assignees of a bankrupt would have been entitled to a contingent interest, which might not fall into possession until after the bankrupt had obtained his certificate.

[151] *Mr. Tinney*, in reply, admitted that, if the contingency had vested in possession before the expiration of the term of imprisonment, the Crown would have been entitled to the benefit of it; but it was impossible for the Court to hold that the Crown could be placed in a better situation than the legatee himself, and be entitled to a benefit before it had accrued, and after the period at which the felon, by virtue of the statutory pardon, had regained all his civil rights.

May 24. THE MASTER OF THE ROLLS:

The question reserved for consideration in this case was, whether a legacy, to which William Holden was entitled under the will of William Stokes, the testator in the cause, was forfeited to the Crown.

The legacy was charged on the testator's real estate, and given to the legatee when he should attain the age of twenty-one years. It was said, on the one hand, that the personal estate was exhausted in paying debts; and it was admitted, on the other hand, that, if the legacy could only be paid by means of the charge upon the real estate, it was contingent until the legatee attained twenty-one years of age.

In the month of January, 1833, the legatee, not being twenty years of age, was convicted of stealing, and sentenced to a month's imprisonment, which he underwent, and was then discharged. He afterwards, and on the 17th of July, 1834, attained his age of twenty-one years. The legacy then became vested, and payable, and it is claimed by the Crown as having

been forfeited by the conviction of the legatee for the offence which he committed.

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For the legatee, it was alleged that a contingency is not forfeitable; that by the statute of the 9 Geo. IV. c. 32, s. 3, the punishment has the like effect and consequences as a pardon under the Great Seal, and that, as the legacy did not vest until after the punishment was endured, the right to it was not forfeited.

It is clear that the offence committed by the legatee subjected him to forfeiture, and the only question is, whether the contingent legacy was forfeitable. Hawkins (1) says, "It seems agreed that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right, and not as executor or administrator to another, are liable to forfeiture. Also it seems to be settled that a bond taken in another's name, or a lease made to another in trust for a pers n who is afterwards convicted of felony, are as much liable to be forfeited as a bond made to him in his own name, or a lease in possession." None of the words used in this description of the things liable to forfeiture apply to contingencies; but it was argued, that any thing that could be granted or assigned, or which might be the subject of a valid contract in equity, was liable to forfeiture, and that a contingent legacy might be the subject of a valid contract. I need not consider the question, whether every thing which may be granted or assigned is forfeitable, because it is admitted that, at law, a contingency does not pass by deed; and I apprehend that no case can be found in which it has been held, that any other than immediate rights (grantable or assignable) are subject to forfeiture. And though a contingency may be the subject of a contract, which, when made for a valuable consideration, *a court of equity will enforce after the event has happened, yet, till the event has happened, the party contracting to purchase has nothing but the contingency, a very different thing from a right immediately to recover and enjoy the property.

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(1) Book 2, c. 49, s. 9.

STOKES v. HOLDEN.

By the contingency in this case, the attainment of twenty-one years of age by the legatee, was in the nature of a condition precedent to the vesting, or to the right immediately to recover and enjoy the legacy. That condition was not fulfilled at the time of the conviction, or at the time when the punishment was fully endured, being the time when the legatee was to have the benefit of a pardon. The legatee was still not entitled to the legacy, and might never have become entitled to it. It was not till long after that the vesting took place by his living to the age of twenty-one years.

There is, I believe, no direct authority on the subject, but finding it said by Chief Justice WRAY in the case of *Manning* and *Andrews* (1), that "a use, so long as it is in contingency, cannot be forfeited, as if a mortgagor be attainted and pardoned mean betwixt the mortgage and the day of redemption," I think that, under the circumstances of this case, and relying on the principle on which Chief Justice WRAY must have founded his opinion, I may safely conclude that this contingent legacy, the event upon which the contingency depended not having happened until after the punishment was endured, was not forfeited to the Crown by the preceding conviction. And I must therefore declare that the legatee is now entitled to receive it.

1836.
March 15, 16.

Rolls Court.
Lord LANGDALE, M.R.

[154]

HARGREAVES *v.* ROTHWELL (2).

(1 Keen, 154—160; S. C. 5 L. J. (N. S.) Ch. 118.)

Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction.

BY an indenture, dated the 24th of October, 1827, and made between John Nuttall, of the one part, and the defendants, John

(1) 1 Leon. 260.

(2) But purchasers are now protected from this extension of the doctrine of imputed notice by the Conveyancing Act, 1882, s. 3; and see *In re Cousins* (1886) 31 Ch. D. 671, 55 L. J. Ch. 662, 54 L. T. 376. —O. A. S.

Rothwell, Peter Rothwell, and Robert Kay, of the other part, the hereditaments and premises therein described were demised and assigned for a term of 800 years by Nuttall to the said defendants, their executors, administrators, and assigns, to secure the repayment of the sum of 1,500*l.* and interest; and the indenture contained a trust for the sale of the mortgaged premises.

By an indenture, dated the 19th of November, 1829, and made between John Nuttall, of the one part, and the plaintiff John Hargreaves, of the other part, reciting, among other things, the above-mentioned indenture, it was witnessed that, in consideration of 2,000*l.* advanced to Nuttall by the plaintiff, Nuttall conveyed to the plaintiff, his heirs, executors, administrators, and assigns, the freehold and leasehold premises therein described, including the premises comprised in the indenture of the 24th of October, 1827, subject to redemption upon repayment of the 2,000*l.* and interest, and also subject to the prior mortgage to the defendants, John Rothwell, Peter Rothwell, and Robert Kay.

By an indenture, dated the 1st of November, 1830, and made between John Nuttall, of the one part, and the defendants, John Rothwell, Peter Rothwell, and Robert Kay, of the other part, reciting the indenture of the 24th of October, 1827, and that the defendants, John Rothwell, *Peter Rothwell, and Robert Kay, had [*155] advanced to Nuttall the further sum of 2,200*l.* and that Nuttall had agreed to secure the same upon the said mortgaged premises, and upon such additional security as therein mentioned, it was witnessed that Nuttall for himself, his heirs, executors, &c., covenanted that the premises comprised in the said indenture of mortgage should continue to be a security, not only for the sum of 1,500*l.* and interest, but for the said further sum of 2,200*l.* and interest; and the indenture contained the further covenants therein mentioned for securing the repayment of the said sums and interest to the defendants, John Rothwell, Peter Rothwell, and Robert Kay.

In May, 1832, a fiat of bankruptcy was issued against John Nuttall, and the bill was filed by the plaintiff, John Hargreaves, for the purpose of obtaining the benefit of his incumbrance, subject to the prior mortgage of the 24th of October, 1827, and for that purpose it prayed that his mortgage might be declared

HARGREAVES v. ROTHWELL.

entitled to priority over the third mortgage to the defendants, John Rothwell, Peter Rothwell, and Robert Kay. The defendants by their answer insisted that, at the time of the execution of the indenture of the 1st of November, 1830, they had no notice of the plaintiff's incumbrance, and it was admitted that they had no direct notice; but it appeared that Samuel Woodcock was the solicitor for the mortgagor and the mortgagees in all the three transactions, and the question was whether, under those circumstances, the defendants had not constructive notice of the second incumbrance.

Mr. Pemberton and *Mr. Walker*, for the plaintiff:

The rule, that notice to the solicitor is notice to the client,
[*156] has been too long established, and is too firmly *settled to be shaken. * * The case of *Brotherton* v. *Hatt* (1), which has decided the law of the Court on this point, and which cannot now be questioned, shews that the same principle applies to a diversity of transactions.

Mr. Kindersley and *Mr. Monro*, *contrà*:

[157] * * In *Hiern* v. *Mill* (2) Lord ELDON expressly states, that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit. The principle that notice to
[*158] an agent, in *order to bind his principal, must be in the same transaction was recognised by Sir JOHN LEACH, in *Mountford* v. *Scott* (3), a case which is exactly in point with the present; for there the same agent acted as solicitor both for the vendor and vendee. Whether the prior transaction was or was not present to the mind of the solicitor when he drew the third indenture was an immaterial circumstance. * * *

Mr. Pemberton, in reply. * * *

(1) 2 Vern. 574.
(2) 9 R. R. 149 (13 Ves. 114).
(3) 18 R. R. 189 (3 Madd. 34).

The MASTER OF THE ROLLS, in the course of the argument, said he was clearly of opinion that where one transaction was closely followed by, and connected with another; or where it was clear, as in the case before the Court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction. The only authority which raised the least doubt in his mind was the case before Sir John Leach, which had been cited at the Bar, and he would not determine the present case until he had looked into that decision.

On the following day, his Lordship gave judgment as follows:

In the marginal note to the case of *Mountford* v. *Scott*, it is said that notice to an agent, in order to bind his principal, must be in the same transaction; and this though the agent acted as attorney for the vendor and vendee. The judgment itself certainly does not *lay down the proposition so absolutely as [*160] it is stated in the marginal note; but the case came upon appeal before Lord Eldon, and is reported in *Turner* v. *Russell* (1), where it appears that Lord ELDON'S judgment turned upon a point entirely different, which rendered the question of notice wholly immaterial. The point upon which Lord ELDON decided the case was that, where deeds are deposited for the particular purpose of obtaining credit, the person with whom the deeds are deposited has no lien upon them for what is due to him in respect of monies previously advanced. But Lord ELDON notices the ground of the VICE-CHANCELLOR'S decision, and the observations he makes on the subject of notice are extremely important. "The VICE-CHANCELLOR," he observes, "in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man

(1) 24 R. R. 55 (T. & R. 274).

HARGREAVES v. ROTHWELL.

credit for having forgotten it. I should be unwilling to go so far as to say that, if an attorney has notice of a transaction in the morning, he shall be held, in a court of equity, to have forgotten it in the evening; it must in all cases depend upon the circumstances."

In these observations I entirely concur. The case of *Mountford* v. *Scott*, therefore, does not raise any obstacle that affects the view which I took of this case, and I am clearly of opinion that the plaintiff is entitled to priority in respect of the second mortgage.

1836.
Feb. 27.
April 16.

Rolls Court.
Lord LANGDALE, M.R.

[176]

BLACKWELL *v.* BULL (1).

(1 Keen, 176—182; S. C. 5 L. J. (N. S.) Ch. 251.)

Estate by implication.

Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; it was held, that the testator, in the words "my family," intended to comprise his wife; and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate.

THE will of Richard Bull, dated the 17th of June, 1834, was in the following words: "In the first place, my will and wish is that my business of a cheesemonger be carried on by my wife Sarah Bull and my son John Bull jointly, for the mutual benefit of my family; and I likewise will and devise in trust all my property for the following purpose, that is to say, that at my wife's decease the whole of my property, of whatever nature or description, as well freehold as personal, shall be equally divided amongst my children, John, Richard, William, Mary, and Caroline Bull, their executors or assigns, share and share alike. And I hereby appoint my wife Sarah Bull, my son John Bull, and my friend Samuel Blackwell, executrix and executors of this my will."

[177] The testator died shortly after the date of his will, leaving his

(1) *Ralph* v. *Carrick* (1877) 5 Ch. Div. 984, 48 L. J. Ch. 801, 40 L. T. 505.

widow, Sarah Bull, and John Bull, his eldest son and heir-at-law, and four other children, all infants, surviving him. BLACKWELL v. BULL.

The will was proved by the plaintiff, James Blackwell, and Sarah Bull; and the bill was filed by the plaintiff against the widow and children of the testator, for the purpose of having the rights of the several parties declared, and the trusts of the will carried into execution.

The principal questions in the cause were, whether the widow, in the absence of any express limitation to her, was included in the word "family," and consequently took under the will a beneficial interest in the testator's business; and whether she was entitled, by implication, to a life-interest in the testator's real and personal estate.

Mr. Blake, for the widow [as to the meaning of the word "family," cited *M'Leroth* v. *Bacon* (1); and as to the widow's claim to an estate by implication he cited *Hammond* v. *Neame* (2), *Bird* v. *Hunsdon* (3), *Crawford* v. *Trotter* (4), and other cases].

Mr. Puller, for the younger children: [179]

The word "family" has a distinct and definite signification, and must be taken to mean children exclusive of their parents, unless there are plain expressions in the will indicating a contrary intention on the part of the testator: *Barnes* v. *Patch* (5). * * As to the property not engaged in the trade, the widow [180] takes no life estate by implication, but the words "after the decease of my wife" are to be construed distributively, and referred to the disposition which the testator had before made as to the property employed in the trade. * * *

Mr. Wright, for the heir, said the rule was, that the heir-at-law could not be disinherited by implication. * * Either the whole estate during the life of A. descends to the heir by reason of the uncertainty of the devise, and because the heir

(1) 5 R. R. 11 (5 Ves. 159).
(2) 18 R. R. 15 (1 Swanst. 35).
(3) 19 R. R. 82 (2 Swanst. 342).
(4) 20 R. R. 312 (4 Madd. 361).
(5) 7 R. R. 127 (8 Ves. 604).

BLACKWELL v. BULL.

cannot be disinherited upon conjecture; or else the interest of the heir in that part of the estate to which the implication does not extend, in other words his title by descent will be affected by the devise during the life of A., to the extent only of that share of the estate which he takes in common with the other persons after the decease of A.; and, applying that *principle to the present case, there being five children among whom the property is to be equally divided, the widow will be entitled only to a life interest in one fifth part of the real estate.

[*181]

Mr. Blake, in reply.

THE MASTER OF THE ROLLS:

It is evident that the word "family" is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect.

Under different circumstances it may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding the wife; or in the absence of wife and children, it may mean his brothers and sisters, or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance, and in the case of a will we must endeavour to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will; and applying these considerations to the present case, I am of opinion that in the words "my family," the testator clearly intended to comprise his wife. He did not contemplate any severance or separation either of his family or of the property employed in the trade, but probably considered that they would, as it may be hoped they will, continue united, enjoying together the benefit of the business. If the case should be otherwise, it may become necessary *to determine their separate interests, and I think that the wife and son John carrying on the business are first entitled to a proper remuneration for their trouble in carrying

[*182]

it on, and that the clear profits ought to be applied for the common benefit of the wife and children. If a separation of the family should take place, I think that each member will be entitled to an equal share of the profits; and, as to the property not engaged in the trade, though the case as regards the real estate is not without difficulty, yet on the whole will, and what appears to me the evident intention, I think the widow is entitled to a life interest in both the real and personal estate. * * *

SNOW *v.* POULDEN (1).

1836. *March* 24.

Rolls Court. Lord LANGDALE, M.R.

(1 Keen, 186—189.)

A testator directed the residue of his property to be invested in land, and given to S., who was "not to be of age to receive this until he attained his twenty-fifth year, and to be entitled to him and his heirs male:" Held, that S. took a vested estate tail in the land, subject to be devested if he should not attain twenty-five; and that the rents and profits were applicable to his benefit during his minority.

[186]

THE residuary clause of the will of Thomas Fitzherbert was in the following words: "The rest of my property to be invested in land, and given to my grandson, Thomas Fitzherbert Snow; when of age to have a commission in the army regulars at twenty-one; to remain in the army seven years, and not to be of age to receive this until he attains his twenty-fifth year, and to be entitled to him and his male heirs bearing the name of Thomas Fitzherbert for ever."

The question was, whether the devise to Thomas Fitzherbert Snow was vested or contingent.

Mr. Pemberton, for the devisee [cited *Boraston's* case (2), *Bromfield* v. *Crowder* (3), and *Duffield* v. *Duffield* (4)]. In the present case there was a person *in esse*, who could take when he should attain the age of twenty-five years; and the devisee is entitled, according to all the authorities, to a vested estate tail, subject to be devested if the contingency should not take effect.

[187]

(1) Foll. by ROMILLY, M. R., *Attwater* v. *Attwater* (1853) 18 Beav. 330, 336.

(2) 3 Co. Rep. 19.

(3) 8 R. R. 805 (1 Bos. & P. N. R. 313).

(4) 32 R. R. 70 (3 Bligh, N. S. 260).

SNOW v. POULDEN.

Mr. Spence, for the heir-at-law and next of kin:

In *Duffield* v. *Elwes* there was a residuary devise, and in *Bromfield* v. *Crowder* there was a devise over. So in *Phipps* v. *Williams* (1), a case recently before the Vice-Chancellor, and falling within the same class of cases, there was a devise over. In *Phipps* v. *Williams* also, as in *Duffield* v. *Elwes*, there was a residuary clause. In the present case there is no limitation over, and that circumstance is of importance in determining

[*188] *the question, whether a devise shall be held to be vested or contingent, a question which must always depend upon the intention of the testator. Here, if the devise is held to be contingent, there are no limitations over to be put in jeopardy, and no intention of the testator in that respect will be defeated. * * *

Mr. Pemberton, in reply:

[189] * * In *Boraston's* case, the very case which constitutes the foundation of the rule upon which cases of this description have been decided, there was no devise over.

The MASTER OF THE ROLLS held that the devisee took an immediate vested interest, as tenant in tail, in the land in which the residue of the testator's personal property was directed to be invested, subject to be devested if he should not attain the age of twenty-five years, and that the rents and profits were consequently applicable to his benefit during his minority.

1836.
Feb. 12, 13.
April 14.

Rolls Court.
Lord LANGDALE, M.R.
[206]

BRAITHWAITE *v.* BRITAIN (2).

(1 Keen, 206—223.)

A general testamentary direction for the payment of debts, followed by a direction that particular devisees shall pay specified amounts to the testator's executors, indicates that the debts are to be paid by the executors, and the implied charge of debts is qualified and restricted in accordance with the subsequent direction.

Mortgagees, with notice of a specific charge for payment of debts

(1) 35 R. R. 118 (5 Sim. 44). (2) See *Palmer* v. *Graves*, *post*, p. 110.

upon devised estates, were held, notwithstanding releases of the estates by the executors to the devisees (such devisees being themselves two of the executors, and the releases not shewing that the charge had been raised and paid), to be bound to see to the application of the mortgage money.

BRAITHWAITE v. BRITAIN.

THE bill was filed on the 3rd of April, 1833, by Sarah Braithwaite, against the representatives of John Britain the elder, and other persons who were interested in, or claimed liens upon, the estate of John Britain the elder; and it prayed that an account might be taken of what was due to her in respect of certain deposits which she had made with the partnership firm of John Britain the elder, deceased, and the defendants, John Britain and William Thackwray; and that it might be declared that she was entitled to be paid out of the real and personal assets of John Britain the elder.

Previously to March, 1824, John Britain the elder, and the defendants John Britain and William Thackwray, were bankers in partnership together, and were indebted to the plaintiff in respect of deposits made by her from time to time between the 1st of April and the 13th of November, 1823, in the sum of 2,500*l.*, on which they allowed interest.

John Britain the elder died in March, 1824, leaving his nephew, William Britain, his heir-at-law, and his nephews John and George Britain surviving him; and having duly made his will, dated the 8th of October, 1823, whereby he first ordered and directed all his just debts and testamentary expenses to be paid and discharged; and after bequeathing certain pecuniary *legacies and annuities, he gave and devised [*207] unto his nephew, William Britain, his heirs and assigns, all and singular his lands, tenements, and hereditaments, situate at Sinderly, subject nevertheless, and the testator thereby charged the said premises at Sinderly with the payment of the sum of 3,800*l.*, to be paid or accounted for by his said nephew unto his executors thereinafter named, at the end of twelve calendar months next after his decease, with interest for the same, after the rate of 4*l.* per cent. per annum. And the testator gave and devised unto his nephew John Britain, his heirs and assigns, all and singular his messuage or dwelling-house, lands, tenements, and hereditaments whatsoever, with

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their appurtenances, situate and being at Kirklington, subject nevertheless, and the testator thereby charged the said last-mentioned premises with the payment of the sum of 1,400*l.*, to be paid or accounted for by his said nephew John Britain, unto his executors thereinafter named, at the end of twelve calendar months next after his decease; and the said testator thereby gave and bequeathed unto his nephew John Britain, and to his nephew George Britain, to be equally divided between them, share and share alike, all and singular his share and interests of and in the banking concern wherein he was a partner, carried on under the firm of John Britain the elder, John Britain the younger, and William Thackwray. And the testator declared it to be his will and intention, that the said last-mentioned bequest should extend not only to such share of profits, benefit, and advantage as should be due, owing, or belonging to him as such partner as aforesaid at the time of his decease, but also to all such sum or sums of money as should at that time be due and owing to him from the said banking concern, on the balance of his private account, and on every other account relating to the said banking concern; and [*208] after specifically bequeathing *certain other parts of his personal estate, as to the said several sums of 3,800*l.* and 1,400*l.* thereinbefore directed to be paid or accounted for by his said nephews, William Britain and John Britain, out of the several estates thereinbefore devised to them; and also all the rest, residue, and remainder of his real and personal estate and estates whatsoever, chargeable nevertheless with the payment of all his just debts and testamentary expenses, and of the several annuities and legacies thereinbefore bequeathed, he gave, devised, and bequeathed the same and every part thereof unto his nephews, the said William Britain, John Britain, and George Britain, their heirs, executors, administrators, and assigns absolutely as tenants in common, share and share alike; and the testator appointed his said nephews, William Britain, John Britain, and George Britain, executors of his will.

John Britain and George Britain alone proved the will on the 6th of July, 1824, and possessed themselves of the personal estate of the testator.

William Britain, the devisee of the testator's estate at Sinderly, and John Britain, the devisee of the estate at Kirklington, after the death of the testator, entered into possession of those estates respectively, and of the receipt of the rents and profits thereof.

By an indenture dated the 20th of April, 1826, between William Britain and George Britain of the one part, and John Britain, of the other part, reciting, that by the will of the testator, John Britain the elder, the 3,800*l.* charged on Sinderly, and the 1,400*l.* charged on Kirklington, were given to the testator's nephews, William Britain, John Britain, and George Britain, without noticing that they were made chargeable with the payment *of the testator's debts; and after further stating that [*209] William Britain, John Britain, and George Britain had apportioned and divided between themselves their respective shares of the said sums of 3,800*l.* and 1,400*l.*; and that all accounts between them as to those sums had been settled to their mutual satisfaction, it was witnessed, that John Britain and George Britain released to William Britain all the Sinderly estate, and all the claims which they might have against William Britain on account of the 3,800*l.*, or their shares therein. And by another indenture of the same date between William Britain and George Britain of the one part, and John Britain of the other part, it was witnessed that William Britain and George Britain released to John Britain all the Kirklington estate, and all the claims which they might have against John Britain on account of the 1,400*l.*, or their shares therein.

Shortly after the execution of these deeds, and in May, 1826, William Britain executed a mortgage of the Sinderly estate to William Morton to secure the repayment of 1,800*l.* and interest. In the year 1830 the defendants, Sir Charles Dalbiac and George Dalton, lent 3,000*l.* to William Britain, 1,200*l.* to be applied to his own use, and 1,800*l.* to pay off Morton, and by deeds of lease and release dated the 15th and 16th of April, 1830, the Sinderly estate was conveyed as a security for the repayment of the 3,000*l.* and interest to the defendants, Sir Charles Dalbiac and George Dalton, who claimed, by their answer, the benefit of that mortgage in priority to the plaintiff. In November, 1830, William Britain executed to George Douthwaite a further charge of 1,000*l.*

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on the Sinderly estate, and the benefit of this further charge was claimed by the defendants, William Lawson, and Gabriel Fielding, in priority to the plaintiff.

[210] In the year 1828 John Britain, claiming to be absolutely entitled to the Kirklington estate, deposited the title deeds relating to that estate, with the defendants, Messrs. Swann & Co., to secure a balance amounting to 2,479*l.* due to them on an account. The defendants, Messrs. Swann & Co., by their answer claimed to be entitled to the benefit of that equitable charge on the Kirklington estate in priority to the plaintiff.

The plaintiff having in vain endeavoured to obtain payment by applications to Thackwray and John Britain, at length brought an action against them in Hilary Term, 1832. Thackwray confessed judgment; John Britain defended the action, and delayed the proceedings by obtaining an injunction which was afterwards dissolved; and on the 8th of September, 1832, a verdict was obtained against him for 2,200*l.* A few days afterwards a fiat in bankruptcy was issued against him, and the defendants, Wilks and Gaunt, were appointed his assignees.

[Two of the questions raised in the cause were whether the whole of the testator's real estate was subjected to the payment of his debts, or only the Sinderly and Kirklington estates made liable to the specific sums respectively charged upon them; and, whether the defendants claiming under legal or equitable charges were or were not, under the circumstances, bound to see to the application of the mortgage money, or entitled to be considered as purchasers for valuable consideration without notice.]

[211] *Mr. Pemberton* and *Mr. Geldart*, for the plaintiff:

[212] * * By the introductory words of the will, the testator directs all his just debts to be fully paid and discharged, and he afterwards directs the sums charged upon the Sinderly and Kirklington [*213] estates to be paid to his executors *and accounted for. These directions are in effect equivalent to a direction to his executors to pay all his just debts, and it has been held that such a direction will operate as a condition imposed upon the executors to satisfy the testator's debts as far as all the property which they derive under the testamentary disposition will extend, whether

real or personal. [They cited *Henvell* v. *Whitaker* (1), and distinguished *Warren* v. *Davies* (2).] Wherever these legatees are named, they are always expressly described as executors. Whatever came to their hands, therefore, as such executors, they were bound to apply to the payment of debts. * * It has been held that where the estate is charged with the payment of debts *or legacies, if from the circumstances of the transaction the sale or mortgage by an executor afford intrinsic evidence that the money was not to be applied for the debts or legacies, the purchaser or mortgagee will hold liable to the charge: *Watkins* v. *Cheek* (3). Here it is not pretended that the mortgages were made for the purpose of paying debts or legacies, and the releases afforded intrinsic evidence of the contrary. * * *

[214]

[*215]

Mr. Barber, *Mr. G. Richards*, and *Mr. Walker*, for the defendants Sir Charles Dalbiac, and Dalton, and Messrs. Swann & Co.:

The real estates of the testator are not charged generally with the payment of debts, nor are the Sinderly and Kirklington estates made liable beyond the amount of the sums respectively charged upon them. *Henvell* v. *Whitaker* (1) is distinguishable from the present case. There the testator directed all his debts to be paid by a certain executor thereinafter named, to whom all his real as well as personal estate was given; in this case there are separate and distinct devises to two of the executors, and to George Britain, the other executor, no real estate whatever is given. *Henvell* v. *Whitaker* lays down the rule applicable to similar cases in which the charge arises by implication. The next case, *Warren* v. *Davies* (2), which resembles the present case, establishes *the exception to the rule which is applicable to cases where the charge by implication does not arise. Where, after a direction for payment of debts or legacies by executors after named, an estate is devised to one of two executors, as in *Warren* v. *Davies*, the implication of a charge upon the devised estates does not arise. In the present case there is an express

[*216]

(1) 3 Russ. 343; see 27 R. R. 88.

(2) 39 R. R. 133 (2 My. & K. 49).

(3) 25 R. R. 181 (2 Sim. & St. 199).

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charge to the amount of certain specified sums upon the Sinderly and Kirklington estates; but, beyond that amount, the principle of the decision in *Warren* v. *Davies* applies, and no charge can arise by implication. * * The charge of particular sums for the payment of debts upon the Sinderly and Kirklington estates, negatives all possibility of the testator's intention to charge his real estates generally: [*Douce* v. *Lady Torrington* (1).]

[217] * * It is said that the mortgagee was bound to see to the due application of the sum of 3,800*l.* charged upon the Sinderly estate; but where a charge is to be paid by an executor, and, from the length of time which has elapsed, it may be reasonably inferred that the charge has been satisfied, it is surely sufficient for a purchaser or mortgagee to see that there was a release of all claims from the executor to the persons entitled to the estate subject to the charge. [*Watkins* v. *Cheek* was a case of fraud, and has no application to the present case.]

[218] *Mr. Kindersley*, *Mr. Spence*, *Mr. Purvis*, *Mr. Wilbraham*, *Mr. Witham*, and *Mr. Torriano*, for other defendants.

Mr. Pemberton, in reply. * * *

[219] THE MASTER OF THE ROLLS:

Upon the death of John Britain the elder, the plaintiff had a legal demand against the defendants, John Britain and William Thackwray, as surviving partners, and besides that legal demand, she was in equity entitled to be paid out of the estate of John Britain the elder, the deceased partner. It is not denied that she is still so entitled, if the parties now interested in the estate should not have a valid defence arising from lapse of time, or other circumstances, which have occurred since the death of John Britain the elder.

Upon the construction of the will of John Britain the elder, I think that the direction to the executors (2) to pay the debts did

(1) 39 R. R. 308 (2 My. & K. 600).

(2) The general direction for payment of the testator's debts, though not in terms addressed to the executors, was to be carried out by them, since the sums specifically charged and applicable for debts were expressly directed to be paid to them.—O. A. S.

not affect more than the property which he had directed to come to the hands of the executors, and therefore did not amount to a charge on the devised estates beyond the amount of the respective sums of money which he had directed those estates respectively to be subject to: *Warren* v. *Davies* (1). But under the statute 47 Geo. III. c. 72, all his real estates, not charged by his will, were subject to the payment of his debts.

It appears that the will was proved by John and George only, and not by William Britain; but, framed as this will is, I think that William, having accepted the benefits given to him, could not renounce the executorship in such a way as to exonerate himself from any liability to which he might be subjected as executor in this Court. [220]

It does not appear that the plaintiff had notice of the dissolution of the partnership by the death of the elder Britain, or, if she had, whether she ever applied to the executors, as such, for payment out of the estate of the deceased partner. But John Britain, one of the surviving partners, was an executor of the deceased partner, and I cannot assume him to have been ignorant of the rights or claims of the plaintiff. However the fact may have been as to notice, the plaintiff, having her legal demand against the surviving partners, as well as her equitable demand against the estate of the deceased partner, frequently applied at the banking-house for payment; and in the course of the years 1827, 1828, and 1829, she obtained some small sums on account.

It is obvious that the plaintiff has a *primâ facie* case. The deceased John Britain was her debtor: she had against his estate a claim which has not been satisfied. Why should she not be paid now? In *Vulliamy* v. *Noble* (2), Sir W. GRANT said, "It cannot be disputed that the deceased partner was subject to the liability, nor can it any more be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged *they must be before his liability ceases." In *Wilkinson* v. *Henderson* (3), Sir JOHN LEACH [*221]

(1) 39 R. R. 133 (2 My. & K. 49).
(2) 17 R. R. 143 (3 Mer. 593, 619).
(3) 36 R. R. 386 (1 My. & K. 582).

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considered, that "the estate of the deceased partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner." How then, in this case, is the estate of the testator relieved from the liability?

First, it is said, that the plaintiff is precluded from relief by the Statute of Limitations. No demand, it is said, was made from March, 1824, when the testator died, up to April, 1833, when the bill was filed, a period of nine years. On this occasion it is not necessary to determine the effect of the statute in barring claims against the estate of a deceased partner, in cases not attended by the peculiar circumstances belonging to this case. But considering that in cases of this kind the creditor of a partnership has a right to avail himself, not only of the nature of the contract, but also of the equities subsisting between the parties; that the surviving partners may, as to past transactions (in respect to which they are subject to liability in common with the estate of the deceased partner), be not unreasonably considered as acting not only for themselves, but also on account of the estate of the deceased partner—that the demand was clearly kept up against the surviving partners—that one of the surviving partners was one of the executors of the deceased partner, acting as such, and also one of the legatees of the interest of the deceased partner in the concern, and that the testator had made charges on his real estate for the payment of his debts, I think that the case, considering all its circumstances, *does not fall within the operation of the statute, and is not governed by the legal consideration on which the cases of *Atkins* v. *Tredgold* (1), and *Slater* v. *Lawson* (2), were decided.

[*222]

It is next said that, by the will, no more than 3,800*l.* was charged upon Sinderly, and no more than 1,400*l.* upon Kirklington, for the payment of debts; and so far I concur; but it is further argued, that the estates were effectually discharged from those sums by the releases; that the mortgagees are not bound to see to the application of the money, and that they were

(1) 26 R. R. 254 (2 B. & C. 23). (2) 1 B. & Ad. 396.

BRAITHWAITE v. BRITAIN.

purchasers for valuable consideration, without notice of the plaintiff's claim.

If the two sums of 3,800*l.* and 1,400*l.* had been raised and paid to the executors, I think that the mortgagees would not have been bound to see to their application, and there might have been circumstances under which the declaration and release of the executors would have protected them; but they had notice of the will and of the trading; they knew that by the will the executors were bound to pay the debts; and that the sums of 3,800*l.* and 1,400*l.* were given, with the residuary property, to the executors, chargeable with the debts; and with this knowledge they take a title under the deed of the 20th of April, 1826, by which it is so far from appearing that the money was paid to the executors that I think the contrary appears; for the sums of 3,800*l.* and 1,400*l.* are treated merely as legacies to the nephews, who are stated to have apportioned and divided the amount among themselves. The consequence, I think, is, that the releases only operate to the extent of the beneficial interest to which the executors, *as legatees, were entitled in the charges; and that, for the benefit of creditors, the legatees continue to be affected with the charges against the mortgagees, who took under such a title. [*223]

As to any claim against the surplus of the Sinderly and Kirklington estates, after paying the charges, I think that the mortgagees must be considered as purchasers for valuable consideration without notice. * * *

[It is not thought necessary to reprint the minutes of the Order.]

BAKER *v.* SUTTON (1).

1836. *May* 2, 6, 7.

(1 Keen, 224—234; S. C. 5 L. J. (N. S.) Ch. 264.)

Rolls Court. Lord LANGDALE, M.R.

A bequest of the residue of personal estate for such religious and charitable institutions and purposes within the kingdom of England, as in the opinion of the testator's trustees should be deemed fit and proper, is a good charitable bequest. [224]

A charitable bequest of money, directed to be laid out on mortgage security, at the highest interest that could be legally and safely obtained for the same, held to be void under the Mortmain Act.

HENRY STOCKING, by his will, dated the 18th of May, 1825, after * * giving some pecuniary legacies, * * as to [226]

(1) *In re Piercy*, '98, 1 Ch. 565, 67 L. J. Ch. 297, C. A.

BAKER v. SUTTON.

all the rest, residue, and remainder of his goods, chattels, monies, securities for monies, whether in the public funds or otherwise, and all other his personal estate whatsoever and wheresoever, he gave and bequeathed the same to his executors in trust for such sundry religious and charitable institutions or other purposes as he might thereafter specify in any codicil or codicils to that his will. And in failure so to do, in trust that they, and the survivors and the executors, and administrators of such survivors, should pay and dispose of the same for such religious and charitable institutions and purposes within the kingdom of England as in the opinion of the major part of them should be deemed fit and proper.

[227] The testator made a codicil to his will [not disposing of the residue of his personal estate].

The bill was filed by the next of kin against the trustees and the *Attorney-General;* and the questions in the cause were, first, whether the bequest of the residue was sufficiently definite to take effect as a good charitable bequest; and, secondly, whether a legacy of 6,200*l.* [which the testator directed to be invested on mortgage securities for charitable purposes] was or was not void by the Mortmain Act [in consequence of such direction].

Mr. Kindersley and *Mr. Blunt*, for the next of kin [cited *Williams* v. *Kershaw* (1), *Morice* v. *The Bishop of Durham* (2), *Waldo* v. *Caley* (3), *Ommaney* v. *Butcher* (4), *Horde* v. *The Earl of* [229] *Suffolk* (5), and other cases]. In *Horde* v. *The Earl of Suffolk* Sir JOHN LEACH makes no allusion to the case of *Ommaney* v. *Butcher:* he founds his decree entirely upon the resemblance of the bequest in the case before the Court to that in *Waldo* v. *Caley;* and there is no reason to suppose that he intended to question the authority of *Ommaney* v. *Butcher*. * * *

Mr. Chandless and *Mr. Roupell, contrà:*

This case is distinguishable from *Morice* v. *The Bishop of Durham*, and the late case of *Williams* v. *Kershaw*, for in

(1) Otherwise *Williams* v. *Williams*. See 42 R. R. 269.
(2) 7 R. R. 232 (9 Ves. 399).
(3) 19 R. R. 165 (16 Ves. 206).
(4) 24 R. R. 42 (T. & R. 260).
(5) 39 R. R. 136 (2 My. & K. 59).

those cases the Court went very much upon the effect of the words "liberal" and "benevolent." Benevolence is sufficiently distinguishable from charity. * * Supposing, however, that religious purposes *are to be considered as distinct from charitable purposes, then the word "and" must be taken disjunctively, and will be equivalent to "or;" and if equivalent to "or," it has been held that where an option is given between two modes of proceeding, one of which only will give effect to a charitable gift, the Court will adopt that which will effectuate the charitable intention of the testator. Thus, in *The Attorney-General* v. *Hill* (1), the LORD CHANCELLOR says that, if in that case it had been the intention of the testator to give the trustees power to lay out the residue of his personal estate in the purchase of lands either in Scotland or England, the gift to charity would be good. * * *

[*230]

Mr. Kindersley, in reply:

[231]

* * Many religious purposes are not necessarily charitable, though they may be, and undoubtedly are so, in a purer and more enlarged sense of the word. * * *Browne* v. *Yeale* (2). The words "mortgaged security" were clearly used by the testator in their ordinary sense, and the trustees would not have been justified in investing the money in lands out of the country.

[232]

THE MASTER OF THE ROLLS:

May 6.

In this case the bequest is for such religious and charitable institutions and purposes as the major part of the trustees shall think proper; and the question is, whether this is to be considered as a gift for charitable purposes. In *Williams* v. *Kershaw*, the gift was for such benevolent, religious, and charitable purposes as the trustees should in their discretion think most beneficial; and the MASTER OF THE ROLLS, considering that these words were to be taken, not conjointly, but in a distributive sense, was of opinion that they were too vague to raise a

(1) 35 R. R. 81 (3 Russ. 338).
(2) Cited in a note to *Moggridge* v. *Thackwall*, 6 R. R. 78, *n.* (7 Ves. 50).

BAKER v. SUTTON.

charitable trust which this Court could carry into execution (1). I have looked carefully into all the cases, and I do not find any one of them precisely in point with the present. In *Morice* v. *The Bishop of Durham* (2), where the bequest was for objects [*233] of *benevolence and liberality, much stress was laid upon the word "liberality," as a word not only not necessarily importing charity, but often conveying notions inconsistent with any purposes of charity, and at any rate open to such latitude of construction as to raise no trust which a court of equity could carry into execution. All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose. In *The Attorney-General* v. *Stepney* (3), the testator gave the residue of his personal estate for the use of the Welsh circulating charity schools, as long as they should continue, and for the increase and improvement of Christian knowledge, and promoting religion, and to purchase bibles and other religious books, Lord ELDON assumes, throughout his judgment, that a religious purpose was a charitable purpose. He adverts to the case of Mr. Bradley's will, *Browne* v. *Yeale* (4), where the testator directed such books to be purchased and circulated as might have a tendency to promote the interests of virtue and religion, and the happiness of mankind, and he sufficiently manifests his dissent from Lord THURLOW'S decision in that case in favour of the next of kin, by intimating that he should not follow it unless the very words were again to be decided upon.

I am of opinion that the bequest, in the present case, for such religious and charitable institutions and purposes as the trustees should think fit, is a good charitable gift.

As to the other point, I think I am not at liberty to adopt

(1) The words of Lord COTTENHAM as to this point were as follows: "Did he (the testator) mean that there should be no application of any fund to any but religious purposes? Such is not the natural meaning of the words, or the apparent intention of the testator. He intended to restrain the discretion of his trustees only within the limits of what was benevolent, or charitable, or religious." "The option in the present case makes the gift bad, not because illegal, but because it introduces a generality which deprives it of its character of a charity legacy, and makes it impossible for this Court to execute it."

(2) 7 R. R. 232 (9 Ves. 399).

(3) 7 R. R. 325 (10 Ves. 22).

(4) 6 R. R. 78 (7 Ves. 50, *n.*).

the refinements suggested at the Bar, but that I must look to what the testator really and substantially meant. I cannot suppose that the testator meant the mortgage of a ship, or of any personal chattel, or that the testator *contemplated the investment of the money in Ireland or Scotland, or in any foreign country. The impression upon my mind is that the testator intended an investment in real security; but I will consider that point before I finally decide it.

[*234]

May 7.

On the following day his Lordship intimated his adherence to that opinion.

MANN *v.* BURLINGHAM (1).

1836. *July* 7.

(1 Keen, 235—237.)

Rolls Court. Lord LANGDALE, M.R.

[235]

A direction to executors to purchase so much freehold land as could be bought for 100*l.* for a charitable purpose; and in case land could not be conveniently purchased within twelve months after the testator's decease, to pay 20*s.* per quarter for such charitable purpose, until such purchase could be made, does not give the executors such a discretion as to take the bequest out of the Mortmain Act.

THE will of John Mann contained the following bequest: "I will and desire my executors to purchase so much freehold lands as can be bought for 100*l.*, after reserving so much of that 100*l.* as shall be sufficient to pay for the conveyance of the land, and other expenses that the law of the case may require. And I will that the land so purchased be safely conveyed to trustees, such as are appointed from time to time to manage the estate long since given for the support of the Particular Baptist interest at Great Ellingham, of which interest Charles Hatsker is now pastor. And my will is, that the land so purchased be so conveyed as the profits arising therefrom be enjoyed and received hereafter by the minister or pastor of the aforesaid Particular Baptist church at Great Ellingham for ever, so as to be consolidated with the old estate. And in case land cannot be conveniently purchased within twelve months after my decease, my will is that 20*s.* per quarter be paid to the minister of such Baptist church as shall be the resident preacher from time to

(1) See now the Mortmain and Charitable Uses Act, 1891, s. 5.—O. A. S.

MANN v. BURLINGHAM.

time until such purchase can be made. And I hereby authorize my executors to raise the said 100*l.* so given as aforesaid out of my real estate or personal estate."

The question was, whether this bequest was within the Mortmain Act.

Mr. Wray, for the *Attorney-General*, submitted that the executors, under this bequest, had such a discretion as enabled them to abstain from laying the money out in land, and

[*236] consequently to support the charitable *intention of the testator. In *Grimmett* v. *Grimmett* (1), the testator directed a fund to stand in the name of trustees until the whole could be laid out in the purchase of lands for a charitable purpose to their satisfaction; and Lord HARDWICKE supported the charitable gift, and held that, so long as the statute remained in force, the trustees could never approve of so laying it out, and it would be a breach of trust if they did. In this case, the executors had a discretion to give effect to the testator's intention in a lawful manner, if land could not be conveniently purchased within twelve months after his decease; and as land never could be conveniently purchased, as long as the Mortmain Act remained in force, the executors had a continuing discretion. Whenever an alternative was presented of executing a charitable purpose in a lawful and in an unlawful manner, the Court would effectuate the charitable intention.

Mr. Kindersley, contrà, [cited] *Grieves* v. *Case* (2), where the testatrix gave to trustees a sum of money for a charitable purpose, to be laid out in the purchase of land, and to be placed out at interest till a purchase could be made, [and] the Court held, that the gift was void, because land was ultimately the thing intended to be given, [and *Baker* v. *Sutton* (3).]

[237] THE MASTER OF THE ROLLS:

If I were called upon to decide upon the very words used by the testator in the case of *Grimmett* v. *Grimmett*, I should

(1) Ambl. 210.
(2) 4 Br. C. C. 67.
(3) *Ante*, p. 65.

MANN v. BURLINGHAM.

follow the decision of Lord HARDWICKE in that case. But the present case is distinguishable from *Grimmett* v. *Grimmett*, leaving no such discretion to the trustees as that which Lord HARDWICKE made the foundation of his judgment. The words here are, "In case land cannot be conveniently purchased within twelve months after my decease, my will is that 20*s.* per quarter be paid to the minister of such Baptist church, until such purchase can be made." There can be no doubt that the testator intended the trustees at all events to invest the money in land; and I am of opinion, therefore, that this legacy cannot stand.

BELK *v.* SLACK.

1836. *July 7.*

(1 Keen, 238—240.)

Rolls Court. Lord LANGDALE, M.R.

[238]

A bequest of residue of personal estate to A. for life, and after the death of A. and B. (testator's sole next of kin) to G. B. and H. B. to be equally divided between them, share and share alike, or to the survivor or survivors of them.

G. B. and H. B. both died before the period of distribution: Held, that their representatives were respectively entitled to a moiety of the residue on the death of B.

WILLIAM BELK, by his will, dated the 16th of November, 1799, gave the residue of his real and personal estate to trustees upon trust to pay the interest and produce thereof to his mother during her life, and after the decease of his mother and daughter he devised and bequeathed the same to his brother, George Belk, and his sister, Hannah Belk, to be equally divided between them, share and share alike, or to the survivor or survivors of them.

The testator died shortly after the date of his will, leaving his mother, his daughter Sarah Slack, his brother George Belk, and his sister Hannah Belk, surviving him. It appeared by the Master's report that George Belk died in 1820, and that Hannah Belk survived the testator, but had not been heard of for upwards of thirty years. Sarah Slack, the testator's daughter, and sole next of kin, survived the testator's mother, and died in 1821.

BELK v. SLACK.

The bill was filed by the personal representative of George Belk against the personal representative of Sarah Slack, and the question in the cause was, whether the plaintiff was entitled to a moiety of the residue of the testator's personal estate (there being no real estate), or whether, in the events which happened, the residue was undisposed of at the death of the surviving tenant for life, and went to the testator's next of kin.

Mr. Pemberton and *Mr. Parker*, for the plaintiff [cited *Shergold* v. *Boone* (1), and *Sturgess* v. *Pearson* (2)].

[239] *Mr. Kindersley, contrà:*

* * Here, the legatees having died in the lifetime of the tenant for life, the period of division never arrived, and the legacy, at the death of the surviving tenant for life, was undisposed of, and belonged to the next of kin.

[240] *Mr. Pemberton*, in reply. * * *

The MASTER OF THE ROLLS held that Hannah Belk must be presumed to have died in the lifetime of the surviving tenant for life; and that the plaintiff, and the representative of Hannah Belk, were respectively entitled, at the death of the surviving tenant for life, to a moiety of the residue.

1836. *July* 9.

Rolls Court. Lord LANGDALE, M.R.

[240]

HUTCHINSON *v.* STEPHENS.

(1 Keen, 240—246.)

A testator gave all his lands, tenements, and hereditaments, and the residue of his personal estate, to trustees, &c. to the use of his grandson H. T. for life, and after his decease in trust for the child and children of H. T., at his or their ages of twenty-one, as tenants in common; but in case H. T. should happen to die without leaving any lawful issue of his body living at the time of his decease, then over.

H. T. had two children, a son, who died in his infancy, and a daughter

(1) 9 R. R. 195 (13 Ves. 370). (2) 20 R. R. 316 (4 Madd. 411).

who attained twenty-one, but died intestate in the lifetime of H. T., leaving children: Held, that in the events which happened, the personal estate belonged to the personal representative of the daughter of H. T., and that the real estate vested in her heir-at-law.

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HENRY WILKINSON, by his will dated the 15th of January, 1791, devised and bequeathed his real estate, and the residue of his personal estate, in the following words: "I do hereby give, devise, and bequeath all and every my freehold houses, lands, tenements, and hereditaments whatsoever and wheresoever, in possession, reversion, remainder, or expectancy, and also all the rest, residue, and remainder of my personal estate whatsoever not hereinbefore disposed of, after payment *of my debts, [*241] legacies, and funeral expenses, and the charges of proving this my will, unto the said William Stephens, Thomas White, and W. Marriott, their heirs, executors, administrators, and assigns for ever, (according to the several and distinct estates, rights, and interests which I have and they can take therein,) in trust for and to the use of my grandson Henry Tripp, for and during the term of his natural life; and from and after his decease, in trust for the child and children of the said Henry Tripp lawfully to be begotten, if more than one at his, her, and their respective ages of twenty-one years, in equal shares and proportions, to take as tenants in common and not as joint tenants; and if there shall be but one child of the said Henry Tripp living at the time of his decease, then in trust for such only child at his or her said age of twenty-one years. But in case my said grandson Henry Tripp shall happen to depart this life without leaving any lawful issue of his body living at the time of his decease, then and in such case I do hereby give, devise, and bequeath all and every my said freehold estates, and the said residuum of my personal estates," over to the persons therein mentioned.

The testator died in November, 1791, leaving his grandson Henry Tripp, named in the will, his heir-at-law and sole next of kin. Henry Tripp had issue a son who died an infant in his lifetime, and a daughter, Christian Mary, who intermarried with the plaintiff Hutchinson, and had several children, parties to the cause.

Christian Mary Hutchinson died in May, 1828, in the lifetime

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of her father Henry Tripp, who died in the year 1831, and by his will bequeathed all his property among the children of his daughter Christian Mary Hutchinson. The plaintiff Hutchinson having taken out administration to the estate of his wife, filed

[*242] the original bill against the *trustees and persons interested under the will, claiming the personal estate. He subsequently became a bankrupt, and a supplemental bill was filed by the parties claiming interests under the will against his assignees.

Mr. Pemberton and *Mr. Rogers*, for the plaintiff in the original suit:

The plaintiff in the original suit claimed, under the will of the testator in the cause, as administrator of his wife, the whole of the testator's personal estate; and as executor and trustee under the will of Henry Tripp, he has, notwithstanding his bankruptcy, a sufficient interest to maintain the suit. * * The plaintiff has no interest in the real estate. [They cited *Sturgess* v. *Pearson* (1).]

[243] *Mr. Tinney* and *Mr. Longley*, for the children of Christian Mary Hutchinson:

[244] * * There is no direct gift to the grandchildren, because the testator clearly contemplated that they would take a derivative interest under the gift to their parents; and that derivative interest can only be given by enlarging the estate of the parents to a fee-simple. An indefinite estate to A., and if A. do not attain twenty-one, to B., gives the fee to A. by implication, if he attain twenty-one. That the testator intended to make an effectual provision for the grandchildren of Henry Tripp is manifest from the limitation over, in case Henry Tripp should die without leaving issue; and that provision is effectuated by giving the children a fee. * * *

[245] *Mr. Preston*, for the executor and trustee under the will of Henry Tripp:

* * The limitation over could not take effect, because, although Henry Tripp left no children, he left grandchildren,

(1) 20 R. R. 316 (4 Madd. 411).

who answered the description of lawful issue, though no devise was made to them. He became entitled, *therefore, in the events which happened, both to the real and personal estate of the testator as heir-at-law and next of kin. * * *

[*246]

Mr. Pemberton replied as to the personal, and *Mr. Tinney* as to the real estate.

The MASTER OF THE ROLLS held that, in the events which happened, the personal estate belonged to the personal representative of the daughter of Henry Tripp, and that the real estate vested in her heir-at-law. The intention of the testator appeared to be, to make a provision by way of settlement for the family of Henry Tripp; and that construction would effectuate his intention.

BOOTH *v.* LEYCESTER (No. 1) (1).

1836.
Feb. 24, 26, 29.
March 5, 7.
April 16.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
1838.
Feb. 8, 9.
Nov. 13.

Lord COTTENHAM, L.C.

(1 Keen, 247—267; S. C. 5 L. J. (N. S.) Ch. 278; affirmed on appeal, 3 My. & Cr. 459—471; S. C. 8 L. J. (N. S.) Ch. 49.)

The Court will not give interest upon the arrears of an annuity, unless a special case be made.

[UPON the point mentioned in the head-note, the MASTER OF THE ROLLS said:]

In the ordinary case of dower, or jointure, or rent-charge, or of annuity given by will, and no special circumstances in the case, it was admitted that the annuitant would not be entitled to interest on arrears; but it is said that the case is different, first, —where the nature of the security is such that if the remedy had been enforced at law and possession taken, the party would have been entitled to retain possession till he was satisfied, not only in respect of the principal but of the interest on the arrears; secondly, where the conduct of the grantor, or the situation of the property is such that the creditor could not by any diligence of his own have procured payment, but took all necessary steps

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[264]

(1) Another point which arose in this suit is reported in 1 Keen, 579, and will be found *post*, p. 123. —O. A. S.

BOOTH v. LEYCESTER.

as soon as he had any prospect of obtaining fruit from his diligence.

As I am of opinion that the facts on which the second point is raised are not made out in evidence, it is not necessary to consider that.

As to the first point, the contract was for the purchase of a redeemable annuity during the life of Sir John Roger Palmer. The securities were of two kinds, one by demises and assignments, with power to distrain and enter, and after entry to continue in possession till payment of the arrears, and all such costs, charges, damages, and expenses as should be occasioned by non-payment. The other securities were by mere covenants, but in both cases there were judgments for the debt and damages (1).

A great many cases were cited. In the older cases the Court considered that it was a matter of discretion to give or refuse
[*265] interest on the arrears of annuities. *That notion has long been exploded, and it has been considered that a special case is necessary. If the annuitant is delayed in his proceedings at law by the interposition of this Court at the instance of the debtor; or if the debtor seeks the aid of this Court to relieve him from the hardships to which he may be exposed at law, this Court will allow interest on the arrears; and the principal question here is, whether this is such a special case as, according to the principle on which the Court has acted, entitled the annuitant to interest on the arrears. The mere nature of the contract does not entitle him to such interest. There is nothing in the instruments to shew that interest on the arrears was in contemplation, and the successive payments, which were contracted for, were not absolute payments to be made at any fixed times, but contingent payments to be made if Sir John Roger Palmer should be living at the appointed times. The case of *Robinson* v. *Cumming* (2) shews that the right of entry, as to the annuities in respect of which there was a right of entry, does not give a right to interest on arrears; and the case is not in this Court advanced

(1) The statute under which judgments carried interest (1 & 2 Vict. c. 110, s. 17) was not then passed. —O. A. S.

(2) 2 Atk. 411.

by the authority to hold till all costs, charges, damages, and expenses are paid.

BOOTH v. LEYCESTER.

[On appeal the LORD CHANCELLOR upon this part of the case said:]

1838.

[3 My. & Cr. 465]

It was attempted to support the claim to interest on the ground that the grantor had withdrawn himself from the country, and by his own conduct prevented the plaintiff from obtaining payment; but the evidence did not make out such a case, and the question therefore is, first, whether the charge upon the property entitles the annuitants to interest; and, secondly, whether the judgments do so.

The argument upon the first point is twofold; first, that though interest upon arrears is not stipulated for, in terms, by the annuity deeds, yet there are provisions which are equivalent, and therefore include it; secondly, that the annuitant, if he had pursued his remedy at law, might have obtained interest upon the arrears, and that he ought, therefore, to be allowed interest in equity.

The first ground rests entirely upon the provision, in the clause of entry, that the annuitant shall hold, until not only the arrears of the annuity, but all such costs, losses, charges, damages, and expenses, as shall be occasioned by the nonpayment of the annuity at the days and times stipulated, shall have been paid; and upon some similar expressions which occur in the proviso for the cesser of the term. These provisions, it is contended, amount to a contract for interest. If, however, the parties had intended to contract for interest upon arrears, it would have been very easy for them to do so. Damages may, no *doubt, be an [*466] equivalent for interest; but the two things are not only not the same, but are of a precisely opposite nature. Interest contracted for is due under the contract, and in pursuance of it; but damages are a compensation for a breach of the contract. It is impossible that the parties could have intended by these terms to contract for the payment of interest upon arrears; and a reference to other parts of the deed puts this beyond all doubt. The power of distress is for the annuity, and all arrears thereof, as in the case of a rent, to the intent to satisfy the arrears, and

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all costs, charges, and expenses to be occasioned by the nonpayment of the same. Next comes the clause of entry, in which the word "damages," coupled as it is with the words "costs, charges, and expenses," must be construed to mean damages incurred by or incident to the entry and holding possession. In declaring the trusts of the term, the expression is, "to raise the arrears of the annuity, together with all such damages, costs, charges, and expenses as the annuitant shall expend or be put unto by reason of the nonpayment of the annuity." In a subsequent part of this clause, the expressions are, "costs, charges, damages, and expenses incurred, suffered, borne, sustained, and laid out, by reason, or on account, of the nonpayment of the annuity." If it had been intended to stipulate for interest upon the arrears, or for an equivalent for it, that would have formed part of all the trusts, and an object of all the remedies; but, with respect to the 4,000*l.*, the trust is only "to secure payment of the arrears, and all costs, charges, and expenses incurred or sustained by reason of the nonpayment." The covenant for payment is only for the annuity and the arrears thereof. So, it is provided that, upon the death of the grantor, "and full payment of all arrears, and of all such costs, charges, and expenses as aforesaid," satisfaction shall be entered up on the judgments; and, in the clause of repurchase, the provision is for *payment of what shall be due "on account of the annuity, and of such costs, charges, and expenses as aforesaid." It appears to me clear that this deed does not contain any stipulation for interest upon arrears, or for any equivalent for it; but that the expression relied upon was introduced only for the purpose of securing the grantee against any damages or losses which he might sustain in enforcing the remedies, and not from the breach of the contract for payment. * * *

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If, upon the second part of the argument, namely, that, if the annuitant had pursued his remedy at law, he might have obtained interest, and that he ought therefore to be allowed it in equity, it be meant that the deed gave him at law a right to interest, that is answered by the observations I have made upon the deed itself. But if it be meant that, if the annuitant or his trustee had obtained possession under the

powers in the deed, this Court would not have relieved the grantor against such possession without payment of interest upon the arrears, that argument is answered by the fact, that the grantor, or those who derive title through him, are not in this suit seeking any such relief; that the grantee never did avail himself of his legal remedies, but is now applying to this Court for relief; and the authorities shew that in such a case this Court does not give interest upon arrears of annuities.

[Upon this subject his Lordship cited *Robinson* v. *Cumming* (1) and other authorities to the same effect, and he concluded his judgment on the point by saying:] I must necessarily come to the conclusion that, upon this first head, namely, the right of the annuitant, independently of the judgment, he is not entitled to interest upon the arrears; and that the decision of the MASTER OF THE ROLLS upon that point is correct.

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Appeal dismissed with costs.

WHATTON *v.* CRADOCK.

1836. *July* 13, 14.

(1 Keen, 267—269; S. C. 6 L. J. (N. S.) Ch. 178.)

Rolls Court. Lord LANGDALE, M.R.

Where the amount of principal and interest due upon a mortgage has been found by the Master's report, the rule now is to compute subsequent interest upon the principal only; and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due.

[267]

THE bill was filed for the purpose of having the estates devised by the testator in the cause sold free from incumbrances; and the trusts of the will carried into execution. By the decree at the hearing it was referred to the Master to inquire what incumbrances were subsisting upon those estates, and it was ordered that the estates should be sold. The Master by his report, dated in April, 1835, found, among other things, that the principal sum of 1,200*l.*, and 315*l.* interest, making the aggregate sum of 1,515*l.*, were due to Isaac Faulkner in respect of a mortgage. The estates were sold, and the purchase-money paid into

(1) 2 Atk. 409.

WHATTON v. CRADOCK.

Court; and upon the reference back to the Master to compute subsequent interest and costs directed at the hearing on further directions,

Mr. John Romilly, for the incumbrancer, submitted that he was entitled to have interest computed upon the aggregate sum of principal and interest found due by the Master from the date of the report; and he cited *Bickham* v. *Cross* (1), where Lord

[*268] HARDWICKE laid it *down as the rule of the Court, "that where the mortgagor came to redeem, and the mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest, and costs, all that is considered as one accumulated, consolidated sum; and if the Court enlarges the time, and it goes back to the Master to compute subsequent interest and costs, the Master reports the subsequent interest upon the whole sum."

Mr. Pemberton and *Mr. Kindersley*, *contrà*.

July 14. THE MASTER OF THE ROLLS:

From an early period it was considered that the Master's report finding the interest due on a mortgage debt made that interest principal, and that, if payment was delayed, interest was to be computed from the date of the report upon the aggregate amount of the principal, previous interest, and costs; and on enlarging the time for payment of what was found due to the mortgagee on his bill of foreclosure, the course was to give him interest on the whole sum previously found due for principal, interest, and costs. This was held to be the practice by Lord HARDWICKE in the case referred to. [His Honour here mentioned other cases to the same effect.]

[269] But the practice is now different, and the time for paying what is found due on the mortgage is enlarged upon payment of the interest and costs found due, and the subsequent interest on the principal only, and subsequent costs are directed to be computed and taxed. And a distinction has been taken between a decree for sale and payment of incumbrances according to their priorities,

(1) 2 Ves. Sen. 471.

and a decree for foreclosure. Thus Lord KING, in *Neal* v. *The Attorney-General* (1), refused to give interest upon the whole sum reported due for principal, interest, and costs to a prior against a subsequent incumbrancer, but without prejudice if there should be a surplus. So in *Harris* v. *Harris* (2), Lord HARDWICKE recognised the distinction between the case of a foreclosure and a decree for sale. And in cases of this nature, where the amount of principal and interest due upon a mortgage has been found by the Master's report, and it has been referred back to the Master to compute subsequent interest, it has been the practice, for many years past, to compute such subsequent interest upon the principal only.

MEREDITH *v.* BOWEN.

1836. *July* 19.

(1 Keen, 270—273.)

Rolls Court. Lord LANGDALE, M.R.

Interest at 4 per cent. ordered to be paid upon a debt, not in its nature bearing interest, vexatiously withheld by a husband from the executor of his deceased wife.

[270]

THE demand of the plaintiffs in this suit, which arose out of a contract not in its nature carrying interest, having been established by an issue, and it appearing by a letter of the defendant Williams, dated the 12th of February, 1831, that he had expressed his determination not to pay the sum in question, unless compelled by law, it was now asked, on the part of the plaintiffs, at the hearing on further directions, that the defendant Williams might be ordered to pay interest at 5 per cent. on the debt wrongfully detained by him from the date of his refusal to pay it. The facts of the case are stated in his Lordship's judgment.

For the plaintiffs, *Arnott* v. *Redfern* (3) was cited as an authority which proved that, where there had been a wrongful withholding of a debt arising out of a contract which did not carry interest, interest in the shape of damages might be allowed by the jury for the unjust detention of the money; and it was argued that the defendant Williams having improperly delayed the payment of

(1) Mose. 246.
(2) 3 Atk. 722.
(3) 3 Bing. 353.

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a just demand, the case fell within that class of recognised exceptions to the general rule, where a court of equity would grant interest upon an annuity, or other debt not in its nature bearing interest: *Booth* v. *Leycester* (1). In this case, the debt, consisting of money advanced by a wife out of her separate property to her husband, could not be recovered at law.

[271] *Mr. Tinney*, *Mr. Temple*, *Mr. Bethell*, and *Mr. Metcalfe*, for the plaintiffs.

Mr. Pemberton, *Mr. Kindersley*, and *Mr. James Russell*, *contrà*.

THE MASTER OF THE ROLLS:

Elizabeth Williams, being entitled to a sum of stock in the New 4 per cent. Annuities to her separate use, advanced to her husband, the defendant Thomas Williams, out of that property the sum of 1,000*l.* by way of loan; and by her will, dated the 13th of January, 1830, she made the following bequest: "I leave 1,000*l.*, now in Mr. Williams's hands, and 1,000*l.*, in the New Fours, to Richard James;" out of which James was to pay the annuities therein mentioned to the plaintiffs.

The testatrix died shortly after the date of her will, and a few days after her decease a copy of the will was sent by her executor to her husband. It does not appear that any direct demand of payment was made by the executor at that time; but from a letter addressed shortly afterwards to the executor by Thomas Williams, it appears that the husband expressed his dissatisfaction at the bequest made by his deceased wife, and declared that he never would pay the sum of 1,000*l.*, unless compelled by law. For some reason, which does not appear, the executor seems to have considered that he had not the means of recovering his demand, and no steps were taken by him for that purpose. The plaintiffs, who are the annuitants entitled under the specific bequest, seem also to have been of the same opinion, for in their bill, which was filed in April, 1832, they state that the money

[*272] could not be recovered; and it was *not until April, 1833, that

(1) *Ante*, p. 75.

they altered their opinion in that respect, and, upon an amended bill, insisted that the money might be recovered, and would have been recovered but for collusion between the executor and Thomas Williams the husband. Williams insisted that the money which was represented to have been advanced to him by his wife as a loan, was, in point of fact, a gift. The evidence being conflicting as to that point, an issue was directed, at the hearing of the cause, to try whether the money was advanced by way of loan, or was intended to be a gift; and, after an unsuccessful appeal by the defendant Williams from the order directing the issue, that issue has been found in favour of the plaintiffs. The fact that it was a loan having been established, the question now is, whether or not Williams shall pay interest upon the 1,000*l.* What was the precise nature of the contract, and whether Williams was to pay interest or not to his wife during her life is not in any way established. No assistance, then, being afforded by the nature of the contract between the parties at the time the loan was made, what is to govern the Court in deciding the question, whether interest is or is not to be recovered? It appears from the letter that Williams was aware what would be the consequence of his resistance to the payment of the money, and yet refused to pay it. He puts the parties to a suit to recover their rights, and declares his intention to interpose every obstacle in their way until he is compelled to pay by law.

It is impossible for me to consider this otherwise than as a vexatious resistance. He might have had reason to think it a gift rather than a loan; but the fact of its being a loan and not a gift having been established, I am bound to declare, and I should be giving a premium *for a resistance which must be [*273] considered as vexatious if I held otherwise, that he must pay interest upon the amount of the 1,000*l.* from the date of his refusal to pay it, and, under all the circumstances, the case being one not entirely free from hardship, at 4 per cent. With respect to the costs of the suit, those which relate to the taking of the accounts must be borne by the estate of the testatrix, and those which relate to the recovery of the specific legacy must be paid by the defendant Williams.

1836.
July 23.

Rolls Court.
Lord
LANGDALE,
M.R.

[275]

BROWN *v.* BROWN (1).

(1 Keen, 275—278.)

Priority of particular legacies.

A testator gave 1,000*l.* to trustees, upon trust to pay the interest to his wife during her life, and after her decease he declared his will to be, that the 1,000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his will; and he gave a legacy of 500*l.* in trust for N. M. and his wife, in nearly the same words: Held, that a priority was given to these two legacies.

THE will of William Brown contained the following bequest: "I give and bequeath unto Edward Bowring and Benjamin Lawrence, the sum of 1,000*l.* sterling, upon trust to invest the same in the purchase of some or one of the public stocks or funds of Great Britain, in their joint names, and to lay out the same on mortgage, or otherwise, at interest; and, when so invested, upon further trust to pay to, or otherwise permit and suffer my wife, Harriet Brown, to receive the interest and dividends thereof during the term of her natural life; and from and immediately after her decease my will and meaning is, and I direct that the said sum of 1,000*l.* sterling, or the stocks, funds, and securities in or upon which the same shall be invested, shall fall into and become a part of my personal estate, and applicable to the trusts or payment of the legacies given by this my will."

The testator next gave several pecuniary legacies, and proceeded to give a legacy of 500*l.* to trustees in trust for Noah
[*276] Meadows and his wife, for their joint *lives, and the life of the survivor of them, in nearly the same words as those used in the bequest for his wife, the only difference being, that, after the decease of the survivor of them, he directed that "the said sum of 500*l.* sterling, or the stocks, funds, and securities in or upon which the same should be invested, should fall into and become a part of his personal estate, and applicable to the trusts or payment of the several legacies given by his will." He then gave legacies to two of his servants, and bequeathed the residue of his estate and effects to his brother, Joseph Brown.

The testator's estate being insufficient to pay the legacies, the question in the cause was, whether the legacies to the testator's

(1) *In re Schweder's Estate*, '91, 3 Ch. 44, 60 L. J. Ch. 656, 65 L. T. 64.

wife, and to Noah Meadows and his wife were entitled to priority, or were to abate in proportion with the other legacies.

Mr. Kindersley and *Mr. Dixon*, for the widow [cited *Lewin* v. *Lewin* (1)].

Mr. Pemberton and *Mr. Spurrier*, *contrà*:

Lewin v. *Lewin* was determined upon a special ground, which Lord HARDWICKE explained in the subsequent case of *Blower* v. *Morrett* (2); and it is now well settled, *that a wife stands in no better situation, where the fund is deficient, than any other legatee. [They cited *Beeston* v. *Booth* (3).] [*277]

THE MASTER OF THE ROLLS:

Primâ facie a testator must be presumed to intend that all his legacies should be equally paid, and the *onus* is upon those who contend for a priority to shew that the testator meant to give a preference to a particular legatee.

In this case the testator gives 1,000*l.* to trustees, upon trust to invest the same, and pay the interest to his wife for her life; and after her decease he declares his will to be, that the 1,000*l.* "should become a part of his personal estate, and applicable to the trusts or payment of the legacies given by his will;" and the legacy of 500*l.* given in trust for Mr. Meadows and his wife is in almost the same words, the only difference being that, in the corresponding passage, he declares that the *500*l.* shall become applicable to the payment of the "several" legacies given by his will. [*278]

If the testator had contemplated that all his legacies would be at once satisfied, it would have been unnecessary to direct that the two legacies in question should be applicable, after the decease of the legatees, to the payment of the legacies given by his will. He cannot be reasonably presumed to have contemplated, as has been suggested at the Bar, the death of the three legatees to whom these two legacies are given, within a twelvemonth after his decease; and there is nothing in the

(1) 2 Ves. Sen. 415.
(2) 2 Ves. Sen. 420.
(3) 20 R. R. 287 (4 Madd. 168).

BROWN v. BROWN.

language of the will which affords ground for the argument that he intended to provide for such a possibility. There is no way, therefore, in which effect can be given to the words used by the testator but by giving a priority to these two legacies.

1836.
March 23, 24.
April 19.

Rolls Court.
Lord LANGDALE, M.R.
[281]

FOSTER *v.* HARGREAVES.

(1 Keen, 281—288.)

The Crown as assignee by operation of law (under an inquisition and extent) of a Crown debtor's equitable interest in a fund in Court does not obtain priority over a previous equitable assignee for value whose assignment was not completed by notice.

IN the month of January, 1812, George Ridge was one of the partners in the banking house of Cocks, Biddulph & Co., and was also a customer of the house. On the 15th of January in that year George Ridge transferred the sum of [*282] 3,000*l.* from his separate cash account *with the firm to the account of his son John Holman Ridge, who drew it out for his own use.

By this transaction John Holman Ridge became indebted to George Ridge, and on the 20th of February, 1812, an indenture was executed by and between John Holman Ridge of the one part, and George Ridge of the other part, whereby John Holman Ridge assigned to George Ridge his right to a sum of 10,000*l.* and certain other property represented by a fund in Court, to hold the 10,000*l.* and other property in trust, that George Ridge should first deduct his costs, and in the next place should retain and apply the residue, as far as the same would extend, in payment and discharge of the money then due from John Holman Ridge to George Ridge with interest, and also in further payment of all and every other sums of money which George Ridge should or might advance or pay to or for the use of John Holman Ridge with interest, and subject to those trusts in trust for John Holman Ridge.

John Holman Ridge died in August, 1816. At the time of his death he was indebted to his father in the before-mentioned sum of 3,000*l.* and interest thereon from the day of the advance. He

was indebted to the banking house of Cocks, Biddulph & Co. (in which his father was a partner), in the sum of 15,657*l.* 8*s.* 11*d.*, which was secured by a bond. He was also largely indebted to the Crown, and, in respect to the Crown debt, George Ridge was liable to a considerable extent under bonds which he had executed in the years 1802 and 1803 as one of the sureties for his son.

In January, 1817, Cocks, Biddulph & Co. treated the debt of 15,657*l.* 8*s.* 11*d.*, due from the estate of John Holman Ridge as a bad debt; and they placed it as such to the debit of the capital, and profit and loss account *of the partners; and each [*283] partner's share of the aggregate loss, including this particular loss, being set off against his capital and interest in the concern, George Ridge, who was partner for a fourth share, had in effect to bear the loss of 3,914*l.* 7*s.* 2*d.*, being one-fourth of the debt of 15,657*l.* 8*s.* 11*d.*

George Ridge died in October, 1824, and in February, 1826, the Crown issued process against his executor, to enforce his liability upon the bonds, by which he had become one of the sureties for his son; and in consequence of this proceeding, the executor of George Ridge paid to the Crown two several sums of money, viz. 2,000*l.* on the 14th of October, 1828, and 313*l.* 11*s.* 8*d.* on the 10th of April, 1829.

Before either of these sums was actually paid, and on the 9th of June, 1827, an inquisition under a writ of *diem clausit extremum* was taken, and by the inquisition, after finding certain particulars relating to a debt due from Lord Crewe to John Holman Ridge, and the securities for the same, (being in fact the property comprised in the indenture of the 20th of February, 1812), it was stated that George Cooper Ridge, the executor of George Ridge, claimed all such benefit as he was entitled to under the same indenture, and the sheriff returned that he had seized and taken the property into the hands of his Majesty.

By an order in the cause, dated the 20th of November, 1834, it was referred to the Master to inquire whether the executor of George Ridge, or any and what other person was entitled to or beneficially interested in the fund in question under any deed or

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other security; and the Master was to state priorities, and take an account of what was due.

The *Attorney-General* claimed the fund, free from any claim on the part of the executor of George Ridge; and the executor claimed the benefit of the deed of the 20th of February, 1812, as a security, first, for the 3,000*l.* advanced on the 15th of January, 1812, and interest; secondly, for the 3,914*l.* 7*s.* 2*d.*, the loss which George Ridge sustained by reason of John Holman Ridge's debt to Cocks, Biddulph & Co. proving bad; and thirdly, for the sums of 2,000*l.* and 313*l.* 11*s.* 8*d.*, paid to the Crown by the executor of George Ridge in respect of his liability under the surety bonds.

The Master reported in favour of the executor of George Ridge on all points, and the case now came on upon a petition of the executor to confirm the report, and a cross-petition of the *Attorney-General*, and a nominee of the Crown raising objections to the report, and praying that it might not be confirmed.

Mr. Pemberton, *Mr. Kindersley*, and *Mr. Koe*, in support of the petition, contended that the sum of 3,000*l.* advanced by George Ridge, the father, and the sums of 2,000*l.* and 313*l.* 11*s.* 8*d.* paid by the petitioner in respect of the liability of George Ridge as a surety for his son were clearly debts secured to the estate of George Ridge, the father, under the assignment of February, 1812. It has been held that the Crown might take goods under an extent after they had been seized by the sheriff but not sold, because the property continued in the debtor until sale, and the seizure by the officer of the law was for the benefit of those who were by law entitled, *Giles* v. *Grover* (1); but the Crown could not avoid an equitable mortgage, *Casberd* v. *The Attorney-General* (2); or a *bonâ fide* assignment in trust for creditors:

[*285] **Rex* v. *Watson* (3). * * *

The *Solicitor-General* and *Mr. Wray*, *contrà*, [relied] upon the principle established in the cases of *Dearle* v. *Hall* (4), and *Loveridge* v. *Cooper* (5). * * *

(1) 36 R. R. 27 (9 Bing. 128; 1 Cl. & F. 72).
(2) 20 R. R. 671 (6 Price, 411).
(3) West on Extents, 115.
(4) 27 R. R. 1 (3 Russ. 1).
(5) 27 R. R. 1, 12 (3 Russ. 1, 30).

Mr. Pemberton, in reply. * * *

THE MASTER OF THE ROLLS:

In the petition of the *Attorney-General* all the claims of the executor are objected to upon the ground that the property, comprised in the deed, consisted of *choses in action*, and no notice, as it is alleged, was given to the trustees by whom the funds were held or ought to have been realised; and the two last claims are objected to on grounds peculiar to themselves. Upon a consideration of the circumstances of this case, I think that the doctrine of notice, as established by the cases of *Loveridge* v. *Cooper* and *Dearle* v. *Hall* (1), is not applicable, and, there being no other objection to the claim of the 3,000*l.* and interest, I am of opinion that the Master's report in that respect must be confirmed.

As to the 3,914*l.* 7*s.* 2*d.* it is clear that, so far as that claim is concerned, John Holman Ridge never contracted any debt to George Ridge separately. His dealing with the firm began before the date of the deed of the 20th of February, 1812; the very debt thereby principally secured was a debt which had become due to George Ridge by a transfer in the partnership books, and by John Holman Ridge availing himself of it. The debt contemporaneously due to the partners was secured by a distinct and separate bond, and I cannot construe the deed in such a way as to make it a security for what might become due from John Holman Ridge to the partners; and considering that this debt was due to the partners alone, so long as John Holman Ridge lived, I do not think that the mode in which the partners, after his death, thought fit to deal with the debt amongst themselves could alter the right which any of them had against his estate. Upon the whole, it appears to me *that the Master has [*288]
erroneously found the 3,914*l.* 7*s.* 2*d.* and the interest thereon to be a charge on the fund in Court.

As to the sums of 2,000*l.* and 313*l.* 11*s.* 8*d.*, at the date of the deed, at the death of John Holman Ridge, and at the time of his own death, George Ridge was liable to pay these sums on account of

(1) 27 R. R. 1, 12 (3 Russ. 1, 30).

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John Holman Ridge. If he had paid them, they would have been payments made to the use of John Holman Ridge, and would clearly have been secured by the deed. At last they were paid by the executor to the Crown in discharge *pro tanto* of John Holman Ridge's debt under compulsory process, which had issued and was in force before the inquisition. I think that a court of equity would not at any time have permitted John Holman Ridge to redeem his interest in this fund without relieving George Ridge from the liability on his bonds, and I am of opinion that in this respect the Master's report is right.

Confirm the report as to the 3,000*l.*, 2,000*l.* and 313*l.* 11*s.* 8*d.* and the interest thereon respectively.

Allow the objection as to the 3,914*l.* 7*s.* 2*d.* and interest.

Compute subsequent interest on the sums as to which the report is confirmed, and sell so much of the fund in Court (16,926*l.* 18*s.* 3*d.* Bank 3 per cent. Annuities), as will be sufficient to pay the same, and transfer the remainder to Mr. Maule as nominee on behalf of his Majesty.

1836.
March 29.
April 16.

Rolls Court.
Lord LANGDALE, M.R.

ATTORNEY-GENERAL *v.* SMITHIES.

(1 Keen, 289—308; S. C. 5 L. J. (N. S.) Ch. 247.)

[SEE the report of an appeal from this decision in 2 My. & Cr. 135.]

1836.
July 13, 27.

Rolls Court.
Lord LANGDALE, M.R.

STOREY *v.* LORD GEORGE LENNOX.

(1 Keen, 341—357.)

[AFFIRMED on appeal as reported in 1 My. & Cr. 525.]

BODDY *v.* DAWES (1).

1836.
Dec. 20.

Rolls Court.
Lord LANGDALE, M.R.

[362]

(1 Keen, 362—368.)

A testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one; and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal, as therein mentioned:

Held, that the grandchildren were entitled to the interest during their minority.

HENRY DAWES made his will, dated the 31st of January, 1827, in the following words: "After my just debts and funeral expenses are paid, I give unto my executor and the trustees hereinafter named the sum of 10,000*l.* stock in the 3½ per cent. Annuities in trust for the following purposes; that is to say, I give to Mr. John Marlett Boddy the interest arising from the sum of 2,500*l.* of the above-named stock for and during the term of his natural life, and from and after his decease I hereby give and bequeath the aforesaid sum of 2,500*l.* to be equally divided amongst the children of my late daughter, Jane Maria Boddy, or their descendants; *but should there be none of them surviving, then [*363] my mind and will is that the said sum be equally divided amongst such other grandchildren as I may then have living, or in default thereof, to my legal representatives; and I hereby give to my grandson, Henry Dawes Boddy, the sum of 2,500*l.* of the above-named stock; and to my grand-daughter, Georgiana Maria Boddy, the sum of 1,500*l.* of the above-named stock; and to my grand-daughter, Amelia Jane Boddy, the sum of 1,500*l.* of the above-named stock; and to my grandson, George Frederick Boddy, the sum of 2,000*l.* of the above-named stock, on my above-named grandchildren respectively attaining the age of twenty-one years; but should any of my said grandchildren die before the age of twenty-one years, then my mind and will is that their portion be equally divided amongst those of my said grandchildren who shall attain the age of twenty-one years; but

(1) This case has been judicially described as "special in its circumstances:" per PAGE WOOD, V.-C., *Dundas* v. *Wolfe Murray* (1863) 1 H. & M. 425, 431.

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should the whole of my said grandchildren die before attaining the age of twenty-one years, then my mind and will is that the interest arising from the above-named sum be enjoyed by the said John Marlett Boddy for and during his natural life, and from and after his decease then the principal to be divided amongst such other grandchildren as I may then have living, or in default thereof, then to my legal representatives; and I hereby give and bequeath all the rest and remainder of my property not hereby devised, real and personal, of whatever nature or kind it may be, unto my son, Henry John Dawes, his heirs, executors, and assigns, for ever; and I do hereby appoint my said son Henry John Dawes my sole executor; and for the carrying of the above-named trusts into execution, I do hereby appoint my said son Henry John Dawes, together with Thomas Greenwood and William Spencer, trustees for the purposes hereinbefore named."

[364] The testator died, leaving the plaintiffs, his grandchildren named in the will, who were all infants, and John Marlett Boddy, their father, surviving him; and the question in the cause was, whether the infants were or were not entitled to maintenance.

Mr. Tinney and *Mr. Seton*, for the plaintiffs. * * *

[366] *Mr. Pemberton* and *Mr. Parker, contrà:*

* * The rule is, with the single exception of the case of parent and child, that interest, unless expressly given, can never

[367] be allowed upon a contingent legacy. * * Even in a case between parent and child, the Court will not direct the interest of a contingent legacy to be applied for the child's maintenance, unless the parent is totally incapable of maintaining it. *Butler* v. *Butler* (1), *Kime* v. *Wellfitt* (2). * * *

Mr. Tinney, in reply. * * *

[368] THE MASTER OF THE ROLLS:

The testator, by giving the legacy to his executor and trustees, has separated the 10,000*l.* 3½ per cent. stock from the general residue of his estate. He has given the interest arising from 2,500*l.*, part of the whole legacy, to John Marlett Boddy for his

(1) 3 Atk. 58. (2) 30 R. R. 211 (3 Sim. 533).

life; the remainder of the 10,000*l.* he has given in different shares to his grandchildren named, on their respectively attaining the age of twenty-one years, and has not, in terms, disposed of the interest during their minorities; but he has directed that if they all die before attaining twenty-one years of age, the interest "arising," not the interest which has arisen, from the whole legacy shall be enjoyed by John Marlett Boddy, during his life. The question is, whether he has disposed of the interest during the minorities of the legatees. There is weight in the argument that the word "portion" in this will may have been used only in the sense of "part or share;" but it may have been used in a sense more favourable to the grandchildren; and looking at the whole of this will, it appears to me to afford a reasonable inference that the testator intended to give the intermediary interest to the grandchildren, who were to take the principal on their attaining the age of twenty-one years.

SAWYER *v.* BIRCHMORE (1).

1836.
April 19.
June 25.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
1837.
Jan. 16, 17.
Aug. 15.

Lord COTTENHAM, L.C.

(1 Keen, 391—403; S. C. 6 L. J. (N. S.) Ch. 277; varied on appeal, 2 My. & Cr. 611.)

The circumstance that an intestate's personal estate has been distributed in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, and compelling them to refund a proportion of their shares.

THE bill was filed by persons stating themselves to be five of the next of kin, or the representatives of five of the next of kin of James Clear, deceased, at the time of his death, and it prayed that the defendants, Ann Birchmore, Henry Robert Briggs, Robert Briggs, and Henry Panton Reeves, might refund the several sums which it was alleged they had been overpaid under a decree of the Court, in order that the plaintiffs might receive what they alleged themselves to be entitled to.

[391]

The testator, James Clear, died on the 15th of January, 1814, having made a will by which he bequeathed the *residue of his

[*392]

(1) *Mohan* v. *Broughton* [1899] P. 211, 68 L. J. P. 91; aff. [1900] P. 56, 69 L. J. P. 20.

SAWYER v. BIRCHMORE.

personal estate to his wife, and appointed the defendants, Thomas Peter Stone and Mary Smith, his executors. The testator's wife having died in his lifetime, his residuary personal estate was undisposed of by his will, and became divisible among his next of kin. His will was proved by the defendants Thomas Peter Stone and Mary Smith. In the year 1825 Mary Smith, alleging that the testator died without leaving any next of kin, filed a bill against her co-executor Stone and the *Attorney-General* to have the testator's personal estate administered under the direction of the Court.

By the decree, dated the 6th of July, 1827, it was referred to the Master to make the usual inquiries as to the next of kin.

On the 8th of April, 1830, the Master reported that Ann Birchmore, Henry Robert Briggs, and Robert Briggs, three of the defendants to this cause, together with four other persons now represented by the defendants, Ann Birchmore, Henry Robert Briggs, Robert Briggs, and Henry Panton Reeves, were the only next of kin of James Clear, the testator, at the time of his death.

The report being confirmed, a supplemental bill was filed to bring the persons so found to be the next of kin, or their representatives, before the Court; and by a decree, dated the 2nd of July, 1830, they were declared to be entitled to the residuary estate; the accounts were directed to be taken, and were accordingly taken; and at the hearing for further directions on the 16th of April, 1831, it was referred back to the Master to tax all parties their costs; and it was ordered that, after payment thereof, the residue of the testator's estate should be apportioned and divided among the persons who were, or who

[*393] represented *those who had been found to be, the next of kin.

On the 16th of June, 1831, the Master reported that the ultimate residue to be divided among the next of kin of the testator living at his death, and the representatives of such of them as had since died, amounted to 5,659*l.* 18*s.* 3*d.*, and, pursuant to the decree, divided that sum into seven equal parts of 808*l.* 11*s.* 2*d.* each, and the estate was distributed into those shares accordingly.

On the 2nd of May, 1833, each of the defendants, among whom the residue of the testator's estate had been distributed,

received from the solicitors of the plaintiffs the following letter:

"SIR,—Our clients, Mr. T. P. Day, Mr. R. Carter and his sister, and Mr. G. Sawyer, have just put into our hands papers and documents to substantiate their claims as some of the next of kin of James Clear, late of Leatherhead, deceased, which papers were some time ago lodged first with Mr. Gilman, and afterwards with Mr. Auberry, to carry such claims into the Master's office in the Chancery suit brought by Miss Smith against the executors, but which, as it now appears, by some unaccountable misconduct was not done. This neglect, however, will not deprive our clients of their shares of the funds, seeing that their claims were perfectly well known to you and the other parties who obtained the funds out of Court. According to our impression, the amount to have been divided among the next of kin was 5,737*l.* 4*s.* 2*d.*: our clients' twelfth shares, as it appears to us, would have been about 478*l.* each. *Under the unfortunate [*394] circumstances into which our clients have fallen, their remedy now is, we apprehend, to institute a new suit to compel the parties who have obtained the fund in question to contribute to them their shares. The question of costs is the only possible impediment that can be thrown in the way of recovering their rights; but fortunately for them, you and others next of kin were perfectly well acquainted with the justice of their claims at the time you allowed the Master to make a partial report in your own favour. This is so important an ingredient in the consideration of costs, that we do not despair (if compelled to institute a suit), of being able to throw the burthen of costs upon those parties who purposely kept the Court in ignorance of our client's title. We shall be most unwilling to resort to extremes, and it will rest with yourselves to avert the consequences. We hope that after you have conferred together, you will come to a determination to administer to our clients (your own near relations) the same measure of justice without strife, which they can obtain by driving their cousins to a Chancery suit;" &c.

This letter was not answered, and the plaintiffs filed their present bill in January, 1834, against the defendants, amongst

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whom the residue of the testator's estate had been distributed, and against the executors. The bill alleged that, while the above-mentioned proceedings were depending, the defendants well knew the right of the plaintiffs as some of the next of kin, and yet proceeded without making them parties thereto, and by concealing the state of the proceedings, and intimidating the different solicitors to whom the plaintiffs applied to prosecute their claims, obtained a partial distribution in favour of some only of the next of kin.

[395] The defendants, by their answer, said that they did not believe that the plaintiffs were next of kin of the testator. They further said that the plaintiffs did not come in and prove their alleged claims under the decree, although frequently applied to and requested so to do, and fully apprised of the consequences that would ensue from their not doing so; and they submitted that the plaintiffs, even if they were some of the next of kin, yet having been apprised of all the proceedings had in the suit, and having been repeatedly requested, during the progress thereof, to come in and prove their alleged claims, and having neglected to take any steps to do so, ought not now to be allowed to disturb the proceedings, and the distribution consequent thereon. They admitted that they were informed of the plaintiffs' claim before the money was distributed, but they said that they placed no reliance on the information, because of the plaintiffs' privity and knowledge of the suit, and their neglect to bring forward their claims, though repeatedly warned of the consequences of their refusing to do so. And the defendant Henry Robert Briggs stated that, on the 8th of May, 1828, in reply to an application of the plaintiff R. Carter, he, the defendant, referred him to Mr. Rourke the solicitor for the defendant Mary Smith, and cautioned him to be active in following up his claim.

The parties went into evidence; and among the evidence produced by the plaintiffs were letters which had passed before the institution of the suit in 1825, between Mr. Towse, who had acted as the solicitor of some of the defendants, and the solicitors of other defendants. Mr. Towse had been examined as a witness by the plaintiffs, and demurred to the interrogatory requiring the production of this correspondence, and seeking information

as to other matters, on the ground *that he was privileged by the confidential relation in which he stood to some of the defendants, but that demurrer was overruled, with liberty to the parties defendants to raise such objections as they should be advised (1). This evidence was now objected to on the part of the defendants, but was read *de bene esse*. The object of it was to shew that the claims of the plaintiffs, as some of the next of kin, were recognised by the defendants so long ago as the year 1817, and that the plaintiffs and defendants at that time concurred in endeavouring to satisfy the executors of their claims, and to induce the executors to distribute the residue among them without a suit. [*396]

It was admitted at the Bar, on the part of the plaintiffs, that there was no case against the defendant Mary Smith.

Mr. Kindersley and *Mr. Moore*, for the plaintiffs [cited *David* v. *Frowd* (2) and *Gillespie* v. *Alexander* (3).] There is a distinct allegation in the bill that the plaintiffs were ignorant of the proceedings until after the distribution of the estate. [397]

Mr. Pemberton and *Mr. Lynch*, *contrà*:

The circumstances of this case differ entirely from those in *David* v. *Frowd*; and the principle upon which that case was decided is sufficient to displace all title to relief on the part of the present plaintiffs. * * *

The case was new, though the decision went upon the well established principle that a man's rights shall not be concluded by a distribution of property in which he is interested, made in his absence: but then that absence must be involuntary, and there must be no *laches*; and it is a total misapprehension of the principle upon which that case was determined to suppose, that the decision went to sanction *so monstrous a claim as that of the present plaintiffs, who call upon parties to refund the money which they have received under the sanction of the Court, after having voluntarily looked on at the distribution of the fund [399] [*400]

(1) See *Sawyer* v. *Birchmore*, 41 R. R. 133 (3 My. & K. 572).

(2) 36 R. R. 308 (1 My. & K. 200).

(3) 27 R. R. 35 (3 Russ. 130).

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without attempting to enforce their alleged rights, and continue to lie by after the distribution of the fund for a period of nearly two years.

Mr. Kindersley, in reply.

June 25.

THE MASTER OF THE ROLLS (after stating the facts of the case):

From the commencement of the suit, instituted in 1825, until the distribution of the testator's estate in July, 1831, every thing appears to have been regularly conducted. There was no hurry or precipitation. Two years and three quarters elapsed between the decree directing the inquiry, and the report as to the next of kin. More than an additional year elapsed between the date of that report and the distribution of the estate.

At the end of nearly two years after the distribution of the estate the persons, who obtained the money, received the letter from the solicitor of the present plaintiffs, dated the 2nd of May, 1833; and, that letter not being answered, the present bill was filed.

The parties have gone into evidence, and I consider it to be manifest, from the letter of the 2nd of May, 1833, that the plaintiffs knew of the proceedings during their progress; and, though there is an error of date in the evidence of George Birchmore, it is (with the exception of that error) consistent with the other parts of the case. The correspondence shews
[*401] that, long before the *proceedings were instituted, the defendants well knew that the plaintiffs claimed to be some of the next of kin of the testator; but the allegation of concealment and intimidation is wholly destitute of proof.

The rule applicable to cases of this nature, as stated by Lord ELDON in *Gillespie* v. *Alexander* (1), is that a creditor who does not come in till the executor has paid away the residue is not without remedy, though he is barred the benefit of the decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the executor at all. In *David* v. *Frowd* (2), Sir JOHN LEACH determined that the next of kin, who had made no claim till after the fund was distributed, might

(1) 27 R. R. at p. 40 (3 Russ. 136). (2) 36 R. R. 308 (1 My. & Keen, 200).

maintain a suit to compel those who had been found next of kin, and had received distribution, to refund.

But all cases must be affected by their peculiar circumstances. The claim of the creditor in *Gillespie* v. *Alexander* was under investigation in the Master's office, before and at the time when the order was made to distribute the fund. In the case of *David* v. *Frowd*, the proceedings had been conducted with extraordinary rapidity. The plaintiff did not know of the proceedings till after the distribution had taken place, and she filed her bill with very little delay. In the case of *Greig* v. *Somerville* (1) there had been considerable delay, but the claimant was a foreigner (the Emperor of Russia), and though he knew of the death of the intestate his debtor, the advertisement in the *London Gazette* appears to have been the only evidence brought to charge him with knowledge of the proceedings.

This case therefore differs materially from the others. The [402] plaintiffs knew of the proceedings, instructed solicitors to act for them in prosecuting their claim, but take no proceedings under the decree, and no proceedings against those who have had the benefit of the decree, till more than two years after the distribution.

I think that under such circumstances, if there was nothing else to affect the case, the Court ought not to assist parties who so act; but here the defendants knew of the plaintiffs' claims, and it is alleged that those claims were not only known by the defendants, but admitted by them to be just; and if the fact were so, I think that the plaintiffs, notwithstanding their own negligence, might be entitled to relief. One set of persons, knowing that the right of which they claimed the benefit was common to themselves and to other persons, could not, on the false pretence of their being the only persons entitled, be permitted to avail themselves of the authority of the Court to obtain the whole fund for themselves to the exclusion of the others whom they knew to be equally entitled.

But on a careful examination of the correspondence, and of the proceedings in the cause, so far as they have been brought

(1) 1 Russ. & My. 338, where the creditor's right to prove was qualified by the direction that he was to be in the same position as if he had commenced a fresh suit for payment of his debt.—O. A. S.

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under my notice, I am satisfied that at the time when the first bill was filed, and before the decree, none of the twelve persons claiming to be next of kin had made out a title. For the purpose of avoiding trouble and expense, and to induce the executors to divide the fund, any of the claimants were probably willing to admit the claims of the others; but there is nothing to shew that satisfactory proofs were ever adduced, or that any party agreed to admit the validity of the claims of the others notwithstanding the want of satisfactory proofs.

[403] Whether the plaintiffs have now proved that they are next of kin, has not been discussed before me; nor is it necessary; for, under the circumstances to which I have adverted, considering the knowledge which the plaintiffs had of the former proceedings; their neglect to go in and prosecute their claims; the lapse of time after distribution before the present suit was instituted; the failure of the plaintiffs to establish any case of concealment, or intimidation; or any conclusive recognition by the defendants of the validity of their claims, I am of opinion that the plaintiffs cannot sustain the suit, and I am therefore compelled to dismiss the bill; and as the defendants have nothing to do with the default, if any, which has deprived the plaintiffs of the opportunity of making out such claims, if any, as they may have been justly entitled to, I must dismiss it with costs.

1837.

[2 My. & Cr. 611] An appeal was brought against his Lordship's decision [which is reported in 2 Mylne & Craig, 611, as follows:]

Sir W. Horne and *Mr. Moore*, for the appeal.

Mr. Wigram and *Mr. Lynch, contrà:*

With respect to the principles which govern courts of equity, in directing monies to be refunded, where such monies have been paid, under an order or decree in a cause, to persons who are subsequently discovered not to have been entitled, the same authorities were referred to as had been referred to in the

[*612] Court below. Upon *the effect of *laches* and acquiescence, *Goodman* v. *Sayers* (1) and *Govett* v. *Richmond* (2) were cited.

(1) 22 R. R. 112 (2 Jac. & W. 249). (2) 40 R. R. 56 (7 Sim. 1).

SAWYER v. BIRCHMORE. *August* 15.

The LORD CHANCELLOR in giving judgment, entered into a minute and elaborate review of the evidence in the cause, and expressed an opinion that, upon the result of that evidence, a knowledge of the pendency of the former suit was not conclusively brought home to any of the plaintiffs. His Lordship then proceeded as follows:

In this state of circumstances, I think it would be very unsafe to conclude the claim of the plaintiffs, upon such evidence, without giving them an opportunity of further inquiry. I therefore think that the decree for dismissal should be reversed; and that it should be referred to the Master to inquire, whether the plaintiffs or those whom they represent, or any of them, are any of the next of kin of the intestate James Clear; and if he shall find that they are such next of kin, then to inquire whether they, or any and which of them, had any, and what notice of the suit for distributing the estate of the said James Clear, and of the proceedings therein; with liberty to state special circumstances: costs and further directions to be reserved.

If the latter inquiry should be answered in the negative, there will be no obstacle to the plaintiffs' demand. It is, therefore, unnecessary for me at present to observe upon the other facts of the case, particularly upon the circumstance of the personal representative, and some of the next of kin co-operating, as it is alleged, in getting a report, excluding some, of whose claim, at least, all had ample notice. Should it become necessary to consider this point, the Master's report will probably furnish materials which may considerably affect the question.

BENNETT *v.* REES.

1836. *Aug.* 4.

(1 Keen, 405—409.)

Rolls Court. Lord LANGDALE, M.R. [1 Keen, 405]

In suits for specific performance between vendor and purchaser, every thing connected with the title may be the subject of the usual reference upon motion as to the vendor's title, and may be added by way of inquiry to that reference; but the Court will not allow any inquiry to be added as to matters which have no reference to the title, and which are not admitted by the answer.

THE bill was filed by the vendors for the specific performance of a contract for the purchase of an estate by the defendant. The answer of the defendant admitted the contract, and that the

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plaintiffs had delivered to him an abstract of their title; but the defendant said he was advised that the same was an imperfect abstract, inasmuch as there was nothing to shew that the title disclosed thereby was the title to the said purchased premises. And the answer further stated that the plaintiff had never, before the filing of the bill, produced any or sufficient evidence of the identity of the premises which were the subject of the contract with the premises mentioned in the abstract. And the defendant believed that the plaintiff had not at any time up to that period been able to make a good title to the premises.

A motion was now made, on the part of the plaintiffs, that it might be referred to the Master to inquire whether a good title could be made to the premises in question, and whether the

[*406] plaintiff ever and when delivered *to the defendant an abstract of their title, and whether the same was a perfect abstract, or in any and what way deficient; and if deficient, whether the defendant ever and when made any objection on account of such deficiency, and whether such abstract was afterwards perfected, and when, with liberty to state special circumstances.

In support of the motion it was said that, it being extremely probable in this case that the only question between the parties would be ultimately one of costs, the object of the present application was to save the expense of an additional reference to the Master. * * *

[407] On the other side, it was contended that such an order as was now asked for, on the part of the vendor, was altogether without precedent, and could not, consistently with the established practice, be granted by the Court. * * *

[408] *Mr. Kindersley* and *Mr. Cooper*, in support of the motion.

Mr. Lloyd, contrà.

THE MASTER OF THE ROLLS:

In suits for specific performance between vendor and purchaser, the Court has, for some time past, been in the habit, upon admission of the defendant by his answer that there is nothing but the title in dispute, of directing a reference, upon motion, to inquire into the title; and even before answer the title will be referred, when no objection is raised by the defendant. Every thing that appears to be connected with the title

may be the subject of that reference. I think, therefore, that there is no objection, in addition to the ordinary reference, to an inquiry whether the defendant objected at any time to the want of evidence as to the identity of the premises. As to the inquiry whether the abstract *was perfect, and if deficient, in what respects its deficiency consisted, and whether it was ever perfected, the ordinary rule of the Court does not justify the introduction of that part of the proposed reference. It was directed by Sir JOHN LEACH, that in every order by which it was referred to the Master to inquire whether a good title could be made, there should be inserted a direction that, if the Master should find that a good title could be made, he should inquire when it was first shewn; and so the order is now always made, unless for some reason stated at the time, and by the express direction of the Court, the inquiry as to the time when a good title was first shewn should be omitted.

[*409]

The order [contained an inquiry] whether the plaintiff can make a good title to the estate in question, in this cause agreed to be purchased by the defendant, and when such title was first shewn, and whether the defendant or his solicitor ever and when required of the plaintiffs or their solicitor any and what evidence of the identity of the premises in the abstract with the premises purchased. * * *

DOUGLAS *v.* CONGREVE.

1836.
May 3.
Aug. 4.

(1 Keen, 410—428; S. C. 6 L. J. (N. S.) Ch. 51.)

Rolls Court.
Lord LANGDALE, M.R.

A testator gave to M. S. 50,000*l.* 3 per cent. Consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate:

Held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the will from the payment of legacy duty.

[410]

* * * * *

GEORGE DOUGLAS, the testator in the cause, by his will, dated the 12th of March, 1831, after directing all his just debts to be

[412]

DOUGLAS v. CONGREVE.

fully paid, gave and bequeathed to Mrs. Margaret Stoddart, wife of James Douglas Stoddart, then residing with him, 50,000*l.*, Three per cent. Consolidated Annuities, to be transferred within six months after his decease to her, or as she should direct for her own sole and separate use, independent

[413] of her husband; * * and, after giving a considerable number of pecuniary legacies to the persons therein named, he directed that the duty upon all the pecuniary legacies, thereinbefore bequeathed, should be paid out of his general personal estate. * * *

[414] The testator died on the 12th of March, 1833, and his will was proved by William Congreve and Ralph Dunn, two of the executors named therein.

James Douglas Stoddart, after the testator's death, assumed, by the King's license, the name of Douglas.

The bill was filed by Margaret Stoddart Douglas, by her next friend, against the executors, against her husband, James Douglas Stoddart Douglas, and against other parties interested under the will, to have the will established, and the trusts thereof carried into execution.

The decree, made at the hearing, directed the usual accounts and inquiries; and on the cause coming on for further directions

[415] on the Master's report, * * [a question arose] whether the bequest of 50,000*l.* Three per cent. Consols was to be considered as a pecuniary legacy, and, as such, exempted by the testator from the payment of legacy duty. * * *

Mr. Pemberton and *Mr. Griffith Richards*, for the plaintiff:

[417] * * A gift of stock is a gift of a particular species of annuity, and entitles the legatee to the value of the stock, as much as a gift of any other annuity entitles the legatee to call for the value of the annuity. It is a pecuniary legacy, therefore; and, being a pecuniary legacy, it is exempted by the testator from the payment of legacy duty. * * *

[420] *Mr. Tinney* and *Mr. Maclean*, for the trustees of the settlement.

Mr. Kindersley and *Mr. R. D. Thomson*, for the defendants, the persons entitled in remainder to the residuary estate:

* * As to the question whether the legacy of the 50,000*l.* Three per cent. stock can be considered as a pecuniary legacy, it has been decided that stock will not pass *under the word "money," or words equivalent to money: *Ommanney* v. *Butcher* (1), *Gosden* v. *Dotterill* (2). * * *

[*421]

Mr. Pemberton, in reply.

[422]

THE MASTER OF THE ROLLS [after disposing of some other questions which had arisen, said] :

Aug. 4.

The next question relates to the legacy duty on the legacy of 50,000*l.* Three per cent. Consols. The testator having given this legacy of stock, and afterwards several legacies of sums of money, directs that the duty upon his pecuniary legacies shall be paid out of his general personal estate; and the question is whether the legacy duty upon the Consolidated Bank Annuities given to the plaintiff is to be paid under the direction, and I think that it is not. In the cases of *Hotham* v. *Sutton* (3), and *Ommanney* v. *Butcher* (1), it was held that stock could not be considered as passing or described by the word money, and, having regard to those authorities, I think that I cannot consider a legacy of a sum of stock as a pecuniary legacy. * * *

[424]

[The remainder of the judgment deals with other points raised in the case.]

NEALE *v.* MACKENZIE.

(1 Keen, 474—486.)

1837. *Feb.* 22.

Rolls Court. Lord LANGDALE, M.R.

Insolvency is a ground upon which the Court will refuse specific performance of an agreement to grant a lease, but there must be proof of general insolvency.

A. having a life interest in premises vested in trustees who had a power of leasing, agreed to grant a lease for twenty-one years to B. The trustees refused to grant a lease to B., on the ground that he was in

[474]

(1) 24 R. R. 42 (T. & R. 260).
(2) 36 R. R. 244 (1 My. & K. 56).
(3) 10 R. R. 83 (15 Ves. 319).

NEALE v. MACKENZIE.

insolvent circumstances, and that the grant of such lease would be a breach of trust against their cestuis que trust.

The Court being of opinion that B. was entitled to specific performance, and that the trustees had given A. some authority to act, ordered the trustees to execute a lease to B. to the extent of A.'s interest.

THE bill was filed by Thomas Neale against the defendant John Andrew Mackenzie, and the defendants Archibald Corbett and John Carr; and it prayed for the specific performance of an agreement by the defendant Mackenzie to grant to the plaintiff a lease of the premises in question, for seven, fourteen, or twenty-one years, at a rent of 65*l.*, and that the defendant Mackenzie might procure all other (if any) necessary parties to execute such lease, and that he might make compensation to the plaintiff in respect of the matters mentioned in the prayer.

The premises comprised in the agreement, consisting of a house with a garden and orchard at Higham Hill, together with eight acres of land, were devised by John Ingleby to the defendants Corbett and Carr as trustees in trust for his daughter Ellen Ingleby [who afterwards became the wife of the defendant J. A. Mackenzie], and after her decease for her children; and the trustees were empowered, with the consent of the person or persons beneficially entitled in possession to the receipt of the rents and profits of the devised estates, to demise all or any part thereof to any person or persons for any term of years not exceeding twenty-one years, subject to the usual restrictions.

[The facts of the case are sufficiently stated in the following judgment.]

[476] In October, 1834, the plaintiff filed his bill, and upon the answer coming in, it appearing that the property was vested in the trustees Corbett and Carr, he amended his bill by making the trustees parties.

[478] *Mr. Pemberton* and *Mr. Wilbraham*, for the plaintiff.

[479] *Mr. Kindersley* and *Mr. Loftus Wigram*, for the defendant Mackenzie [cited *Buckland* v. *Hall* (1), *Price* v. *Assheton* (2)].

[481] *Mr. Bayley*, for the trustees.

(1) 7 R. R. 1 (8 Ves. 92).

(2) 41 R. R. 222 (1 Y. & C. 441).

Mr. Pemberton, in reply.

[The arguments of counsel sufficiently appear from the judgment.]

THE MASTER OF THE ROLLS: [482]

It appears that, under the will of John Ingleby, the father of Mrs. Mackenzie, the property in question was given to the defendants Corbett and Carr as trustees in trust for Mrs. Mackenzie during her life, and, after her decease, in trust for her children. Mrs. Mackenzie married in the year 1832, and in consequence of that marriage Mr. Mackenzie became entitled, in right of his wife during their joint lives, to this property. If Mrs. Mackenzie survived her husband, she would be entitled, for her life; and if she died in his lifetime, the beneficial interest in the property would belong to her children. Mr. Mackenzie, being thus in possession of the property, let a portion of it to Mr. Charlton as tenant from year to year; and being desirous to procure a tenant for the rest he employed Mr. Cooper, an auctioneer, to let it. What were precisely the facts which took place at this time, it is difficult to collect from the statements made by the several parties. Mr. Mackenzie states, in his first answer, that both the *trustees requested [*483] him to find a tenant; but, in his second answer, he says that this was a mistake, and that he was so requested by Mr. Carr only. In the answer of the trustees, Carr states that, in the course of conversation, Mackenzie mentioned that the premises were unoccupied, and that he (Carr) thereupon said he wished they were let. Whatever the real state of the case was as to this point, an agreement was entered into on the 25th of June, 1833, between Mackenzie and the plaintiff.

By that agreement Neale was to be tenant for a year at 70*l.*, and he was to have the option, at the expiration of that year, of taking a lease at seven, fourteen, or twenty-one years, at a rent of 65*l.* a year. Certain repairs were to be performed by these parties respectively; the internal repairs by the plaintiff, and the external by Mackenzie. Neale was actually let into possession of all the property except the portion of land occupied by Charlton; and no complaint was made against him that he

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did not perform his part of the agreement. He continued in possession until the month of February, 1834, when a warrant of distress was sent into his house, and not withdrawn till payment was received of the sum of 35*l.*, which would have been the amount of rent due, had the plaintiff been in possession of the whole of the premises. This conduct on the part of Mackenzie was naturally complained of, and an action was brought for the illegal distress, and damages recovered. This proceeding is no further material in the present case than as it marks the disposition which at this time existed between the parties.

In May, 1834, Neale gave notice that he should call for a lease in pursuance of the agreement. In answer to that communication, he was told that Mackenzie had no right to grant a lease, inasmuch as the property was vested in trustees for
[*484] Mrs. Mackenzie; and the *consequence was that this bill was filed. Mackenzie resists the specific performance of the agreement upon the ground I have mentioned, and also because the plaintiff, as he alleges, is in insolvent circumstances; and he particularly alleges the fact of the plaintiff having deserted the house which he rented of Mr. Waddilove without paying his rent. The bill having been amended to bring the trustees before the Court, a second answer was put in by Mackenzie in which he alleges other circumstances, with a view to shew the insolvency of the plaintiff. It appears from the evidence that Neale, in the years 1822 and 1826, entered into compositions with his creditors, and that in the year 1833, about the time that he entered into this agreement, upon quitting the house which he then occupied in Shoreditch he prevailed upon his landlord to accept a composition of 60*l.*, for an arrear of rent, amounting to 81*l.* 5*s.*, then due to him, and that of that sum of 60*l.* only 10*l.* has been actually paid. It appears also that the rates and taxes were not paid at the time he quitted the house, and that process was issued against him to compel payment.

These circumstances, it is said, afford such evidence of the insolvency of the plaintiff, that the Court ought not to consider him entitled to compel specific performance of this agreement.

I do not say that insolvency would not be a ground upon which the Court would refuse specific performance, but the insolvency must be proved in some satisfactory manner. It is not necessary that the party should be proved to have taken the benefit of the Insolvent Debtors' Act, or that he should have given up all his property for the benefit of his creditors; but there must be such proof of general insolvency as the Court can act upon, and as Judges upon great consideration have *deemed sufficient [*485] to indicate that state of circumstances; and there does not appear to me, in the present case, to be such evidence of general insolvency as can induce me to say that the plaintiff is not in a situation to perform the covenants contained in this lease. On the other hand, there is the evidence of three persons of unimpeachable character, one of whom has been a surety for the plaintiff to the amount of 1,000*l.* since the year 1833, who speak to their having had dealings with him for many years, and to their opinion of his responsibility in terms which are entitled to the more weight, because they are not exaggerated. As to the compositions which he made with his creditors in the years 1822 and 1826, I do not think that I ought to advert to them. How can those circumstances be material, if he has conducted himself properly since that time? I think, therefore, that the defendant Mackenzie is not entitled upon the alleged ground of the plaintiff's insolvency to resist the specific performance of this agreement, and, as against him, the plaintiff is entitled to the relief which he prays.

The next question is, whether the plaintiff is entitled to relief as against the trustees, in respect of any other interest, except the interest of Mackenzie. It appears that the trustees left Mackenzie in possession of the property, and that they permitted him to let a portion of it to Charlton. They were aware, also, of some agreement entered into by Mackenzie; but I do not think the facts shew that they had any intention of trusting Mackenzie with the disposal of any interest beyond his own, or that they are bound by any part of the agreement that affects the interest of Mrs. Mackenzie if she should survive her husband, or the interest of the children after her death. The agreement, therefore, must be specifically performed so far as affects the

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interest *of Mr. Mackenzie, and no further. The costs of the suit must be paid by the defendant Mackenzie; those of the trustees by the plaintiff in the first instance, and then over to him by the defendant Mackenzie.

1836. *May* 25, 27, 30. *July* 4.

Rolls Court. Lord LANGDALE, M.R.

ATTORNEY-GENERAL *v.* ASPINALL.

(1 Keen, 513—544.)

[REVERSED on appeal, as reported in 2 My. & Cr. 613, to be contained in a later volume of the Revised Reports.]

1837. *March* 6, 8.

Rolls Court. Lord LANGDALE, M.R. [545]

PALMER *v.* GRAVES (1).

(1 Keen, 545—551; S. C. 1 Jur. 164.)

Under a general testamentary direction to pay debts, followed by a direction for payment thereof out of the rents and profits of the testator's real estate accruing at his death, the implied charge is limited to the particular rents and profits thus indicated.

THE bill was filed by Robert Palmer on behalf of himself and all other the creditors of James Graves, deceased, against John Graves, the executor of the deceased testator, and parties interested under his will.

The testator commenced his will with the following words: "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will to be duly paid." [And after making several specific devises] he gave, devised, and bequeathed unto his son, John Graves, his heirs, executors, administrators, and assigns, all the rest, residue, and remainder of his freehold and personal, and other his property, estate, and effects, not therein specifically devised and bequeathed; and he gave and bequeathed unto the said John Graves, his executors and administrators, his silver service of plate, consisting of a teapot, sugar basin, and cream ewer, together with the rents and profits of his freehold and leasehold hereditaments and premises,

[546]

(1) *Corser* v. *Cartwright* (1873) L. R. 8 Ch. 971, 974, 29 L. T. 596; in H. L., L. R. 7 H. L. 731, 45 L. J. Ch. 605.

due and accruing up to what is commonly termed a quarter day, which should ensue next after his decease; which rents and profits he charged with the payment of his said debts, funeral expenses, and the *charges of proving his will; and the testator, [*547] after making some other bequests, appointed John Graves sole executor and residuary legatee of his will. * * *

The question raised in the cause was, whether, according to the true construction of the will, the testator's real estate was charged with the payment of his debts.

Mr. Bacon, for the plaintiff, submitted that the introductory words of the will created a charge upon the testator's real estates for the payment of his debts. * * *

Mr. Chandless and *Mr. Rogers*, *contrà*. * * * [549]

Mr. Bacon, in reply. * * *

THE MASTER OF THE ROLLS * * on a subsequent day gave [550] the following judgment on the question as to the charge:

March 8.

The question reserved in this case is, whether the testator has, by his will, charged all his real estates with the payment of his debts. He commences his will by saying, "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." These words, if not limited or controlled by any thing else in the will, are sufficient to constitute a charge of all the real estates with the payment of debts; not a clear express charge upon all the testator's lands, but a charge by implication, capable of being explained by subsequent words, or a subsequent provision for the payment of the debts.

The testator, after employing the words I have stated, proceeds to make several devises and bequests, and then gives and bequeaths unto John Graves a small quantity of silver plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to what is commonly termed a quarter day, which should ensue next after his decease, "which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will." The will contains nothing else from which the testator's intention, as

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to the payment of his *debts, can be collected, and on the authority of *Thomas* v. *Britnell* (1) and *Douce* v. *Lady Torrington* (2), I think the general charge by implication is controlled by the specific charge made in the subsequent part of the will.

I am, therefore, of opinion that, upon the whole, there is no general charge upon the testator's real estate for the payment of his debts (3).

1837. *March* 4.

Rolls Court. Lord LANGDALE, M.R. [551]

WHEATLEY *v.* PURR.

(1 Keen, 551—558; S. C. 6 L. J. (N. S.) Ch. 195; 1 Jur. 133.)

A sum of 2,000*l.* was by the direction of H. O. carried by her bankers to an account in the name of herself as trustee for the plaintiffs; the bankers gave a promissory note for the amount payable fourteen days after sight with interest at 2½ per cent. to H. O., trustee for the persons therein named. After the death of H. O. her executors received from the bankers the sum secured by the promissory note:

Held, that the transaction amounted to a complete declaration of trust, and that the executor was a trustee for the plaintiffs in whose favour the trust was declared.

HARRIET OLIVER, by her will, dated the 1st of September, 1825, bequeathed to George Oliver and Susan Oliver the sum of 2,000*l.* and other benefits, and appointed Simpson, since deceased, and the defendant Purr, executors of her will.

In September, 1826, Susan Oliver intermarried with John Wheatley: she died on the 16th of July, 1831, in the life-time of the testatrix, leaving three children, issue of the marriage, who were the infant plaintiffs, John Richardson Wheatley, Susanna Mary Wheatley, and Harriet Wheatley.

[552] In the year 1833 the testatrix Harriet Oliver had in the hands of her bankers Messrs. Oakes & Co. of Sudbury in Suffolk, the sum of 3,000*l.*, upon which sum the bankers allowed her interest at 2½ per cent. In the month of June in that year she gave notice to Messrs. Oakes & Co., by Charles Partridge, her confidential servant, that she would draw out the sum of 3,000*l.* so deposited in the month of July following. She accordingly, on the 1st of July, delivered to Partridge a promissory note for 3,000*l.*, which had been given by the bankers in acknowledgment

(1) 2 Ves. Sen. 313.
(2) 39 R. R. 308 (2 My. & K. 600).
(3) And see *Braithwaite* v. *Britain*, *ante*, p. 56.

of the deposit, and she desired him to deliver the same to the bankers, and to direct the bankers to place 2,000*l.* in the joint names of the plaintiffs and her own (1), as trustee for the plaintiffs, and to bring back the remaining 1,000*l.* with the interest accrued thereon. Partridge executed these instructions, and the sum of 2,000*l.* was entered in the books of the bankers, to the account of Harriet Oliver, as trustee for John Richardson Wheatley, Mary Wheatley, and Harriet Wheatley, and the following receipt or order given for it:

"SUDBURY BANK, July 1st, 1833.—Fourteen days after sight I promise to pay Mrs. Harriet Oliver, trustee for John Richardson Wheatley, Mary Wheatley, and Harriet Wheatley (1), or order, two thousand pounds, with interest at 2½ per cent. For Oakes, Brown, Moore, and Hanbury. (Signed) DANIEL HANBURY."

A receipt for this promissory note was signed by Mrs. Oliver, and given to the bankers.

Harriet Oliver died on the 7th of January, 1834, possessed of the above-mentioned promissory note, and her will was duly proved by James Purr alone, who possessed himself of her personal estate; and he obtained payment from Messrs. Oakes & Co. of the sum of 2,000*l.* *and interest, in discharge of the promissory note. The money so received was invested by the executor in the 3 per cent. Consols, in his own name. [*553].

The bill was filed by the infant plaintiffs, by John Wheatley, their father and next friend, and it prayed a declaration that Harriet Oliver was a trustee of the 2,000*l.* and interest for the plaintiffs, and that such principal sum and interest might be paid, or the stock in which the same had been invested transferred into the name of the Accountant-General in trust for the benefit of the plaintiffs; and it further prayed for the usual reference as to their maintenance.

It appeared by the evidence of Partridge (1) and Pratt, the principal clerks of Messrs. Oakes & Co., that Mrs. Oliver, on directing Partridge (1) to give notice to the bankers that she intended to draw out the 3,000*l.*, had expressed to Partridge her desire that 2,000*l.* out of the 3,000*l.* should be placed in the bank for

(1) The learned reader will observe the discrepancies in the report. The head-note has been amended so as to agree with the document set out and with the judgment.—F. P.

WHEATLEY v. PURR.

the benefit of Mrs. Wheatley's children; that Partridge, when he gave notice of her intention to the bankers, inquired how her wishes could be accomplished; and that Pratt suggested to Partridge that Mrs. Oliver might have a promissory note payable to her as trustee for the children, and that the old promissory note must be given up, and a new one to that effect prepared.

The question in the cause was, whether the defendant was a trustee for the plaintiffs, or for the next of kin, Mrs. Oliver having died intestate as to her residuary estate; and that depended upon the question whether the intention of Mrs. Oliver, (which was not disputed), to create a trust for the plaintiffs had or had not been perfected.

* * * * *

[554] *Mr. Pemberton* and *Mr. Pigott*, for the plaintiffs [cited *Ex parte Pye*; *Ex parte Dubost* (1)].

[555] *Mr. Barber* and *Mr. Jeremy*, *contrà*:

There can be no doubt of the intention of Mrs. Oliver to create a trust; but the trust was not perfected by any act done in her life-time; and the consequence was that the bankers found it impossible to resist the demand, made by the executor, for the sum secured by this promissory note, as part of Mrs. Oliver's personal estate. [They cited *Antrobus* v. *Smith* (2), *Gaskell* v. *Gaskell* (3), *Tate* v. *Hilbert* (4), and other cases of the failure of imperfect gifts (5).]

[556] *Mr. Pemberton*, in reply:

[*557] In all the cases cited on the other side, except **Gaskell* v. *Gaskell*, something was wanting, to render the act a complete declaration of trust, and therefore the intended gift failed. * * The testatrix, by a declaration of trust, converted herself into a trustee for the benefit of the infant plaintiffs.

[558] THE MASTER OF THE ROLLS (after stating the facts of the case):

The question is, whether in the acts done by Mrs. Oliver, for the purpose of constituting herself a trustee for the benefit of

(1) 11 R. R. 173 (18 Ves. 140).
(2) 8 R. R. 278 (12 Ves. 39).
(3) 2 Y. & J. 502.
(4) 2 R. R. 175 (2 Ves. Jr. 111).
(5) The distinction now established (*Milroy* v. *Lord*, 4 D. G. F. & J.) between an imperfect gift and an imperfect voluntary trust was not clearly appreciated at the date of this decision.—O. A. S.

Mrs. Wheatley's infant children, any thing was wanting to accomplish her purpose. I am of opinion that she did constitute herself a trustee for the infant children, and that a trust was completely declared so as to give to the plaintiffs a title to the relief which they claim. Upon the death of Mrs. Oliver, the bankers were called upon to pay the money by her executor, who had undoubtedly a right to claim it, in his character of legal personal representative, upon whom, if Mrs. Oliver was a trustee, the trust devolved. The executor received the money, as part of the general assets of the testator. Those assets it was his duty to defend against the claim of the plaintiffs, until their right should be ascertained, and he has acted very properly, therefore, in refusing to part with the fund, without the authority of the Court.

SHAW *v.* BORRER (1).

1836.
April 22, 23
August 5.

Rolls Court.
Lord LANGDALE, M.R.
[559]

(1 Keen, 559—578; S. C. 5 L. J. (N. S.) Ch. 364.)

A general direction by will for the payment of debts overrides specific dispositions of particular property.

A purchaser is not bound in such case to inquire as to the insufficiency of any assets not specifically disposed of, nor is he responsible for the application of his own purchase-money paid by him to the executors.

THE bill was filed for the purpose of compelling the specific performance of an agreement, whereby the defendant contracted to purchase a certain advowson from two of the plaintiffs.

The advowson in question was devised by Sir George Gregory Shaw, and upon the construction of his will, dated the 13th of April, 1831, the question of title arose.

The will commenced as follows: "First, I direct all my just debts, funeral and testamentary expenses to be paid and discharged with all convenient speed, after my decease; and I give and devise all that the advowson and right of patronage of and to the rectory or living of Hurstperpoint, in the county of Sussex, with the rights, members, and appurtenances thereof, unto and to the use of my son John Kenward Shaw and John Cornwall,

(1) See *Ball* v. *Harris*, 4 My. & Cr. 264, and see now 22 & 23 Vict. c. 35, ss. 14—18, which makes the concurrence of the executors unnecessary in some cases.—O. A. S.

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[*560] *their heirs and assigns, but upon trust, nevertheless, that they, or the survivor of them, or the heirs or assigns of such survivor, shall and do present my youngest son, Robert William Shaw, to the same, when and as the same rectory or living shall become vacant, and subject thereto upon trust that they, my said trustees, or the survivors, &c. do sell and absolutely dispose of the said advowson and right of patronage, either by public sale or private contract, as they or he may think fit, and do and shall pay the monies to arise by such sale, after defraying expenses, unto and equally between all my daughters, who shall be then single and unmarried, in equal portions share and share alike." And the testator directed that the receipts of the trustees should be a good discharge for the purchase-money, and that the purchaser or purchasers should not be liable or accountable for the application, misapplication, or non-application thereof. The testator then gave a certain leasehold estate and furniture to trustees, upon trust to permit his eldest unmarried daughter to have the use thereof during her life, if she so long continued unmarried, and after her decease, or marriage, which should first happen, upon trust to permit his second, third, and all other his unmarried daughters, severally and successively, to have the use thereof; and after the decease or marriage of all his daughters, in trust for his son John Kenward Shaw, if he should be then living, but if not, then in trust for his eldest son, for the time being, his executors, administrators, and assigns. To this bequest of the leasehold estate and furniture, there was annexed a power of sale to be exercised under certain circumstances, with directions that the purchaser should not be liable to see to the application of the purchase-money. And after the death of his wife, the testator appointed and devised his manors, messuages, lands, and hereditaments whatsoever, to Maximilian Dudley

[*561] Digger Dalison, *and John Cornwall, and their heirs, upon trust, with all convenient speed, after the death of the testator's wife, to convey and settle the same, to the use of his eldest son John Kenward Shaw, and the heirs male of his body; and, for want of such issue, to his two grandsons, and the heirs male of their respective bodies, with several remainders over; and after giving his jewels to his wife absolutely, he gave his plate and household

goods, &c., described in his will as belonging to his mansion-house at Kenward, to his wife, for her life, and after her death, to the trustees, Dalison and Cornwall, upon trust to permit the same to be used by the person who, by virtue of the will, should, for the time being, be entitled to the mansion-house at Kenward, to the intent that, as far as the rules of law and equity would permit, the same might be as heir-looms for the benefit of the successive owners of the mansion-house; and for that purpose the testator declared that the same should not vest absolutely in the child of any of his children, until such child should attain the age of 21 years. And the testator, after giving directions respecting his farming stock, and giving to his wife all other his personal estate not before disposed of, appointed John Kenward Shaw, (who was one of the trustees of the advowson,) Robert William Shaw, (the son who was to be presented with the living, when it became vacant,) and John Kenward Shaw Brooke, executors of his will.

The testator died in the month of October, 1831, and his will was proved by the executors named therein.

The contract was entered into by the plaintiffs, Sir John Kenward Shaw and John Cornwall, the trustees of the advowson, as the bill alleged, in concurrence with, or at the request of the executors by John Hayward, their attorney, with the defendant *William Borrer, for the sale of the advowson, at the sum of [*562]
8,400*l*. The bill was filed by the trustees of the advowson and the executors, and it prayed, in addition to the prayer for a specific performance of the contract, that the purchase-money might be paid to the executors.

The bill alleged that the testator, at his decease, was indebted to an amount far exceeding the personal estate which he was possessed of, at the time of his decease, and that the plaintiffs, the executors, were under the necessity of having money raised for the payment of his debts, by the sale of his real estate, according to the direction contained in the will; and that the plaintiff, Sir John Kenward Shaw, one of the executors, and also one of the devisees in trust of the advowson, was satisfied of such necessity, and therefore willing, in his character of devisee in trust, to concur with the executors in selling the same for the

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purpose of paying the testator's debts; and that the plaintiff, John Cornwall, the other devisee in trust of the advowson, the plaintiff, Robert William Shaw, who was beneficially entitled under the will to the next presentation of the advowson, and the daughters of the testator who were all single and unmarried, were all satisfied of the insufficiency of the testator's personal estate, and concurred in the necessity of such sale.

The defendant, by his answer, denied all knowledge of the matters so alleged by the plaintiffs, and insisted that he had contracted with the plaintiffs, Sir John Kenward Shaw and John Cornwall, as trustees of the advowson, and with them only.

The cause was heard on the 21st of April, 1834, and by the decree then made, a reference was directed to the Master, to [*563] inquire whether a good title could be *made, and if so, when it was first shewn. Evidence was gone into, before the Master, to shew the deficiency of the testator's personal estate; and the Master reported that a good title could be made, and was first shewn on the 18th of December, 1832. To that report the plaintiffs filed two exceptions; the first of which alleged that the Master ought to have certified that a good title could not be made.

[One of the reasons assigned by the defendant, for his first exception, was] that no proper evidence was produced before the Master, to shew the deficiency of the personal estate, and other property of the testator, to answer his debts, or to prove the necessity of a present sale for the payment thereof, so as to justify the Master in stating that a good title could be made thereto by a present sale thereof for payment of the testator's debts.

Mr. Tinney, *Mr. Hodgson*, and *Mr. Longley*, in support of the exception:

[566] * * If the personal estate is insufficient for the payment of the debts, then, and not till then, the real estate is to be resorted to—not indiscriminately, however, for it will depend upon the circumstances of the particular case what portion of the real [568] estate is to be first applied. * * Where the estate of a testator is administered by means of a suit in equity, the Court takes care that all proper parties interested in the assets are

before the Court; it directs the necessary inquiries to be made, and accounts to be taken in the Master's office, and it never permits the real estate to be applied to the payment of debts unless such an application is expressly directed or sanctioned by the will, until the deficiency of the personal estate is regularly ascertained. But the incidental inquiry in the Master's office as to the state of the testator's assets upon a reference *as to [*569] title is a proceeding of a totally different character; it wants all the important ingredients which belong to an inquiry in a suit for the administration of assets; it is, in fact, a mere *ex parte* proceeding. * * *

Mr. Pemberton and *Mr. Simpson, contrà:*

* * It is clear, upon the authorities, that where there is a [570] general charge for payment of debts and no devise of the real estate, the executors may sell; and where there is such a general charge and a devise to trustees, *the trustees, upon a deficiency [*571] of the personal estate being ascertained, are bound to convey the legal estate at the direction of the executors. * * In the present case the executors, the trustees, and the parties beneficially intrusted concur in the sale of the advowson; the purchaser will, *quâcunque viâ datâ*, get the legal estate, and he is not liable to see either to the deficiency of the testator's assets, or to the application of the purchase-money.

The following [among other] authorities were cited: [*Farr* v. *Newman* (1), *Doran* v. *Wiltshire* (2), *Watkins* v. *Cheek* (3), *Bonney* v. *Ridgard* (4), *Allan* v. *Backhouse* (5), *Bootle* v. *Blundell* (6), *Jenkins* v. *Hiles* (7), *Shallcross* v. *Finden* (8).]

Mr. Tinney, in reply. [572]

THE MASTER OF THE ROLLS (after stating the reasons assigned by the defendant for his first exception): *Aug.* 5.

Upon the best consideration I have been able to give to the effect of the will, with reference to the two first reasons, it

(1) 2 R. R. 479 (4 T. R. 621).
(2) 19 R. R. 287 (3 Swanst. 699).
(3) 25 R. R. 181 (2 Sim. & St. 199).
(4) 1 Cox, 145; see 11 R. R. 28 and 14 R. R. 247, *n.*
(5) 13 R. R. 23 (2 V. & B. 65).
(6) 15 R. R. 93 (1 Mer. 193).
(7) 6 R. R. 14 (6 Ves. 646).
(8) 3 R. R. 75 (3 Ves. 738).

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appears to me probable at least, that the testator did not intend the advowson to be sold under the devise to trustees, until they had presented his youngest son to the living, and that the sale was intended to be made subject to the incumbency of the youngest son. The money to arise from the sale was intended for the daughters who should be unmarried at the time when the sale took place, whenever the proper time was. Now, there might be no unmarried daughters at that time: the advowson might consequently fall into the residuary real estate, and become subject to limitations, on which questions of some nicety arise, and which may not give more than a life interest to any person now *in esse*. Under these circumstances, I think that, if there were no title to sell except that of the trustees of the

[*573] advowson for the purpose of their special *trust, the Court could not properly compel a purchaser to accept the title, and the exception ought to be allowed.

But another title to sell is claimed. It is alleged,—and, for any thing I have heard to the contrary, truly alleged—that the contract was entered into, at the instance of the executors, for the purpose of raising money to pay debts. I do not think it very material that the executors were not parties to the contract personally. One of the vendors was both executor and trustee, and all the other executors are co-plaintiffs with the trustees; and, in this state of things, we are brought to the consideration of a question of great importance. There being a general direction to pay debts, so expressed as to constitute a charge on all the testator's real estates; and there being, in the same will, a devise of a particular portion of the real estate to trustees for a special purpose, and a residuary devise of real estates for other special purposes, and no suit in equity to ascertain the deficiency of the personal estate to pay the debts, can the trustees and executors together make a title to the purchaser of that part of the real estate, which was devised to trustees for special purposes? It is argued that such a sale can only be effected under the decree of a court of equity for the administration of the testator's estate.

Upon the question, whether the purchaser is bound to see to the application of the purchase-money, there is some authority.

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[His Honour referred on this point to *Elliot* v. *Merriman* (1), and other cases, and continued as follows:] It seems, therefore, clear that a charge of this nature has been and ought to be treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts. If so, is there any good reason to doubt, but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors?

Though the advowson is devised to trustees for special purposes, the testator has, in the first instance, charged all his estates with payment of his debts. The charge affects the equitable but not the legal estate; and, upon the construction, the trusts of the will affect this estate, first, in common with the testator's other property for the payment of debts, and next, separately for the special purposes mentioned in the will.

Possibly, upon the testator's death, it might not be necessary to resort to the real estate at all for the payment of the testator's debts; and, if it should be necessary to resort to the real estate, some part ought in a due administration to be applied in payment of debts before *other parts, and it is said that the necessity for raising money to pay the debts out of the real estate, and if such necessity exists, the proper selection of that part of the real estate which ought to be first sold ought to appear, and can only be proved by the Master's report in a suit for the administration of assets. It is true that, if the administration of assets devolves on the Court by the institution of a suit for the purpose, the Court, in the exercise of its jurisdiction, acts with all practicable caution, and proceeds in strict conformity with its established rules. But this is a caution exercised not for the benefit of the creditors or at their instance; for they ask nothing, and have a right to nothing, but payment of their debts; and the question is not, what the Court thinks it right to do for the benefit of the persons who have claims, subject to the debts; but whether the estate,

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(1) Barnard. 78.

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subject to debts by the will, and sold and conveyed by the devises for special purposes at the instance of the executors, would remain in the hands of the purchaser subject to any claims created by or founded on the will, or whether there is any obligation to see done that which the Court would do in a suit to administer assets.

An argument is deduced from the statutes which have made real estates assets in courts of equity for payment of simple-contract debts; but it does not appear to me that the rule, which the Legislature has thought fit to apply in cases where the real estate is not charged with payment of debts, is necessarily to be applied in cases where the testator has charged his real estate with such payment. And on the whole, considering that the charge creates or constitutes a trust for the payment of debts, or, as Lord ELDON in one place, adopting the language of Lord THURLOW, expressed it, that "a charge is a devise of the estate
[*578] in substance *and effect *pro tanto* to pay the debts," and conceiving that the purchaser is not bound either to inquire whether other sufficient property is applicable, or ought to be applied first in payment of debts, or to see to the application of the purchase money, I think that the exception must be overruled.

Exception overruled.

The second exception, which related to the time at which a good title was shewn, was abandoned.

1836.
March 9.

Rolls Court.
Lord LANGDALE, M.R.
[578]

RIPLEY *v.* MOYSEY.

(1 Keen, 578—579.)

The general personal estate of a testator is liable to all costs occasioned by his mistake, or rendered necessary for the purpose of obtaining the opinion of the Court on the construction of his will, though some of those costs may have been incurred in proceedings affecting the real estate only, and the result of which was to benefit a devisee of the real estate.

THE testator devised a real estate, subject to the payment of a corn-rent, for a charitable purpose to Christopher Wilson. It appeared, by the Master's report, that the Christian name of the

person, to whom the testatrix intended to give the estate, was James instead of Christopher.

Mr. Beames and *Mr. Simons*, for the residuary legatee, submitted that the costs of the inquiry as to the identity of James Wilson, and the costs of making the Attorney-General a party, for the purpose of having the charge of the corn-rent declared void under the Mortmain Act, ought to be borne by the devisee, for whose benefit the inquiry was made, and who, by the result of the suit to which the Attorney-General was a necessary party, had acquired the estate exonerated from the charge.

Mr. Kindersley, contrà.

THE MASTER OF THE ROLLS: [579]

The inquiry was rendered necessary by the mistake of the testatrix, and the residuary legatee is only entitled to the residue of the personal estate, after payment of all costs and charges occasioned by the will.

BOOTH *v.* LEYCESTER (No. 2) (1).

1837. *Feb.* 23.

(1 Keen, 579—580; affirmed, 3 My. & Cr. 459; S. C. 8 L. J. (N. S.) Ch. 49.)

Rolls Court. Lord LANGDALE, M.R. [579]

An injunction was granted to restrain the plaintiff from prosecuting a suit not brought to a hearing in Ireland, the subject-matter of the suit being the same as that of a suit instituted in this Court, in which this Court had pronounced a decree, refusing the relief sought by the plaintiff.

A PETITION was presented in this cause by the defendants, praying that the plaintiff Booth might be restrained from proceeding in a suit which he had instituted in the Court of Chancery in Ireland, as the assignee of certain annuities granted by the late Sir John Roger Palmer (to which the English and Irish estates of Sir J. R. Palmer were alleged to be subject), for the purpose of recovering the arrears of those annuities. The Irish suit had not been brought to a hearing, and the ground upon which the injunction was sought, was, that the subject-matter of the suit was exactly the same as that of the cause in which this petition was presented, and in which a decree had

(1) *Carron Iron Co.* v. *Maclaren* (1855) 5 H. L. C. 416, 24 L. J. Ch. 620.

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been pronounced by this Court against the claim of the plaintiff (1).

Mr. Spence and *Mr. Tinney*, in support of the petition, cited *Harrison* v. *Gurney* (2), *Clarke* v. *The Earl of Ormonde* (3), and *Lord Portarlington* v. *Soulby* (4).

Mr. Pemberton and *Mr. Kindersley*, *contrà*, admitted that the subject-matter of the two suits and the relief sought were the same, and that an application might *properly have been made in Ireland for staying the proceedings in the Irish cause, on the ground that the subject of the suit was *res judicata* in this Court. Such an application could not, upon the authorities—and there had been some very recent decisions upon the point—have been refused by the Court of Chancery in Ireland. But they submitted that, in this cause, the application could not be granted, because the Court had no jurisdiction to interfere with the proceedings of a foreign Court. Even if the Court had jurisdiction, the defendants had no equitable right to call upon the Court for its interposition, inasmuch as both the English and Irish suits had been instituted so long ago as the year 1833, and they had never taken any steps to stop the Irish suit.

[*580]

THE MASTER OF THE ROLLS:

It has been justly observed at the Bar that, if an application had been made to the Court of Chancery in Ireland to stay the proceedings in the suit pending in that Court, on the ground that the subject-matter of it was *res judicata* in a Court of competent jurisdiction in this country, the authorities upon this point would probably have induced that Court to accede to the application. The question is, whether, with these authorities before me, I ought to put the parties to go to Ireland, in order to obtain an order which this Court has, undoubtedly, jurisdiction to make at once. As it appears that these suits were instituted for the same matter in all respects, and there has been an adjudication upon that matter, from which there may, indeed, be an appeal, but

(1) *Ante*, p. 75.
(2) 22 R. R. 111 (2 Jac. & W. 563).
(3) 23 R. R. 143 (Jac. 546).
(4) 41 R. R. 23 (3 My. & K. 104).

which, for the present, must be considered as final, I think I should not be performing my duty, if I permitted the plaintiff to go on with the proceedings in Ireland. The injunction prayed by this petition must, therefore, be granted.

HOWARD *v.* RHODES.

1837. *March* 18.

Rolls Court. Lord LANGDALE, M.R.

[581]

(1 Keen, 581—582; S. C. 6 L. J. (N. S.) Ch. 196.)

The Court will not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary.

THE bill was filed by the several parties interested under a will (some of whom were infants), against the four defendants named executors and trustees in the will, for the purpose of having a new trustee appointed in the room of the defendant Charles Lane, who was desirous of being discharged from the trusts reposed in him by the will, there being no power contained in the will for appointing new trustees. The defendants had all proved the will and acted in the trusts thereof.

The defendant Charles Lane, by his answer, admitted that he was desirous of being discharged from the trusts reposed in him by the testator's will upon being properly released and indemnified in respect thereof.

Mr. Lloyd, for the plaintiffs, asked for the usual reference to the Master to approve of a new trustee.

Mr. Sharpe, for the continuing trustees.

Mr. Lane, for the retiring trustee, asked for the costs of that defendant and certain extra expenses which had been incurred by him in respect of this suit.

The MASTER OF THE ROLLS said the defendant, in his answer, assigned no reason for his retirement, and that no costs could be allowed to a trustee so declining to perform the trusts reposed in him.

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Mr. Lane submitted that no costs were asked against the retiring trustee by the plaintiffs.

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The MASTER OF THE ROLLS said it was the duty of the Court to protect the estate against being burthened with the costs of a trustee who had declined, without any cause assigned, to perform the trusts reposed in him, and had thereby rendered this suit necessary.

The usual reference was directed, and no order made as to costs.

1836.
Nov. 23.
Dec. 5.

RAFFETY *v.* KING (1).

(1 Keen, 601—619; S. C. 6 L. J. (N. S.) Ch. 87.)

Rolls Court. Lord LANGDALE, M.R.

The effect of lapse of time as a bar to the redemption of a mortgage previously to the statute 3 & 4 Will. IV. c. 27.

[THE following passage from the judgment of the MASTER OF THE ROLLS in this case dealing with the point mentioned in the above head-note may be found useful:

THE MASTER OF THE ROLLS, in the course of his judgment, said:]

[616]

If the mortgagee enters in his character of mortgagee or by virtue of his mortgage title alone, he is for the period of twenty (2) years liable to account, if called upon, and liable to become trustee for the mortgagor, if payment be tendered to him; but holding himself ready to answer these liabilities, he owes no other duty. He may, if permitted, hold on for twenty years without accounting or admitting his mortgage title, and if he does so, his title becomes as absolute in equity as it was previously at law. The mortgagor having for twenty years

[*617]

neglected to tender payment, or to procure *an account or admission, is held to have lost his right of redemption, so that the mortgagee in this case has only to look what was at first his mortgage title, and to the length of possession without account or admission.

But if the mortgagee enters, not in his character or in his right of mortgagee only, but as purchaser of the equity of

(1) *Hyde* v. *Dallaway* (1843) 2 Ha. 528.

(2) Now twelve: see Real Property Limitation Act, 1874, s. 7.

redemption, he must look to the title of his vendor, and to the validity of the conveyance he takes; and if the conveyance be such as in law or in equity only gives for his benefit the estate of a tenant for life, he must, as it appears to me, take that estate subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainderman.

One of those duties is to keep down the interest of the mortgage, and having united in himself the two characters of mortgagor and mortgagee, he must, in the language of Chief Baron MACDONALD, "be considered to have supported the rights, and discharged the duties of each." He owes a duty quite distinct from that which belongs to him in the mere character of mortgagee. So it was held in *Corbett* v. *Barker* (1), and *Reeve* v. *Hicks* (2); and, in the judgment upon the plea in *Ravald* v. *Russell* (3), the mortgagee being purchaser of the equity of redemption, and having taken insufficient conveyances, obtained the husband's interest, and nothing more. The length of possession did not avail him.

The argument, on which it is contended that time ought to run against the remainderman in all cases, is, that as the remainderman may redeem, he ought to be barred if he neglects to do so; and, speaking generally, it is clear that the remainderman has an interest *which, as against the mortgagee, entitles him to redeem. But if the tenant for life procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it is by no means so clear that the remainderman can, without the consent of the tenant for life, redeem the mortgage vested in him; and the observations of Chief Baron ALEXANDER upon that subject, in the case of *Ravald* v. *Russell*, are well worthy of attention.

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* * * * *

[The MASTER OF THE ROLLS then referred to the facts of the case.]

(1) 4 R. R. 856 (1 Anst. 138; 3 Anst. 755).

(2) 25 R. R. 241 (2 Sim. & St. 403).

(3) 34 R. R. 257 (Younge, 9).

1836.
Nov. 30.
Dec. 2.
1837.
Jan. 13.

Rolls Court.
Lord
LANGDALE,
M.R.

Affirmed.

1837.
July 11.

Lord
COTTENHAM,
L.C.
[672]

NEALE *v.* NEALE.

(1 Keen, 672—684.)

A. and B., having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, A., the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. A. was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; and, after A.'s death without issue, B., having discovered his own title as tenant in tail, repudiated the agreement, and brought an action of ejectment to recover the whole estate.

On a bill filed by the devisee of A., the Court, upon the principle on which it supports family arrangements, decreed B. to do all necessary acts to bar the entail, and vest the parts of the lands, allotted under the agreement to A., upon the trusts of A.'s will.

THE bill was filed by Daniel Neale and others, claiming under the will of James Neale, against Joseph Neale, the brother of the deceased James Neale, and two other persons, one of whom, Marsh, was an incumbrancer of the plaintiff Daniel Neale, and the other a legatee under the will of James Neale; and it prayed that Joseph Neale might be compelled to do and concur in such acts as were necessary for barring the entail of the copyhold estate in question, and specifically to perform *an agreement [*673] for the division of that estate between himself and his deceased brother James Neale; and, if the Court should be of opinion that the plaintiffs were not entitled to that relief, then for an account of the rent of a portion of the estate possessed or occupied by the defendant Joseph Neale for some time previous to the death of his deceased brother James Neale.

The estate in question was the subject of a settlement made by Joseph Neale, the elder, the grandfather of the defendant Joseph Neale and his deceased brother James, in the month of May, 1747. Being then absolutely entitled, Joseph Neale, the elder, made a surrender to the use of himself for life, remainder to his wife Mary for life, remainder to the heirs of her body by himself for life, remainder to himself in fee.

On the death of Joseph, the elder, which happened in the month of November, 1753, Mary Neale, his widow, became tenant in tail in possession under the settlement; but she was,

by mistake, admitted to the copyhold estate as tenant for life only, and James Neale, her eldest son, and the father of the defendant Joseph and his deceased brother James, in the lifetime of his mother, and in November, 1794, surrendered the reversion or remainder, supposed to be expectant after her death, to the use of himself for life, remainder to his wife Unity for life, remainder to such persons as he should by will appoint; and he then made a will, by which he devised the estate, subject to the life interest of Mary his mother, and the life interest of Unity his wife to his two sons, James and Joseph, their heirs and assigns, for ever; and he soon afterwards died.

Mary Neale, the mother, died in March, 1800, leaving three grandsons, James Neale, the defendant, Joseph *Neale, and [*674] Daniel Neale, surviving her; James, as her eldest son, being the person really entitled to the estate, under the surrender of Joseph Neale, the grandfather.

Under the surrender of James Neale, the elder, Unity, his widow, appeared to have an estate for life, with remainder to her two sons, James and Joseph; and, under this apparent title, Unity took possession. She some time afterwards married James Day; and Day and his wife were admitted under the will of James Neale, the elder.

After the death of Unity Neale, and on the 8th of February, 1821, James Neale, the brother of Joseph, who was really entitled as tenant in tail, and the defendant Joseph Neale, who appeared to be entitled under the will of James Neale, the father, were admitted as tenants in common in fee. It appeared that James, who was an idle and extravagant person, and in some degree dependent upon his brother Joseph, entertained some suspicion, and at times insisted that his father had no right to make a will, and in this state of things they came to an agreement with each other for a partition of the estate in the month of March, 1821. In discussing the terms of this agreement, which was not committed to writing, it was proposed by James that Joseph should take, as his half, certain closes called Meer Ditches and Newlands, containing together 14 acres; and that James should keep the rest, amounting to 16¾ acres, for his share. To this Joseph objected on account of the

NEALE v. NEALE.

inequality; and, upon this difference, their younger brother interposed, and proposed that, in addition to the 14 acres, James should give up to Joseph an orchard called the Ridge, containing ¾ of an acre; and both James and Joseph having acceded to this, it was finally agreed that Joseph should have as his share [*675] *Meer Ditches, Newland, and the Ridge, containing in all 14¾ acres; and that James should have the remaining 16 acres as his share. The difference in quantity was 1¼ acre; and with reference to this difference the defendant Joseph, by his answer, stated that, being unwilling to enter into any legal contest with his brother, touching the proportion of his half of the property, and at the same time being influenced by repeated assertions made by his brother that the whole of the property was his, and that his father had no right to make a will, he was induced to consider, and during the life of James did consider the arrangement and agreement as finally settled and agreed between them.

This agreement having been made, the parties severally took possession of the shares allotted to them; and they dealt with and enjoyed them separately during the life of James, and for some time afterwards.

On the 6th of April, 1824, James Neale made his will, and thereby devised his share of the estate to the plaintiff Daniel Neale, subject to various charges in favour of the other plaintiffs, and of the defendant Joseph Neale.

James Neale died on the 24th of January, 1830, without issue, leaving Joseph his elder brother, his heir, and the heir of the body of his grandmother Mary by Joseph her husband, and consequently tenant in tail of the copyhold estate under the limitations of the copyhold estate created by the surrender of the 14th of May, 1747. Some time after the death of James Neale, his devisee, Daniel Neale, having occasion to raise money by mortgage of the estate, found that he could not do so without exonerating it from the charges created by the will of James, [*676] one of which was a legacy of 60*l.*, *payable to the defendant Joseph, who, upon receiving a promissory note for the sum, at the request of Daniel, released the estate from the charge.

During this time no question, respecting the agreement of 1821, or as to the title of the estate, had arisen; but in 1832,

Joseph Neale, the defendant, produced a copy of the surrender of May, 1747, and claimed to be entitled to the entirety of the estate under the limitations, which had never been barred, and, his claim being resisted, he brought an action of ejectment to recover possession of that share which was allotted to James Neale in 1821.

Upon that action being brought, the present bill was filed; it charged that the copy of the surrender of May, 1747, was from the year 1801 in the possession of Joseph Neale, who knew the contents and effects thereof, but concealed the same from James Neale.

The defendant Joseph Neale, by his answer, denied all knowledge of the copy of the surrender until it was found, in the year 1832, by his son, amongst other papers, in one of the top drawers in a chest of drawers in the bed-room of the defendant Joseph Neale's house at Park Milk Farm.

It appeared by the evidence that in March, 1801, when Unity Neale intermarried with Day, she left the house which she then occupied in the possession of the brothers, James and Joseph Neale, and that among the furniture in that house was an old writing desk which had belonged to James Neale, the father, and which contained a number of papers in one of the drawers. Shortly afterwards the brothers James and Joseph entered into partnership; and they continued to occupy *the house until [*677] July, 1809, when the partnership was dissolved, and Joseph became the sole tenant of the house, James, however, continuing to live with him as a lodger. The desk was valued among other furniture, and taken by Joseph, and considered as his property. Joseph left the house in the year 1816, and took the desk with him; he returned to the house in 1820, and brought the desk back with him. During all this time James lived with him as a lodger. The drawer which contained the papers was sometimes locked, and sometimes left open. In 1828 Captain Newman, a friend of the defendant Joseph, wished to borrow the drawer for the purpose of keeping powder in it, and the papers were then removed from the drawer, and placed in a chest of drawers in an upper room where the copy of court roll was found by the son of the defendant Joseph Neale in June, 1832.

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In December, 1832, the defendant Joseph Neale laid the copy of court roll before his solicitor, and shortly afterwards brought the action of ejectment.

Mr. Tinney and *Mr. John Romilly*, for the plaintiffs:

[678] * * The agreement between the brothers to give effect to the dispositions made in their father's will, and to settle amicably all matters in dispute or doubt between them will, upon the recognised principles of this Court, be effectual as a family arrangement: *Stapilton* v. *Stapilton* (1). A compromise of a doubtful right is a sufficient foundation in equity for such an agreement, and the defendant admits by his answer, that he consented to an inequality of partition on the ground of the doubt which, at the time of the arrangement, hung upon his apparent title. * * *

[679] *Mr. James Russell*, for the defendant, Marsh, the incumbrancer.

Mr. Pemberton, and *Mr. R. P. Chichester*, *contrà*:

[680] * * The allegation that there was a fraudulent possession of the deed on the part of the defendant Joseph is completely displaced by the evidence. * * *

[681] It is not pretended that Joseph ever agreed to give up any thing beyond the difference between the moiety of the property and the portion which he consented to take. He never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party

[682] with whom the agreement was made. * * An agreement to alter the rights of parties in respect of an interest in real estate cannot be made by parol; neither is there any foundation for the proposition that a partition can be made by parol. The case cited in *Thomas* v. *Gyles* (2) as an authority for the proposition inserted in the marginal note, that a partition between tenants in tail, though only by parol, shall bind the issue, is not law.

Mr. Tinney, in reply.

(1) 1 Atk. 2. (2) 2 Vern. 232.

THE MASTER OF THE ROLLS (after stating the facts):

If there were such knowledge and such concealment as are charged by this bill, there can hardly be a greater fraud than that which was committed by the defendant Joseph Neale.

The circumstances are no doubt attended with very great suspicion; but, after reading the charges and the answer with the very little evidence really bearing on the question, it does not appear to me that I can safely and satisfactorily impute to the defendant a knowledge of the copy of the court roll, before the time when he says it was found. He most positively denies it. His conduct in December, 1830, almost a year after the death of James, appears to me to be inconsistent with it, and however extraordinary it may seem that such a document should have been so long in his possession unexamined and unknown, yet in the station of life of these persons, their extreme negligence or want of curiosity may perhaps be accounted for, and I can hardly say that the nature of the case is such as to make it fit for a *court of justice to presume a knowledge [*683] in the absence of proof.

But considering him to have been ignorant of this copy of court roll during the life of his brother James, the question remains, whether he is not bound by the agreement of 1821. It does not appear to me that the agreement merely related to the mode of enjoying the estate, or had reference only to a partition. Joseph did not so consider it; he knew that James thought himself entitled to the whole estate, and he himself, influenced, as he says, by the assertions of James, and desirous to avoid litigation, consented to accept less than half. This then is not a simple agreement for equality of partition; it is an agreement for partition with compensation for abandoning a supposed right and a claim. Upon what that supposed right depended does not appear; but that there was a supposed right of James to some extent yielded to by Joseph is clear, and, if it be considered that the right, which to the parties themselves at that time was only supposed, had a real foundation, which might have been verified either by production of the document then in the possession of Joseph, or by searching the court rolls of the manor; that, if Joseph had not made the concession which he

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did, James, instead of consenting to the agreement, might have investigated the title, and proved that the whole estate was his own, it will appear that the concession, however trifling in itself, placed the parties in a situation very different from that in which they might otherwise have stood; and looking at this case with reference to those principles deducible from the several cases cited at the Bar, I am of opinion that the agreement, though parol, yet being in the nature of a family arrangement, and [*684] followed by the uninterrupted several enjoyment of the *portions allotted to the two brothers respectively, is an agreement which this Court will enforce.

Decree the defendant to do all acts for barring the entail, and for vesting those parts of the estate, which were allotted to James, in the plaintiff Daniel on the trusts of the will, and subject to the mortgage to Marsh.

No costs of so much of this suit as seeks to charge the defendant Joseph with a knowledge of the copy of court roll before May, 1832; the plaintiff to pay the costs of Marsh; the costs of the plaintiff, other than those mentioned, to be paid by the defendant Joseph.

This decision was appealed from, and affirmed by the LORD CHANCELLOR on the 11th of July. [No further report of this appeal has been found.]

1836.
Nov. 9.

Rolls Court.
Lord LANGDALE, M.R.
[685]

GILES *v.* GILES.

(1 Keen, 685—693; S. C. nom. *Penfold* v. *Giles*, 6 L. J. (N. S.) Ch. 4.)

A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights.

THOMAS GILES, by his will dated the 26th of November, 1830, gave all his real and personal estate to his brother Jeremiah Giles and John Buckton upon trust to sell his real estate, and

out of the produce of such sale to pay off any mortgages which might be due at the time of his death, and to invest the residue of such produce and of his personal estate, after payment of his debts and legacies, in trust for his wife Ann Giles, for and during the term of her natural life, as a *feme sole*, and not liable to the debts, assignment, or control of any husband or husbands; and whose receipt alone, notwithstanding any coverture, should be a legal and good discharge to his trustees, to the intent that the yearly interest, dividends, and profits, might be a provision for the personal maintenance and support of his said wife Ann during her natural life; and that the same or any part thereof should not be subject to any claim whatever, or to any sale, alienation, charge, or incumbrance: and after her decease, in trust for his *brother Jeremiah Giles during the term of his life: [*686] and after his decease, for the only proper use and benefit of the three children of his said brother. And the testator appointed Jeremiah Giles and John Buckton executors of his will.

The testator died on the 5th of April, 1831, leaving the plaintiff, described in his will as his wife Ann Giles, surviving him; and his will was proved by the executors named therein.

In the year 1834, the plaintiff, describing herself as Ann Giles, widow, filed her bill against the executors and trustees, and against the children of Jeremiah Giles, praying that the testator's will might be established, and the trusts thereof performed. * * The defendants, by their answer, said they were informed and believed, that in the year 1817, when the ceremony of marriage was performed between the plaintiff and the testator, John Penfold her husband was living; and that he still was, at the date of their answer, living.

The defendants went into evidence, by which it appeared that [687] a deed of separation, dated the 2nd of March, 1815, was prepared between John Penfold of the first part, Ann Penfold his wife of the second part, and the testator Thomas Giles and another trustee of the third part; that the testator was cognisant of such deed, though he did not execute it, and that John Penfold was still living. Under these circumstances, when the cause came on to be heard on the 15th of December, 1833, it was directed to stand over for the purpose of making Penfold a party; and a

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supplemental bill was filed by the plaintiff, described therein as Ann Penfold *alias* Giles, by her next friend, against John Penfold.

* * * * *

[688] The facts, established by the evidence, were that both the testator and the plaintiff knew that John Penfold was living in 1815; that they performed the ceremony of marriage in 1817; that the testator and the plaintiff lived together, and were considered as husband and wife, and that the testator believed her to be his lawful wife at the time of his death; and that the defendant Buckton, who was the testator's solicitor, knew that Penfold was living when he drew the testator's will.

[689] *Mr. Pemberton* and *Mr. James Parker*, for the plaintiff:

There is no pretence for the resistance which has been made to the payment of the plaintiff's legacy, unless it could be shewn that fraud had been practised upon the testator; and fraud is neither alleged nor proved. The mere fact of a false description is perfectly immaterial, unless fraud can be connected with it: [*Schloss* v. *Stiebel* (1). The single exception of fraud proves the [690] rule: *Kennell* v. *Abbott* (2)]. In this case the testator had exactly the same opportunity of ascertaining that Penfold was alive as the plaintiff; and the knowledge or suspicion, if any, that he was living must have been common to both of them. Fraud, therefore, is out of the question; and the plaintiff is clearly entitled to the benefit of the bequest.

Mr. Skirrow, *Mr. Kindersley*, *Mr. Richards*, and *Mr. Chandless*, *contrà*. * * *

[691] *Mr. Pemberton*, in reply. * * *

THE MASTER OF THE ROLLS:

In this case the testator, by his will, gives a legacy to his wife Ann Giles; and the plaintiff, describing herself as Ann Giles, widow, files a bill against the executors and trustees of the testator to recover payment of that legacy. The defence is, that the plaintiff does not answer the description which the testator [*692] has, in his *will, applied to her, for that she is not, in fact, the

(1) 38 R. R. 67 (6 Sim. 1). (2) 4 R. R. 351 (4 Ves. 802).

widow of the testator; and it appears, by the evidence, that the plaintiff does not, in point of fact, answer that description, and that, at the time when the ceremony of marriage was performed between the testator and the plaintiff, she was the wife of another person. The plaintiff alleged, by her bill, that Penfold, her first husband, was dead at the time when that ceremony of marriage took place between her and the testator, but it was proved that Penfold was at that time and still is living; and a supplemental bill was filed, with leave of the Court, for the purpose of bringing Penfold before the Court as a party.

It is clear that, in point of law, a mere misdescription of a legatee will not defeat the legacy; and it is equally clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect. That was the principle upon which the case of *Kennell* v. *Abbott* was decided, and the soundness of that decision has never been questioned. In this case it is said that, though no fraud upon the testator is proved, fraud must be inferred, because, in point of fact, an offence was committed by the plaintiff, who, knowing that her first husband was living in 1815, married the testator in 1817; and it is argued that the testator could not know, and the plaintiff must be assumed to know, that her first husband was living. The reason assigned why the testator could not know it is, that he had some religious scruples as to his conduct before the marriage, and that those religious scruples must have been removed before he consented to marry; and the ground upon which the Court is to infer that the plaintiff did know that fact is, that there is evidence of Penfold being known to be alive in the year 1830. This is an inference which I cannot follow: [*693] I cannot assume, from the facts of the case, that the plaintiff had a guilty knowledge which the testator had not in common with the plaintiff. If I could assume that, the case would be very like that of *Kennell* v. *Abbott*; but in the present case the testator, as well as Mrs. Penfold, had both an actual knowledge of the existence of John Penfold in the year 1815; and it was not more the duty of Mrs. Penfold than it was the duty of Thomas Giles, *the* testator, to ascertain that John Penfold was dead before they

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ventured to proceed to the ceremony of a marriage between themselves. There is no more reason why I should impute to the plaintiff a fraud upon the testator than to the testator a fraud upon the plaintiff; which of them was guilty, if either of them, must depend upon circumstances which are not before the Court. If both had a guilty knowledge, no fraud was committed upon the testator; and however immoral the conduct of the parties, it is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights. It is said that, the plaintiff having described herself as the widow of the testator, and having alleged, upon her bill, that Penfold was dead in the year 1817, when she performed the ceremony of marriage with the testator, whereas it is proved, by the evidence, that that allegation is contrary to the fact, her bill ought to be dismissed out of this Court; but I cannot say that that allegation is of such a nature that it ought to deprive her of the right to the legacy which she has under the will of the testator, and of her right to claim the benefit of the bequest in this suit. As the defendants admit assets, therefore, the usual accounts must be taken of the testator's personal estate. The consideration of costs will be very material in this case, where the conduct of parties is open to so much censure; but, for the present, costs must be reserved.

1837.
July 14, 17.

Rolls Court.
Lord LANGDALE, M.R.
[694]

SMITH *v.* PHILLIPS (1).

(1 Keen, 694—700; S. C. 6 L. J. (N. S.) Ch. 253.)

A. made an equitable mortgage of certain premises to B., and he afterwards entered into an agreement to grant a lease of the premises to C., who had notice of the prior charge. A. became bankrupt before the lease was executed, and on the petition of B. an order in bankruptcy was made, under which the premises were sold, and B. became the purchaser, and retained the amount of his equitable mortgage out of the purchase-money.

Held, on a bill filed by C. for specific performance of the agreement, that B. having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement.

IN the year 1831 William Holman, being possessed of a certain messuage in the county of Hertford, which he held for the residue

(1) *John Brothers Abergarw Brewery Co.* v. *Holmes* [1900] 1 Ch. 188, 69 L. J. Ch. 149; and see *O'Loughlin* v. *Fitzgerald* (1873) Ir. Rep. 7 Eq. 483.

of a term of ninety-nine years, made an equitable mortgage of the same to the defendant John Phillips to secure the repayment of a loan of 400*l.* and interest.

In April, 1833, Holman entered into an agreement to let the above-mentioned messuage to the plaintiff Smith; and the following memorandum was signed by both parties:

"Memorandum of an agreement made and entered into this 6th day of April, 1833, between William Holman, victualler, and William Smith, painter. Whereas it hath been agreed between the parties hereto, that W. Holman, being the landlord of the public house called the 'Half-way House' between Ware and Hertford, shall let to William Smith the said house and premises, at the sum of 35*l.* per annum, payable half-yearly, it is hereby agreed that William Holman shall grant to William Smith a lease of the said premises for the term of seven, fourteen, or twenty-one years, determinable by a notice to be given by the said William Smith in writing at the least six months prior to the end of either of the said terms, he, the said tenant William Smith, hereby agreeing to pay all taxes and parochial assessments (except the land tax), the said rent to be paid half-yearly from the day of the 25th of March last; *and that William Holman, his executors or administrators, shall take of the said William Smith, his executors or administrators, the fixtures of the said house and premises at the expiration or other determination of the said term, at a fair valuation, if required by the said William Smith. And it is also agreed that William Smith shall pay to William Holman the sum of 60*l.* over and above the valuation of the furniture, stock in trade, and effects in and upon the said premises at the time of him, the said William Smith, taking possession thereof. The said William Holman to pay all rates, taxes, and impositions up to the time of his giving possession under this agreement."

[*695]

Previously to the date of this agreement, Holman had notice of the equitable mortgage of the defendant Phillips. In pursuance of the agreement, the stock and effects were valued at the sum of 216*l.*, which sum, together with the consideration money for the lease, was paid by the plaintiff, and the plaintiff was thereupon let into possession.

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On the 15th June, 1833, and before a lease was executed, Holman became a bankrupt. On the 28th of November following, the defendant presented a petition in the Court of Review, stating his equitable mortgage, and praying that the premises might be sold, and that he might be paid out of the produce of the sale so much as was due to him upon his security. By an order of the Court of Review, the premises were directed to be sold, and were sold accordingly by public auction on the 22nd of February, 1834. The defendant had liberty to bid at the sale, and became the purchaser at the sum of 600*l.*, out of which he retained the amount due to him in respect of his equitable mortgage. The agreement for the lease was produced at the sale by an [*696] agent *of the plaintiff, and read in the auction room; and the solicitor for the defendant also read an opinion of counsel to the effect that the equitable mortgagee was not bound by the agreement, and that the plaintiff could not enforce the same against him.

By an indenture of assignment, dated the 6th of May, 1834, between the assignees of Holman of the first part, Holman of the second part, and the defendant of the third part, it was witnessed that, for the considerations therein mentioned, the assignees and Holman assigned to the defendant, his executors, &c. the premises in question, subject to the rents and covenants in the original lease, and also subject to the claim of the plaintiff to a lease under the memorandum of agreement of the 6th of April, 1833; but it was thereby declared that "nothing in such exception contained was meant to admit the validity of such claim, and which claim the defendant, at the time he purchased the said premises, was advised and believed to be void."

Shortly after the purchase, the defendant gave notice to the plaintiff to quit the premises; and, on the refusal of the plaintiff to quit at the expiration of such notice, the defendant brought an action of ejectment to recover possession of the premises.

The bill prayed a specific performance of the agreement of the 6th of April, 1833, and that the defendant might be decreed to grant a lease in pursuance thereof.

Mr. Pemberton and *Mr. Bethell*, for the plaintiff:

The plaintiff is clearly entitled to the specific performance of this agreement. The defendant purchased *from the assignees [*697] the leasehold interest, which was subject to his own equitable charge and to that of the plaintiff. His own charge was paid out of the purchase-money; and he became the owner of the leasehold estate discharged from the mortgage, and subject to the equitable charge of the plaintiff. This is the common case of a first incumbrancer, who, with notice of a second incumbrance, purchases the estate, and by so doing extinguishes his own charge, and lets in the second incumbrancer. He might have kept his equitable mortgage on foot by making an assignment of it to a third person before he became the purchaser; but, as he has not done so, there remains no incumbrance upon the estate, except that which arises out of Holman's agreement to grant a lease to the plaintiff, and that agreement the defendant is bound to perform. The very indenture of assignment, under which the defendant claims, shews that he bought the estate subject to the agreement for the lease.

Mr. Temple and *Mr. Sharpe*, *contrà*:

The defendant had an equitable mortgage, and the plaintiff an equitable lease; the equities, therefore, being equal, priority in point of time will prevail, and the plaintiff cannot set up a subsequent charge to defeat the prior charge of the defendant. All that the plaintiff can by possibility pretend to claim is the value of the lease contracted for, after satisfaction of the prior charge of the defendant. * * If the estate had been purchased [698] by a stranger, the plaintiff could only have claimed the benefit of his agreement after satisfaction of the defendant's mortgage; and how can the equities between the plaintiff and defendant be varied by the circumstance of the defendant having become the purchaser? Even if the defendant has, by the operation of a technical rule, lost the advantage of his priority in consequence of his having omitted to make an assignment of his security, this is not a case in which the Court is called upon to determine the priorities of the incumbrancers, but in which the plaintiff seeks for specific performance, which it is in the discretion of

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the Court to refuse, where a party is endeavouring to take an advantage of a technical rule against the justice of the case.

[699]

Mr. Pemberton, in reply:

Whatever disadvantage may have accrued to the defendant from his purchase, he bought with his eyes open; and having united the characters of mortgagee and owner, and thereby discharged the estate of his own incumbrance, he is no longer in a situation to claim priority to the second incumbrancer (1).

July 17.

THE MASTER OF THE ROLLS:

In this case Holman made an equitable mortgage of the premises to the defendant, and he afterwards entered into an agreement to grant a lease of the same premises to the plaintiff. Holman became a bankrupt; the property was sold under an order of the Court of Review, made on the petition of the defendant, the equitable mortgagee. The defendant himself became the purchaser, and received or retained out of the purchase-money the sum secured by his equitable mortgage. The premises were sold subject to the plaintiff's claim under the agreement, and the assignment expressly recites that they were so sold. The plaintiff has a clear right to have the lease which he contracted for, and that right is to be worked out against the equity of redemption. No doubt, the interest of the bankrupt might have been so sold as to keep the equitable mortgage of the defendant distinct from the equity of redemption; but the defendant, by becoming the purchaser, has united

[*700]

those interests; *and the question is, whether the equitable mortgage and the equity of redemption having been united, those interests can now be separated. I am of opinion that they cannot be separated; and that the plaintiff is entitled to have his equitable charge satisfied out of the united interests which now constitute the equity of redemption.

(1) For the grounds upon which the Court has determined the equities between a second incumbrancer and a prior incumbrancer who, with notice of the subsequent incumbrance, has purchased the equity of redemption, see the cases of *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Toulmin* v. *Steere*, 17 R. R. 67 (3 Mer. 210); and *Parry* v. *Wright*, 24 R. R. 191 (1 Sim. & St. 368, and 5 Russ. 142).

THE ATTORNEY-GENERAL *v.* THE CORPORATION OF NORWICH.

1836.
Dec. 18, 19.
1837.
Jan. 13.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
1837.
May 6, 27, 31.

Lord COTTENHAM, L.C.

(1 Keen, 700—714; S. C. 1 Jur. 398; affirmed on appeal, 2 My. & Cr. 406—431.)

Demurrer to an information against the corporation of Norwich, praying for an injunction to restrain certain applications of the city fund of the borough and city of Norwich, which, as the information alleged, were intended to be made in violation of the Municipal Corporations Act, 5 & 6 Will. IV. c. 76, allowed under the circumstances.

In the ordinary management of the borough fund a court of equity ought not to interfere; but in a case of misapplication calling for a specific remedy, *semble*, that the jurisdiction of the Court is not excluded by the Municipal Corporations Act, but the case stated must allege circumstances which if proved will necessarily constitute a breach of trust.

A municipal corporation may be justified in discharging, out of the corporate funds, the expenses of opposing *quo warranto* informations against individual members of the corporation, if the object of such informations be to impeach the title, or destroy the legal existence of the corporation, as a body.

[700]

THIS information was filed by the *Attorney-General*, at the relation of Samuel Bignold, against the Mayor, aldermen, and burgesses of the city of Norwich, and against Thomas Osborne Springfield, Thomas Brightwell, Peter Finch, Henry Willett, and Thomas Edwards; and, in substance, it prayed the Court to declare, that certain applications intended to be made of the city fund of the borough and city of Norwich were contrary to and in direct violation of the provisions of the Act for regulating municipal corporations (1), and a breach of the trusts and duties of the Mayor, aldermen, and burgesses, and ought to be restrained by the order and injunction of the Court; and that an injunction might be accordingly granted; and that in case any sums have been wrongfully paid, as alleged, the same might be repaid and refunded by such *persons, and in such manner as there might be occasion; and that the defendants Springfield, Brightwell, Finch, and Willett might be decreed personally to pay the costs of the relator, incidental to the suit, and for general relief.

[*701]

By the seventy-first section of the Act, it is provided that estates vested in corporations in their corporate character in

(1) 5 & 6 Will. IV. c. 76. (Rep. 45 & 46 Vict. c. 50, s. 5.)

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trust for charitable purposes should cease on the 1st day of August, 1836; and that if, before that time, no other direction should be made by Parliament, the LORD CHANCELLOR should make such orders as he should think fit for the administration of such trust estates, subject to the charitable uses.

No other direction having been made by Parliament, the LORD CHANCELLOR proceeded to exercise the power vested in him by appointing trustees for the administration of the charity estates, vested in corporations, upon applications made to him by petition; and, some time before the 19th of August, 1836, Mr. Springfield, then acting as Mayor, and certain members of the council of Norwich, presented or prepared to present a petition to the Lord Chancellor on the subject; and, on the 19th of August, certain proceedings of the council of Norwich took place, and were entered in the books of the Corporation as follows: "Mr. Councillor Finch moved, and Mr. Councillor Beare seconded the following resolutions, which, being put to the vote, were carried by a majority of twenty-one, there being ayes thirty-two, noes eleven: viz. Resolved, that this council do adopt the petition already presented, or in course of presentation, to the Lord Chancellor, by the Mayor of this city and other members of the council, praying for the appointment of trustees to the several charities in this city lately under the management
[*702] of the former corporation; and that *the town clerk be instructed to procure an order of the Lord Chancellor in conformity with the prayer of such petition; and that the town clerk be empowered to attach the city seal to the same, or a copy thereof. Resolved, that the Mayor, and Peter Finch, and Henry Willett, Esquires, together with the town clerk, be a deputation to proceed to London for the purpose of furthering the objects of the petition, with power to employ attorneys and counsel as they may think necessary, and that the town clerk be authorised to take such corporate books and documents as he may think proper, together with such other evidence or testimony as he may deem necessary; and that he be also authorised to take the opinion of one or more counsel on any points touching the said charities, or the estates belonging to the same, as he may think proper or be advised."

On the 23rd day of September following, other proceedings of the council took place, and were entered in the book as follows: "It was moved by Mr. Alderman Young, and seconded by Mr. Councillor Spratt, that the following resolution be agreed to by the council: viz. Resolved, that the authority and power given to the deputation, appointed by a resolution of a council at a former meeting held on the 19th day of August last, for promoting and furthering the objects of the petition preferred to the Lord Chancellor by Thomas Osborne Springfield and others in the matter of the charities, be continued to the gentlemen forming such deputation; and that the town clerk be ordered to take all requisite proceedings for carrying the resolutions and orders of the council, touching the appointment of trustees of the charities into effect. Whereupon Mr. Councillor Bignold moved, seconded by Mr. Councillor James Steward, as an amendment, that the said resolution be not adopted by the council. The chairman put the *amendment to a shew of [*703] hands, which was negatived by a large majority, and the original resolution was adopted and agreed to."

The information charged that, in pursuance of the resolutions, the persons named as a deputation, came to London for the alleged purpose of attending to the petition, and that great costs had been incurred for their travelling and other expenses, and for their entertainment. That such costs had not been, and were not intended to be paid by the individuals who incurred them; but were paid by Mr. Staff, the town clerk, or left unpaid, upon an arrangement or understanding that the same should be defrayed out of the city or borough fund, or other property of the corporation.

The information further stated, that on the 4th of November, 1836, two rules were made by the Court of King's Bench, by one of which rules the 14th day of the same month was given to Mr. Springfield to shew cause, why an information in the nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to be mayor of Norwich, and by the other of which rules the same day was given to Mr. Brightwell to shew cause, why the like information should not be exhibited against him, to shew by what authority he

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claimed to be an alderman of Norwich. And that on the 11th of November between the date of the rules and the time given for shewing cause, a meeting of the council of Norwich was held, and an order was made as follows: viz. "Ordered that the town clerk be, and he is hereby directed and authorised to adopt the necessary measures for shewing cause against the rule *nisi* of the Court of King's Bench, obtained by Samuel Bignold and Henry Rogers for an information *quo warranto* against Thomas Brightwell, a member of *this council, and that the city treasurer be authorised and directed to pay from time to time out of the city funds to the town clerk such sums of money as the city committee shall think proper and requisite for defraying the law expenses and disbursements of, and attending such shewing cause, or otherwise in relation to the said rule, such orders to be signed by three members of the said committee. And further ordered that the town clerk be, and he is hereby directed and authorised to adopt the necessary measures for shewing cause against the rule *nisi* of the Court of King's Bench, obtained by Samuel Bignold and Henry Rogers for an information *quo warranto* against Thomas Osborn Springfield, Esq., a member of this council; and that the city treasurer be authorised and directed to pay from time to time out of the city funds to the town clerk such sums of money as the city committee shall think proper and requisite, for defraying the law expenses and disbursements of and attending such shewing cause, or otherwise in relation to the said rule, such orders to be signed by three members of the said committee."

[*704]

The information alleged that the defendants Springfield, Brightwell, Finch, and Willett were present when this order was passed, and supported the making of it; that afterwards, on the 24th of November, the rule against Brightwell was made absolute, and the rule against Springfield was enlarged. That expenses had been incurred upon the authority and foundation of the orders, and that the Mayor, aldermen, and burgesses, and the individual defendants, wrongfully intended to sign the requisite order of the corporation to pay Mr. Staff the town clerk, who acted as attorney for Springfield and

Brightwell, the costs and disbursements occasioned by the proceedings in the Court of King's Bench.

The information charged that the intended application of the city funds was altogether wrongful, contrary to the statute, and in breach and violation of the duties and obligations of the mayor, aldermen, and burgesses, as trustees of the funds and property of the corporation for the benefit of the burgesses or citizens and inhabitants.

[705]

To this information, two general demurrers, for want of equity, were put in; one by the corporation and Mr. Edwards, the treasurer; the other by Springfield, Brightwell, Finch, and Willett. * * *

Mr. Pemberton, *Mr. Kindersley*, and *Mr. Booth*, in support of the demurrer.

Sir Charles Wetherell, *Mr. Tinney*, and *Mr. Anderdon*, *contrà*.

1837. *Jan.* 13.

THE MASTER OF THE ROLLS:

The prayer of this information is supported by a general allegation, that the intended application of the city fund is altogether wrongful, directly contrary to the clear and express words of the statute, and in breach and violation of the duties and obligations of the Mayor, aldermen, and burgesses, as trustees of the funds and property of the corporation for the benefit of the burgesses or citizens and inhabitants of the city. But there is no allegation that the corporation has no interest either in the appointment of trustees of the charities, or *in the proceedings arising out of the rules of the Court [*706]
of King's Bench, no allegation that the borough fund is insufficient to pay all the expenses which, by the ninety-second section of the Act, are specifically directed to be paid, or that all those expenses have not been paid, or that there is no surplus after these payments. In the argument for the demurrer, it is, in the first place, admitted, that the council, as the governing body of the borough, has not a right to do what it will with the borough fund, or the corporate property; and that, in one sense, the Mayor, aldermen, and burgesses,

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represented by the council, may be considered to be trustees; but it is contended that, if considered as trustees, they are trustees for themselves alone, and subject only to the checks and control given by the statute. That the trust was created, not with a view of giving courts of equity a jurisdiction to interfere in every case in which any burgess or inhabitant differed from the decision of the council on the propriety of any item of expense, but for the purpose of affording a rule, as between the representative governing body, and the burgesses at large, and that the observance of that rule is secured, in the only way the Legislature intended, by the power given to the burgesses to elect the councillors and auditors, and to examine the accounts. It is further argued, that, in this case, there is nothing in the proposed application of the borough fund which can reasonably be called wrongful; that the corporation has a substantial interest in the due administration of the charity estates, and in defending elections properly made. It is further argued, that a jurisdiction such as is now proposed to be exercised ought not to be entertained at all; that there is no case in which the Court, having no fund or estate on which it can operate, has been called upon prospectively to restrain trustees from incurring expenses conceived by them to be within the scope of their trust;

[*707] *that, if there were a trust estate to be administered, and an account to be taken, an improper item might be disallowed, but that here, there is no trust estate or fund which can be administered in this Court; and yet the Court is asked to interfere prospectively, because it is apprehended a misapplication may be made; and it is urged that, if this jurisdiction be sustained there is no single expense of a corporation which may not be prospectively submitted to the jurisdiction of a court of equity; that the litigation and the mischief would be enormous, and the Act could not be worked.

* * * * *

[711] [Here his Lordship went into a detail of the provisions made by the statute for the constitution of the governing body, and the due management of the revenues of the corporation; and after observing that many particular cases might be conceived in which great injustice and injury might be done, if no sufficient

remedy for specific and individual misapplications were afforded, he said:]

I am of opinion, however, that the present case does not impose upon me the duty of deciding upon any general question as to the jurisdiction of this Court in cases of alleged misapplication of the borough fund; as it appears to me that, even if such jurisdiction exists, a case is not, upon this information, made out for applying it. For any allegation of fact which is contained in this information, the applications which are now proposed to be made of the borough fund, and which the information seeks to restrain, may be proper. A mere general charge that the proposed applications are wrongful will not supply the want of facts from which it is fairly and legally to be deduced that wrong is about to be done. The information stating intended acts which may or may not be wrongful (and upon that I give no opinion) cannot be sustained, upon a mere allegation that they are wrongful, in the absence of the facts and circumstances by which alone it can be determined whether they are wrongful or not. Whatever may be the jurisdiction, I think that a court of equity ought not to apply it in the consideration of particular *items of expense which may or may not, for any thing which appears upon the record, be proper for the corporation to pay, but which happen to excite the displeasure of some individual who thinks it worth his while to promote an information. *Demurrer allowed.*

[713]

[*714]

This decision was appealed from, and affirmed by the LORD CHANCELLOR [as reported in 2 My. & Cr. 406. With reference more particularly to the *quo warranto* expenses, his Lordship said:]

Throughout the whole of this information then there is the most general statement of the proceedings against these two individuals, Springfield and Brightwell. There *is no statement of the ground on which their title is impeached; no allegation that the case only affects themselves individually: but, from the nature and terms of the information, the mode in which the title of the corporation is stated (of course looking only to the language used in the information,) almost amounts to a statement that the relator at least questioned the legal existence of the

[2 My. & Cr 420]

[*421]

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corporation itself. It is not stated in this information that that was the object of the *quo warranto*; but it is quite sufficient in the view I take of the case, that there is no allegation that it was not a proceeding for the purpose of attacking the legal existence of the corporation.

On the other part of the case, with respect to the charity petition, there is an allegation that certain proceedings under a charity petition were adopted by the corporation, and that those proceedings have been attended with considerable expenses; and that the council intend to pay such expenses out of the corporation fund.

With regard to the fund out of which the expenses are alleged to be about to be paid, the language is as large and as general as it is possible for language to be. The allegation is, that such intended application of the funds or property of, or vested in the corporation, to such before mentioned ends, purposes, and objects respectively, or any of them, "is altogether wrongful, and directly contrary to the clear and express provisions of the said Act of Parliament, and in breach and violation of the duties or obligations of the said mayor, aldermen, burgesses or citizens, as trustees of the funds and property of the said corporation for the benefit of the burgesses or citizens, and inhabitants at large of the said city." There is no allegation of any intention to pay [*422] the *expenses in question out of any particular fund; no allegation that such payment will interfere with any of those claimants who are directed to be paid out of the fund in the first instance: the statement is merely of an intention to pay out of some fund or other belonging to the corporation.

Now there are two parts of the case material to be considered, which are, the generality of the allegations with regard to the object of the *quo warranto* informations, and the generality of the allegations with regard to the nature and circumstances of the fund out of which the expenses are proposed to be paid. I quite agree with the MASTER OF THE ROLLS, that if a statement is made by a plaintiff, which is in itself so ambiguous that in one sense it would not, and in another it would, amount to a charge of breach of trust, you are not at liberty, upon a demurrer, to adopt the unfavourable interpretation, and to extend the meaning

of the allegation beyond that which the plaintiff has himself stated on the record; and that by the rules of pleading, in putting a meaning on doubtful expressions, the presumption is rather against the party pleading, than the party who objects to the language of the pleading. If, for instance, the allegation in a bill is, that two funds are in the possession of the defendant, a trustee, one of which might, and the other could not, be legitimately applied in a particular mode; and that the defendant, having those two funds, intends to make a payment, which, if paid out of the one fund, would be a breach of trust, but which would not be a breach of trust if paid out of the other, it is never presumed, on a general allegation of that description, that the payment is intended to be made out of that fund which could only be dealt with by a breach of *trust. On the contrary, [*423] the presumption is, that what is intended to be done, is intended to be rightfully and properly done, provided there are circumstances enabling the party to do that properly, which it is alleged he intended to carry into effect.

In considering this information, therefore, unless I can come to the conclusion that under no possible circumstances it would be proper for the trustees to pay the expenses of the charity petition out of the corporate funds, or to make payments out of those funds for any expenses incident to the opposition to *quo warranto* informations contesting the corporate character of members of the corporation, nothing stated in this information calls for any judgment from me on the questions which have been discussed upon the construction of the Act of Parliament. So strongly was it felt, indeed, that there might be cases in which the corporation would be justified in making these payments, that *Sir William Follett*, in his reply, was driven to use this argument, that if any particular circumstances did exist, it was for the defendants, in their own justification, to state and explain them in their answer; and that it was sufficient for the relator to make a *primâ facie* case. That is contrary, however, to the known and established rules of pleading. It is for the plaintiff to allege the grievance of which he complains; and if he does not on his record sufficiently allege it, the defendant is not called upon to answer at all. If the case, as stated on the record, brings before the Court allegations on which two

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constructions may be fairly put, one consistent with the innocence of the defendant, and the other implying a breach of trust on his part, it is contrary to all the rules of pleading to presume that that is wrong which the plaintiff has not thought proper to allege as wrong, by not *setting forth those circumstances which are necessary to make it so.

[*424]

[The LORD CHANCELLOR then referred to the ninety-second section of the Act of 5 & 6 Will. IV., and cited *R.* v. *Inhabitants of Essex* (1) and *R.* v. *Tower Hamlets Commissioners* (2).]

* * * * *

[426] Now, addressing myself to the proceedings on the *quo warranto* informations, to which certainly by far the strongest part of the relator's argument is directed, I will suppose a case which, though not alleged on the face of the information, is perfectly consistent with every thing that is there alleged; I will suppose that, on some ground or other, (the information does not state what) the title of Messrs. Springfield and Brightwell is impeached, and that the *same question which is raised to affect the title of those two individuals would affect the legal existence of the corporation itself. It was said, indeed, that a mode of proceeeding might be adopted which would at once challenge the title of the whole corporation. That may be so; but it is quite clear that another course of proceeding may be adopted for the same purpose, and that the question, though raised as to the right of an individual, may have for its object to impeach the title of every member of the corporation, or of so many of them as would destroy the legal existence of the corporation. There is no allegation that it is not so here. The information carefully abstains from giving the grounds on which the proceeding was instituted. When, however, I find the proceeding so stated as applicable to particular individuals, and coupled with the statement as to the whole corporation, that the mayor, aldermen, and burgesses, or the persons claiming to be rightfully mayor, aldermen, and burgesses, have, in point of fact, assumed the powers and jurisdiction of the corporation, that comes very near to a statement that the character of the whole corporation is challenged. It is said there is no allegation of that kind. I am not inquiring whether on the face of the information it is so

[*427]

(1) 2 R. R. 470 (4 T. R. 591). (2) 35 R. R. 277 (1 B. & Ad. 232).

alleged or not; but whether the detail of the circumstances which may very possibly exist be inconsistent with that which appears on the record. Instead of being inconsistent with it, I find it much more consistent with it than the case which the relator's argument assumes, namely that the information intended to state that the object of the *quo warranto* informations is to attack the title of these two individual corporators only.

Suppose the case of an objection set up in the Court of King's Bench, the effect of which would be, if prosecuted *with success, [*428] to destroy the corporation. In the argument it was said that if there were no legal corporation, there could not be a more legitimate question to raise. That is perfectly true; but there is another supposition, which is, that the corporation was perfectly legally constituted, and that there was no real foundation, therefore, for the application for the *quo warranto* informations on which the title of the corporators is sought to be attacked. Is it to be said that under the ninety-second section, if an attempt is made to destroy the legal existence of the corporation, and the corporation have surplus funds, applicable, under the direction of the council, for the benefit of the inhabitants (who must, of course, be considered interested in the corporation of the town of which they are inhabitants), it is an improper application of the surplus funds to defend proceedings on *quo warranto* informations, having for their object to destroy that corporation of which the individuals attacked are members, and which is the trustee of the very fund stated by the information to be held for the benefit of the public? If, under these circumstances, it would not be illegal in the corporation to defend the body of which they are members, against unfounded proceedings by information in the nature of a *quo warranto*, such a state of things is quite consistent with what is alleged on the face of the information, and nothing is stated upon this record which would amount to a breach of trust.

Such being my view of the allegations with respect to the *quo warranto* informations, it is hardly necessary for me to say a word with regard to the charity petition, which appears to me to have been presented for a most legitimate purpose, and prosecuted in a most proper mode.

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[His Lordship having dealt with the point, said:]

I am of opinion, therefore, that the MASTER OF THE ROLLS was fully justified in the view which he took, and in the ground upon which alone he decided, namely, that there is not on this information what amounts to a sufficient allegation of a breach of trust.

I leave the question upon the merits totally untouched. I am very glad that the case is in a position which enables me satisfactorily to myself to dispose of this appeal, without touching on any of the points of law which have been argued at the Bar. The time may come when those important points may legitimately be discussed, and when it may be necessary to decide them. For the present purpose, I found my judgment, as the MASTER OF THE ROLLS did his, on the absence of any allegation in this information, which raises any such case for argument.

It is supposed that the MASTER OF THE ROLLS threw out some observations as to the jurisdiction of the Court over these funds. I abstain from entering into that subject at all. If I were of opinion that under no circumstances the Court had jurisdiction, I should of course allow the demurrer without adverting to the particular circumstances of the case; but I find particular circumstances which are quite sufficient to support the judgment of the MASTER OF THE ROLLS, and upon these the judgment which I have now given is founded.

1836. *Dec.* 21, 22, 24.

Rolls Court. Lord LANGDALE, M.R. [714]

LEE *v.* PARK (1).

(1 Keen, 714—724; S. C. 6 L. J. (N. S.) Ch. 93.)

Motion to restrain a creditor, after a decree, from issuing execution on a judgment obtained before the decree *de bonis testatoris, et, si non, de bonis propriis* as to costs, refused under the circumstances.

Principles upon which the Court acts in restraining proceedings at law, after a decree, with reference to the priority of the decree or judgment at law, and other circumstances.

THIS was a motion, on behalf of the defendants, Godfrey Park and James Iveson, executors of the will of Richard Bigham, deceased, for an injunction to restrain the Rev. William Gilby

(1) *In re Womersley* (1885) 29 Ch. D. 557, 54 L. J. Ch. 965, 53 L. T. 260.

and Henry John Shepherd, executors of the will of John Lockwood, deceased, from issuing execution upon a judgment, obtained by them at law on the 8th of August, 1835, upon a bond, dated the 6th of April, 1824, and given by Richard Bigham, the testator in the cause, to John Lockwood, and Robert Sandwith, deceased.

The bond was conditioned to secure the repayment of the sum of 1,800*l.* advanced by Lockwood and Sandwith, the trustees under a marriage settlement, to Richard Bigham, with interest at 4 per cent. Richard Bigham died shortly after the execution of the bond, without having paid the debt thereby secured, and having by his will, dated the 26th of January, 1825, appointed Godfrey Park and James Iveson his executors.

John Lockwood survived his co-trustee Sandwith, and died on the 9th of May, 1827, having made a will by which he appointed William Gilby and Henry John Shepherd his executors. [715]

The executors of Lockwood, being unable to obtain payment of the bond debt and interest, brought an action in the Court of Exchequer of Pleas, on the 19th of June, 1835, against Park and Iveson, the representatives of Richard Bigham, to recover the sum of 2,606*l.* 11*s.* 11*d.*, being the amount of the principal and interest due upon the bond at that time. The defendants at law at first pleaded *non est factum*, but, being advised that they had no defence to the action, they withdrew that plea, and suffered judgment to go by default. The costs were taxed by the Master at 20*l.* 9*s.*, and judgment was entered up, on the 5th of August, 1835, for the amount of the debt and costs to be levied *de bonis testatoris, et, si non, de bonis propriis* as to the costs. On the 5th of December, 1835, the plaintiffs at law issued a writ of *fieri facias de bonis testatoris* on the judgment indorsed by the sum of 2,627*l.* 0*s.* 11*d.*, but the writ remained unexecuted, there being no goods of the testator.

On the 10th of July, 1832, John Lee and Eleanor his wife, and Cicely Robinson, claiming as legatees under the will of Richard Bigham, filed their bill against Park and Iveson, the executors of that will, and other parties, praying for the usual amounts of the testator's personal estate, and for the application of the same in a due course of administration.

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By the answer of all the defendants to the bill, the defendants Park and Iveson stated their belief, that they had possessed themselves of the personal estate and effects of the testator [*716] sufficient to pay all his debts, *funeral and testamentary expenses, but not his legacies charged on his personal estate. They admitted that they had entered into possession of the testator's real estates, and receipt of the rents, and that the rental of the real estates was 350*l.* per annum. The defendant Iveson admitted that he was a solicitor, and that he had received all the rents of the real estate; but he denied that either of the executors had then or at any time any balances in their hands of the testator's personal estate, or of the rents of the real estate, except such small sums as might from time to time have remained in their hands until the application thereof, but the amount of which the defendants were unable to set forth.

By their further answer, the defendants Park and Iveson said that Park had received the greater part of the personal estate, and had made the greater part of the payments on account of debts and annuities, which had been made under the trusts of the will.

By a schedule to the further answer, it appeared that, the sum of 5,265*l.* 19*s.* 11*d.* had come to the hands of the testator's executors, and that a considerable portion of that sum had been applied to the payment of the testator's simple contract debts. It appeared further by this schedule, that the whole of the payments made by the executors amounted to 4,340*l.* 11*s.* 4*d.*, leaving an apparent balance in their hands of 925*l.* 8*s.* 7*d.*

The decree for the usual accounts was made on the 30th of January, 1836.

The motion for the injunction was supported by an affidavit stating the judgment, and the decree, and that the plaintiffs at law threatened to issue execution on the judgment.

[717] By an affidavit filed in opposition, it was stated that the plaintiffs at law had received no notice of the suit in equity, or of the decree therein, except from the affidavit of the executors.

Mr. Bethell, in support of the motion [cited *Lord* v. *Wormleighton* (1) and other cases].

(1) 23 R. R. 14 (Jac. 148).

Mr. Piggot, contrà:

* * The executors, by suffering judgment to go by default, admit assets, and if none are found, or if, as appears by the schedule to the answer, a *devastavit* has been committed, they are personally liable for the debt; and against that personal liability a court of equity will not protect them. * * *

[718]

Mr. Bethell, in reply.

[719]

THE MASTER OF THE ROLLS:

Dec. 24.

It has been argued that in cases of this nature the Court pays no regard to the question, whether the decree or judgment has priority in time, but considers only the quality of the judgment, and that, the judgment in this case being a judgment to recover *de bonis testatoris*, the executors are, as of course, entitled to restrain the judgment creditors from issuing execution. I do not accede to that argument. The jurisdiction in these cases was first established upon questions which arose between judgments at law, and decrees in equity, for payment of ascertained debts out of the assets. It was determined that such decrees and such judgments were, in the administration of legal assets, to be considered of equal value, and that the one which was prior in time (whether decree or judgment), should be first satisfied out of the assets. [His Honour here referred to a number of old cases which established this proposition and he observed (p. 722) that the case of *Drewey*, v. *Thacker* (1) was the only case, so far as he was aware, in which an executor had been protected against execution upon a judgment obtained prior to the decree; and referring to Lord ELDON'S observations upon that case, he pointed out that as Lord ELDON there made no order upon the motion before him, the order of the Vice-Chancellor was in effect left undisturbed; but under circumstances which prevent it from being regarded as an authority.

His Honour then continued as follows:]

In the subsequent case of *Clarke* v. *Lord Ormonde* (2), in which the point was not raised, Lord ELDON is reported to have said that, even if a creditor has got a judgment before a decree,

[724]

(1) 19 R. R. 274 (3 Swanst. 529). (2) 23 R. R. 8 (Jac. 108).

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though he may come in and prove as such, he must not take out execution, and in reference to the conduct of the parties, and perhaps to the nature of the claim there may be such cases; but such is not the ordinary rule; and in this particular case, having regard on the one hand to the nature of the suit in equity, the time when the bill was filed, the statements as to the assets in the answer, the time when the decree was obtained, and the absence of any explanation of the state of the assets at this time; and having regard, on the other hand, to the time when the action was brought, and the judgment obtained, the rights which the bond creditors have obtained of having satisfaction out of the assets of the testator, if the sheriff finds them, or if not, upon the sheriff's return, to bring an action which will entitle them to satisfaction out of the goods of the executor—considering also that, if there should be a deficiency of assets, the claimants thereon would, if they suffered, suffer because they used less diligence than the plaintiffs at law, but would not suffer at all, if the executors were held to have a right to stand against the assets only in the situation in which the creditors would have stood upon a just administration, I think that this motion ought to be refused with costs.

1837. *April* 6, 7.

Rolls Court. Lord LANGDALE, M.R.

[729]

RICHARD THOMAS *v.* SIR EDWARD CHOLMELEY DERING, BART., SIR WILLIAM RICHARD POWLETT GEARY, BART., AND CHOLMELEY DERING (1).

(1 Keen, 729—748; S. C. 6 L. J. (N. S.) Ch. 267; 1 Jur. 427.)

E. D. was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell at the request and by the direction of the tenant for life. There was issue of the marriage.

E. D., acting as absolute owner, entered into a contract by

(1) *Barnes* v. *Wood* (1869) L. R. 8 Eq. 424, 38 L. J. Ch. 683, and *Barker* v. *Cox* (1876) 4 Ch. D. 464, 46 L. J. Ch. 62, shew that the difficulty of ascertaining the just amount of abatement from the purchase-money is not now a sufficient reason for refusing to enforce the partial execution of the contract in cases like the present one. And see *Stewart* v. *Kennedy* (1890) 15 App. Cas. at p. 102.—O. A. S.

correspondence to sell the estate to T., and the trustees afterwards refused to concur in the sale:

Held, on a bill for specific performance, first, that there was a binding contract between the vendor and purchaser, and that the vendor was bound to perform it, if he was able; secondly, that the vendor ought not to be decreed to request or direct the trustees to execute a conveyance, unless the trustees ought to comply with the request; thirdly, that the trustees had a discretion, under the power of sale, which the Court had no power or jurisdiction to control; and lastly, that the purchaser was not entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate and his ultimate reversion.

Principles upon which the Court proceeds in determining whether the purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate contracted to be sold, and is, therefore, incapable of performing the whole contract.

IN the month of June, 1834, an advertisement appeared in the *Maidstone Journal*, stating that an estate, about three miles from Maidstone, consisting of a manor and 682 acres of land, with farm-houses, &c., and affording good pheasant and partridge shooting, was to be sold by private contract, and that further particulars might be obtained by applying to the solicitors therein named.

The plaintiff, having reason to believe that the estate belonged to Sir Edward Cholmeley Dering, authorised his agent, Wise, to treat for the purchase of the estate, and Wise accordingly addressed a letter to Sir Edward C. Dering, requesting to be informed whether the Thornham *Court estate was for sale; [*730] and if so, what was to be included in the purchase, and what price was desired for it.

[After some correspondence Wise made by letter an] offer, on [731] the part of the plaintiff, of 18,000*l.* for the estate, timber and all included; to which Sir E. C. Dering sent the following letter in reply:

"OXON HOATH, Sunday, 27th of July, 1834.

"SIR,—In answer to your letter of yesterday, you may inform your friend that, although I am aware the sum he has offered is below the value of the property, I have nevertheless made up my mind to accept his offer. I have this day written to my solicitor to say I have agreed to accept 18,000*l.* for the whole, and he will draw up an agreement immediately. I told him Mr. Thomas

THOMAS v. DERING.

would probably call on him early this week: I go up to-morrow, and shall return on Thursday. Although *I have sold this [*732] property for considerably less than I intended, I have to thank you for having mentioned it to Mr. Thomas."

In consequence of this letter a negotiation took place between the solicitor of the plaintiff and the solicitors of Sir E. C. Dering for the preparation of a formal contract. On the 31st of July Sir E. C. Dering wrote a letter to his uncle, the defendant Cholmeley Dering, to the following effect: "I have sold some outlying farms, in order to enable me to purchase nearer home. The price is 18,000*l.*; the net income 680*l.*, which, at twenty-five years' purchase, is 17,000*l.*, and leaves 1,000*l.* for the timber. Considering the present rate of interest for money, I think it fairly sold."

On the 4th of August the plaintiff applied to Sir E. C. Dering for permission to shoot over the land, which was immediately granted.

On the 5th of September, 1834, the solicitors of Sir E. C. Dering delivered to the solicitor of the plaintiff the draft of an agreement, commencing as follows: "Sir E. C. Dering, so far as he can under the settlement made upon his marriage, but not further, or otherwise, agrees to sell to Mr. Thomas all the manor," &c.; and containing various stipulations, to which, as well as to the clause referring to the settlement of which this draft was the first notice, the plaintiff's solicitor objected.

In consequence of these objections, the solicitors of Sir E. C. Dering declined delivering an abstract of title, and on the 3rd of November, the plaintiff's solicitor received from the solicitors of Sir E. C. Dering the following letter: "We beg to inform you [*733] that Mr. Cholmeley *Dering, one of the trustees of Sir E. C. Dering's settlement, being of opinion that the price proposed by Mr. Thomas for the estate at Thornham was not sufficient, made inquiries upon the subject, and has by such inquiries confirmed his opinion; and, in consequence, feels it his duty to decline giving his concurrence to the proposed sale. You must, therefore, consider the treaty at an end."

In the month of December following, the bill was filed against

Sir E. C. Dering, praying for the specific performance of the contract. To this bill the defendant Sir E. C. Dering put in a plea, setting forth indentures of lease and release, dated the 6th and 7th of April, 1832, made on his marriage, whereby the estates therein mentioned, comprising, among others, the Thornham estate, were vested in Cholmeley Dering and Sir William Geary, and their heirs, upon the trusts therein mentioned; namely, to the use of Sir E. C. Dering for life, without impeachment of waste, with remainder to the trustees, to preserve contingent remainders; remainder to trustees for a term to secure a jointure to Sir E. C. Dering's mother; remainder to the first and other sons of the marriage successively in tail male, with an ultimate limitation to Sir E. C. Dering in fee. And the settlement contained a proviso, that it should be lawful for Cholmeley Dering and Sir W. Geary, and the survivor of them, and the executors or administrators of such survivor, at any time or times thereafter, at the request, and by the direction o Sir E. C. Dering during his life, to dispose of and convey, either by way of absolute sale or exchange, all or any part of the manors, hereditaments and premises thereby limited in strict settlement, and the inheritance thereof in fee simple to any person or persons whomsoever, and for such price or prices in money, or for such equivalent or recompense in lands *as to the [*734] said Cholmeley Dering and Sir W. Geary, and the survivor, &c., should seem reasonable.

The plea having been overruled, the plaintiff amended his bill by making Cholmeley Dering and Sir W. Geary defendants. The amended bill charged, that the letters and correspondence before stated constituted a valid and binding contract as well upon Sir E. C. Dering as upon the plaintiff, and that it was entered into with the privity and consent of the trustees; and it prayed, that the defendants might be decreed specifically to perform the same; and that they, and all other necessary parties, might be ordered to join in conveying the purchased estate to the plaintiff and his heirs, and to deliver up possession of the same to the plaintiff and his heirs, the plaintiff being ready on his part specifically to perform the contract.

The defendant, Sir E. C. Dering, by his answer, said, that at

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the time he carried on the correspondence with Wise, he supposed he was only negotiating for the sale of the estate, and never intended that such correspondence should be a binding contract on himself or the plaintiff. The defendant set out the indentures of settlement made on his marriage, and stated that there was issue of the marriage one son, Edward Cholmeley Dering, who was then living, and insisted that the trustees of that settlement had not in manner and form therein mentioned disposed of, or contracted to dispose of, the premises in question. The defendant further said, that the correspondence did not contain a proper description of the premises pretended to be the subject of the alleged contract; that the price proposed to be given by the plaintiff was inadequate; and that, even if he had entered into such contract, it was out of his power to perform the same, the trustees having refused to give their consent to the proposed sale of the estate.

[735] The defendant, Cholmeley Dering, by his answer, said, that he never gave his consent to Sir E. C. Dering to enter into the alleged contract; that he had been informed of the correspondence between Sir E. C. Dering and Wise in the month of May, 1835, and not before; that the advertisement in the *Maidstone Journal* was not inserted with the privity or consent of the defendant or of his co-trustee, and that he was not acquainted with the contents thereof, or informed that the estate had been advertised for sale until the month of October, 1834; that the price offered by the plaintiff was inadequate; and that it would be prejudicial to the interests of Sir E. C. Dering, and the other parties for whom the defendant and Sir W. Geary were trustees, to part with the estate; and he submitted that he and his co-trustee would be guilty of a breach of trust, if they concurred in such alleged sale, or executed any instrument for carrying the same into effect.

The defendant, Sir W. Geary, denied, by his answer, that he had authorised Sir E. C. Dering to enter into the alleged contract; and he said, that he was wholly ignorant that an advertisement had been inserted in the *Maidstone Journal* for the sale of the estate, until long after the same was so inserted; and that after being informed by Sir E. C. Dering, that Cholmeley Dering

had refused to concur in the proposed sale, he, Sir William Geary, also declined to concur in such sale; and he insisted that he had a right so to do.

After the amended bill had been filed, and before the defendants put in any answer thereto, Sir E. C. Dering, having employed workmen to cut down timber upon the Thornham estate, a supplemental bill was filed by the plaintiff for the purpose of obtaining an injunction to restrain the defendants from committing such waste. *An *ex parte* injunction was [*736] obtained; and a motion to dissolve it was afterwards refused, with costs.

Mr. Pemberton, *Mr. Kenyon Parker*, and *Mr. Duppa*, for the plaintiff:

[Considering all the circumstances] the Court will presume that [737] the trustees acquiesced in the contract, and compel them to complete it. The power of sale gives no discretion to the trustees, except as to the price; and, if the price is inadequate—though there is no pretence for the alleged inadequacy—Sir E. C. Dering must make good the insufficiency. * * The rule is well settled, that where a vendor misrepresents the quantity of interest which he possesses, but is able to perform his contract to a certain extent, the purchaser is entitled, if he chooses, to take such interest as the vendor can give him, with an abatement: *Mortlock* v. *Buller* (1), *Neale* v. *Mackenzie* (2).

Mr. Kindersley and *Mr. Richards*, for the defendant Sir E. C. Dering:

* * The trustees, in the exercise of the discretion given to [738] them by the power, have sworn that they should consider themselves guilty of a breach of trust, if they consented to the proposed sale. Sir E. C. Dering's direction to convey would be nugatory, unless the trustees acquiesced in the propriety of the sale; for the request and direction of the tenant for life are, by the terms of the settlement, subject to the approbation of the trustees, and the Court has no authority to control the exercise of the discretion so reposed in them. As to a conveyance by

(1) 7 R. R. 417 (10 Ves. 316). (2) *Ante*, p. 105 (1 Keen, 474).

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Sir E. C. Dering himself of such interest as he has, no such relief is asked by the bill; and the plaintiff cannot obtain it in a suit which is not framed for that purpose. * * There is a tenant in tail in existence, and it is impossible to say how large a portion of the interest may be comprised in the intermediate estates which the tenant for life cannot convey. * * *

[739]

Mr. Barber and *Mr. Turner*, for the trustees:

The trustees positively deny, by their answer, that they knew of the advertisement, or in any manner authorised or assented to the sale. * * To direct them or the survivor of them to execute a conveyance to the plaintiff would be in effect to direct them to commit a breach of trust. * * *

[740]

Mr. Pemberton, in reply:

The conduct of the trustees is irreconcilable with their answer, and with any other conclusion than that they authorised and consented to the sale; and, if they authorised the sale, the surviving trustee is bound to execute a conveyance. If, however, the contract cannot be executed to its full extent, Sir E. C. Dering is, at any rate, bound to perform it to the extent of his own interest in the estate. This is a less degree of relief than that which is sought by the bill, and therefore involved and included in the prayer for the greater relief. It is no valid objection, that, because the whole of the relief sought by the bill cannot be given, the Court may not grant a part of it, though such part may not be specifically prayed for.

THE MASTER OF THE ROLLS (after stating the facts):

It is impossible to read this correspondence without coming to the conclusion that Sir Edward Dering, in the treaty for the sale of this estate, acted as the owner of the estate, or as a person who, being in the possession of the estate, had the power of selling it. I have no hesitation in saying that, by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties. *It is true, that mention is made in the letters of an intended formal contract, to be afterwards drawn up; but there

[*741]

are many cases in which a correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case. I am of opinion, therefore, that Sir Edward Dering was on the 27th of July, 1834, bound by his contract to sell this estate. What the result may be in this case will depend on questions involving very different considerations from the mere binding nature of the contract between these parties.

The contract having been entered into, Sir Edward Dering was himself bound to perform it, if he could; but he could not perform it without the concurrence of the trustees, and the trustees did not concur. The next question, then, is, whether the trustees are bound to concur; and the argument, on behalf of the plaintiff, is, that, from the circumstances of this case, the Court must necessarily infer that they either authorised Sir Edward Dering to enter into the contract as their agent, or that they so far acquiesced in what he had done, that he must be considered as their agent. And certainly the circumstances of this case are somewhat extraordinary, when the relation between the parties is considered. Mr. Cholmeley Dering, the uncle of Sir Edward Dering, and Sir W. Geary, his half-brother, were living in the same neighbourhood, and on the most affectionate and confidential terms with Sir Edward Dering; and at the very time when this contract was in preparation, Sir Edward Dering was residing in the house of Sir W. Geary. The trustees have, however, sworn that no communication on the subject was made to them. There was an advertisement for the sale of the property in question in the month of June; all these parties read *the [*742] newspapers; but the trustees have stated, in their answers, that they knew nothing of this particular advertisement.

The question is, whether under such circumstances, there is sufficient ground to induce the Court to presume that Sir Edward Dering was authorised by the trustees to enter into the contract; and I am of opinion that there is not sufficient ground for that presumption.

The trustees are empowered by the settlement to sell at the request of the tenant for life; and the next question is, whether

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Sir Edward Dering is bound to make that request. His conduct, it must be admitted, is open to much observation. He assumed to act as absolute owner of the estate, or at least as a person entitled to sell it; and after the objection, on the part of the trustees in whom the legal estate was vested, which seems to have been made on the 2nd of August, he never communicated that objection to the person with whom he had entered into the contract, but, on the contrary, gave instructions to his solicitor to prepare a formal agreement. It seems strange that it never occurred to a gentleman of Sir Edward Dering's station, that, when the objection was raised by the trustees, or one of them, it was his bounden duty to communicate that objection to the person with whom he had entered into the contract.

The draft of the agreement, which was sent on the 5th of September to the plaintiff's solicitor, contained the first intimation that Sir Edward Dering had not the absolute power of selling this estate. This led to the discussion between the solicitors, which ended in the letter of the 3rd of November declaring the treaty to be at an end, and in the institution of this suit.

[743] With respect to the point which has been raised, whether Sir Edward Dering can now be called upon to request or direct the trustees to convey, I think that he ought not to be called upon to do so, unless it shall appear that the trustees, when requested or directed, ought to comply with the request; and, without at present determining this point, the strong inclination of my opinion is, that the power of sale does give a discretion to the trustees in relation to all the matters comprised in the terms of the power, and that this Court has no power or jurisdiction to interfere with the discretion so vested in the trustees.

It is a general principle, subject, however, to some important qualifications, that, if a party enters into a contract to sell an estate, and it turns out that he is unable to complete his contract, but is nevertheless able to perform a part of it, the Court will compel him, if the purchaser chooses, to execute as much of the contract as he is able. There may be a difficulty, in ascertaining the amount of abatement out of the purchase-money to which the purchaser would be entitled, arising out of the nature of Sir

Edward Dering's interest, which consists partly of a tenancy for life without impeachment of waste, and partly of the ultimate reversion; but, if Sir Edward Dering is exposed to any difficulty from this cause, he has brought it entirely upon himself. As to this point, and on the construction of the power of sale, I shall reserve my judgment.

On a subsequent day his Lordship delivered the following judgment on the reserved points:

In the month of July, 1834, the defendant, Sir Edward Dering, conducting himself as if he were the absolute owner of the estate in question, or as if he had *an absolute power to dispose of it, [*744] agreed to sell the estate to the plaintiff for 18,000*l*. It afterwards appeared that the estate did not belong to Sir Edward Dering absolutely, but was vested in trustees, who had a power to sell at the request of Sir Edward Dering; and that Sir Edward Dering was himself beneficially entitled to the estate for his life without impeachment of waste, and to the ultimate reversion in fee, in default of issue male by his present marriage, of which there is issue now living.

I have before stated that I considered the contract binding upon Sir Edward Dering, but not upon the trustees; and it appears to me, upon the true construction of the settlement under which the trustees hold the estate, that they have a discretion which would entitle them to refuse to concur in a sale requested by Sir Edward Dering; and that, in the absence of any imputation upon them, this Court ought not to interfere with that discretion.

The plaintiff, however, expressed a desire to take such interest as Sir Edward Dering alone could give, upon having a proper abatement made from the purchase-money, and the case stood over to give me an opportunity of considering whether the partial execution of the contract could properly be decreed in this case. There are, certainly, authorities to shew that this Court has jurisdiction to compel a vendor, who has misrepresented the extent of his interest, to convey that which he really has, and to make a corresponding abatement from the purchase-money.

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[Upon this point his Honour cited and referred to *Mortlock* v. *Buller* (1) and other cases which followed that decision, and continued his judgment as follows:]

[747] But without derogation, in any respect, from the jurisdiction, it is apparent that the Court will not, in every case, compel a vendor to convey such estate as he can; and omitting on this occasion those cases in which the purchaser, at the time of the contract, knew of the limited interest of the vendor, or in which an attempt has been made to commit a fraud on a power, which have no application to the present case, I apprehend that, upon the general principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the [*748] contract, the Court, before *directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor. Here the vendor has a life estate without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement and the protection intended to be afforded to the objects of it—conceiving that the consequence of a partial execution of this contract might be prejudicial to those objects—seeing the difficulty of ascertaining, upon satisfactory grounds, the just amount of abatement from the purchase-money, and considering, also, that nothing has been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself owner of an estate he desires to possess, has sustained no damage for which compensation may not be given by a jury, it appears to me that, in this case, I ought not to decree a conveyance of the vendor's life estate and ultimate reversion to the purchaser. The bill must therefore be dismissed, but without costs.

Bill dismissed accordingly.

(1) 7 R. R. 429—430 (10 Ves. 315).

COVENTRY *v.* COVENTRY.

(1 Keen, 758—760; S. C. 6 L. J. (N. S.) Ch. 275.)

1837. *Aug.* 4.

Rolls Court. Lord LANGDALE, M.R.

[758]

The trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates and funds with annuities and other incumbrances, filed a bill to be discharged from the trusts, and for the appointment of new trustees under the direction of the Court.

The Court granted the relief sought by the bill, and ordered the costs to be paid out of the interest of the tenant for life.

THE bill was filed by the Earl of Coventry, Sir Roger Gresley, and the Hon. George Paulett, who were the trustees of the settlement made on the marriage of Thomas William Coventry and his wife, against Thomas William Coventry and his wife, and the children of the marriage, and against the trustees of the Westminster Life Insurance Society and other parties, incumbrancers upon the property in which Thomas W. Coventry was interested as tenant for life under his marriage settlement.

The bill, after stating the marriage settlement, and that the marriage took effect in July, 1823, proceeded to state four indentures of assignment, dated respectively in April, 1827, June, 1827, March, 1828, and August, 1833, by which Thomas W. Coventry assigned his life interest in the several trust-funds, comprised in the settlement, therein mentioned, to the trustees of the Westminster Life Insurance Society, for securing to them the several annuities therein mentioned. It then stated an indenture whereby Thomas W. Coventry covenanted to indemnify the parties thereto, who had become bail for him in a certain action, and demised to them certain hereditaments comprised in the settlement for ninety-nine years, if he should so long live, by way of further security upon the trusts therein mentioned. The bill stated other annuities and incumbrances charged upon the life-interest of Thomas W. Coventry in the estates or funds comprised in the settlement, and that the estates comprised therein had been sold by the plaintiffs at his request, by virtue of a power given to them by the settlement, *and that the [*759] produce of such sale had been invested by the plaintiffs in the purchase of 3 per cent. Bank Annuities; and that such trust-funds had been charged by Thomas W. Coventry with another

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annuity, and that notices of the several incumbrances and assignments of his interest in the trust-funds had been served upon the plaintiffs, and that the plaintiffs were made responsible, as they were advised, for the due application of the interest and dividends of the trust-funds to the payment of the several annuities and charges, they never having contemplated, when they consented to become the trustees of the settlement, that they should be exposed to such liabilities, but intending only to undertake the trusts for Thomas W. Coventry and his family. The bill stated that, for these reasons, the plaintiffs were desirous of being discharged from the trusts of the settlement, and that they had applied to the defendant Thomas W. Coventry to appoint new trustees in their place, and that such applications had not been complied with; and it prayed that they might be discharged from being trustees of the trust-funds under the settlement, and that proper persons might be appointed in their place under the direction of the Court, and that their costs, charges, and expenses might be paid.

The decree sought by the plaintiffs was not resisted by any of the defendants, and the only question was, whether the costs were to be borne by the tenant for life, or to be paid out of the trust funds.

Mr. Pemberton, for the plaintiffs.

Mr. Beales, for the tenant for life.

Mr. Paynter, *Mr. Parry*, *Mr. Bearan*, and *Mr. Elmsley*, for the other defendants.

[760] THE MASTER OF THE ROLLS:

The relief sought by the plaintiffs is to be discharged from the trusts of the settlement, made on the marriage of Thomas W. Coventry and his wife, and to have new trustees appointed under the direction of the Court, it appearing upon the pleadings that, in consequence of the embarrassed state of the fund occasioned by himself, the tenant for life has been unable to procure new trustees. Are these trustees, under the circumstances stated in the bill, to go on in the execution of a trust

which they undertook only for the benefit of the tenant for life and his family, but which, by his conduct, has involved them in difficulties and responsibilities which they never contemplated? I am of opinion that they are not. I had lately occasion to consider (1) the case of a trustee coming without any reason to be discharged from the trust at the expense of the estate, and I did not think that the estate ought to bear the expense. These trustees do not seek to be discharged without reason, but in consequence of the acts of the tenant for life, and being of opinion that they are entitled to the relief sought by the bill, the only question is, who are to pay the costs? Are the trustees to pay them? Certainly not; neither ought the estate, under the circumstances, to be burthened with the costs, and I think they will be properly paid out of the interest of the tenant for life.

EARL OF GLENGAL *v.* BARNARD.

1836.
June 27, 28.
Nov. 7.

Rolls Court.
Lord LANGDALE, M.R.

(1 Keen, 769—794; S. C. 6 L. J. (N. S.) Ch. 25.)

[AFFIRMED on appeal by the House of Lords as reported in 2 H. L. C. 31, under the title of *Lady Thynne* v. *Earl of Glengal.*]

COOKSON *v.* HANCOCK.

1836.
April 26.

Rolls Court.
Lord LANGDALE, M.R.

(1 Keen, 817—825; S. C. 5 L. J. (N. S.) Ch. 245; 6 L. J. (N. S.) Ch. 56.)

[AFFIRMED on appeal as reported in 2 My. & Cr. 606.]

KENT *v.* PICKERING.

1837.
July 27, 28.
Aug. 10.

Rolls Court.
Lord LANGDALE, M.R.
[1]

Aug. 10.
[7]

(2 Keen, 1—8; S. C. 6 L. J. (N. S.) Ch. 375.)

One of two executors has a right to retain his own debt out of a balance due from both to the testator's estate.

[UPON the point mentioned in the above head-note,

THE MASTER OF THE ROLLS said:]

In this case a balance is found due from two executors to the testator's estate. One of the executors is a creditor, and claims

(1) *Howard* v. *Rhodes*, *ante*, p. 125 (1 Keen, 581).

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to be entitled to retain the amount of his debt out of the balance due from the two. The reasons on which the right of one executor to retain his own debt out of the assets of the testator in his hands, is founded, are applicable to the case in which the assets are in the hands of both, and the debt is due only to one. One executor cannot sue the other in that character: each has a right to pay or release any debt; and in this case supposing the balance to have been in the power of the two jointly, the executor who is not a creditor, could not dispose of it, without the concurrence of his co-executor the creditor; and I think that the executor and creditor had a right to refuse his concurrence to the payment of any other debt of equal rank till his own was satisfied.

In *Hopton* v. *Dryden* (1) the point was not determined, for although it seems to have been agreed in argument that, of two executors, one who was a creditor had a right to retain, yet in that case, the right was lost by the death of that executor leaving his co-executor surviving him, because the executor of the deceased executor might sue the surviving executor of the testator.

[8] In *Chapman* v. *Turner* (2) it was determined that of two administrators one could not retain against the other, but that they were to retain their debts rateably, and in *Willand* v. *Fenn*, cited in *Jacomb* v. *Harwood* (3), a difference between executors and administrators as to their rights and powers was negatived. Under these circumstances, I think that one executor who is a creditor of the testator, has his right of retainer out of assets consisting of a balance due from himself, and another executor jointly.

(1) Pr. in Ch. 179.
(2) 11 Vin. Abr. 72; 9 Mod. 268.
(3) 2 Ves. Sen. 265.

ROGERS *v.* THOMAS (1).

1837.
March 18.

Rolls Court.
Lord
LANGDALE,
M.R.

(2 Keen, 8—13.)

[8]

A testatrix, whose property consisted chiefly of stock in the public unds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row all which might remain of her money after her lawful debts and legacies were paid:

Held, that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate.

AURELIA ROGERS made her will, dated the 9th of September, 1832, [and thereby, after giving a legacy of 4,000*l.* and a number of other pecuniary legacies, she gave and bequeathed] to the [9] inhabitants of Tawleaven Row, in the parish of Sethney, "all which may remain of my money after my lawful debts and legacies are paid," [and the testatrix concluded her will as follows:] I do here name and appoint as my only executors, my brother Frederick Rogers and William Tweedy, jun., authorising and requesting them to execute all the provisions of this my last will and testament; first paying all my lawful debts and funeral expenses, and next my legacies, all which shall be paid within three months after my decease.

The testatrix made three codicils to her will, by which she gave some other pecuniary legacies.

The testatrix died shortly after the date of her will; and her will was duly proved by the executors named therein.

The bill was filed by the executors against the next of kin of the testatrix, or some of them, for the purpose of having the residuary personal estate of the testatrix distributed; and by the decree at the hearing, it was referred to the Master to take the usual accounts; and to ascertain the clear residue, and of what particulars the personal estate of the testatrix consisted at the time of her death; and to inquire who were the inhabitants of Tawleaven Row at the time of her death, whether any of them were since dead, and, if so, who were their personal representatives; and who were the next of kin of the testatrix living at her death.

The Master, by his report, found that all the debts and legacies were paid, and that the clear residue of the *testatrix's [*10]

(1) *In re Cadogan* (1883) 25 Ch. D. 154, 53 L. J. Ch. 207, 49 L. T. 666; *In re Egan*, '99, 1 Ch. 688, 68 L. J. Ch. 307, 80 L. T. 153.

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personal estate, after payment of debts and legacies, consisted of 678*l.* 7*s.* 10*d.*, 3 per cent. Reduced Bank Annuities, and the sum of 42*l.* 9*s.* 8*d.* in cash; and that her personal estate, at her death, consisted of 3,571*l.* 8*s.* 7*d.*, 3 per cent. Consolidated Bank Annuities, 2,363*l.* 7*s.* 4*d.*, 3 per cent. Reduced Bank Annuities; the sum of 258*l.* 2*s.* 3*d.*, cash in her banker's hands; and the sum of 57*l.* 14*s.* 7*d.* in her dwelling house, together with certain articles consisting of wearing apparel, &c. And he found that the row, called Tawleaven Row, consisted of seven houses, which were entirely occupied by poor fishermen and labourers, and their families; and that the inhabitants, at the time of the death of the testatrix, were the persons in his report enumerated, being thirty in number, of whom three were since dead, without leaving any personal representatives; and he also found who were the next of kin of the testatrix living at her decease.

The bill was amended by making the inhabitants so found, and such persons, not already defendants, who were found to be some of the next of kin, parties to the suit.

Two questions were made: first, whether the gift to the inhabitants of Tawleaven Row was a valid gift, or void for uncertainty; secondly, whether the stock would pass under the gift of the rest of the testatrix's money.

Mr. Sharpe, for the plaintiffs, submitted, that the gift to the inhabitants of Tawleaven Row was good, whether it was to be considered as a charitable gift, or as a gift to a class. That class having been ascertained by the Master's report, there was no uncertainty as to the objects of the testator's bounty. As to the effect of the words, "all which may remain of my money," in the residuary clause, [he cited *Kendall* v. *Kendall* (1) and
[11] *Legge* v. *Asgill* (2).] The words, "rest of my money," must have reference to the previous gift of 4,000*l.*, and other pecuniary legacies; and it appeared that the testatrix was not possessed at her decease of much more than 300*l.* in money, so that there could be no doubt as to her intention.

(1) 28 R. R. 125 (4 Russ. 360). (2) 24 R. R. 51 (T. & R. 265).

Mr. Bazalgette, for the inhabitants of Tawleaven Row, cited *The Attorney-General* v. *Clarke* (1), where the testator gave the interest of 4,200*l.* Bank Annuities to the poor inhabitants of St. Leonard, Shoreditch, and it was objected that the gift was void for uncertainty; but the Court held it to be a good charitable bequest, excluding from the benefit of it such poor inhabitants as received parish relief, for otherwise, it was said, it would be giving to the rich and not to the poor. * * *

Mr. Follett, for the next of kin, contended that * * the word "inhabitants" was used without any qualification or restriction; there was nothing to raise any implication of charitable intention; the term would include all occupiers, and lodgers of every condition; and there was not sufficient certainty in the persons, who were to take, to give validity to the gift, as a gift to individual objects of bounty. [12]

[As to the other point, he cited *Gosden* v. *Dotterill* (2).]

The MASTER OF THE ROLLS held, that the persons found by the Master to be the inhabitants of Tawleaven Row, were entitled to the residue of the testatrix's general personal estate after payment of her debts and legacies. In *Kendall* v. *Kendall* the testator bequeathed to his wife "all monies, goods, clothing, &c., my property, which may remain, after paying the charges incident to my funeral, and such debts as I may owe at my death;" and Sir JOHN LEACH observed, that "the mention of debts and funeral expenses afforded a strong inference that the testator considered himself as disposing of that property, which by law was subject to those charges, namely, his residuary personal estate." Here the bequest of "all which may remain of my money," was after the testatrix's lawful debts and legacies were paid; and the inference as to her intention was at least equally strong (3). [13]

(1) Ambl. 422.
(2) 36 R. R. 244 (1 My. & K. 56).
(3) See the next case.

1837.
July 22.
August 8.

Rolls Court.
Lord LANGDALE, M.R.

DOWSON *v.* GASKOIN.

(2 Keen, 14—19; S. C. 6 L. J. (N. S.) Ch. 295; S. C. nom. *Dawson* v. *Gaskin*, 1 Jur. 669.)

A testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of legacies, bequeathed whatever remained of money to the five children of E. D.:

Held, that the general residuary personal estate passed under this bequest.

[14]

ELIZABETH SMITH, by her will, dated the 12th of June, 1834, [after giving several pecuniary legacies to the amount of more than 2,000*l.* and some specific legacies, concluded her will as follows:] "whatever remains of money, I bequeath to Edward Dowson's five children, to be equally divided."

The testatrix died on the 30th of August, 1834, leaving the plaintiff, Elizabeth Dowson, her sole next of kin; and her will was proved by the executors named therein.

[15] The bill was filed by the plaintiff, who claimed to be entitled to all that part of the testatrix's residuary personal estate which did not consist of money, against the executors and the five children of Edward Dowson. By the decree at the hearing, it was referred to the Master to inquire, among other things, of what particulars the personal estate of the testatrix consisted, at the time of making her will, and of her death, and to ascertain the clear residue of her personal estate. By the Master's report it appeared that, at the date of the testatrix's will, her personal estate consisted of 3,157*l.* 8*s.* 6*d.* New 3½ per cent. Reduced Bank Annuities, 539*l.* 11*s.* 7*d.* cash in the Brighton Savings Bank, and 350*l.* cash, together with plate, wearing apparel, &c., and that the stock and money in the Savings Bank, with the interest accrued thereon, continued in her possession at her death. The Master found that a balance of 96*l.* 16*s.* 2*d.* cash, and the sum of 2,060*l.* 9*s.* 11*d.* New 3½ per cent. Reduced Bank Annuities, remained unapplied; and that those sums, subject to the payment of certain legacies, as to which the executors sought the direction of the Court, constituted the clear residue of the testatrix's personal estate.

The principal question in the cause was, whether that part of the testatrix's residuary personal estate, which consisted of stock,

would pass under the words "whatever remains of my money" to the five children of Edward Dowson, or whether it was undisposed of, and belonged to the plaintiff as next of kin.

DOWSON v. GASKOIN.

Mr. Stinton, for the plaintiff [relied on the case of *Gosden* v. *Dotterill* (1)].

Mr. Stuart, contrà:

* * Where the property of a testator consists of money and stock, and he gives legacies which more than exhaust his money, and makes a disposition of the rest of his money, the previous dispositions of his will are in themselves explanatory context, and shew that by the rest of his money he intended the residue of his general personal estate: [*Legge* v. *Asgill* (2), *Kendall* v. *Kendall* (3)]. [17]

Mr. Stinton, in reply. [18]

THE MASTER OF THE ROLLS:

The question in this case arises upon the meaning of the words "whatever remains of money" in the last clause of the will. "Whatever remains of money" must signify a remainder at some time, or after some operation upon the sum of which the remainder is contemplated. Is it to be the sum existing at the date of the will, or the remainder of that sum or of any subsequent sum which may exist at the death of the testatrix, or after payment of her debts and legacies? There is no intimation that she intended the money (literally so called) to be first applied in payment of debts and legacies; and no reason can be given why the Court is to apply it first, or to make an apportionment for the purpose of wholly or partially defeating that which seems to be the intention of the testatrix. In the construction of wills, the object of the Court is to give effect, as far as it can, to the real meaning of testators; and experience shews that the word "money" is often used in the sense of property. Even in the case of *Gosden* v. *Dotterill*, which is in many respects like the present, and in which Sir JOHN LEACH considered himself precluded by the authorities from giving effect *to the intention, [*19]

(1) 36 R. R. 244 (1 My. & K. 56).
(2) 24 R. R. 51 (T. & R. 265, *n.*).
(3) 28 R. R. 125 (4 Russ. 360).

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he nevertheless thought it right to say that he had no doubt that it was the intention of the testatrix in that case that the stock should pass under the term "money."

I have looked at the several cases of *Hotham* v. *Sutton* (1), *Ommanney* v. *Butcher* (2), *Legge* v. *Asgill* (3), and *Kendall* v. *Kendall* (4), and from them it appears that, although a simple bequest of money will not of itself pass stock, yet the word "money" may be so used in a will, as from the whole context to shew that the testator meant it to pass stock and other personal estate; and that, when the intention can be clearly collected, the Court will act upon it; and, as I think that the intention clearly appears upon this will, I must declare that, upon the true construction, the five children of Edward Dowson are entitled to so much of the stocks, monies, and debts as remained after payment of the funeral and testamentary expenses, debts, and legacies of the testatrix.

In the civil law, which made no distinction, except for very limited purposes, between land and personal property, the word "pecunia" comprehended every species of corporeal property: Pecuniæ verbum non solum pecuniam numeratam complectitur, verum omnem omnino pecuniam, hoc est, omnia corpora; nam corpora quoque pecuniæ appellatione contineri nemo est qui ambiget. Dig. lib. 50, tit. 16, l. 178. It also included incorporeal rights: Pecuniæ nomine non solum numerata pecunia, sed omnes res tam soli quam mobiles, et tam corpora quam jura continentur. *Ibid.* l. 222.

1836. *Dec.* 6.
1837. *Jan.* 14.

Rolls Court. Lord LANGDALE, M.R.

[25]

MALINS *v.* FREEMAN (5).

(2 Keen, 25—35; S. C. 6 L. J. (N. S.) Ch. 133.)

Where an estate is purchased at an auction under a mistake as to the lot put up for sale, the Court will not decree specific performance against the purchaser, but leave the vendor, if he has sustained any damage by the mistake of the purchaser, to his remedy at law.

A bill for specific performance was accordingly, under such circumstances, dismissed without costs.

THE plaintiff, William Malins, being the owner of an estate, partly freehold and partly copyhold, called "The Rookery," and situate at Woodford, in the county of Essex, caused the same to be put up for sale by auction, in five lots, on the 8th of May,

(1) 10 R. R. 83 (15 Ves. 319).
(2) 24 R. R. 42 (T. & R. 260).
(3) 24 R. R. 51 (T. & R. 265, *n.*).
(4) 28 R. R. 125 (4 Russ. 360).
(5) *Tamplin* v. *James* (1880) 15 Ch. Div. 215, 217, 43 L. T. 520.

1834. Richard Ellis the elder acted as auctioneer; and among *the conditions of sale which were read previously to the commencement of the sale, it was stipulated that the purchaser of each lot should pay down a deposit of 20 per cent. in part of the purchase-money, and sign an agreement for the payment of the remainder of the purchase-money, with the amount of the timber, fixtures, &c., on or before the 30th of August, 1834. [*26]

The defendant James Freeman attended the sale, and was declared the highest bidder for and the purchaser of Lot 3 at the sum of 1,400*l.*; and, upon the lot being knocked down to him, he handed in his card to Richard Ellis the younger, who acted as clerk to his father, and wrote down the name and address of the defendant on a copy of the conditions and particulars of sale. There was a reserved bidding on the other lots of the plaintiff's estate, none of which were actually sold. A copyhold estate belonging to one Davies was afterwards put up for sale, but was also bought in under a reserved bidding. At the close of the auction the defendant was called upon to pay the deposit of 20 per cent. upon the price of Lot 3, and to sign an agreement for the payment of the remainder of the purchase-money in pursuance of the conditions of sale, when he declared that he had made a great mistake in bidding for Lot 3 of the plaintiff's estate, having in fact been employed only to bid up to a protecting price for Davies's estate, and he refused to sign the contract or pay the deposit. The bill was filed against the defendant for a specific performance of the agreement; it charged that the property, comprised in Lot 3, consisted of a piece of land which was described and commented upon by the auctioneer at the time of the sale, differed entirely from the property of Robert Davies, which was put up in a single lot, and consisted of a house and grounds, and that the alleged mistake was a mere after-thought of the defendant, set *up by him in consequence of his having repented of his purchase. The bill further charged, that the person employed to bid up to a protecting price for Davies's estate was not the defendant, but a person of the name of Cole. [*27]

The defendant, by his answer, stated that he was appointed to bid for Davies's property up to a protecting price, and that

MALINS v. FREEMAN.

having entered the auction room while Lot 2 of the plaintiff's property was in the course of sale, he supposed and believed that the next property offered for sale would be Davies's, and under that impression, he bid for Lot 3 of the plaintiff's property, without any knowledge or consideration of the value thereof, and that the price at which the same was knocked down to him, was a most exorbitant and unreasonable one. That at the conclusion of the sale he explained the mistake to the auctioneer, and requested him to extricate him from the difficulty in which it had placed him. The defendant further submitted and insisted that there was no sufficient contract in writing, within the statute, signed by the defendant or his agent so as to be binding on the defendant, and that there was no real bidder for Lot 3, but that the plaintiff's solicitor was the only bidder besides the defendant, and that such solicitor acted as a puffer for the vendor, and did in fact bid several times against the defendant, and run the lot up to an exorbitant price.

By the evidence of Cole, it appeared that both Cole and the defendant were employed by Davies to bid up to a protecting price for his property, and that, in a conversation which took place between Cole and the defendant, after Lot 3 of the plaintiff's property had been knocked down to the defendant, Cole informed the defendant of his mistake, and advised him

[*28] to speak *to the auctioneer about it at once, but the defendant declined doing so until the sale was over.

Mr. Kindersley, *Mr. Sidebottom*, and *Mr. Malins*, for the plaintiff:

[29] * * The defendant cannot be permitted to set up his own *crassa negligentia*, as a reason why the Court should relieve him from his liability. [The defendant was close to the auctioneer, heard the lot] described and commented upon, and also, before he handed in his card, heard the auctioneer declare that the lot was absolutely sold, thereby distinguishing the lot sold to a purchaser from those which were bought in. The Court has repeatedly decreed specific performance against purchasers of estates at auctions, and in no instance has it relieved a purchaser at an auction on the ground of alleged mistake. * * *

Mr. Pemberton and *Mr. Rogers*:

* * Upon the evidence there can be no reasonable doubt that the defendant attended the sale for the sole purpose of bidding up to a protecting price for Davies's estate, and that he bid for and became the purchaser of Lot 3 of the plaintiff's property under a mistake. Will the Court, then, permit the plaintiff to take advantage of that mistake, by compelling the defendant to pay an exorbitant price for property which he never intended to purchase? If the plaintiff has sustained any damage by the mistake of the defendant, he has his remedy at law, and to that remedy the Court will leave him. * * *

[30]

[31]

Mr. Kindersley, in reply.

[32]

1837. *Jan.* 14.

THE MASTER OF THE ROLLS:

The plaintiff being entitled to an estate called the Rookery, at Woodford in Essex, employed Richard Ellis and Son as auctioneers to sell the same by auction in five lots on the 8th day of May, 1834; and the same auctioneers were employed by a Mr. Davies to sell for him an estate at Layton on the same day and at the same place, Garraway's Coffee-house.

The defendant Freeman, who was acquainted with Davies, met Davies on the day preceding the sale, and offered to go and bid for him. Davies having accepted his offer, a meeting between them was appointed to take place at the auctioneer's on the day of sale at twelve o'clock. The object of Davies in appointing this meeting was, that the defendant should receive his instructions from the auctioneer; but the defendant not having kept his appointment, joined Davies at Lloyd's Coffee-house between one and two o'clock, and was in a hurry to proceed to the sale, fearing that he might be too late to bid for Davies's estate. Davies gave him *his own instructions, and the defendant hurried away to Garraway's Coffee-house.

[*33]

The auctioneer's arrangement was to sell the several lots of the plaintiff's estate first, and then to sell Davies's estate, and it appeared that the defendant arrived at the auction room when the second lot of the plaintiff's estate was under sale. He placed himself near enough to the auctioneer, for a person not deficient in hearing to hear what the auctioneer said. Lot 2 of the

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plaintiff's estate was bought in; and the auctioneer, having described Lot 3 in terms wholly inapplicable to Davies's estate, offered that lot for sale. The defendant began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to 1,400*l.* The lot was then knocked to him, and the auctioneer declared the property to be absolutely sold. The defendant was not at that moment called upon to sign the contract, but he handed in his card, shewing his name as purchaser. About the same time, Mr. Cole, another person employed by Mr. Davies to bid for him, asked the defendant what had induced him to purchase the lot, to which he observed, "Why it is Davies's property, is it not?" Mr. Cole having told him that it was not, but that he had bought part of Malins's property at Woodford, the defendant seemed much flurried, and said he would speak to the auctioneer. Cole advised him to do so at once, but he said he would wait till the sale was over; and, after the sale was over, being called upon to pay the deposit and sign the contract, he said he had made a great mistake in bidding for Lot 3 of the plaintiff's estate, having in fact only intended to bid for Davies, and he refused to sign the contract or pay the deposit.

[34] The auctioneer wrote the defendant's name, as purchaser, on a copy of the conditions and particulars of sale, in such a manner as the plaintiff alleges is sufficient to make the contract binding on the defendant; and therefore he insists that he is entitled to a specific performance of the agreement.

Upon the facts proved, some questions are raised as to the validity of the contract; but supposing the contract to be valid, the defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it.

Certainly if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and, if the defendant by his carelessness has caused any injury or loss to the plaintiff, he is accountable for it.

But the defendant may be answerable for damages at law without being liable to a specific performance in this Court. In cases of specific performance the Court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach

of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the Court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the Court will relieve, for the Court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the Court will enforce a *specific performance, leaving the defendant to his legal liability. [*35] And I think that, if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and, when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law. Let the bill, therefore, be dismissed without costs.

TIMSON *v.* RAMSBOTTOM (1).

1836. *Nov.* 24.
1837. *Jan.* 13.

Rolls Court. Lord LANGDALE, M.R.

(2 Keen, 35—53.)

An equitable assignee for value without notice of a previous assignment may obtain priority over the same by giving notice to the surviving trustees of the fund where the only trustee who had notice of the previous assignment has died without informing his co-trustees thereof.

[THE facts of this case are sufficiently stated in the following judgment:] [35]

Mr. Pemberton and *Mr. Lovat*, for the petitioner, Charles Corfield, [whose assignment was second in point of date]. [47]

(1) Distinguished by STIRLING, J. in *In re Wasdale* [1899] 1 Ch. 163, 68 L. J. Ch. 117, 79 L. T. 520, and criticised by Lord MACNAGHTEN in *Ward* v. *Duncombe* (1893) A. C. at P. 394.—O. A. S.

TIMSON v. RAMSBOTTOM.

Mr. Barber, *Mr. Kindersley*, and *Mr. Walford*, [for the executors of Anthony Bacon, the elder, the previous incumbrancer].

1837. *Jan.* 13.

[48]

THE MASTER OF THE ROLLS:

In 1819, Anthony Bacon, the elder, was one of the executors of the testator Richard Ramsbottom, and is said to have had the sole management of the testator's affairs. Anthony Bacon, the younger, having attained twenty-one years of age, was entitled to a certain share of the testator's residuary estate, and being in want of money, his father made him some advances, and agreed to make those advances up to 5,000*l.*, on having an assignment of his son's interest in the testator's estate; and thereupon by indenture, dated the 6th day of February, 1819, and made between Anthony Bacon, the younger, of the one part, and Thomas Bacon, Robert Langford, and Thomas Walford of the other part, Anthony Bacon, the younger, assigned his share of, and interest in the testator's estate to Thomas Bacon, Robert Langford, and Thomas Walford, on trust to receive the same, and thereout repay the 5,000*l.*, with interest at 5 per cent. to Anthony Bacon, the elder, and in trust, as to the residue, after such payment for Anthony Bacon, the younger.

In the year 1821, the advances of the father amounted to the full sum of 5,000*l.*, and thereby he completed the consideration for which the deed was executed; but it does not appear that he ever communicated this transaction to his co-executors; and upon this the question arises, whether the knowledge which one of several executors has of an assignment executed to himself by a legatee is notice which will give validity to the assignment to the prejudice of a subsequent assignee.

Anthony Bacon, the elder, died in the year 1827, and in the following year, Henry Thomas Timson, a surviving executor,

[*49]

filed a bill for the administration of the *estate in this Court. A decree was made in 1830, and in 1831 the residue of the testator's estate was brought into Court.

After this, Anthony Bacon, the younger, executed a deed dated the 13th of March, 1832, and made between himself of the one part, and Charles Corfield of the other part, and thereby

assigned his share of and interest in the testator's estate to Charles Corfield, on trust to retain and pay 1,000*l.* lent by him to Anthony Bacon, the younger, together with interest and costs, and on trust, as to the residue, to pay the same to Anthony Bacon, the younger.

Of this assignment notice was given to the executor Mr. Timson on the 9th day of May, and upon the validity of this notice two questions are raised. It is said the notice was invalid; first, because it was not accompanied by any inquiry as to prior incumbrances; and, secondly, because the fund being in Court, an application ought to have been made for an order to prevent the fund being paid out without notice to the assignee.

The first reason, alleged for the invalidity of the notice, is answered by the case of *Foster* v. *Blackstone*, which was affirmed in the House of Lords, and in which the like argument was used without effect.

The second reason might have been of weight, if the executors of Anthony Bacon, the elder, had obtained an order before Corfield; but as both parties afterwards obtained an order on the same day, there is no competition in that respect; and, neither party having any advantage in respect of the order, I think that notice to the executor must be considered good. If no *order had been obtained by either party, it would have been the [*50] duty of the executor, and it is indeed the constant practice of executors to inform the Court of any incumbrances before an order is made for the distribution of the fund.

But the notice, to the executor of Ramsbottom, of Mr. Corfield's assignment would be of no avail, if, at the time when his assignment was taken, Mr. Corfield had notice of the prior assignment, made by Anthony Bacon, the younger, to his father; and the next question raised is, whether Mr. Corfield had such notice. In such a case it appears to me that the *onus probandi* is on the party who charges notice. There is no attempt to prove direct notice, and that is distinctly denied; and the only doubt on the subject is, whether Charles Corfield had constructive notice through the medium of William Corfield, his solicitor.

Mr. William Corfield has not in terms denied notice. His affidavit is to the effect that, at the time of the indenture,

TIMSON v. RAMSBOTTOM.

Anthony Bacon, the younger, told him that there was no incumbrance on the property, and that he was to share with his brothers and sisters in the division to be made of Ramsbottom's estate.

This does not meet the charge of notice in distinct terms; but it is inconsistent with the supposition that, at the same time, Mr. Anthony Bacon (from whom alone the knowledge of the prior assignment was to come) informed William Corfield that his share of Ramsbottom's estate was subject to a prior incumbrance, so large as that which really existed; and it is entirely consistent with the inference to be drawn from the deed itself, by which Mr. Anthony Bacon covenanted and declared that he [*51] was rightfully entitled to his share of the estate, and *had not charged or incumbered the same or any part thereof in any manner whereby Charles Corfield might be hindered from receiving the same, but then had full right to assign the same.

To meet the inference deducible from the deed and from the affidavit of William Corfield, the executors of Anthony Bacon, the father, have tendered an affidavit of Anthony Bacon, the son, in which he states that William Corfield was his solicitor, and employed by him to borrow 1,000*l.*, the repayment of which he told William Corfield he was willing to secure by assigning to the lender his share of Ramsbottom's estate, subject to the previous assignment of the 6th of February, 1819, which was to secure 5,000*l.* actually advanced by his father to him, or for his use. The affidavit has other statements, to the effect that the deponent believed Charles Corfield had notice of the prior assignment; that part of the money was applied in satisfying William Corfield's costs, and other claims; and that, in the year 1827, William Corfield was aware of the prior assignment when he stated that it was of no validity. But as these statements would not (even if the reception of the affidavit were free from objection) afford evidence to fix Charles Corfield with notice at the time of the assignment, I shall not notice them further.

The statement that, in the transaction itself, Mr. Bacon told William Corfield, the solicitor of the vendor, that the assignment intended as a security was to be subject to a prior charge, is undoubtedly material, and makes it necessary to consider whether

the affidavit ought to be received; or, if received, what weight is due to it under the circumstances.

[52]

The reception is objected to on two grounds; first, because it is produced to contradict the declarations of the same person contained in his solemn deed; secondly, because it is produced to support a claim of the executors of Anthony Bacon, the elder, in whose estate the deponent is interested.

I am of opinion that the first objection cannot be supported, however the weight of the testimony may be affected. A man may be examined as a witness to contradict declarations of his own in a deed which he has executed. And as to the second objection, it appears that the deponent has, by an assignment made to his brother Charles, ceased to have any interest in his father's estate. Supposing this to be correct, I am obliged to compare this affidavit with the affidavit of William Corfield, and the effect of the deed; and the result of my consideration of this evidence is, that Mr. Charles Corfield is not fixed with constructive notice of the prior assignment.

What remains, therefore, is to consider whether there was sufficient notice of the assignment of the 6th of February, 1819, and I regret to say that none of the authorities referred to appear to me to afford a guide. In *Dearle* v. *Hall* the fund was invested in the names of trustees, and notice was given to all. In *Loveridge* v. *Cooper* (1) the fund was invested in the names of trustees, and notice was given to the only survivor. In *Foster* v. *Blackstone* (2) the incumbrance was charged on a life interest in real estate, vested in trustees; and notice to their solicitors was held good notice to them. In *Smith* v. *Smith* (3) the incumbrance was on a life interest in funds and real estates, vested in trustees; and notice to one of the trustees was held sufficient. In that case there *might be circumstances to induce the Court to presume that the trustee who had notice communicated his knowledge to his co-trustees. But none of the cases cited, nor the cases in bankruptcy which were referred to, appear to me to be like the present. A father and son having a transaction of this sort between themselves, the father being one of several

[*53]

(1) 27 R. R. 1 (3 Russ. 1).
(2) 36 R. R. 334 (1 My. & K. 297).
(3) 39 R. R. 762 (2 Cr. & M. 232).

TIMSON v. RAMSBOTTOM.

executors—no allegation even that the other executors were informed before the notice received from Corfield—no ground whatever to presume that the transaction was communicated to the other executors, each one of whom had separate authority to receive and pay on account of the estate, and who, if they had no notice of the assignment, might have made payment to the assignor without incurring any liability on that account.

I think, after a good deal of hesitation, that the knowledge of one of several executors who was interested, and does not appear to have communicated his knowledge to his co-executors, is not sufficient. It is a case in which the assignee has done nothing but accept the assignment; and it appears to me that the Master's report must be confirmed and the cross-petition dismissed.

This decision was appealed from, and the case was opened before the Lord Chancellor; but, before its conclusion, the parties came to a compromise, and the appellants consented to be bound by the decision of the MASTER OF THE ROLLS.

1838.
Jan. 15, 26.

Rolls Court.
Lord LANGDALE, M.R.

[59]

WAKE *v.* PARKER.

(2 Keen, 59—75; S. C. 7 L. J. (N. S.) Ch. 93.)

A suit by husband and wife in respect of the separate estate of the wife is the husband's suit, and is not binding on the wife. The husband cannot properly be a party to such a suit except as a defendant.

[THE principle stated in the head-note is settled law, but the following observations of the MASTER OF THE ROLLS upon this principle in this case may be found useful.]

Jan. 26.

[70]

THE MASTER OF THE ROLLS:

The testator in this cause, having devised and bequeathed an equal fifth part of his real estate, and of his residuary personal estate to the plaintiff Mrs. Wake for her separate use, without power of anticipation, for her life, and after her death to her children in equal shares, the bill is filed by Mr. and Mrs. Wake and their children, two of them being infants suing by Mr. Wake as their next friend, against the trustee and executor and the other devisees and legatees of the real estate, and residuary

personal estate, for an account; for payment to Mrs. Wake of her share of the rents, and for an investment of the share of the residuary personal estate, which is given to her for her life, and after her death to her children; and for other purposes.

To this bill, two of the defendants, both of whom are residuary legatees, and one of whom is trustee and executor, have put in a general demurrer for want of equity; and the grounds of demurrer stated at the Bar are—first, that the husband and wife ought not to be permitted to sue together for the separate estate of the wife; and secondly, that the husband having no interest in the subject-matter of the suit, is, on that account, misjoined as a plaintiff. [71]

Courts of equity have from an early period permitted married women to sue for their separate estates by their next friends, and to make their husbands defendants; and a married woman, being, as to her separate estate, considered as a *feme sole*, the Courts have acted upon the principle that, in the prosecution of such suits, her authority and consent should be necessary, and should be given and continued independently of her husband; and accordingly, it is said in *Andrews* v. *Cradock* (1), that, if such a bill be filed without the authority of the wife, the same may, upon her affidavit of the matter, be dismissed; and from the case of *Lawley* v. *Halpen* (2), it appears that, if the wife has reason to think that the next friend appointed by herself colludes with her husband, she may, for that reason, have her next friend changed, on procuring security to be given for costs.

Now a suit instituted and carried on by the husband and wife has been considered as the suit of the husband alone, and *primâ facie*, at least, the wife cannot be said to have any control or authority over it: she may possibly have authorised her husband to prosecute the suit, but, in the absence of any thing to shew that she had done so, the suit must be considered as the suit of the husband.

It has undoubtedly been very usual to file such bills, and many decrees have been made without objection in suits instituted by the husband and wife for the wife's separate estate, the Court itself taking care that the separate estate of the wife recovered [72]

(1) Gilb. 36; Prec. in Cha. 376. (2) Bunb. 310.

WAKE v. PARKER.

in such suits shall be protected from the husband. [His Honour here referred to some reported cases where no objection had been taken, and said:] I think that many cases have occurred of suits by husband and wife in which the wife may have seemed to require protection from the husband, and yet decrees have been made without objection.

[73] Nevertheless, whenever the attention of the Court has been drawn to the subject, such suits have always been considered to be the suits of the husbands, and to be instituted and prosecuted by them, and under their influence. The husband, having the power to use his wife's name, may file the bill without her knowledge, and may prosecute it in a manner not favourable to her interests. If the wife's claim be not of a liquidated or specific sum, but of a sum to be ascertained by an account, though the Court might, and certainly would, protect her in the enjoyment of the sum recovered upon the account, that sum might not be the just amount of her right, because the account taken under the proceedings may not have been properly taken; and if the principle be, as I think it is in those cases, that the wife is, as to her separate estate, entitled to prosecute the suit by her own authority, independently of her husband, there seems to be no reason why a suit, instituted by her husband, should bind her,—why she may not, at any time, institute a new suit for the same matter by her next friend, or why a decree (not being a decree for a specific sum secured by the Court for her separate use, and there being no evidence that it was prosecuted with her consent and authority) should be a bar to a new suit instituted by her next friend. * * *

[After some discussion of authorities the MASTER OF THE ROLLS continued:]

[*75] If a bill by husband and wife for the wife's separate estate were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think that a decree ought to be made. And in many other cases I apprehend that, with no more attention than the Court owes to the suitors, effectual means might be employed to ascertain whether the suit was carried on with the free consent of the wife, and to secure the

defendants from any further claims on her part. But confining myself to the present case, in which my attention must be exclusively directed to the statements made in the bill, in which the objection is made by the defendants at the earliest period in the cause, and in which the separate estate of the wife partly consists of a sum to be ascertained by account, I think myself bound to give effect to the objection. I therefore allow the demurrer; but I think that no costs should be given, and I give leave to amend by striking out the name of Mr. Wake as plaintiff, and as next friend of his infant children, and making him a defendant, and by inserting the name of a next friend to the wife and infant children.

WAKE v. PARKER.

COLYEAR *v.* COUNTESS OF MULGRAVE AND OTHERS.

1836. *May* 6, 7. *Aug.* 5.

(2 Keen, 81—98; S. C. 5 L. J. (N. S.) Ch. 335.)

[81]

A father, who had four natural daughters and a legitimate son, entered into an agreement with his son, evidenced by certain deeds, whereby the father covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and died before the covenant on the part of the father was performed, having by his will given the whole of his property to his father, who became the son's personal representative.

A demurrer to a bill filed by one of the natural daughters, and praying to have the agreement executed against the estates of the father and son, was allowed.

Where two persons for valuable consideration as between themselves, covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

THE original bill was filed in the month of October, 1834, by the plaintiff, who was one of the four natural daughters of the Earl of Portmore, against the *Countess of Mulgrave, and the Hon. Edward Phipps, the representatives of the Earl of Mulgrave, who was the surviving trustee under the settlement, made on the marriage of the Earl of Portmore, against the Earl of Portmore, the plaintiff's father; her three sisters with their husbands, and other parties; and it prayed that the plaintiff and the defendants, her three sisters, might be declared to be entitled, under a deed dated the 19th of August, 1818, to a lien on the

[*82]

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personal estate of Brownlow Charles Colyear, deceased, to the extent of 20,000*l.*; and that the defendant, the Earl of Portmore, might admit assets sufficient to answer that lien, or that the usual accounts might be taken of Brownlow Charles Colyear's personal estate, and that it might be declared that the sum of 19,350*l.* 5*s.* 9*d.*, 3½ per cent. Reduced Annuities, in the pleadings mentioned, formed part of the fund on which the plaintiff and the defendants, her sisters, had such lien; and that the deficiency of the sum of 20,000*l.* might be paid by the Earl of Portmore, out of the assets of Brownlow Charles Colyear, with the consequential directions.

The Earl of Portmore answered the bill, but died on the 18th of January, 1835. A bill of revivor and supplement was filed against Jonathan Brundrett and Frederick Waller, his executors, and the original bill was amended. The pleadings extended to an enormous bulk, and it was ultimately arranged that a demurrer should be filed to the amended bill and bill of revivor, as the least expensive mode of determining the question between the parties. In pursuance of this arrangement, the defendants, Jonathan Brundrett and William Frederick Waller, filed a general demurrer to the bill for want of equity. The facts stated by the bill, so far as they are material, and have reference to the questions argued upon this demurrer, were as follows:

[88] In the year 1810, Thomas Charles Viscount Milsington was, under his marriage settlement, entitled in possession to a rent charge of 500*l.* a year to continue during the joint lives of himself and his father; and to the interest of 5,000*l.*, and also of 19,350*l.* 5*s.* 9*d.* 4 per cent. Bank Annuities, to continue for his own life; and expectant upon the death of his father, he was entitled for his life to the rents and profits of certain freehold and leasehold estates, and to the dividends of 38,483*l.* 9*s.* 3 per cent. Bank Annuities.

His wife had died, having left an only child, Brownlow Charles Colyear, then an infant, who under the same settlement was entitled, subject to his father's life interest, to the 5,000*l.* and 19,350*l.* 5*s.* 9*d.* 4 per cent. Annuities; and, subject to the life interests of his father and grandfather, Brownlow Charles Colyear was entitled to the 38,483*l.* 9*s.* 3 per cent.

Annuities, and to certain estates for the interest limited to him by the settlement.

On the 14th of March, 1810, Lord Milsington, by deed, and for some consideration, assigned to Alexander Bruce the rent charge of 500*l.* a year, his life interest in the 5,000*l.*, and 19,350*l.* 5*s.* 9*d.* 4 per cent. Annuities, and his expectant life interest in the 38,483*l.* 9*s.* 3*d.* per cent. Consolidated Bank Annuities.

Lord Milsington had seven natural children, the plaintiff in the present suit, and three other daughters, and three sons.

Mr. Colyear, his only legitimate child, attained his age of twenty-one years on the 4th of August, 1817, and in the following month made a will, by which he gave the whole of his property to Lord Milsington, his father.

Lord Milsington was very much in debt, and Mr. Colyear, his son, had considerable property, which he derived from his maternal grandfather, the Duke of Ancaster. [84]

In August, 1818, Lord Milsington and Mr. Colyear entered into the arrangement under which the plaintiff claimed relief. Lord Milsington and Mr. Colyear, at that time, concurred in desiring to make a provision for the natural daughters of Lord Milsington, and for the payment of Lord Milsington's debts. The intention was to make the sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. Bank Annuities, which was comprised in Lord Milsington's marriage settlement, and the interest in which had been already assigned to Mr. Bruce, available as a provision for the natural daughters of Lord Milsington; and for that purpose Mr. Colyear agreed, at his own expense, to repurchase that sum from Bruce or his assignees, and also to make up the value of the provision to 20,000*l.* sterling [to be transferred to or invested in the name of Mr. William Henry Surman as a trustee for these daughters, and Lord Milsington agreed to assign to Mr. Colyear his reversionary life interest in the 38,483*l.* 9*s.* 3*d.* 3 per cent. Bank Annuities].

The arrangement was evidenced by three deeds, all of them dated the 19th of August, 1818.

By the first deed, made between Lord Milsington of the first part, Mr. Colyear of the second part, and the defendant William Henry Surman of the third part, [it was agreed that the said sum

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of 19,350*l.* 5*s.* 9*d.* 4 per cent. Consolidated Bank Annuities should be transferred or assigned to the said William Henry Surman, as a trustee appointed for that purpose by Thomas Charles Viscount Milsington and Brownlow Charles Colyear; and also that the said Brownlow Charles Colyear would pay to or invest in the name of William Henry Surman such additional sum in the 4 per cent. Consolidated Bank Annuities, as with the said sum of 19,350*l.* 5*s.* 9*d.* 4 per cent. Consolidated Bank Annuities, should, according to the market price thereof, be equal to the sum of 20,000*l.* sterling. And it was then agreed that the trustee, William Henry Surman, should stand and be possessed of the said sum of 20,000*l.*, upon such trusts as were mentioned in another deed then already prepared, and bearing even date therewith. By the same indenture Lord Milsington assigned to Mr. Colyear all the dividends which, after the death of Lord Portmore, would thenceforth, during the life of Lord Milsington, become due on the 38,483*l.* 9*s.* 3*d.* 3 per cent. Consolidated Annuities.

[88] By the second deed, trusts were declared] for the benefit of the natural daughters of Lord Milsington, which contained provisions for their maintenance during their infancy, and contemplated their marriages, which marriages were provided to be with the consent of Lord Milsington and also of Mr. Colyear; and there was at the end of the deed a proviso that it might be lawful for Lord Milsington and Mr. Colyear, during their joint lives, by any deed or deeds, instrument or instruments, to revoke [all or any of the trusts thereinbefore contained, and to declare any new or other trusts which they] should think proper, "so as the same new trust be for the use, benefit, interest, or security of the four natural daughters, or either of them, but not to deprive the whole of them of the settlement or provision thereby made, and intended to be made."

[By the third deed, made between Lord Milsington of the one part, and Mr. Colyear of the other part, the said]

[89] Brownlow Charles Colyear covenanted with Thomas Charles Viscount Milsington that, on condition of Viscount Milsington fully and faithfully performing all and every the covenants,

[*90] *clauses, and conditions in the indenture of trust of even

date on his part, he, Brownlow Charles Colyear, would pay the several particular debts therein mentioned.

Shortly after the date of these deeds, and in February, 1819, Mr. Colyear died. His father, Lord Milsington, under his will became entitled to all his property, and became his legal personal representative.

A sum of 26,000*l.*, part of Mr. Colyear's estate, had come to the hands of Mr. Surman, the trustee named in the deed of arrangement. In November, 1820, a bill was filed on behalf of the natural children of Lord Milsington, praying that 20,000*l.*, part of it, might be paid or applied upon the trusts of the arrangement of the 19th of August, 1818, and there was also a prayer for payment out of the general assets. This bill was dismissed by Sir THOMAS PLUMER on the 1st of August, 1823, on the ground that, by the deeds, the 19,350*l.* 5*s.* 9*d.* stock was the fund intended as a provision for the natural daughters, and that Mr. Colyear's intention was only to increase that to the value of 20,000*l.*, and that there was no sufficient evidence to shew that he ever appropriated, or made his general assets liable to the appropriation of 20,000*l.*, independently of the settled 19,350*l.* 5*s.* 9*d.* stock.

In 1825, Lord Milsington, having then become Earl of Portmore, commenced proceedings against the assignees of Bruce to vacate the deed of 14th March, 1810. Ultimately, in that suit, the deed was set aside (1) as an assignment, and 11,362*l.* 1*s.* 1*d.* having been found due to the assignee of Bruce, and paid, the 19,350*l.* 5*s.* 9*d.* *stock original 4 per cent., reduced to 3½ per cent., was set free, and was standing, at the hearing of this demurrer, in the names of the deceased trustees of the settlement. The last surviving trustee was the late Earl of Mulgrave, whose representatives were the two first defendants on the record. [*91]

Mr. Tinney, *Mr. Kindersley*, and *Mr. David James*, in support of the demurrer:

* * The Court will not assist a volunteer by executing an imperfect covenant or gift: *Colman* v. *Sarrel* (2), * * *Ellison* v.

(1) See *The Earl of Portmore* v. *Taylor*, 33 R. R. 103 (4 Sim. 182).

(2) 1 R. R. 83 (1 Ves. Jr. 50).

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Ellison (1), *Ex parte Pye, Ex parte Dubost* (2). In this case the contract is not only executory, but purely voluntary, there not being even a meritorious consideration for it, for in law a natural child is a mere stranger, and in this respect equity follows the law: *Fursaker* v. *Robinson* (3). Where a promise is [*92] made *by one person to another for the benefit of a third, or where a contract is entered into between two persons for the benefit of a third person, and that third person is a mere stranger to the consideration, he is neither at law nor in equity entitled to the benefit of the promise or agreement. * * *

[94] *Mr. Pemberton* and *Mr. Wright, contrà*:

* * By the instruments under which the plaintiff claims, a trust was declared, and the relation of trustee and cestui que trust so constituted that the Court will carry the agreement into [95] effect. * * In equity it has been decided that a person, though a volunteer, and who would, therefore, be considered at law a stranger to the consideration, may enforce a trust which has been created for his benefit, provided everything has been done on the part of the person creating the trust, that is necessary to evidence his intention of conferring a benefit on the volunteer: *Fortescue* v. *Barnett* (4). * * *

[96] *Mr. Tinney*, in reply.

Aug. 5. THE MASTER OF THE ROLLS (after stating the facts):

In support of this demurrer it is alleged that the plaintiff is [*97] merely a volunteer; that, being a natural *child, her claim is founded on no consideration either valuable or meritorious, and, consequently, she is entitled to no relief in this Court.

It is admitted that, as between Lord Milsington and Mr. Colyear, there was sufficient consideration passing from one to the other, but it is argued that it was in their power to put an end to the arrangement when they pleased; that a natural child of one of the parties must be considered as a mere stranger, and that the Court will not interfere for a stranger.

(1) 6 R. R. 19 (6 Ves. 656).
(2) 11 R. R. 173 (18 Ves. 140).
(3) Pr. in Ch. 475.
(4) 41 R. R. 5 (3 My. & K. 36).

It is further argued, that this is a bill for the specific performance of a covenant upon which there is no legal right, and nothing could be recovered at law.

For the plaintiff, it was contended that the deeds amounted to a declaration of trust. The stock was, as it still is, standing in the names of the trustees of the marriage settlement. The persons equitably entitled were Lord Milsington, under him Bruce, and in remainder after him Mr. Colyear and Lord Milsington; and Mr. Colyear agreed to redeem or get rid of Bruce, and then to apply the fund for the benefit of the natural daughters; and the argument is, that this agreement is so expressed as to amount to a declaration of trust.

After the most careful consideration of the deed, I cannot think that this is the effect. Lord Milsington and Mr. Colyear expressed clearly their object and intention: what they meant to do in the event of the fund being repurchased, and what Mr. Colyear should and would do at the request of Lord Milsington. The intention was not that the present trustees should be trustees for the natural daughters, but, that, in a certain event, Mr. Colyear, at the request of Lord Milsington, would procure *a transfer to Mr. Surman in trust for the natural daughters; but the whole is executory and nothing concluded. [*98]

The next argument used is that, even if there be no declaration of trust, there may nevertheless be a right to enforce the covenants against the estates of both father and son, inasmuch as the son, by the provisions of the deed, and particularly by the stipulation for his consent to the marriage of his natural sister, had placed himself, as towards them, in *loco parentis;* and considering them as his adopted children, there may, it is said, be meritorious consideration to give them a right to enforce the covenants. But I cannot come to that conclusion; and I apprehend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other. The misfortune for the natural children was, that Mr. Colyear died before the executory agreements were carried into effect.

Demurrer allowed.

1837.
Dec. 9, 10.
1838.
Jan. 23.

Rolls Court.
Lord
LANGDALE,
M.R.
[99]

GODSAL *v.* WEBB (1).

(2 Keen, 99—122; S. C. 7 L. J. (N. S.) Ch. 103.)

By a marriage settlement comprising property limited to the separate use of the wife, it was agreed between the intended husband and wife that the trustees should effect a policy of assurance to the amount of 3,000*l.* on the life of the wife, and annually pay the premium out of the trust-money during the life of the wife, and stand possessed of the assurance in trust after the decease of the wife to invest the 3,000*l.* when received, and pay the interest to the husband for his life, if he should survive the wife, and after the decease of the husband to pay the 3,000*l.* to such person or persons as the wife should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the persons entitled under the Statute of Distributions.

There were no children of the marriage, and the wife, having survived her husband, and being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, and by his will appointed G. his executor and residuary legatee. G. continued to pay the premium, and, on the death of the assured, received the value of the policy.

On a bill filed by the next of kin of the wife against G. and against the executor and residuary legatee of the wife: Held, that the agreement did not constitute a complete executed trust, and that the true intention of the agreement was to create and give to the husband a life interest in the policy money if he survived the wife, but not to create an irrevocable trust for the next of kin; that the assignment was valid, and that G. was entitled to the value of the policy.

By an indenture of settlement, dated the 3rd day of February, 1808, and made in contemplation of a marriage between Mary Procter, widow of Michael Procter, of the first part; John Martin, the intended husband, of the second part; and Thomas Brown and Henry Fowke, of the third part, reciting the will and codicil of Michael Procter, under which Mary Procter was entitled to the several legacies and interests in the testator's real and personal estates therein mentioned; and reciting the death of the testator, and that an agreement had been entered into between the testator's nephew and Mary Procter, to the effect therein mentioned; and also reciting that, upon the treaty for the intended marriage between John Martin and Mary Procter, it had been agreed that all the real estate to which Mary Procter was entitled for her life under the will and codicil, or by the

(1) If the parties had created a clear executed trust in favour of the next of kin it would, of course, have been irrevocable, though voluntary: *Paul* v. *Paul* (1882) 20 Ch. Div. 742, 51 L. J. Ch. 839, 47 L. T. 210.—O. A. S.

agreement, and the interest given by the will to her for life in the sum of 4,500*l.* thereby directed to be, and then lent at interest, in the manner therein mentioned, and also the sum of 400*l.* 3 per cent. Consolidated Bank Annuities by her purchased as in the indenture mentioned, and also the articles *of furniture [*100] therein described, should be vested in Thomas Brown and Henry Fowke upon the trusts thereinafter mentioned, it was witnessed that, in pursuance of the said agreement of marriage, and in consideration thereof, and for making a certain provision for Mary Procter during the continuance thereof, and for the nominal consideration therein mentioned, she, Mary Procter, with the privity and consent of John Martin, granted, bargained, released, and confirmed to Thomas Brown and Henry Fowke, their executors, administrators, and assigns, all the messuages, lands, tenements, and hereditaments therein described, to which Mary Procter was entitled for her life under the said will and codicil, upon the trusts thereinafter declared thereof. And it was further witnessed that Mary Procter assigned to the same trustees all the interest, dividends, and annual produce by the will bequeathed to Mary Procter for her life, to arise from the said sum of 4,500*l.* thereby bequeathed to Thomas Brown and Henry Fowke, upon the trusts therein mentioned, and all the articles of furniture and other effects bequeathed by the will, upon trust that Thomas Brown and Henry Fowke, their executors, &c., should stand and be seised and possessed of the messuages, lands, and other premises thereby released, and the interest, dividends, and effects in the proviso thereinafter expressed, and other premises thereinafter assigned, and also the said sum of 400*l.* 3 per cent. Consolidated Bank Annuities, in trust for Mary Procter until the intended marriage, and after the solemnisation thereof, as to the effects mentioned in the proviso thereinafter contained, upon trust to permit and suffer Mary Procter, at all times during her intended intermarriage, to hold, use, occupy, enjoy, and dispose of the same, and every of them, in such manner as she should think proper, and for her sole benefit, free from the debts, control, and interference of John Martin, her intended *husband; and [*101] as to the said sum of 400*l.* 3 per cent. Consolidated Bank Annuities, upon trust for such person or persons, and for such

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intents and purposes, as Mary Procter, by any writing to be signed by her, and attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of a last will, to be by her signed and published in the presence of, and attested by two or more witnesses, should, notwithstanding her intended coverture, direct or appoint; and as to the dividends and annual produce of the said 400*l.* 3 per cent. Consolidated Bank Annuities, in default of or until such appointment as aforesaid, and as to the yearly rents, issues, and profits of the messuages, lands, &c., thereinbefore released, and the interest and dividends thereby assigned of the trust sum of 4,500*l.*, and of the stocks, funds, or securities, in or upon which the same should be laid out and invested, upon trust during the life of Mary Procter, to pay the same rents and profits, dividends and interest, unto such person or persons, and for such intents and purposes, as Mary Procter, by any writing or writings to be signed with her own hand, should, notwithstanding the intended coverture, from time to time direct or appoint, and until and in default of such appointment, into her own hands for her own sole and separate use and benefit, independent of, and without being subject to the debts, control, or interference of the said John Martin; and also upon trust, in case Mary Procter should make any savings or accumulations of the rent and dividends, to invest the same in manner therein mentioned. And it was thereby declared and agreed, that the receipts in writing of Mary Procter, or any such her appointee or appointees as thereinbefore mentioned, should, notwithstanding her intended coverture, be good and sufficient discharges for all rents, dividends, and *other monies to be paid to her or them, under any of the trusts; and in case any part of the rents, profits, dividends, &c., and other monies, or any savings or accumulations therefrom, or all or any part of the effects mentioned in the proviso thereinafter contained, or of the said sum of 400*l.* 3 per cent. Consolidated Bank Annuities, should remain undisposed of at the death of Mary Procter, and there should be issue of the marriage, upon further trust to pay, transfer, or assign the same rents, profits, interest, dividends, accumulations, and other premises, unto all and every the children and child of John Martin by Mary Procter, who, being

[*102]

a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age, or marry, to be equally divided between such children, if more than one, and if but one, then the whole to such one child; and if there should be no such issue, then in trust, after the decease of Mary Procter, and such default of issue as aforesaid, to assign or transfer, and pay the last-mentioned trust-money, stocks, funds, securities, dividends, and accumulations respectively, to such person or persons (including the said John Martin, if she should think proper), for such intents and purposes as Mary Procter, by any writing to be signed by her, and attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of a last will, should in manner therein mentioned direct or appoint; and in default of such direction or appointment, or so far as the same, if incomplete, should not extend, to such person or persons as would have been entitled thereto as her next of kin, at the time of such her decease, and such default of issue as aforesaid, under the statute for the distribution of intestates' personal effects, if she, Mary Procter, had then died sole and intestate, to the *utter [*103] exclusion of the said John Martin. And it was further agreed between Mary Procter and John Martin, that the said Thomas Brown and Henry Fowke should, within two calendar months after the solemnisation of the intended marriage, make an assurance upon the life of Mary Procter for the sum of 3,000*l.* [in their names, and should annually pay out of the said trust-money the regulated premium of assurance during the life of Mary Procter, and stand possessed of the said assurance in trust, from and after the decease of Mary Procter, to place out the said sum of 3,000*l.* at interest upon real or Government security, and to pay the interest thereof to John Martin for his life, if he should survive Mary Procter; and after the decease of John Martin, then in trust to pay the said sum of 3,000*l.* to such person or persons, and in such way and manner as Mary Procter should by will appoint, notwithstanding her intended coverture; and in default of such will] to pay the said sum of 3,000*l.* to the persons entitled under the statute of distribution of intestates' personal estate. Provided nevertheless, that Mary Procter should and might, if

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she pleased, in and by her last will and testament, give and bequeath the said 3,000*l.*, or any part thereof, to her intended husband John Martin absolutely, if he should survive her.

The marriage took effect, and the trustees, in pursuance of the [*104] proviso in the settlement, effected a policy of *assurance to the amount of 3,000*l.* on the life of Mary Martin, at an annual premium of 144*l.* 13*s.*, bearing date the 1st April, 1808.

John Martin died in the month of March, 1817, leaving Mary Martin, his widow, surviving him. There was no issue of the marriage.

By an indenture of assignment dated the 8th of April, 1817, and made between Henry Fowke, who had survived his co-trustee, of the first part, Mary Martin of the second part, and Philip Godsal, the father of the plaintiff, of the third part, reciting, amongst other things, * * that Ann, the wife of Philip Godsal, was one of the sisters of Mary Martin; and that Philip Godsal was also cousin to Mary Martin; and that Mary Martin, in consequence of the decease of John Martin, was unwilling any longer to continue the said assurance, and to pay the annual sum to grow due from time to time as the premium for the same, and had proposed to Philip Godsal to assign the policy to him, * * it was witnessed that, in consideration of the premises, and also of the natural love and affection which she, Mary Martin, had for and towards her cousin Philip Godsal, and her sister Ann, his wife, [Henry Fowke, at the request, and by the direction and appointment of Mary Martin, assigned, and Mary Martin granted and confirmed unto Philip Godsal, his executors, administrators, and assigns, the said policy of assurance, and also the sum of 3,000*l.*, thereby assured to be paid, and all sums of money which should become payable in respect of the said policy of assurance for his and their own use and benefit, and as and for his and their own absolute property for ever.]

[105] Henry Fowke, the surviving trustee, died in the lifetime of Mary Martin.

Philip Godsal continued to pay the annual premium upon the policy of assurance from the date of the assignment of the 8th of April, 1817, until his death. By his will, dated the 4th of April, 1818, he bequeathed the residue of his real and personal estate to

his son Philip Lake Godsal, the plaintiff; and his will was proved by the plaintiff and Charles Hatchett, two of the executors named therein. The annual premiums paid *by Philip Godsal, in his life-time, amounted in the whole to the sum of 1,446*l.* 10*s.* [*106]

Mary Martin died in the month of March, 1835, having made her will, dated the 2nd of August, 1834, whereby she devised and bequeathed all her real and personal estate, and all the residue of the produce of her funded property, monies, and securities for money, and other personal estate and effects not thereinbefore disposed of, to her nephew, the defendant, Edward Humphrey Brown, whom she appointed her executor, and by whom her will was duly proved.

The plaintiff paid the annual premium upon the policy from the death of his father until the death of Mary Martin, amounting to the sum of 1,157*l.* 4*s.*; and upon her decease, he received from the Equitable Assurance Company the sum of 6,570*l.*, being the sum of 3,000*l.* originally secured, together with 3,570*l.*, the amount of the bonuses which had from time to time been added to the policy.

The bill was filed by the plaintiff against the several next of kin, and the executor and residuary legatee of Mary Martin, and it prayed that the sum of 6,570*l.*, received by the plaintiff from the Equitable Assurance Society, might be declared to belong beneficially to the plaintiff, or to the next of kin, or to the executor of Mary Martin; and that, if the decision of the Court should be in favour of the plaintiff, the plaintiff might be declared entitled to retain the same for his own use and benefit; but if the decision of the Court should be adverse to the plaintiff, then that the plaintiff might be declared entitled to deduct the sums of 1,446*l.* 10*s.* and 1,157*l.* 4*s.*, being the amount of the premiums paid by his father, and himself respectively, with interest, from *the sum of 6,570*l.*; or, if he was not entitled to deduct the same, then that the executor of Mary Martin might be decreed to pay the same, with interest, to the plaintiff. [*107]

Mr. Pemberton, *Mr. Barber*, and *Mr. Walford*, for the plaintiff:

* * The power of appointing was confined to the coverture; and in the event which actually happened of the wife surviving her [108]

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husband, she acquired an absolute interest in the value of the policy. The agreement between the husband and wife, upon which the proviso for effecting the policy of assurance was founded, was purely executory. They might have abandoned it, at any time during their joint lives, by directing the trustees to discontinue the payment of the annual premium, and, on the death of the husband, Mrs. Martin was at liberty to keep up or abandon the policy, as she thought proper. * * *

[109] There is no trust to keep up the policy after the death of the husband, and the interest of the next of kin is an interest given to them after the death of the husband, if he should survive, but

[110] not after his death in the lifetime of the wife. * * The next of kin were not purchasers under the settlement, but mere volunteers, in whose favour the Court will not interfere.

Mr. Spence, for the executor, who was also the residuary legatee of Mrs. Martin. * * *

[111] *Mr. Tinney* and *Mr. Piggott*, for the next of kin:

* * The words "notwithstanding her coverture," do not imply that the appointment was only to be made during the coverture; but mean simply that the coverture should be no obstacle to her making a testamentary appointment. The trustee was clearly guilty of a breach of trust in concurring with the tenant for life to make an assignment of the subject of the trust, over which the tenant for life had only a power of appointment by will. * * *

[112] It is said that Mrs. Martin, upon the death of her husband, acquired the absolute interest in the policy, but the language of the settlement affords no ground for that conclusion. Under the trusts of this settlement Mrs. Martin took nothing but a life-interest with a power of disposition over the trust fund. [On this point they cited *Anderson* v. *Dawson* (1).]

[113] The trust, created by the proviso for effecting the assurance, was not executory, but a trust executed in the trustees, the parties creating the trust having divested themselves of all

(1) 15 Ves. 532. A plain executed declaration of trust, see judgment, *post*, p. 206.—O. A. S.

control over the subject of it, and no act requiring to be done, on their part, in order to complete the execution of the trust. The trust being created, the trustees were bound to continue the payment of the premium out of the settled funds for the benefit of the cestuis que trust. * * As to the premiums paid by the plaintiff since the assignment by Mary Martin, he is entitled to be indemnified either by the trustee, who concurred in making the assignment, or by the personal representative of Mary Martin.

[114]

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS [after stating the facts and referring to the contentions of the different parties, said]:

1838.

I am of opinion that the policy cannot be considered as appointed by the will of Mrs. Martin, or as forming part of her general estate. The question appears to me to be entirely between the plaintiff and the next of kin of Mrs. Martin.

[119]

The only professed object of the settlement in the recitals, is to secure the property of Mrs. Martin for her sole use and separate benefit, and to make a certain provision for her during the continuance of the coverture; and it was for that object alone that she professed to assign the trust property to the trustees. But the provision as to the policy shews that, besides that object, she also intended to make a provision for her *husband if he survived her; and, this being an object not stated in the recitals, we cannot in this case rely so much as in some cases may be safe upon the recitals, as affording the means of interpreting the whole instrument. The recital does, however, indicate that which must be deemed to be the principal intention, and it is not to be neglected. In everything which does not relate to the policy, the provisions of the deed are in conformity with the object recited; and, taking the clause relating to the policy in connection with the rest of the deed, the question is, whether the clause did, or was intended to do, more than make a provision for the husband, if he should survive the wife. The next of kin contended that, besides making that contingent provision for the husband,

[*120]

GODSAL v. WEBB.

she has intentionally or otherwise made for them a declaration of trust which could only be defeated by a testamentary appointment.

The case of *Anderson* v. *Dawson* (1), which was relied on by the next of kin, differs considerably from the present. In that case the fund was realised, and actually in the hands of the trustees. The trusts were distinctly declared, and, independently of any agreement to be performed or continued, the trustees were bound by their duty to carry those trusts into execution. In the present case the fund was not realised; it was to be realised and made available by acts to be done after the marriage, in pursuance of an agreement between the husband and wife, and to be continued during their joint lives, as the plaintiff says, but, as the words of the deed are, and as the next of kin contend, during the life of the wife whether she died in the lifetime of her husband or not.

[121] There is certainly a difficulty in saying that the words "during the life of the wife," shall be construed to mean "during the joint lives of the husband and wife;" but to do so would be to act in accordance with the nature of the contract, and the professed and apparent intention of the parties. And I think there is still greater difficulty in saying that, upon the construction of this settlement, the wife intended to create or has created a trust, not only against the husband, if he survived, but against herself if she survived; to continue the trust, principally made to secure a certain provision for herself during the continuance of the marriage, against herself and at her expense, after cessation of the coverture by the husband's death, for the purpose of realising a fund of which she was to have no enjoyment, but which became payable only on her death—which she was not to be able to dispose of otherwise than by will, and which, in default of appointment by will, might pass, upon her death, to her next of kin or to a subsequently taken husband.

The trustees held the policy, and were the legal owners of it. They had, by conveyance and assignment, the life estate, and by agreement between the husband and wife they were to pay

(1) 15 Ves. 532.

the premiums upon the policy during the life of the wife; and, if the husband had survived the wife, or if the wife surviving had permitted the premiums to be paid, there would have been no doubt as to the persons entitled to the money payable on the policy. But the whole provision is founded on the agreement between the husband and wife: except by stating the agreement to be so, there is no declaration of trust, and there is not even a covenant on the part of the trustees. The case appears to be a case of mixed trust and agreement, and looking at the whole of the settlement, I think that the intention of the ultimate limitation in the clause *in question, considered in connection with [*122] the rest of the deed, was only to shew that the agreement was to exclude the husband from taking more than a life interest in the investment of the policy money otherwise than by the gift of the wife, and that from the nature of the clause, considered as an agreement, it was open to the husband and wife during their joint lives, and to the wife if she survived, to alter that which was intended only for their mutual benefit; and it appears to me that, if Mr. Fowke, the surviving trustee, had availed himself of his power as trustee, and insisted on paying the premiums against the will of the widow, she might have compelled him to pay the whole income to her, and that this Court would not have considered her bound to perform the agreement for the benefit of mere volunteers.

Thinking that she had a right to refuse to keep up the policy or to permit the trustee to keep it up, I think that the trustee was entitled to assign it according to her direction, and consequently that the plaintiff is entitled to the fund in question.

COLLINSON *v.* PATTRICK.

1838.
Jan. 19, 20.

(2 Keen, 123—135; S. C. 7 L. J. (N. S.) Ch. 83.)

Rolls Court.
Lord LANGDALE, M.R.

A bond, and all sums of money recoverable in respect thereof, were assigned to trustees, in trust for such intents and purposes, and such person or persons as E. P., a married woman, should direct or appoint; and, in default of appointment, for her separate use. E. P. afterwards appointed her interest in the bond to certain persons, in order to indemnify them in case they should not be able to recover the whole of a sum [123]

COLLINSON v. PATTRICK.

appropriated by her husband, who was their solicitor, and for no other consideration appearing upon the deed.

Held, that this was an executed trust, to which, though without consideration, the Court would give effect.

[THIS was a bill filed by Maria Collinson, widow, Anna Maria Collinson, and Caroline Palmer Collinson, against the executors of Thomas Etheridge, and other defendants, claiming payment of monies due under a certain bond given by the testator.

The following facts were stated in the pleadings: A bond dated the 18th of November, 1801, was given by the testator Thomas Etheridge to secure the payment of 1,000*l.* to William Catling within one month after his marriage (which took effect) with the obligor's daughter Elizabeth Etheridge. The defendant Elizabeth Pownall, the wife of Edward Pownall, was the only surviving child of William Catling and Elizabeth, his wife, who died some time after the marriage.]

[124] By an indenture dated the 9th of December, 1833, and made between William Catling of the first part, Elizabeth Pownall of the second part, Edward Pownall of the third part, and the Rev. Richard Clough, Andrew Wood Baird, and William Pownall, of the fourth part, * * William Catling assigned to the trustees the bond of the 18th of November, 1801, and all sums of money which, on the death of Thomas Etheridge,

[*125] became or were due and *payable or recoverable under or by virtue of the said bond, [upon trust for such purposes as Elizabeth Pownall should appoint, and in default thereof upon trust for her separate use.]

By an indenture, dated the 7th of January, 1834, and made between Elizabeth Pownall of the first part, Edward Pownall of the second part, the plaintiff Maria Collinson of the third part, and the plaintiffs Anna Maria Collinson and Caroline Palmer Collinson of the fourth part, reciting, among other things, the bond of the 18th of November, 1801, and the indenture of assignment dated the 9th of December, 1833, and reciting that a partnership had then lately subsisted between Edward Pownall and William Powell Hart as attornies and solicitors at Ipswich, but that the same had been recently dissolved, and that, during the existence of such partnership, Edward Pownall borrowed and appropriated

the sum of 1,000*l.* belonging to the plaintiff Anna Maria Collinson, and also the sum of 1,500*l.* belonging to the plaintiff Caroline Palmer Collinson; * * and reciting that, [126] in order to save harmless and indemnify the plaintiffs Anna Maria Collinson and Caroline Palmer Collinson, in case they should not be able to recover the whole of the sums so borrowed and appropriated by Edward Pownall, it was witnessed that, in pursuance of and for effecting the said proposal, and in consideration of the premises, Elizabeth Pownall, in execution of the power given to her by the indenture of assignment, directed, limited, and appointed that all and every the sums of money to which she was entitled under the said assignment, and all her estate, right, title, &c. therein and thereto, should vest in the plaintiff Maria Collinson, her executors, administrators, and assigns, as her and their own absolute properties, upon trust * * to pay to the plaintiffs Anna Maria Collinson and Caroline Palmer Collinson so much of the sums appropriated by Edward Pownall as they should not be able to recover, and to stand possessed of the residue upon the trusts of the indenture of the 9th of December, 1833. * * *

Mr. Tinney and *Mr. James Russell*, for the plaintiffs. * * * [127]

Mr. Pemberton and *Mr. Teed*, for Mrs. Pownall: [128]

* * The interest was a mere *chose in action*, a sum of [130] money, not actually in the hands of the trustees, but to be recovered by them in a suit; and it was clearly established by the authorities, that where any thing remained to be done to complete the legal interest in a person intended to be constituted a trustee for a volunteer, such volunteer has no *locus standi* in this Court. The late case of *Edwards* v. *Jones* (1), was an express authority to shew that the Court would not execute an imperfect attempt to make an assignment of a bond without consideration, even where the legal interest was in the person professing to assign it.

[They also disputed the validity of the deed of the 7th of January, 1834, on other grounds which are not material for the purposes of this report.]

(1) 43 R. R. 178 (1 My. & Cr. 226).

COLLINSON v. PATTRICK. [131]

Mr. Romilly, for the assignees of Edward Pownall, who disclaimed.

Mr. Richards, for William Pownall, who, by his answer, stated that he had not executed the deed of the 9th of December, 1833, nor accepted the trusts thereof.

Mr. Turner, *Mr. Geldart*, and *Mr. E. Montagu*, for other defendants.

Mr. Tinney, in reply:

* * The plaintiffs do not call upon the Court to execute the trust; all they ask is a declaration that they are entitled to stand in the place of Elizabeth Pownall, who has done every thing to vest her interest in the bond in the plaintiffs. If she disputes the title of the plaintiffs, and seeks to set aside the deed under which they claim, she may file a cross-bill, but the deed cannot [*132] be set aside in this suit. * * *Colman* v. **Sarrel* (1) was a case in which the subject of voluntary assignment was stock which the assignor never transferred. He did not do all in his power, therefore, to put the subject of assignment out of his control, and this Court could not compel a transfer of stock. * * *Edwards* v. *Jones* was a case in which a mere memorandum was indorsed upon the bond in question, and there was evidently no complete act which amounted to an assignment. If the act had been complete, the LORD CHANCELLOR distinctly intimated that he acquiesced in the principle on which *Fortescue* v. *Barnett* (2) was decided, and that the Court would have given effect to it.

* * * * *

[133] THE MASTER OF THE ROLLS:

In this case the plaintiffs have been defrauded of a considerable sum of money, the whole of which they will probably lose, if they do not obtain the benefit of their security. On the other hand Mrs. Pownall appears to have executed the deed, under which the plaintiffs claim, with a view of obtaining a benefit for her husband, which in fact was never obtained; and, if the plaintiffs

(1) 1 R. R. 83 (1 Ves. Jr. 50). (2) 41 R. R. 5 (3 My. & K. 36).

succeed in their claim, she will have given up her separate property, without any equivalent, to a stranger. On either side it will be a case of considerable hardship for the party against whom the Court must decide. (His Lordship proceeded to state the facts of the case.)

Three objections have been raised to the relief prayed by this bill. First, it is said that the deed of the 7th of January, 1834, was executed by Mrs. Pownall for a consideration not stated upon the deed, and under an engagement which has never in fact been performed. Next, it is said that the deed was executed without any *consideration; and that, the deed being voluntary, and [*134] something requiring to be done by the party creating the trust, it is a trust which cannot be executed by this Court. Thirdly, it is insisted that the suit is not framed in conformity with the ordinary rules of the Court.

As to the first point, it does not appear to me that I can adjudicate upon it, in the present state of this record, and in the absence of a cross-bill impeaching the validity of the deed.

With respect to the second objection, it seems to me that, so far as depended upon the party executing this deed, every thing has been done to constitute an executed trust. It is certainly a matter well worthy of consideration how far the peculiar situation of a married woman, entering into such an engagement as the present by which she binds her separate estate, is not entitled in a court of equity to the same species of protection which the law gives to persons entering into a legal obligation, and whether a contract of indemnity, so entered into, should not in this Court be supported by a valuable consideration. A declaration of trust is considered in a court of equity as equivalent to a transfer of the legal interest in a court of law; and, if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration. If this had been a transaction resting on an agreement, not conferring the legal interest—if it had been an executory contract, this Court, in the absence of consideration, would not have given effect to it; but if what has been done is equivalent to a transfer of the legal interest, the parties, in whose favour the trust is created, are entitled to have the benefit of it

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in this Court, and I am of opinion that this deed gives an interest to the plaintiffs which does so entitle them.

[His Honour then considered the third objection, and held that the suit was properly framed.]

1837. *April* 10, 11, 18. *May* 31.

Rolls Court. Lord LANGDALE, M.R.

[150]

THE ATTORNEY-GENERAL *v.* CAIUS COLLEGE.

(2 Keen, 150—171; S. C. 6 L. J. (N. S.) Ch. 282.)

A testator, contemplating that a fixed annual income of 250*l.* would arise from the investment of 5,000*l.*, which annual income he directed to be distributed by his supervisors in the manner directed by his will, gave to his executors and other persons certain property, and directed them, after his death, to erect a grammar-school for the instruction of five score scholars; and he ordered six tenements to be built for six almsfolk, and ordained six fellowships and scholarships to be founded in Caius College. He then appointed the master and fellows of Caius College to be the supervisors of his will, and willed that the master and four senior fellows should perform all that was appointed to be done by the supervisors, and he gave to the master and four senior fellows for their pains, yearly, the sums of money afterwards appointed to them. He then gave particular sums, amounting in the whole to 243*l.* 14*s.* 8*d.* (among which were a sum of 3*l.* to the master, and 30*s.* each to the four senior fellows), and he willed that the remainder of the 250*l.* per annum should be from time to time bestowed in such charitable uses as his executors for their times, and, after, his supervisors, should think fit.

The sum of 5,000*l.*, given by the will, was invested in land, and the rents had increased greatly beyond the 250*l.* originally contemplated by the testator.

Held, that the master and four senior fellows took the remainder of the 250*l.* upon trust for charitable purposes, exclusive of any application of it to their own benefit; and that they were entitled to a proportion of the surplus rents in respect of the gift of the remainder, *pro ratâ*, with the other specified objects of the testator's bounty.

Principles upon which the Court proceeds in the exercise of its jurisdiction over charitable foundations, and in the application of relief, where the funds have for a long period been, without corrupt intention, misapplied by the trustees:

The Court considers not only the terms of the gift, but the circumstances under which the gift was accepted, and the foundation established.

A college is under no obligation to accept an accession to its foundation, or any other trust; but, if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust.

If there are questions upon the original instrument of foundation, and an arrangement be made at the time of acceptance, and is evidenced either by contemporaneous instruments, or even by constant subsequent usage, which may be considered as evidence of such arrangement, the

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Court will not disturb it, though in its own view of the original instrument, that arrangement was in effect not expedient.

Where the founders of charitable institutions have thought fit to appoint colleges to be trustees of their foundations, the Court is not at liberty to interfere with the will of the founder in that respect, upon the notion that, when individuals are trustees, there is a greater personal responsibility.

Where there had been great errors and misapplications of the charitable funds committed by the trustees and their predecessors for two centuries, but no corrupt or improper motive was imputed to them, the Court refused to appoint new trustees. And in consideration of the great accumulation of the charity property, the result of the care and economy of the trustees, and of other circumstances, the Court, notwithstanding the errors which had been committed, allowed to the trustees their costs of the suit out of the funds which had been so accumulated.

The Court directed, that in settling a scheme for the grammar-school, liberty should be given to the master to approve of a plan for adding instruction in writing and arithmetic to instruction in grammar, and other learning fit to be taught in a grammar-school.

THIS information was filed by the *Attorney-General*, at the relation of William Reeves and others, against the master and fellows of Gonville and Caius *College in the University of Cambridge, and against the master and other members of the College in their individual capacities, and against Mr. Bailey, the schoolmaster of a free grammar-school, founded by Dr. Stephen Perse, the testator in the cause. The information prayed an account of the property belonging to, or applicable to the purposes of the charity founded by Dr. Perse, which had been possessed by the master and fellows of the College; and a declaration that the income thereof was applicable to the charitable purposes declared in the will of Dr. Perse, and of George Griffith, and particularly in support of the free grammar-school, and the maintenance of the master and usher thereof; and that the rents of certain hereditaments in Free School Lane in Cambridge, were exclusively applicable to the support of the school, and of the master and usher. The information also prayed, that the master and fellows in their corporate capacity, and the other defendants personally might answer for such part of the income as had been improperly applied; and that the master and fellows of the College, and the master and four senior fellows thereof might be removed from the office of trustees and supervisors of the will, at least so far as respected the school and the management thereof, and the appointment of

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the master and usher thereof, and that ordinances and orders might be made for the government of the school for the time to come.

This charity was founded by the will of Dr. Stephen Perse, dated the 27th of September, 1615. The testator gave certain sums of money, amounting to 5,000*l.*, to be advanced by way of loan to certain corporations; and, contemplating that a fixed annual income of 250*l.* would arise therefrom, he directed the same to be distributed by his supervisors in the manner directed by his will. He then gave to his executors, and other persons certain

[*152] *property in Cambridge, and directed them, after his death, to erect and build a convenient house to be used for a grammar-school, with a lodging chamber for the master and another for the usher; and he willed that five score scholars born in Cambridge, Barnwell, Chesterton, and Trumpington, and no more nor any other, should be in the free school taught and instructed, and those freely. He then ordered to be built six tenements for the habitation of six poor almsfolk, and ordained six fellowships and six scholarships to be founded and settled in Gonville and Caius College, to be called Dr. Perse's fellows and scholars. He appointed the master and fellows of the foundation of the College to be supervisors of his will, and willed that the master and four senior fellows should execute and perform all that was appointed to be done by the supervisors; and he gave to the master and four senior fellows for their pains, yearly, the sums of money afterwards appointed to them. The will then proceeded to direct the application of the 250*l.* per annum, as follows:

"Item, I will that the said 250*l.* per annum to be received as aforesaid, yearly by my supervisors, to be by them yearly paid out in such sort to such persons and purposes as by this my will is appointed to be paid in perpetuity, at the two feasts of St. Michael and the Annunciation yearly, by equal portions. Item, to the schoolmaster of my free school 40*l.* per annum, and to the usher 20*l.* per annum for ever. (He then proceeded to give other particular sums, amounting in the whole to 243*l.* 14*s.* 8*d.*, among which were the following:) Item, to the master, fellows, and scholars of the said College, towards the reparations of the buildings of the said College, now built and

hereafter to be built, and increase of their stock, 6*l.* 13*s.* 4*d.* Item, to the *master of Gonville and Caius College for the time being, 3*l.* yearly for ever; and to the four senior fellows of the ancient foundation of the said College from time to time 30*s.* a piece yearly, for ever. [The testator then disposed of the remainder of the 250*l.* as follows:] The remainder of the said 250*l.* per annum, I will, shall be from time to time bestowed in such charitable uses as my executors for their times, and, after, my supervisors shall think fit."

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He appointed Valentine Carey, Martin Perse, and Robert Spicer to be executors, and contemplating the possibility of the intended loans not being effected, he, in that case, empowered his executors to invest the 5,000*l.* in the purchase of land to produce an income of 250*l.* a year, *ultra* reprises, to be purchased or taken in mortmain, or to such uses and to such feoffees, or in such manner as by his executors or the survivor of them, and, after their time, by his supervisors should be thought fit, so always as the yearly revenue thereof might be, yearly from time to time received, laid out, and paid in such manner, to such uses, intents, and purposes, and to such persons as before in his will was appointed to be paid in perpetuity; and at the end of his will he ordained that, after the death of his executors, the master and fellows of the College should be executors of his will, and should perform whatever his former executors should leave unperformed; provided, however, that the master and four senior fellows should, after the death of the first named executors, have the ordering, disposing, election and appointment of all things appointed to his executors or supervisors by his will.

The corporations, to whom the testator desired that the 5,000*l.* should be advanced by way of loan, declined to accept the same, and that sum was, in pursuance of *the directions of the testator in case the loans should not be accepted, invested in the purchase of land, and the land so purchased was conveyed to the master and fellows upon the trusts of the will. The income arising from this property had increased from the sum of 250*l.* originally contemplated by the testator, to upwards of 2,000*l.* a year.

[*154]

It was admitted at the Bar, on the part of the defendants, that great errors and irregularities had been committed in the

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management of the property, in the distribution of the income, and particularly in the conduct and management of the school; and a reference for a scheme was not, therefore, resisted.

The principal questions raised upon the information were—first, whether the master and four senior fellows took, under the bequest of the remainder of the 250*l.*, the whole surplus income after payment of the specific bequests, as trustees for such charitable purposes as they thought fit, and for the benefit of the College, if they so thought fit to exercise their discretion; or whether they took only, under the gift of the remainder of the 250*l.*, a rateable proportion of the surplus income with the other objects of the specific bequests, as trustees for charitable purposes, exclusive of an application of it to their own benefit. Secondly, if the latter were the right construction of the will, whether the College was not entitled, under a deed of arrangement between the heir and executor of the founder and the College, to dispose of the whole income. Thirdly, whether the master and four senior fellows ought not to be removed from their office of trustees; fourthly, whether, as against the master and one of the senior fellows, the account ought not to be carried back beyond the period at which the information was filed.

[155] On the first point, in support of the argument for a rateable apportionment of the surplus rents between the specified objects of the testator's bounty and the master and four senior fellows as trustees of the remainder of the 250*l.*, the distinction between a gift of unascertained residue, and a gift of the remainder of a specific sum, was relied upon, and [*Page* v. *Leapingwell* (1), *The Attorney-General* v. *Skinners' Company* (2), *The Attorney-General* v. *The Corporation of Bristol* (3), *The Attorney-General* v. *Catherine Hall* (4), *The Attorney-General* v. *Brazen Nose College* (5), and other cases were cited].

[156] On the second point, *The Attorney-General* v. *Pembroke Hall* (6) was relied upon by the defendants.

On the other points, *The Attorney-General* v. *Corporation of*

(1) 11 R. R. 234 (18 Ves. 463).
(2) 26 R. R. 126 (2 Russ. 407).
(3) 22 R. R. 136 (3 Madd. 319, 2 Jac. & W. 294).
(4) 23 R. R. 92 (Jac. 381).
(5) 37 R. R. 107 (2 Cl. & Fin. 295).
(6) See 25 R. R. 244 (2 Sim. & St. 441).

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East Retford (1), was cited in support of the information, and *The Attorney-General* v. *The Dean of Christ Church* (2), *The Attorney-General* v. *The Mayor of Exeter* (3), *Davis* v. *Spurling* (4), [and other cases], were cited for the defendants.

The Attorney-General v. *The Haberdashers' Company* (5), [and other cases] were cited as authorities for the introduction of reading, writing, and other elementary learning into the scheme for the grammar-school.

THE MASTER OF THE ROLLS:

May 31.

It appears from the will that the testator, having several benevolent purposes in view, intended them to *be carried into effect by means of the College of which he had been a fellow. [*157]

His principal object, however, appears to have been to establish a free grammar-school in Cambridge. He gave the land on which the school was to be built, and directed his executors to build it: he further directed that boys educated in the school should have a preference in the election of the scholars on his foundation, and intimated, rather than expressed, a wish that his fellows might, by sufficient authority, be incorporated into the body of the College. He gave to the schoolmaster and usher, and to the scholars and fellows of his foundation, different sums, amounting in the whole to 144*l.*, making considerably more than half of the whole revenue; and the whole scheme appears to me to indicate an earnest desire to encourage the school in close connection with the College.

The master, fellows, and scholars, or, as in another place he calls them, the master and fellows of the foundation, are appointed the supervisors of his will, and his executors, after the death of the persons first appointed. But he wills that the master and four senior fellows do, at all times, execute and perform every thing in his will appointed to be done by the supervisors. He gives to them certain annual sums of money, expressly "for their pains;" and, in a subsequent part of the will, he provides that only the master and four senior fellows

(1) 39 R. R. 124 (2 My. & K. 35).
(2) 23 R. R. 126 (Jacob, 474, 637; 2 Russ. 321).
(3) 26 R. R. 105 (2 Russ. 362).
(4) 32 R. R. 141 (1 Russ. & My. 64).
(5) 27 R. R. 122 (3 Russ. 530).

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shall, after the death of his executors, have the ordering, disposing, election and appointment of all things appointed to his executors or supervisors by his will. The master and four senior fellows are, therefore, in effect trustees of the will, and of this charitable foundation to be carried on in connection with the College. The power, however, of expelling fellows and scholars [*158] *is expressly given to the master and twelve senior fellows.

It may not unreasonably be supposed that, in establishing the close connection which he did between the school and the College, the testator intended to do that which would be beneficial to both. What pecuniary benefit he intended for the College, is to be collected from the terms of his will, and the mode in which he has directed the distribution of the fixed revenue of 250*l.* a year which he contemplated. The particular sums, of which he directed the application, amounted in the whole to 243*l.* 14*s.* 8*d.*, leaving a remainder of 6*l.* 5*s.* 4*d.* Amongst the particular sums which he gave, were 6*l.* 10*s.* 4*d.* towards the reparation of the buildings of the College then built, or thereafter to be built, and the increase of their stock; the sum of 3*l.* to the master of the College, and the sum of 30*s.* to each of the four senior fellows of the ancient foundation; and he gave the remainder of the 250*l.* to be bestowed in such charitable uses as his executors for their time, and after, his supervisors should think fit.

On the construction of the will, I think that, in the gift of the 6*l.* 13*s.* 4*d.*, the testator treated the College as an object of his bounty; but, in giving the particular sums to the master and four senior fellows, it scarcely appears that he intended to treat them in that character. He imposed on them an onerous duty, and, having regard to the words used in a preceding part of the will, namely, "I give to the said master and four senior fellows, for their pains respectively for ever, the sums of money appointed to them by this my will, desiring them to see the uses of this my will duly performed," I think it appears that he meant to give them, not a mere bounty, but a remuneration for the services [*159] which he *intended them to render. And, as to the remainder, I consider it to be no beneficial gift to the College, but a specific direction to bestow it in such charitable uses as the supervisors should think fit; and I think that this direction does not entitle

the master and four senior fellows to apply any part of the remainder to their own exclusive use. Being the acting supervisors and trustees of the fund, it was their right and duty, as such trustees, to apply the remainder to charitable uses; but, being trustees, I am of opinion that they were not entitled to make themselves partakers of the benefit.

This appears to me to be the construction of the will, having regard to the fixed income which the testator contemplated; and I do not think that the effect is materially varied by the subsequent clause of the will in which the testator contemplated a purchase of land in lieu of the particular investment of the 5,000*l.* which he intended to be made. He desires that the purchased land should produce 250*l.* a year beyond reprises; but he fixes the trust upon the yearly revenue of the land, and directs the same to be "paid in such manner, to such uses, intents, and purposes as before in his said will was appointed to be paid in perpetuity;" and although, upon the construction of the will, with reference to the increased revenue, it may be doubtful whether we ought to consider the remainder spoken of by the testator as the fixed sum of 6*l.* 5*s.* 4*d.* (being the residue of the 250*l.* a year after deducting the particular payments appointed by the testator) or as the same sum together with its proportional increase in reference to the augmentation, or the whole residue of the augmented income after deducting the fixed payments directed by the will, yet, in any view of the case, it appears to me that the only power, which the master and four senior fellows could possess, would be to direct *the charitable [*160] purposes to which such residue should be applied, and that they would have no power to apply any part to their own use, any otherwise than as they might be partakers of a proportionate or proper increase of the sum given to the College as a bounty, and probably to increased recompense for increased trouble in the managing a property of increased value.

In cases of this nature, however, it is important to look, not only at the terms of the gift, but also at the circumstances under which the gift was accepted and the foundation established.

It appears that, very soon after the testator's death, the other two executors committed the executorship to Martin Perse alone,

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and that he alone, in concurrence with the College, settled the foundation. The corporations declined the loans which were offered to them; and, on the 17th of October, 1616, Martin Perse covenanted with the master and the four senior fellows that he would, before Michaelmas then next, cause to be assured so much land as should be of the yearly value of 250*l.* above reprises, and by common estimation likely to continue so, to the master and four senior fellows, for the performance of the good uses intended by the will; and would, before the same time, cause to be erected the free-school, alms-houses, and causeway mentioned in the will.

Some time after this, Martin Perse purchased from Sir Thomas Bendishe, for 5,000*l.*, the manor of Frating and other property, which he afterwards by deed, dated the 6th of March, 1618, conveyed to the master and six fellows of the College, on trust to permit the master and fellows to dispose of the same in the performance of the good uses expressed in the will, and thereafter, [*161] at such *time as the master and fellows should think fit, to convey the property to the master and fellows and their successors for ever; and by an indenture of even date, Martin Perse covenanted that Sir Thomas Bendishe should surrender fourteen acres of woodland, being copyhold, to the use of the same trustees upon the same trusts.

By another indenture of the same date (6th of March, 1618), and made between Martin Perse of the first part, and the master and fellows of the second part, the master and fellows acknowledged that the property conveyed to the trustees was then of the yearly value of 250*l.*, and they accepted the conveyance thereof as a full satisfaction and performance to them of the legacy of 250*l.* per annum; and they released Martin Perse and the executors from that legacy of land intended to be purchased with the 5,000*l.* This deed, after providing for the then possible case that the corporations might recover some of the sums intended to be advanced to them by way of loan, contained a covenant on the part of the master and fellows, that they would, out of the rents of the property, so far as the same would extend, maintain the good uses mentioned in the will, to be maintained with the yearly revenue of 250*l.*; and that if, by

wood sale, or other profit arising out of the property, any sum of money should be raised above the yearly revenue of 250*l.*, the same should be invested in the purchase of lands, the rents of which should be applied in the reparation of the new buildings of Stephen Perse in the College, and the free-school and almshouses in the town of Cambridge, founded under the will of Stephen Perse, and in defraying expenses about the property, or concerning the endowment made by Stephen Perse by his will to the College; and lastly, to the bettering of the said good uses appointed by the will to be *performed with the revenue of 250*l.* per annum, or for the bettering of some of them as to the master and fellows and their successors should seem most fit. The master and fellows then acknowledged that Martin Perse had distributed 500*l.* in making a new building in the College for the Perse fellows and scholars; and then provision was made for the event which might happen of the rents falling off so as not to produce 250*l.* a year.

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In substance this arrangement, instead of providing for the immediate application of any surplus income, provided, first for its investment, and then for the application of the income arising from the investment; and, passing over any question arising from the purchase of woodland and copyhold property, for which (if I correctly understand the transaction) freehold was afterwards substituted, it does not appear to me that the arrangement was in any way improvident or improper. In the beginning, it was much more safe and prudent to make some investment of the surplus, instead of making an immediate application of the whole, and the purposes, for which the income arising from the investment were to have been applied, seem to have been right.

It is, I think, to be collected from the deed, that Martin Perse and the College at that time considered that 250*l.* a year was the whole amount which the testator intended to apply to the charitable uses mentioned in his will. If this were strictly so, the surplus would have had to be applied to such charitable purposes as the College should direct; but, by this deed, the College covenanted that, after repairs and expenses were satisfied, the income to arise from the investment of the surplus should be

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applied in bettering the good uses appointed by the will, or some of them, as the College should direct.

Now it has often been declared in this Court, that a college is under no obligation to accept an accession to its foundation, or any other trust; that, if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust; but that, if there are questions upon the original instrument of foundation, and an arrangement be fairly made at the time of acceptance, and is evidenced either by contemporaneous instruments, or even by constant subsequent usage, which may be considered as evidence of such arrangement, then the Court will not disturb it, although in its own view of the original instrument, that arrangement was in effect some modification of that which might now be considered the best construction of the original instrument. And, looking at the case with reference to these considerations, though I might in some degree differ in opinion from those who agreed to this arrangement of March, 1618, I should not think myself at liberty to disregard it. It was, I think, a reasonable arrangement for carrying into execution the trusts of the will, and although the mode of accumulation, if constantly pursued, would after a certain time lead to inconvenience requiring a check, and some new regulation under the authority of this Court, yet, as to the application of the revenue, I see nothing to object to it, as a term on which the executors conferred, or the College accepted the trust; and, if that mode of application had been pursued in the spirit in which it was directed, I think that there would have been no just ground of complaint, and that it would not have been proper for me to make the sort of decree which, under the present circumstances, the case appears to me to require.

[*164] It would appear that, soon after the testator's death, Mr. Martin Perse, in performance of the will and of his *own covenant in the deed of 1616, erected a school-house and lodgings for the schoolmaster and usher. The school-house and lodgings did not occupy the whole of the land destined for them, and, on the 20th of April, 1621, the executors and devisees in trust of Stephen Perse demised a portion of the land to Robert

Allot, for fifty years, for the purpose of raising a yearly rent to be bestowed for and towards the reparation of the free school; and there can, I apprehend, be no doubt that the whole revenue derived from the property was properly applicable to the purposes of the school alone.

In February, 1623, ordinances for the government of the school were made by the executors and the Judges of assize.

In November, 1657, the survivor of the trustees named in the deed of March, 1618, conveyed the estates therein comprised to the master and fellows of the College; but it does not appear that any thing further was done with the property in Free School Lane, or in whom the inheritance of that property is now vested.

In the year 1686 Mr. George Griffith gave to the master and fellows 100*l.* to be employed for a supplement to the revenue of the free school.

The foundation of the charity being such as I have stated, it appears from the proceedings in this cause that there have been considerable errors and irregularities in the management of the property, in the distribution of the income, and more particularly in the conduct and management of the school. The defendants admit at the Bar that it has been so, and they are so far from interposing any obstacle to the due regulation of the *charity that they offer to give every facility for that purpose. [*165]

Under these circumstances it is clear that there must be a reference to the Master to approve of a scheme for the application of the income of the property belonging to this foundation, and for the conduct and management of the school, and that there must be an account of the receipts and payments of the defendants. But the relators, in the name of the *Attorney-General*, insist that, besides this relief, the master and fellows of the College ought not to be allowed to act as trustees of the property; and that, as against the master, and one of the fellows, the account ought to be carried much farther back than the filing of the information. And some questions are raised respecting the declarations which ought to be made for the guidance of the Master in settling the scheme; respecting the

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proper inquiries for ascertaining the property, and respecting the costs of the suit.

Upon the question whether there ought to be new trustees, I am of opinion that I ought not to apply to the case any such general principle or general reasonings as have been urged at the Bar. It is not for me to consider whether corporations or colleges are or are not, in a general view, well or ill qualified to be trustees. The founders of many charitable institutions have thought fit to appoint colleges to be trustees of their foundations; the law has allowed this to be done, and courts of equity are not, in my opinion, at liberty to say that this shall not be done, upon the notion that, when individuals are trustees, there is a greater personal responsibility. How little that personal liability is in many cases available, experience shews us; but I consider it clear that these are not considera-

[*166] tions, which this Court is at liberty to *resort to on such questions; and I cannot admit the validity of the argument, which, after all the errors and misapplications that upon a careful examination of the original documents appear to have been committed by the present members of the College and their predecessors for two centuries past, affirms that every error was wilfully committed, and infers, from the total amount of them, that the present members of the College or corporation and their successors in all time to come are and will be incompetent faithfully to fu the office of trustees. On the other hand, when I see how anxiously the founder in this case has connected his foundation with the College, and the utter impossibility of separating one from the other without defeating his plain and manifest intention, I conceive it to be perfectly clear that the College cannot be removed from the office of trustees on any of the grounds stated, and it does not appear to me that the circumstances of this case make it fit to accede to the proposal which has been made to appoint new trustees without prejudice to the rights of the College as supervisors, or that any real advantage would be gained by it. It seems to me that, whatever regulations might be made in that respect, the effective administration must, consistently with the testator's intention, substantially remain with the College, and that, after all that

can be done, the right of resorting to this Court would, as in other cases of trust, afford the only real and effective security for the due administration of the trust.

With respect to the accounts as against the College and the defendants Messrs. Turnbull, Musgrave, Houlditch and Thurtell, nothing more is asked than an account from the filing of the information. But with respect to the master of the College and Dr. Woodhouse, it is asked that they should be ordered to refund certain sums which *they have received beyond the amount of what was justly payable to them. [*167]

As to the allegation on which this demand is made, I am under the necessity of saying that, after considering the nature of this foundation and the facts stated in the answer, it does, in my present view of the case, appear to me that considerable over-payments were made to the master and four senior fellows of the College before the year 1830; but, notwithstanding that, considering all the circumstances of this case—that the first deviation from the letter of the will in favour of the master and four senior fellows was made in the year 1787, before the present master was made a member of the College—that the alterations in 1804 and in 1812, in which the present master concurred, were made in conjunction with the four senior fellows at those times respectively, and who are not now before the Court—that the alteration in 1825, in which the present master and Dr. Woodhouse partook, were made in concurrence with three other senior fellows, who are not now before the Court and one of whom has been dismissed from the suit since its institution—considering further, that the amount which, in reference to all the circumstances of this case, the master and four senior fellows might have been justified in receiving has not been ascertained, but is now subject to question, so that the amount of over-payment is even at this time unknown, and conceiving that the excess cannot under the circumstances of this case be fairly measured by the advance from the previous payment—considering also that, in 1830, when the objectionable nature of what had been done was first brought to the attention of the master and four senior fellows, a correction (whether adequate or not) was *bonâ fide* undertaken to be applied and was in fact

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applied—having regard also to the admissions, properly made at the Bar, that no corruption *or improper motive is chargeable against any of the parties in this cause, and that every facility is now offered in placing the matter upon a proper footing, I am of opinion that I should deviate from the principles on which the Court has acted in such cases, if I were to direct the account to be carried back against the master and Dr. Woodhouse in the manner that has been asked.

With respect to the declarations, which ought to be made, it appears to me that they should be so far particular as to call the attention of the Master distinctly to the property to be applied, and to the purposes to which it is applicable; and, under the circumstances of this case, I think that I cannot properly make a decree leaving to the defendants so much discretion as was done in the case of *Jemmit* v. *Verril* (1). I therefore propose to make a declaration almost in the terms which have been asked by the relators in the name of the *Attorney-General.* (See declaration, *post*, p. 228.)

The costs of the suit remain to be considered. The relators must have their costs out of the fund. They do not ask any costs against the defendants, but they desire that all the defendants should be made to bear their own costs of these proceedings.

On what ground this is desired against the defendants Messrs. Turnbull, Musgrave, Houlditch, and Thurtell, has not been stated; it is desired against the College, the master of the College and Dr. Woodhouse, on account of their participation in those acts which now appear to be breaches of trust.

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I should be sorry to say any thing from which it could be inferred that corporations and colleges are not *bound strictly to perform the trusts they undertake; but it is evident that, in charging corporations consisting of fluctuating members, they cannot be dealt with as individual persons; for, by doing so, we should visit the present members with the consequences of errors committed by their predecessors, whom they do not in any respect represent; and in every case of this sort, we must look at all the circumstances. There are errors and misapplications

(1) Ambl. 585, *n.*, Blunt's edit.

such as have been dwelt on at the Bar; all of them had their origin before any of the present defendants came into the College; some of them have been greatly aggravated since, and what has been done particularly in regard to the school and the school-house cannot be considered without very great regret; but it appears to me clear from the answers, that, in the ignorance in which all the parties were as to the particular regulations which they ought to have followed or made, they really, when they were acting most erroneously, thought themselves acting fairly even with regard to the school, and at liberty to do all that they did. Their attention was never seriously drawn to the subject till the year 1830; and they then began to inquire for the documents, by which they were to be guided. They were prosecuting those inquiries, and obtaining the advice necessary for their guidance, when, without any previous application being made to them, this information was filed, and their proceedings were arrested. In the year 1830 they had, without suit, altered the distribution which has been, as I think, justly complained of. They then adopted a new distribution, the propriety of which is certainly open to question, but which was meant to put an end to all breach of trust; and, for any thing which I can clearly see to the contrary, they might, from the course they were pursuing, have proceeded to place (as it undoubtedly was their duty to place) the school upon a proper footing without the interposition *of this Court. Moreover, notwithstanding the [*170] errors committed, the College, as trustees, have, by their care, accumulated from the income of this property the several funds mentioned in the answer of Mr. Thurtell, namely, 25,100*l.* 3 per cent. Annuities, 2,400*l.* South Sea Annuities, and 5,000*l.* Exchequer bills. This accumulation is, amidst all the errors which have been committed, the result of the care and economy of the trustees, and now remains applicable to the purposes of the foundation, to the great advantage, as I hope, of the school, and the other objects of the testator's bounty.

Under all these circumstances, though I certainly have hesitated very much, yet, on the whole, it appears to me that I shall not do wrong in allowing these defendants their costs of this suit out of the fund which has been accumulated and preserved

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for the foundation by the care and economy of themselves and their predecessors.

Declare that the lands and funds now in the possession of the College, as trustees or supervisors of Dr. Perse's will, except as to 100*l.* part of such fund, are subject to the trusts of the will of Dr. Perse; and that the sum of 100*l.* is subject to the trusts of the will of Mr. Griffith; that the school-house and the other houses, situate in Free School Lane in Cambridge, together with the income arising from such part thereof as shall not be occupied for the purposes of the school, and the lodgings of the master and usher, and the interest of the 100*l.* bequeathed by the will of Mr. Griffith, are applicable exclusively to the purposes of the will. Refer it to the Master to inquire what the property, other than the property in Free School Lane, and the 100*l.* [*171] bequeathed *by the will of Mr. Griffith, now consists of, and in whom the same is now vested, with liberty to state special circumstances. Declare that the whole income of such property, after setting apart a proper sum to answer the contingencies, ought to be divided amongst the several objects mentioned in the will of Dr. Perse, or such of them as are now subsisting; and that, in the distribution of the income among such objects, the master and fellows are entitled to apply, to such charitable objects as they think fit, such share of the said income as shall bear to the whole thereof the same proportion as the sum of 6*l.* 5*s.* 4*d.* shall bear to the sum of 250*l.* Refer it to the Master to approve of a scheme for the general administration of the property, and for the application of the income of the trust-fund; the Master, in approving of a scheme for the application of the income, to be at liberty to vary the proportions in which the income is to be apportioned among the subsisting objects; and the master and four senior fellows of the College to be at liberty to claim an increased allowance for their pains. Refer it to the Master to approve of a scheme for the future conduct and management of the school, having regard to the share of the general income which shall be allotted to the master and usher, and to the income to arise from the property in Free School Lane, and the 100*l.* bequeathed by the will of Mr. Griffith; and

the Master, in settling the scheme, to be at liberty to approve of a plan for adding instruction in writing and arithmetic to instruction in grammar, and other learning fit to be taught in a grammar school. The *Attorney-General* and the defendants to be at liberty to propose schemes for the purposes aforesaid, for the consideration of the Master.

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MATHER *v.* SCOTT (1).

(2 Keen, 172—180; S. C. 6 L. J. (N. S.) Ch. 300.)

1837. *July* 17, 18.

Rolls Court. Lord LANGDALE, M.R. [172]

A testator gave the residue of his personal estate to his executors and other persons for the erection of almshouses, with a request that they would be pleased to entreat the lord of the manor of Devonport to grant a spot of ground suitable for the erection of dwellings to be appropriated to a charitable purpose:

Held, that the bequest did not clearly exclude a purchase of the land; and that, even if it did, it was void under the Statute of Mortmain then in force.

THE residuary clause of the will of Thomas Spearman was in the following words: "As to all the residue of my property whatsoever, whether money vested in public funds or otherwise, houses or land, plate, household furniture of every description (the latter to be sold when my executors may think fit, and the amount arising from the same to be invested in the public funds), I give the same to the chaplains of his Majesty's dtock-yard a Devonport, and of the Royal Hospital of Stonehouse, for the time being, in conjunction with my executors or their representatives, with a request that they will be pleased to entreat the lord of the manor, either at Devonport or East Stonehouse, to grant a spot of ground suitable for the erection of as many decent dwellings or rooms, something like the charity known by the name of Twelves, in the parish of Charles in Plymouth, for the residence of as many deserving indigent females of the parish of Stoke Damerel and East Stonehouse, followers of the Established Church of England, and not under the age of sixty years, as they may deem proper objects of their charity, with an allowance of 12*l.* per annum to each annuitant, so long as

(1) *In re Watmough's Trusts* (1869) L. R. 8 Eq. 272, 38 L. J. Ch. 723, but now see the Mortmain and Charitable Uses Act, 1891.—O. A. S.

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they conduct themselves soberly and orderly, and thereby proving they are worthy of the same; regulating the number so as to correspond with the amount of property so left, after the dwellings are provided."

The bill was filed by the plaintiff, who was the heir-at-law and next of kin of the testator, against the chaplains described in the will, the executors, the *Attorney-General*, and other parties;

[*173] and the question in the *cause was, whether the bequest of the personal estate was void under the Statute of Mortmain. It was admitted that the gift was void, so far as related to the real estate.

Mr. Pemberton, for the plaintiff:

* * There is nothing in this will which excludes an intention that the money was to be laid out in procuring the land. The direction to the chaplains and executors, that they will be pleased to entreat the lord of the manor to grant a suitable spot of ground for the purpose of the buildings, is not inconsistent with the intention that the lord should be entreated to sell the land; for the grant of a particular spot of land might well be a favour, though a consideration was paid for it.

[175] [Sir JOHN LEACH held in *Johnston* v. *Swann* (1)] that a bequest of the dividends of stock to be applied in providing a proper school-house was good, because the school-house might be hired. In the later cases the rule appears to have been laid down, that a bequest for the purpose of building is void, unless the testator distinctly points to land already in mortmain: *Pritchard* v. *Arbouin* (2), *Giblett* v. *Hobson* (3).

Mr. Tinney and *Mr. Kenyon Parker*, for the widow of the testator.

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

Mr. Temple and *Mr. Sharpe*, for the trustees:

[177] * * In the present case, the testator has used expressions, equivalent to a declaration that the land required for the dwellings shall not be purchased, and which indicate an expectation, or earnest desire, that the land may be given by the lord. * * *

(1) 18 R. R. 270 (3 Madd. 457).
(2) 27 R. R. 106 (3 Russ. 456).
(3) 41 R. R. 114 (5 Sim. 651; and 3 My. & K. 517).

Mr. Pemberton, in reply. * * *

THE MASTER OF THE ROLLS [after referring to the will and to the questions raised, said]:

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In the absence of direct authority, I must look to the object of the statute, and to the opinions of the Judges as they are to be collected from the cases. With the exception of Lord HARDWICKE, whose opinion as to this point in *The Attorney-General* v. *Bowles* (1) has not been followed, all the Judges —Lord ELDON, Sir WILLIAM GRANT, and Lord LYNDHURST— concur in one view of the subject, that a bequest to improve or build upon land, unless the land is already in mortmain, is bad.

In *The Attorney-General* (2) v. *Davies*, Lord ELDON says, "whatever were the decisions formerly when *charity in this Court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that, unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good."

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In *Pritchard* v. *Arbouin* (3), Lord LYNDHURST (4) says, "it is the settled rule of construction, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to some land, which is already in mortmain."

It is said that the direction to the trustees to be pleased to entreat the lord to grant a piece of ground does not bring this case within the principle; but I am of opinion that, if the testator intended to exclude a purchase, he has failed to express his intention; and that it is contrary to the policy of the Mortmain Act, to permit testamentary gifts of money to be laid out on land, as an inducement to draw land into mortmain.

I am of opinion, upon the first point, that the language of the bequest is not sufficiently express; and, upon the second, that the charitable gift must fail.

(1) 2 Ves. Sen. 547.
(2) 7 R. R. at p. 297 (9 Ves. 544).
(3) 27 R. R. at p. 107 (3 Russ. 456, 458).
(4) *Sic. Pritchard* v. *Arbouin* was decided by Sir JOHN LEACH.

1836.
July 25.

Rolls Court.
Lord
LANGDALE.
M.R.

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PEARCE *v.* VINCENT.

(2 Keen, 230—241; S. C. 7 L. J. (N. S.) Ch. 285.)

A testator devised his real estates to his first cousin Thomas Pearce for life, and after T. P.'s decease, he devised and bequeathed all his real and personal estates in trust for such of his relations of the name of Pearce, being a male, as T. P. should by deed or will appoint; and in default of such appointment, for such of his relations of the name of Pearce, being a male, as T. P. should approve of or adopt, if he should be living at the death of T. P. and his heirs, executors, &c. And in case T. P. should not adopt any such male relation, or no such male relation should be living at the death of T. P., then to the next and nearest relation, or nearest of kin of him, the testator, of the name of Pearce, being a male; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, or assigns, for ever.

The testator had a brother, Z. P., who had gone to sea, and had not been heard of for many years; and, supposing Z. P. to have died without issue, the nearest relation of the testator, answering the description in the ultimate limitation, at his decease, was the tenant for life, T. P.; and next to him, R. P., the plaintiff.

T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will.

Held, that T. P. took under the ultimate limitation.

RICHARD PEARCE, by his will, dated the 30th of March, 1813, after devising certain estates to be sold for the payment of debts and legacies, and giving the surplus of the produce of sale, after such payment, to his cousin Thomas Pearce; and after bequeathing an annuity of 200*l.* to Mary Heywood, to be paid out of his freehold and copyhold estates not thereinbefore devised, [he devised certain real estates unto his said cousin Thomas Pearce and his assigns for his life; and after the decease of his said cousin Thomas Pearce, he devised as well his real estate as personal, to the trustees therein named, in trust for such of his relations of the name of Pearce, being a male, as his cousin the said Thomas Pearce should by deed or will, in manner therein mentioned, appoint the same to.; and in default of any such

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appointment] he devised the said estates and premises to the trustees in trust for such of his the testator's relations of the name of Pearce, being a male, as the said Thomas Pearce should approve of or adopt for the purposes of education, (which the testator authorised and directed the said Thomas Pearce to do as soon as he could conveniently after his the testator's decease,)

if he should be living at the time of the decease of his said cousin Thomas Pearce, and his heirs, executors, administrators, and assigns for ever; and in case the said Thomas Pearce should not have approved of or adopted any such male relation as aforesaid, or in case *he should have made such [*232] approval and adoption, and there should not be any such male relation living at the time of the decease of the said Thomas Pearce, then he devised the said estates and premises in trust for the next or nearest relation, or nearest of kin of him the testator of the name of Pearce, being a male, or the elder of such male relations, in case there should be more than one of equal degree, who should be living at his the testator's decease, his heirs, executors, administrators, or assigns for ever. * * And the testator gave all his plate, books, &c. and household furniture to his executors in trust to permit his said cousin Thomas Pearce to * * enjoy the same during his life, and after his decease, then in trust for the persons who should succeed to or inherit the testator's real estates under and by virtue of his will; and the testator * * directed the said Thomas Pearce to pay and apply so much of the rents and profits of his said estates so given, devised, and bequeathed by the testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him the testator of the name of Pearce, whom his said cousin should approve of and adopt in manner aforesaid, in case such male relation should at the time of such adoption be a minor under age, until *such person should have [*233] attained his age of twenty-one years, and invest the residue of the said annual sum of 200*l.* (not expended in such maintenance and education) at interest to accumulate, in the name of his said cousin Thomas Pearce, in some of the public funds, or upon Government or real securities, during the minority of such male relation of the name of Pearce; and the testator declared and directed that his said cousin Thomas Pearce, his executors and administrators, should stand possessed of such accumulations in trust for the benefit of such male relation of the name of Pearce, and the same, with the dividends and interest, should

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be assigned to him at such times and in such proportions, after he should have attained the age of twenty-one years, as his said cousin, Thomas Pearce, his executors or administrators should think most to his advantage; and in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the name of Pearce, as should, upon the decease of his the testator's said cousin, become entitled to his the testator's estates by virtue of his will; and in case such male relation of the name of Pearce, so approved of and adopted by his said cousin Thomas Pearce as aforesaid, should in the lifetime of his said cousin attain twenty-one years of age, then the testator willed and directed his said cousin Thomas Pearce, during his life, to pay and allow, out of the rents and profits of the estates so devised to him for his life as aforesaid, unto such male relation from the time of his attaining twenty-one years of age, the whole of the said annual sum of 200*l.*; provided also, and the testator declared that it should be lawful for, and he did thereby authorise and empower his said cousin Thomas Pearce to demise or lease all or any part of his said manors, farms, lands, and tenements for any term of years, not [*234] exceeding seven years, to take effect in *possession, and at the best and most improved annual rent presently payable, and without taking any fine or premium as therein mentioned.

The testator died on the 3rd of January, 1814, leaving his sister his heiress-at-law, who afterwards died without issue; Thomas Pearce, the son of the testator's uncle Robert Pearce, who was the person named as the testator's first cousin in the will, and who was at the testator's death sixty-seven years of age; Richard Pearce, the plaintiff in this suit, who was the son of the testator's uncle William Pearce, and who was sixty-six years of age at the testator's death; and William Pearce, brother of the plaintiff, who was, at the decease of the testator, fifty-nine years of age.

Thomas Pearce died without issue, on the 18th of May, 1827, having never exercised his power of appointment or adoption in favour of any relation of the testator, and having made his will, by which he devised all his real estate to a stranger.

The question in the cause was, whether the plaintiff or Thomas

Pearce took any, and what, interest under the ultimate limitation contained in the will of the testator.

The cause came on to be heard before the Master of the Rolls (Sir John Leach), on the 17th of January, 1833, when his Honour, considering the question arising upon the will to be a legal question affecting real estate, directed a case to be sent to the Court of Exchequer.

A pedigree was annexed to the case sent to the Court of Exchequer, by which it appeared that the testator had a brother of the name of Zachary Pearce, who had gone to sea, and had not been heard of for many years. The *questions for the [*235] opinion of the Court were, first, whether, under the circumstances stated, Thomas Pearce took any, and what estate, under the ultimate limitation contained in the will of the testator; secondly, whether the plaintiff Richard Pearce took any, and what estate under the ultimate limitation in the will.

The following Certificate was returned, after argument (1), by the Judges of the Court of Exchequer:

"This case has been argued before us by counsel; we have considered it, and are of opinion that, under the circumstances here stated, if Zachary Pearce, the testator's brother, died without issue in the lifetime of the testator, Thomas Pearce took, under the ultimate limitation in the testator's will, an estate in fee simple in the testator's real estates, and an absolute interest in his personalty.

"LYNDHURST.
"J. BAYLEY.
"J. VAUGHAN.
"W. BOLLAND."

The cause came back to be heard upon this certificate on the 10th of June, 1833, when Sir JOHN LEACH expressed his dissatisfaction at the opinion given by the Court of Exchequer, and his regret that he had sent the case to a court of law at all; but, having once taken that course, he considered it proper to take the further opinion of a court of law, and he accordingly directed the same case to be sent to the Court of Common Pleas. * * *

(1) 1 Cr. & M. 598.

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The case was argued (1) before the Judges of the Court of Common Pleas, on the 12th of June, 1835, and the Judges of that Court afterwards returned the following Certificate:

"This case has been argued before us by counsel, and we have considered the same; and assuming Zachary Pearce, the testator's brother, to have died without issue in the testator's lifetime, we think that, under the circumstances above stated, Thomas Pearce took an estate in fee under the ultimate limitation contained in the will of the testator. In consequence of our answer to the first question it becomes unnecessary to answer the second.

"N. C. TINDAL.
"J. A. PARK.
"S. GASELEE.
"J. VAUGHAN."

The cause now came back to be heard upon this Certificate.

Mr. Wright and *Mr. Rogers*, for the plaintiff:

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* * The question was whether it was the intention of the testator to exclude the person to whom he gave a partial interest from taking any benefit under the ultimate limitation, and that intention was to be collected from the whole will, and had in several cases been inferred from particular expressions, inconsistent with the application of the general principle, and constituting an exception to it: *Jones* v. *Colbeck* (2), *Bird* v. *Wood* (3), *Briden* v. *Hewlett* (4). Looking to the whole context of the will, it was clearly the intention of the testator to give a life interest and no more to Thomas Pearce, and the words "next and nearest relation" must be taken to mean next and nearest after Thomas Pearce.

Mr. Pemberton and *Mr. Preston*, *contrà*:

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* * Thomas Pearce was clearly not in the testator's contemplation: neither he nor any other individual was the particular object of the testator's bounty; but Thomas Pearce

(1) 2 Bing. N. C. 328; 2 Scott, 347.
(2) 6 R. R. 207 (8 Ves. 38).
(3) 25 R. R. 238 (2 Sim. & St. 400).
(4) 39 R. R. 146 (2 My. & K. 90).

was within the scope of the testator's general intention indicated by a gift to a person who should answer a certain description. The testator could not know that Thomas Pearce would be the person who *would answer the particular description; and, in [*240] fact, there might still be a person who would exclude Thomas Pearce; for Zachary Pearce, the testator's brother, went to sea, and since the year 1795 had not been heard of. Both courts of law to which the case had been sent having come to the same conclusion, they submitted that the certificate ought to be confirmed, and the bill dismissed.

THE MASTER OF THE ROLLS:

It is somewhat embarrassing to be obliged to decide a case in which Sir JOHN LEACH expressed an opinion so opposite to that which has been given by the two courts of law; but as the case has not suggested to my mind any such doubt as that which was entertained by Sir JOHN LEACH, and as it is desirable that the litigation which this question has occasioned should cease, I will not delay the expression of the opinion which I have formed upon it. The question is, whether Thomas Pearce, being devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation which he afterwards filled.

(His Lordship here stated the material limitations of the will.)

It is tolerably clear that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been devested by the appointment of Thomas Pearce, or by his adoption of a male relation of the name of Pearce, but was, in default of such appointment or adoption, to take effect. If it *should so happen that Thomas Pearce, the devisee for life, [*241] should also, at the death of the testator, answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued that he ought, because the gift to Thomas Pearce for life, and the restrictions

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put upon him, in his character of tenant for life, are wholly inconsistent with an intention, on the part of the testator, to give him the absolute power over the estate. But the testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply in this case; and I am of opinion that, upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given. The bill must, therefore, be

Dismissed.

1838.
March 9.

Rolls Court.
Lord LANGDALE, M.R.
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WILSON *v.* WILSON.

(2 Keen, 249—253.)

Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by the plaintiff, who was entitled to the rents and profits for her life, against the trustees, the Court ordered a receiver to be appointed, and the costs of the suit to be paid by the trustees.

By indentures of lease and release, dated the 12th and 13th days of October, 1827, and made between Benjamin Wilson the elder, the father of the plaintiff, of the first part; the defendant, William Wilson the elder, the uncle of the plaintiff, and the other three defendants, the brothers of the plaintiff, the four defendants being the trustees nominated and appointed by and on behalf of the plaintiff, of the second part; and John Fogg of the third part; Benjamin Wilson, the elder, being seised in fee-simple of the lands and messuages thereinafter described, conveyed the same, subject to the leases therein mentioned, to the use of himself for life; and after his decease, to the use of the four defendants for the term of ninety-nine years, upon trust to receive the rents and profits of the said lands, messuages, and tenements, and after deducting all necessary charges and expenses for repairs, insurance, and otherwise, to pay the same to the plaintiff for her sole and
[*250] separate use and benefit, maintenance and support; and *after

the decease of the plaintiff, to the use of her child or children; and in default of such issue, to the use of the defendants, their heirs and assigns.

Benjamin Wilson, the elder, died on the 18th of June, 1832, William Wilson, the younger, received the rents and paid them over to the plaintiff until the month of October, 1833, when the other three trustees served a notice upon the tenants not to pay their rents to William Wilson, the younger, alone, or except upon receipts signed by all the trustees. In consequence of this notice the tenants refused to pay their rents to William Wilson, the younger, alone. Some time after, an arrangement was entered into, by which the trustees agreed that Edward Sells should receive the rents for a year under a power of attorney; and Sells did, accordingly, receive the rents for a year, but at the expiration of that time, the defendant, Benjamin Wilson, refused to concur in that arrangement, and insisted that he would take the receipts of the rents and the management of the trust property into his own hands. The disputes between the trustees continued; the tenants refused to pay their rents except upon receipts signed by all the trustees, and the rents were in arrear. On the 31st of October, 1835, the bill was filed by the plaintiff. It stated the above-mentioned facts; that various endeavours had been made by and on behalf of the plaintiff to induce the defendants to make such arrangements as might secure to her the punctual receipt of her income, and, among others, that the defendants should execute a power of attorney to some person to be appointed by the plaintiff to receive the rents, and that the defendant, William Wilson, the younger, was ready to accede to such proposal, but that the other defendants refused to do so, and insisted that the defendant, Benjamin Wilson, the younger, should exclusively *act in the management of the trust property, [*251] to which last-mentioned proposal the defendant, William Wilson, the younger, refused to consent. The bill prayed that the due performance of the trust, and the receipt and payment of the arrears of rent, and the punctual receipt and payment of the future accruing rents might be enforced and effected under the decree of the Court, and that, for that purpose, a receiver might be appointed, and that the defendants might pay the costs of the suit.

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On the 31st of May, 1836, the plaintiff intermarried with Emil Christian Grosslob, and the suit was revived by Grosslob and his wife (1) against the same defendants. The defendants answered separately, and substantially admitted the case made by the bill.

Mr. Pemberton, for the plaintiffs, asked either that the trustees might be removed and new trustees appointed; or that a receiver might be appointed, and that the defendants might be ordered to pay the costs of the suit.

Mr. Treslove and *Mr. Whitmarsh*, for the three defendants William Wilson, Benjamin Wilson, and John Wilson, said that these defendants were ready to concur in the same arrangement for the receipt of the rents, which was opposed by only one of the trustees, and they submitted that, in such a case, the Court would adopt the acts of the majority of the trustees.

Mr. Blunt, for William Wilson, the younger, submitted that
[*252] the case of this defendant was distinguishable *from that of the other trustees, and was in fact distinguished by the statement in the bill, and that he ought not, therefore, to be ordered to pay any part of the costs.

THE MASTER OF THE ROLLS:

In this case the plaintiff, without any fault or neglect on her part, but in consequence of the disputes among the defendants, the trustees, has been compelled to come into this Court to ask for that relief which all have admitted that she is clearly entitled to. One thing is perfectly clear—that she ought not to pay the costs of this suit, but that they must be defrayed by those who have compelled her to institute it. As to the substantial relief to which she is entitled, there is no difficulty; a receiver must be appointed in order to secure to her the recovery of the arrears of rent, and the punctual payment of the accruing rents. The costs of the suit up to this time must be paid by some or one of the defendants; and upon the answers which have been separately put in by them, I cannot, at present, adjudicate. Their

(1) See *Wake* v. *Parker*, *ante*, p. 188, 2 Keen, 59.

conduct has been highly improper and absurd: instead of joining to do what was beneficial to their cestui que trust, each seems to have endeavoured to appropriate to himself the credit of managing this small property, and to exclude one or both of the others. At present I cannot tell which has been the most in the wrong; and the only order which the Court can now make is, that the costs be paid by the defendants generally, unless an inquiry be asked by the defendant, William Wilson, the younger, or any other of the defendants, under what circumstances the plaintiff has been prevented from receiving her income. If that inquiry be asked for the purpose of having an adjudication *in respect [*253] of costs between the defendants, the Court will direct it.

The inquiry was waived by the defendants, and the decree was accordingly made for a receiver, and for payment of the costs of the suit by the defendants.

STUBBS *v.* SARGON.

1837. *Aug.* 7.

Rolls Court. Lord LANGDALE, M.R.

On Appeal. 1838. *Jan.* 24, 31.

Lord COTTENHAM, L.C.

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(2 Keen, 255—273; S. C. 6 L. J. (N. S.) Ch. 254; affirmed, 3 My. & Cr. 507—514; 7 L. J. (N. S.) Ch. 95; 2 Jur. 150.)

A testatrix devised to trustees and their heirs, her copyhold dwelling-house, garden, and ground, together with the furniture and effects therein; and also the ten cottages, and two new cottages built by her, with their appurtenances at L., upon trust, to pay the rents of the said hereditaments to her niece S. S., the wife of G. S., or to permit and suffer her to use and occupy the said hereditaments during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life, and after his decease to stand possessed of the said hereditaments, in trust, for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her residuary personal estate.

Held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees.

The testatrix gave certain freehold and leasehold premises to trustees, in trust after the decease of M. I., to dispose of and divide the same unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit.

Held, that this was a good devise to the persons to whom it was

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ascertained that the testator had disposed of her business in her lifetime.

In the residuary clause, "and" was read "or," to effectuate the plain intention of the testatrix.

E. I. indorsed a promissory note for 2,000*l.* and sent it to S. S. in a letter, whereby she gave the same to S. S. for her sole use and benefit, for the express purpose of enabling her to present to either branch of her family any portion of the interest or principal thereon, as she might consider most prudent; and in the event of the death of S. S., by that bequest, she empowered her to dispose of the said sum of 2,000*l.* by will or deed, to those or either branch of the family she might consider most deserving thereof:

Held, that this letter created a trust, the objects of which were too undefined to enable the Court to execute it, and that the 2,000*l.* formed part of the testatrix's general personal estate.

ELIZABETH IVES, by her will dated the 11th of September, 1832, gave and devised to George Sargon, George Fuller, John Henry Padbury, and Edward Ives Fuller, and to their heirs and assigns, all that her copyhold messuage or tenement and dwelling-house, garden and ground wherein she then principally resided, together with the furniture and effects therein, and the coach-house and stable thereto belonging, and also the ten cottages and two new cottages built by her, with their appurtenances, at Lampton, to [*256] hold the same, with *the appurtenances unto, and to the use of the said George Sargon, George Fuller, John Henry Padbury, and Edward Ives Fuller, their heirs and assigns, upon trust that they or the survivors or survivor of them, or the heirs and assigns of such survivor, should pay the rents, issues, and profits of the said hereditaments, into the proper hands of her niece, Sarah Sargon, the wife of George Sargon, or into the hands of such person or persons as she should, from time to time but not by way of anticipation, appoint to receive the same; or otherwise to permit and suffer Sarah Sargon to use and occupy the said hereditaments during her life, to the intent that the same hereditaments and the rents, issues, and profits thereof, might be for her sole and separate use, and not subject to the debts, control, disposition, or engagement of her present, or any future husband; and, after her decease, in trust for George Sargon, during his life; and after his decease, upon trust, that her trustees, or the survivors, &c., should be possessed of and interested in the said hereditaments, in trust for such of the

testatrix's nephews and nieces or grand-nephews and grand-nieces as the said Sarah Sargon should appoint; and in default of appointment, upon trust that the said trustees or the survivors &c. should sell and dispose of the said hereditaments and premises, and such part thereof, over which no appointment had been made; and the testatrix directed that the money to arise by such sale should fall into and form part of her residuary personal estate, and be disposed of as thereinafter mentioned.

The question as to this clause of the will was, whether the furniture and effects, therein mentioned, passed to Sarah Sargon, or belonged to the residuary legatees.

The testatrix gave, devised, and bequeathed to the same trustees, their heirs, executors, administrators, and *assigns, [*257] according to the different natures and qualities thereof respectively, all that her freehold messuage or tenement, with the appurtenances thereunto belonging, situate No. 30, Little Queen Street, wherein she carried on her trade, together with her leasehold stables and warehouses behind the same, and also all her estate and interest in the leasehold manufactory and premises in Maiden Lane, in the parish of St. Pancras, with the appurtenances, together with all and singular the fixtures about the said messuage or tenement in Little Queen Street aforesaid, to hold the said [premises and fixtures unto and to the use of the said trustees, their heirs, executors, administrators and assigns, upon certain trusts for the maintenance, repair and insurance thereof, and subject thereto upon trust for the testator's sister during her life]. "And from and after her decease, in trust to dispose of and [258] divide the same unto and amongst my partners, who shall be in co-partnership with me at the time of my decease, or to whom I may have disposed of my said business, in such shares and proportions as my said trustees shall think fit and deem advisable."

The testatrix, at the date of her will, carried on the business of a varnish and colour maker, in co-partnership with her nephews, John Dialls Innell, Charles Nolloth Stubbs, Samuel Silver, and Thomas Cookes. She was entitled to the property on which the business was carried on, and to the capital engaged

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in it; and she was interested in the profit and loss of the concern to the amount of three-fourths, her partners being interested in the remaining fourth. She had no partners at the time of her death, having disposed of her business to Samuel Silver, Thomas Cookes, Ann Abigail Innell, and John Ives.

The questions, raised as to the last-mentioned clause in the will, were, first, whether the devise to persons who should be the partners of the testatrix at the time of her decease, or to whom she should have disposed of her business in her lifetime, was a good devise within the Statute of Frauds; and, secondly, whether it was or was not void for uncertainty.

The testatrix, by her will, directed her residuary personal estate to be divided among her nephews and nieces, and children of nephews and nieces therein mentioned, except as to her nephew
[*259] John Dialls Innell and *Charles Stubbs, (who was the same person as Charles Nolloth Stubbs,) and her nieces Caroline Ade and Sarah Cookes, and such of her nephews and nieces as might be entitled to any beneficial estate, or interest in her freehold messuage in Little Queen Street, and leasehold premises in Maiden Lane under the devise thereof, whose shares in such residuary freehold estate she directed to be one-half of the amount of the share of her other nephews and nieces.

Charles Nolloth Stubbs took no beneficial interest in the devise of the freehold and leasehold premises in Little Queen Street and Maiden Lane; and the third question raised upon the will was, whether or not it was the intention of the testatrix to include Charles Nolloth Stubbs among the nephews and nieces who, by reason of their taking an interest in the devise of the freehold and leasehold premises, were to take only half the shares of the other residuary legatees.

On the 15th of October, 1827, the testatrix lent to George Fuller the sum of 2,000*l.*, the repayment of which was secured by the following promissory note: "October 15th, 1827. On the 28th of November, 1834, we promise to pay Mrs. Elizabeth Ives, or her order, the sum of 2,000*l.*, with lawful interest at the rate of 5*l.* per cent. per annum, which interest we agree to pay every six months, commencing from the 28th of November next ensuing. —GEORGE THOMAS and CHARLES FULLER."

On the 15th of May, 1829, the testatrix, by a codicil to a former will (the will and codicil being both of them afterwards revoked), gave the sum of 2,000*l.* to Sarah Sargon, for her own use, but with an express wish and desire that she should appropriate any part of it she might deem proper for the advancement or benefit of *any of the testatrix's nieces or [*260] nephews, or great nieces or nephews, she might think proper. But afterwards, and three or four days before the date of her will, the testatrix indorsed the promissory note and sent it to Mrs. Sargon, with a letter dated the 7th of September, 1832, in the following words:

"The inclosed note of 2,000*l.* I have given to Mrs. Sarah Sargon for her sole use and benefit, independent of her husband, for the express purpose of enabling Mrs. Sargon to present to either branch of my family any portion of the principal or interest thereon, as the said Mrs. Sargon may consider the most prudent; and, in the event of the death of Mrs. Sarah Sargon, by this bequest I empower her to dispose of the said sum of 2,000*l.* and the interest, by will or deed, to those or either branch of her family she may consider most deserving thereof. To enable Mrs. Sarah Sargon, my niece, to have the sole use and power of the said sum of 2,000*l.*, due to me by the above note of hand, I have specially indorsed the same in her favour. Signed by me, this 7th day of September, 1832.

"Witness, G. FULLER. E. IVES."

A fourth question in the cause was, whether Mrs. Sargon was entitled to this promissory note for her own use, or whether she held it in trust; and if in trust, for what objects.

The bill was filed for the administration of the testatrix's personal estate by some of the residuary legatees or their representatives against the executors, who were also trustees, and the executrix of her will; namely, George Sargon and Sarah, his wife, who was also the heiress-at-law of the testatrix, George Fuller, John Henry Padbury, and Edward Ives Fuller, against other residuary legatees, and against other parties interested under the will of the testatrix.

* * * * *

STUBBS r. SARGON. [267]

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

Sir Charles Wetherell and *Mr. Kindersley*, for Mr. and Mrs. Sargon.

Mr. Tinney, *Mr. Temple*, *Mr. Rogers*, *Mr. Lovat*, *Mr. Stinton*, *Mr. Parker*, *Mr. Tamlyn*, *Mr. Griffith Richards*, *Mr. Teed*, *Mr. W. C. L. Keene*, *Mr. James Russell*, and *Mr. Bethell*, for the other defendants.

Aug. 7.

THE MASTER OF THE ROLLS:

In this case, certain questions arising upon the construction of the will of Elizabeth Ives, and a question upon the right to a sum of 2,000*l.* due from Messrs. Fuller upon a promissory note, dated the 15th of October, 1827, were reserved at the hearing.

The first question is, what, if any, beneficial interest in the furniture and effects of the testatrix in the house, where she principally resided, passed to the defendant Mrs. Sargon, under the first clause in the will; and I think that no such beneficial interest did pass.

The testatrix, although she gave the house, and the furniture and effects therein, and certain cottages, to her trustees on trust, has omitted, in the statement of the trusts, to take any notice of the furniture and effects, and has employed words which appear to me to be only applicable to the real estate comprised in the devise; *and I am, therefore, of opinion, that the legacy of the furniture and effects does not take effect, because there is no trust declared of them. [*268]

The next question under the will is, whether the ultimate gift of the freehold and leasehold property on which the business of the testatrix was carried on is void under the Statute of Frauds, or for uncertainty, as to either the freehold or leasehold comprised therein.

The testatrix, Mrs. Ives, at the date of her will, carried on the trade of a varnish and colour maker in co-partnership with John Dialls Innell, Charles Nolloth Stubbs, Samuel Silver, and Thomas Cookes. She was entitled to the property on which the business was carried on, and to the capital engaged in it. She was

interested in the profit and loss to the amount of three-fourths of the whole, her partners being interested in the remaining fourth, in equal shares, and by her will she devised as follows. (His Lordship read the devise.)

The question arises upon the last clause, "and from and after her decease," [the decease of the testatrix's sister Mary Innell,] "in trust to dispose and divide the same unto and amongst my partners, who shall be in co-partnership with me at the time of my decease, or to whom I may have disposed of my business, in such shares and proportions as my trustees shall think fit or deem advisable;" and it is objected to this devise,

First, that it is imperfect, as not designating the devisees, and leaving them to be constituted afterwards by some act of the testatrix herself, requiring none of the solemnities rendered necessary by the Statute *of Frauds. The devisees, according [*269] to the words, were to be the partners of the testatrix at the time of her decease, or the persons to whom she might have disposed of her business; and as persons might be such partners or disponees by acts of the testatrix, done without formality, it was argued that the devise was void. I think that this objection cannot be sustained; a man, though not married when he makes his will, may devise to such persons as shall be his children at the time of his death. And if the description be such as to distinguish the devisee from every other person, it seems sufficient without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property, and I think that a devise to such person as may be the testator's partners or the disponees of his business may be good.

The other objection is, that, even if such a devise may be sustained, as not infringing the provisions of the Statute of Frauds, the devise is void for uncertainty; and for the purpose of considering this objection, we must look at the facts. The will was dated the 11th of September, 1832, and the Master by his report finds, "That after the death of the said John Dialls Innell, which happened on or about the 6th day of February, 1833, and up to the 1st day of April, 1833, the trade or business of a

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varnish or colour maker hereinbefore mentioned, was carried on by the testatrix in partnership with the defendants, Charles Nolloth Stubbs, Samuel Silver, and Thomas Cookes, in the shares and proportions, and under the circumstances, and in manner hereinbefore mentioned. And that, at the date of the
[*270] testatrix's will in the pleadings mentioned, namely, on *or before the 11th day of September, 1832, and to the time of the death of the said John Dialls Innell hereinbefore mentioned, he, the said John Dialls Innell, was a partner, and jointly entitled to or interested in the said trade or business with the said testatrix, and the said Charles Nolloth Stubbs, Samuel Silver, and Thomas Cookes, in the same proportionate share as the three last-named defendants; and that, on and from the 1st day of April, 1833, when the said partnership between the testatrix and the said Charles Nolloth Stubbs, Samuel Silver, and Thomas Cookes was dissolved, as hereinbefore mentioned, and up to the time of the decease of the testatrix, the said trade or business was continued and carried on by or in the names of the said defendants, Samuel Silver and Thomas Cookes, and the said Ann Abigail Innell and John Ives, in partnership together; and that such last-named parties were, from the 1st day of April, 1833, interested therein in equal shares and proportions; and that, on the 1st day of April, 1833, or between that time and the 17th day of April, 1833, (the day of the death of the testatrix,) she, the testatrix, in manner and under the circumstances hereinbefore mentioned, disposed of the said trade or business, or of her share or interest therein, to or in favour of the said Samuel Silver, Thomas Cookes, Ann Abigail Innell, and John Ives; and that the said Samuel Silver, Thomas Cookes, Ann Abigail Innell, and John Ives were, from the 1st day of April, 1833, and up to the time of the death of the testatrix, entitled to and interested in the capital and stock employed in such trade or business, and in the debts belonging, due, or owing thereto, accrued on and subsequently to the 1st day of April, 1833, except so far as the said Samuel Silver, Thomas Cookes, Ann Abigail Innell, and John Ives became accounting parties as debtors to the testatrix, or her estate, in respect of such part of the stock in trade of the
[*27] then *late partnership or of the testatrix, as the last-named

parties possessed or retained beyond the amount or value of 1,000*l.* as hereinbefore mentioned."

The result is, that the testatrix had no partners in her business at the time of her death; but that, at that time, she had disposed of her business, and the persons, to whom she had disposed of it, were Samuel Silver, Thomas Cookes, Ann Abigail Innell, and John Ives. And I think that these are the persons amongst whom the trustees are to divide the property in such shares as they may deem advisable.

The third and last remaining question under the will is, whether Charles Nolloth Stubbs, one of her nephews, is to have one sixteenth, or only half of one sixteenth share of the residuary personal estate. [After stating the residuary bequest in the will, his Honour said:] Charles Nolloth Stubbs is, by the name [272] of Charles Stubbs, excluded from more than one half of the shares of other nephews and nieces; but the words of the testatrix are such as to shew, that she intended to exclude only those who took beneficial interests in the freehold and leasehold property in Queen Street and Maiden Lane. Charles was not one of those, and it appears to me that this a case in which, to give effect to the plain intention, the *word "and" may be read [*273] as "or" in the exception; and if this be done, Charles will be entitled to one sixteenth.

The last question in the cause relates to the 2,000*l.*, payable on the promissory note of Messrs. Fuller.

[His Lordship stated the facts as to the promissory note, and read the letter dated the 7th of September, 1832.]

Upon the construction of this letter, I am of opinion that the promissory note was not indorsed and delivered to Mrs. Sargon, as a free gift for her own personal use, but for the purpose of the money, secured by it, being disposed of by Mrs. Sargon to such parts or members of the testatrix's family as were intended to be thereby designated.

Unfortunately the letter is so expressed, that the objects cannot, from the words of it, be ascertained; and thinking the trust too indefinite for the Court to act upon, I am of opinion that the 2,000*l.* must be treated as part of the testatrix's personal estate.

STUBBS v. SARGON.

This decision was appealed from on the first, second, and fourth points, and affirmed, upon each of those points, by the LORD CHANCELLOR [as reported in 3 Mylne & Craig, at p. 507.

In addition to the facts stated in the report below,]

[3 My. & Cr. 509] It is also to be mentioned, that, by a circular letter of the 1st of April, 1833, the testatrix notified to her customers her retirement from business, and recommended her surviving nephews, and the widow of her deceased nephew, Mr. Innell, as her successors. These persons were Samuel Silver, Thomas Cooke, John Ives, and Ann Abigail Innell, widow of John Dialls Innell. The testatrix died on the 17th of April, 1833.

1838. *Jan.* 31.

THE LORD CHANCELLOR:

Three questions were raised on this appeal. The first was, whether the furniture and effects in the copyhold premises were bequeathed with the copyhold premises for the benefit of the parties to whom the copyhold premises were devised? I think not. They are included in the devise to the trustees; but the trusts are declared only of "the hereditaments aforesaid," and of "the rents, issues, and profits thereof;" and the power of sale is given, not to the personal representatives, but to the heirs

[*510] and assigns of the survivor of the trustees. It is *probable that the testatrix intended that the furniture and effects should accompany the copyholds; but she has omitted to declare such to be her intention. I am therefore of opinion that they are not included in the gift.

The second question is, whether the ultimate devise of the premises in Little Queen Street be void, either under the Statute of Frauds, or for uncertainty?

[Upon this point, also, the LORD CHANCELLOR concurred in the decision of the MASTER OF THE ROLLS, saying:]

[512] I think the objection upon the ground of the Statute of Frauds cannot be supported.

[513] Then as to the uncertainty, I think the facts stated in the Master's report clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of

whom had been her partners, and others whom she then introduced, and gives to the four stock in trade to the amount of 1,000*l.*; and, by circulars, introduces to her former connection these four persons, whom she calls her successors. These certainly are persons to whom she had disposed of her business within the meaning of the will.

Another question of some difficulty remains; namely, as to the 2,000*l.* This sum was due upon a promissory note of other persons, having two years to run. The testatrix specially indorsed it to Sarah Sargon, a married woman, for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to either branch of the testatrix's family, any portion of the principal or interest thereon, as she might consider most prudent. It was not contended that this constituted a trust which could be executed. It was, therefore, either an absolute gift to Mrs. Sargon, or, being for a purpose which fails, it reverts to the original owner, and so constitutes part of her estate. Except for the words "her sole use and benefit," this would have been, no doubt, an assignment for the express purpose of enabling the assignee to bestow the property upon another, and would hardly be contended to be a gift for her own benefit. It is to be observed that the words are not "for her *own* use and benefit," as in *Wood* v. *Cox* (1), which was referred to, but "for her *sole* use and benefit, independent of her husband," apparently meaning not to describe an *extent or quality of beneficial interest, but to mark the [*514] character in which the donee was to hold the property, namely, as a *feme sole*, and not as dependent upon her husband. The latter part of this paper strongly confirms the character of trust, which I think belongs to the part I have already considered. It provides that in the event of the death of Mrs. Sargon, the author of the gift by that "bequest" empowered her to dispose of the said sum of 2,000*l.* and interest, by will or deed, to those of either branch of the family she might consider most deserving. If the gift had been intended for the benefit of Mrs. Sargon, with only an intimation of a wish in favour of others, not amounting to a trust, this power to dispose of it by deed or will was wholly

(1) 2 My. & Cr. 684.

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useless, being necessarily incident to the gift; but, if Mrs. Sargon was to be merely the donee of a discretionary power in favour of others—the mere depository of a discretion to be personally exercised—then it was natural and proper to specify that such power and discretion might be exercised by deed or will.

I thought that the gift in *Wood* v. *Cox* was not a gift upon trust, but a gift subject to a charge. This, on the contrary, I think is a gift upon trust; and that—the trust failing,—the property constitutes part of the testatrix's estate.

The revoked codicil of 1829, stated in the report, cannot, I think, be looked at for the purpose of construing this instrument of 1832.

The result is, that I concur, as to all the points objected to, in the judgment of the MASTER OF THE ROLLS.

The petition of appeal must therefore be

Dismissed with costs.

1838.
March 20, 21.

Rolls Court.
Lord LANGDALE, M.R.
[274]

HARCOURT *v.* MORGAN.

(2 Keen, 274—275.)

A testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*; when they got the principal money paid to them, they then to give their uncle J. B. the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond:

Held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal.

CHARLES HARCOURT, by his will, dated the 30th of April, 1829, gave and bequeathed to his friends, Sir John Carr, and James Morgan, their executors, administrators, and assigns, all his leasehold and personal property, bonds, bills, goods, and chattels, to hold the same upon trust to pay, out of the rents of the leasehold premises, the annuities in the will mentioned; and upon trust to pay the remainder of the rents, interest, dividends, and produce of the trust funds, towards the maintenance and education of his son, Charles Harcourt, till he should attain the age of twenty-five years; and upon his attaining the age of twenty-five years, to pay, assign, and transfer, all the leasehold and personal property, subject to the said annuities, to his son, Charles Harcourt, his executors, administrators, and assigns.

And the testator appointed Sir John Carr and James Morgan, his executors.

By a codicil, dated on the same day as the will, the testator, after giving certain annuities and specific legacies, proceeded as follows: "I give and bequeath to my good friends, William Hall and his sister Martha Hall, in equal shares, the amount of the bond I hold from Sir James (1) Hoare, Bart., for 1,000*l.* (the bond is now in the hands of Messrs. Jones, Lloyd, & Co., Lothbury), when they get the principal money paid to them, they then to give their uncle, Mr. John Burt, the sum of 50*l.*, and also their father and mother 50*l.* each, arising from the bond of Sir Joseph (1) Hoare, Bart.; all that remains after the above sums are paid, in the event of the decease of my son, Charles Harcourt, before he *attains the age of twenty-five years, I give to my executors, [*275] and the daughters of George Oakley, to be divided equally between them."

The question was, whether, under the bequest of the amount of the bond given by the codicil, the legatees were entitled to the interest which had accrued due in the testator's lifetime upon the bond, as well as to the principal; and the case stood over for the purpose of affording an opportunity to counsel to produce authorities upon the point.

Mr. Kindersley, on the following day, mentioned *Roberts* v. *Kuffin* (2), where Lord HARDWICKE held that a gift of 200*l.*, secured by a mortgage, passed the principal only; and observed that if a man gives 300*l.* due upon a bond by his will, this does not carry the interest incurred in the lifetime of the testator, because it is quite doubtful what it might amount to, from the uncertainty the time the testator might live after making his will.

Mr. Pemberton cited *Hawley* v. *Cutts* (3), where a question was raised upon the following bequest: "I give A. 300*l.* in money, which he oweth me upon bond;" and there being an arrear of interest to the amount of 20*l.* at the date of the will, the COURT held that A. was entitled only to the principal; but it was at the

(1) *Sic.*
(2) 2 Atk. 115.
(3) 2 Freem. 23.

HARCOURT v. MORGAN.

same time agreed that, if the words had been, "I give A. the debt of 300*l.* which he oweth me," that would have carried the interest as an appendant to the debt.

March 21.

The MASTER OF THE ROLLS held that the legatees were entitled to the arrear of interest upon the bond, as well as to the principal.

1838.
Feb. 1, 2.
March 26.

M'DONALD *v.* BRYCE.

(2 Keen, 276—285, 517—520; S. C. 7 L. J. (N. S.) Ch. 173, 217.)

Rolls Court.
Lord LANGDALE, M.R.
[276]

A testator gave the residue of his property to R. S., the eldest son of P. S., upon his coming of age, and failing him, to the next and other sons in succession of P. S. who should attain twenty-one; and, failing the male children of P. S., to the legatees named in the residuary clause. And he directed his executors to apply the dividends of his residuary property to the maintenance of R. S. during his minority, and of the other sons in succession of P. S. in case of the death of R. S. before attaining the age of twenty-one.

R. S. survived the testator, and died an infant, and P. S., who was far advanced in years, had no other son.

The period allowed by the statute for the accumulation of the income of the residue having expired, it was held that the next of kin, and not the residuary legatees, were entitled to the income of the residue, until the contingency upon which the residue was given, either to a male child of P. S. or to the legatees named in the residuary clause, should be determined.

ROBERT SHAWE, by his will, dated the 20th of March, 1802, after giving legacies to the daughters of Lewis M'Pherson therein named, disposed of the residue of his property, which consisted wholly of personalty, in the following words: "The residue of my property I will and bequeath unto Robert Shawe, the eldest son of the aforementioned Peter Shawe, for his sole use and benefit, upon the said Robert Shawe his coming of age; failing him, to the next male child, procreate of the body of the aforesaid Peter Shawe, and lawfully begotten, who shall attain the age of twenty-one years; failing the male children of the said Peter Shawe, lawfully begotten, to the aforementioned legatees and the survivors and survivor of them in equal proportions, viz., Misses Ann, Margaret, and Elizabeth M'Pherson, and Mrs. Christy Grant, Mrs. Isabella M'Donald, Mrs. Mary M'Donald, and Mrs. Anny M'Lean, all daughters of the aforementioned

Lewis M'Pherson, Esq., of Dalraddy, North Britain; their respective shares to be at their free will and disposal. And whereas the aforesaid Robert Shawe, the residuary legatee named by this will, is now under age, I do constitute and appoint my executors Francis Duncan and Alexander Bryce, and the survivor of them, guardians and guardian of the said child during his minority; and my will is and *I do hereby direct [*277] that they do apply the dividends arising from the property belonging to me, which may remain after paying the different legacies and setting apart a sufficient sum for the payment of the annuities hereinbefore bequeathed with my funeral expenses (my debts being all paid), to the maintenance, education, and benefit of the said child, as they shall judge most advantageous for him; and, in the event of his death before his reaching the age of twenty-one years, I do also constitute and appoint the said Francis Duncan and Alexander Bryce, and the survivors of them, to be guardians and guardian to the male child lawfully begotten of the aforesaid Peter Shawe, who may succeed according to the before-recited disposition in this my said last will and testament, with power to the said Francis Duncan and Alexander Bryce, and survivors of them, or guardians and guardian, to apply the dividends aforesaid to the purposes above-mentioned."

The testator died on the 11th of April, 1812, leaving the plaintiffs Isabella M'Donald, Ann M'Lean, Ann M'Pherson, Margaret M'Pherson, Elizabeth Anderson (in the will named Elizabeth M'Pherson, spinster), together with Christy Grant and Mary M'Donald, all daughters of Lewis M'Pherson, named in the residuary clause, surviving him; and his will was proved by Alexander Bryce alone, Francis Duncan, the other executor, having renounced probate thereof.

Robert Shawe, the son of Peter Shawe, in the will named, died in the month of August, 1814, being then an infant of the age of nine years. Peter Shawe had no other child, and both he and his wife were of a very advanced age.

The bill was filed by the plaintiffs against the executor, and [278] the respective personal representatives of Christy Grant and Mary M'Donald, who both survived the testator; and it prayed that the residue of the personal estate of the testator and of the

M'DONALD v. BRYCE.

accumulations thereof might be ascertained and declared; and that it might be declared, that in default of any male issue of Peter Shawe lawfully begotten, who should live to attain the age of twenty-one years, the plaintiffs, as the surviving legatees of the residue, were entitled thereto in equal shares, and that, in the meantime, and until any male child of Peter Shawe should be born, the plaintiffs were entitled to have the dividends, interest, and produce of the residue paid and applied to their use and benefit. And that, as soon as it should be ascertained that there could be no person entitled to the residue, as a male child of Peter Shawe, lawfully begotten, the whole of the residue, and the accumulations thereof, might be paid to and divided among the plaintiffs in equal shares.

The next of kin of the testator living at his death, or their representatives, were brought before the Court by a supplemental bill.

The question in the cause was, whether the income of the testator's residuary estate, and of the accumulations, from the time at which accumulation was made void by the statute until the contingency should be determined, belonged to the legatees named in the residuary clause, or to the next of kin.

Mr. Pemberton and *Mr. Stuart*, for the plaintiffs:

[279] * * The law has said that accumulation shall cease after the lapse of twenty-one years from the death of the testator, and that the residuary legatees shall not take the income after that time in the form of accumulation; but it leaves the residuary gift untouched, and the residuary legatees are the persons to whom the income would go, if the trust for accumulation were [280] struck out, as the statute requires. * * The right of the plaintiffs to receive the income of the residue, and of its lawful accumulations, may be devested by the birth of a son of Peter Shawe, though, considering the age of Peter Shawe, that is a very remote possibility; but, until it shall be so devested, it is an immediate vested interest.

Mr. Mylne for the defendants, the representatives of the deceased residuary legatees.

Mr. Tinney, *Mr. Lovat*, *Mr. Romilly*, and *Mr. Koe*, for the next of kin: M'DONALD v. BRYCE.

* * Had the Thellusson Act never passed, the ultimate disposition of the income of the residue, and of its accumulations beyond the twenty-one years, must have continued in abeyance, like the accumulated income for the twenty-one years, and the whole would have gone either *to a son of Peter Shawe, or to [*281] the plaintiffs, upon the death of Peter Shawe without male issue. The Act has declared that the surplus accumulation is unlawful, and that the income from the period at which accumulation must cease, until the contingent event shall be determined, shall go to the persons who would have been entitled to receive it, if no accumulation had been directed or implied. There is in this will no express direction for an unlawful accumulation; but it is sufficient that there is a direction which was capable, in certain events, of exceeding the limits prescribed by the statute, and which has, in the event that has actually happened, exceeded those limits: *Shaw* v. *Rhodes* (1). * * We admit that the plaintiffs take a vested interest for the purpose of *transmission [*282] to their representatives, if Peter Shawe should die without leaving a son, but not for the purpose of immediate enjoyment. The residuary gift, supposing it to be unaffected by the statute, would give the plaintiffs no interest for the purpose of enjoyment, until the contingency is determined. How, then, can it be contended that the statute, which makes the residuary gift void for the excess, has the effect of placing the plaintiffs in a better situation than they would have been had it left the gift untouched, and of giving them a vested interest for the purpose of immediate enjoyment? * * *

Mr. Spurrier, for the executor.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS (after stating the facts): *March* 26.

As the gift to the daughters of Lewis M'Pherson was made contingent upon the failure of male children of Peter Shawe,

(1) 43 R. R. 161 (1 My. & Cr. 135).

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and Peter Shawe is still living, and may have sons, it has been considered that the income of the *residue of the testator's estate
[*283] ought to be accumulated for the benefit either of a male child of Peter Shawe, if he should come into *esse*, or of the daughters of Lewis M'Pherson, if Peter Shawe should die without having a son. And accordingly such accumulation is stated to have been made as long as the statute of 39 & 40 Geo. III. c. 98, would permit; and, the period of accumulation allowed by the statute having expired, the question is to whom the income of the residue of the testator's estate, and of the accumulations thereof lawfully made, is to be paid, until it shall appear that Peter Shawe has not a son to take the residue with those accumulations which, if there be no such son, will clearly belong to the daughters of Lewis M'Pherson.

Now the statute which forbids any one to dispose of property by will, so that the income thereof may accumulate for more than twenty-one years from the death of the testator, provides, that in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be void, and the "profits and produce of the property, directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

The plaintiffs in this cause are four of the daughters of Lewis M'Pherson; and they, together with some of the defendants in the same interest, contend that, until the contingency shall be determined, the income of the residue, and of its lawful accumulations, belongs to them. The gift to the daughters of Lewis M'Pherson is, indeed, a contingent executory bequest, and may be defeated by a son of Peter Shawe; yet it is a right which
[*284] *vested in them, so as to be transmissible to their representatives; and that right is only prevented from being an absolute interest by the possibility of a son of Peter Shawe coming into *esse*. It is only with reference to this possibility that a direction to accumulate is in this case implied. If there were no such possibility, there would not only be no implication of a direction to accumulate, but the daughters of Lewis M'Pherson would be

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entitled to the immediate enjoyment. And it is argued that, the implied direction to accumulate being rendered void by the statute, the law gives the enjoyment to the legatee whose right is vested, though subject to be devested by a subsequent event; and that with this the statute concurs in giving the income to the persons who would have been entitled to it, if there had been no accumulation directed.

It is true that, if there be a gift of a legacy for life, with a contingent executory bequest over, the contingent gift over is held to vest in right, though it does not in possession: *Barnes* v. *Allen* (1). It is true, also, that, where there is an immediate gift of a legacy, with a gift over if the legatee die under twenty-one, the first legatee, taking an immediate vested interest, though subject to be devested, is entitled to the income until the event, upon which the devesting is to happen, shall take place. But in this case it is only upon the failure of male issue of Peter Shawe that anything is given to the daughters of Lewis M'Pherson; and, until that event happens, they can take nothing in possession, though they may have a vested right to a contingent interest, and that right may be transmissible to their representatives.

In the present state of things nothing is given for immediate enjoyment. The income of the residue, and of its lawful accumulations, is not given by the will at all, if not given by the residuary clause; and, if given by the residuary clause, is made void by the statute, and so becomes a portion of the residue, undisposed of by the will, and, under these circumstances, it appears to me that it belongs to the next of kin. [285]

July 3.

[520]

[On a subsequent day the MASTER OF THE ROLLS held that the unapplied income which had arisen during the life of the infant Robert Shawe also constituted part of the residue (2 Keen, 520), but as that income was expressly appropriated to the infant by the will, the decision is not consistent with modern authorities. —O. A. S.]

(1) 1 Br. C. C. 181.

1838.
Jan. 11, 13.

Rolls Court.
Lord
LANGDALE,
M.R.

[285]

JONES *v.* WYSE.

(2 Keen, 285—292; S. C. 7 L. J. (N. S.) Ch. 107; 2 Jur. 44.)

Held, that a person, entitled to an interest in property, subject to a limitation over, in the event of his attempting to aliene or incumber the income, may make inquiries, and take advice whether he can sell or not, and do acts indicative of his wishes on the subject, without giving effect to the limitation over.

UNDER several deeds, which were set forth in the pleadings, the real and personal property therein comprised was vested in trustees, in trust for Samuel Purefoy Harper, for his life, with remainder to Elizabeth Harper, who survived Samuel Purefoy Harper, for her life, with remainder to her two daughters, Mary Jones and Louisa Jacques Purefoy Harper, in such manner as she should appoint; and, in default of appointment, equally between them.

[By a marriage settlement dated the 5th day of September,
[286] 1824,] and made between Robert Trasler Scarborough of the first part, Louisa Purefoy Jacques Harper of the second part, and Henry Richard Harper and William Wyse of the third part; [certain property belonging to Louisa Harper was vested in trustees, on trust, as to the real estate, to pay the rents to her for her life,] and, after her death, to pay the same to Robert Trasler Scarborough, [her intended husband,] until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of any Act or Acts for the relief of insolvent debtors, or he should sell, aliene, and charge, or incumber the said rents or profits, or any part thereof, by way of anticipation, or attempt or agree so to do, or should die, whichever of the said events should first happen; and from and after the happening of any one of the said events, and the failure or determination of the trust before declared for Louisa, upon trust for the benefit of the children of the marriage; and, in default of such issue, in trust for Louisa and the heirs of her body; and, in default of such issue, in trust for the children of Mary Jones; and there was a corresponding trust as to such part of the trust fund as consisted of personal estate.

The marriage took effect, and there was no issue of the

marriage; and Louisa Purefoy Jacques Scarborough died in the month of December, 1826, leaving her husband surviving her. Elizabeth Harper, the tenant for life, died in March, 1832.

The bill was filed by William Jones and Mary his wife, and the children of Mary Jones, against William Wyse, Robert Bucknell, and Robert Trasler Scarborough. It charged that the defendant, Robert Trasler Scarborough, *had become, and was [*287] insolvent, and was insolvent in the lifetime of Elizabeth Harper; and that, in her lifetime, he attempted to sell his reversionary interest in the trust property, by way of anticipation; and that, by reason thereof, he committed a forfeiture, and the trusts, by the settlement declared in his favour, ceased and determined, [and the plaintiffs claimed consequential relief].

The defendant Scarborough admitted that he was arrested [288] for debt, and was imprisoned in the Fleet from May, 1830, to March, 1831; and that several of his creditors executed a letter of licence, dated the 23rd day of December, 1831; but he denied that he was ever insolvent, or that he ever compounded with his creditors, or that he ever attempted to sell or incumber his interest in the trust property.

The plaintiffs examined witnesses, and produced several letters; and, from the evidence, it appeared that the defendant Scarborough did endeavour to raise money by sale or mortgage of his interest in the trust property, and was prevented from doing so only by the terms in which the settlement was expressed; and that he never executed any instrument purporting to be a sale or charge, or an agreement to sell or charge the property, because the persons with whom he treated, having become acquainted with the terms of the settlement, refused to proceed in the treaty for the sale or charge.

Mr. Spence and *Mr. Geldart*, for the plaintiffs. * * *

Mr. Tinney, for the defendant Scarborough: [289]

* * His interest was to commence at the decease of the tenant for life, and to continue, until he should commit any of *the acts afterwards enumerated. Now, he had done none of [*290] the acts so enumerated after the death of Mrs. Harper; and

JONES v. WYSE.

indeed almost the whole of the evidence applied to acts done previously to the month of March, 1832. * * A mere attempt to aliene or incumber, not followed by any actual alienation or incumbrance,—an attempt, which has not succeeded, and which is not carried out by any solemn act, such as an assignment of the property, furnishing evidence of the intention,—cannot create a forfeiture, for otherwise a mere doubt or desire, on the part of a person entitled to property, subject to such a limitation as the present, might be a cause of forfeiture; and he might be deprived of his property, if he merely took professional advice upon the question whether he could or could not alienate his interest.

Mr. Pemberton, for the trustees:

Sir Anthony Mildmay's case (1) is an express authority to shew that a forfeiture cannot be created by a mere attempt to aliene; it is there said that "*non definitur in jure quid sit conatus;* and therefore the rule of law decides, that *non efficit conatus nisi sequitur effectus*, and the law rejects conations as things uncertain [*291] which cannot be put in issue." It was held, therefore, that *a proviso restraining Sir Anthony Mildmay from attempting or going about to aliene the estate vested in him was inoperative. So, in *Pierce* v. *Win* (2), where there was a devise to one, and the heirs male of his body, with a proviso that, if he attempted to aliene, his estate should cease, the Court held the condition void; "for *non constat* what shall be judged an attempt, and how could it be tried." *Ware* v. *Cann* (3) is an authority to the same effect. * * *

Mr. Spence, in reply.

Jan. 13. THE MASTER OF THE ROLLS (after stating the facts and the effect of the evidence):

It is argued, on the part of the plaintiffs, that the conduct of the defendant amounted to an attempt to sell, or incumber,

(1) 6 Co. 42 b.
(2) 1 Ventr. 321.
(3) 34 R. R. 469 (10 B. & C. 433).

within the meaning of the settlement, and that, in consequence thereof, the limitation over took effect. In this argument I cannot concur. It appears *to me, that a man, entitled to such an interest and subject to such a limitation over, may desire to sell, make inquiries, and take advice, whether he can sell or not, and do various acts indicative of his wishes on the subject, without giving effect to the limitation over; and, without saying, that no act less than the signature of an instrument purporting to sell, or to be an agreement to sell, could be an attempt to sell within the meaning of this settlement, I think that the acts done by the defendant in this case do not amount to such an attempt; and that the plaintiffs fail in that part of their argument.

Upon the question of insolvency, after a careful perusal of the evidence, I think that it is to some extent, but not conclusively, proved. The evidence consists in some degree of the letters and admissions of the defendant; and as those letters and admissions are not charged in the bill, the defendant has had no opportunity of explaining them, if they admit of explanation.

It was argued, for the defendant, that, whatever evidence of insolvency there might be, it related only to the time previous to the death of Mrs. Harper; and that insolvency, previous to the time when the defendant was to have the actual enjoyment of the property, would not give effect to the limitation over. I think that this argument is not sustained by the language of the settlement; and, if it were, it appears to me that the evidence bears upon a time subsequent to the death of Mrs. Harper in March, 1832.

Considering the state of the evidence, I think it necessary to refer it to the Master to inquire whether the defendant Scarborough, subsequent to his marriage, in the pleadings mentioned, and when, became insolvent, with liberty for the Master to state special circumstances.

1837.
Nov. 20, 21.
1838.
Jan. 29.

Rolls Court.
Lord
LANGDALE,
M.R.

[293]

THE EARL OF WINCHELSEA *v.* GARETTY (1).

(2 Keen, 293—312; S. C. 7 L. J. (N. S.) Ch. 99; 2 Jur. 367.)

A person domiciled in England, who was indebted in money upon bond, died intestate, leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland:

Held, that the right of relief or demand against the personal estate, which by the law of Scotland is given to the heir who has paid moveable debts, is capable of being made available in England, where the personal estate is the primary fund for the payment of all debts.

THIS cause came on upon exceptions to the Master's report, and upon a petition; and the question was, whether the debts of Lady Mary Ker, which had been paid by her co-heirs out of real estate in Scotland, ought to be repaid to them out of her personal estate, to be administered in England.

Lady Mary Ker, and her sister Lady Essex Ker, as the co-heirs of the Duke of Roxburghe, were entitled to certain real estates in Scotland. They were domiciled in England, contracted debts there, and executed joint and several bonds for securing the payment of such debts.

In March, 1818, Lady Mary Ker died intestate. Her sister, Lady Essex Ker, was her heiress-at-law and administratrix. She entered, as she was entitled to do, on the Scotch estates, but did not make up her titles to them according to the forms required by the law of Scotland.

In the month of August, 1819, Lady Essex Ker executed a testamentary deed of disposition, by which she intended to dispose of the Scotch real estates which had descended to her from Lady Mary Ker; but, as she did not make up her titles to those estates, the same were, after her death in September, 1819, claimed by the co-heirs of Lady Mary Ker, the Hon. Henrietta Bellenden, John Bellenden Ker, and John Bulteel, who finally established their title by a decision of the House of Lords.

[*294] Lady Mary and Lady Essex Ker had personal estates in England, and, when Lady Essex Ker died, there *were joint and several bonds of Lady Mary Ker and Lady Essex Ker remaining unpaid.

The will of Lady Essex Ker was proved by the late Earl of

(1) *Harrison* v. *Harrison* (1872) L. R. 8 Ch. 342, 42 L. J. Ch. 495, 28 L. T. 145.

Winchelsea, and Sir Robert Williams Vaughan, two of the residuary legatees; and they filed a bill against another residuary legatee, against the *Attorney-General* as representing charities, and against the co-heirs for the establishment of the will, and the due administration of the estate of Lady Essex Ker.

During the pendency of this suit, some of the bond creditors of Lady Mary and Lady Essex Ker commenced proceedings in Scotland to recover payment of their demands against the co-heirs of Lady Mary Ker; and thereupon the co-heirs filed their bill against the executors of Lady Essex Ker, who had possessed the personal estate of Lady Mary Ker, praying an account, and the due administration of that estate, and of the estate of Lady Essex Ker, and that the same estates might be applied in discharge of such of the debts of Lady Mary and Lady Essex Ker as were, by the law of Scotland, of the nature of moveable debts, and primarily chargeable, as between real and personal representatives, upon the personal estate, and for relieving the heirs; and that the heirs might have the benefit of the suit instituted by the Earl of Winchelsea and Sir Robert Williams Vaughan.

The causes were heard together on the 13th of June, 1825, and by the decree it was directed that the Master should take an account of the personal estate of Lady Essex Ker, and of her debts and legacies; and also an account of the personal estate of Lady Mary Ker come to the hands of Lady Essex Ker, as her administratrix. And the Master was to inquire of what real estates Lady Essex Ker died seised, and which of such estates *passed by her will or deed of disposition; and whether, by the [*295]
law of Scotland, there was a distinction between heritable and moveable debts, as to the payment out of debtors' real and personal assets; and whether, by the law of Scotland, any creditors claiming moveable debts being paid out of debtors' real estate in Scotland, or by the heir or person entitled to such real estate, the heir or person entitled to such real estate was entitled to be paid the amount out of the personal estate, regard being had to the domicile of the debtor; and, if he should find such right to exist by the law of Scotland, he was to inquire

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what debts of that nature had been proved against or paid out of the real estates in Scotland of Lady Mary and Lady Essex Ker, or by the heir, or person entitled to the said respective estates in Scotland.

In the course of the proceedings by the creditors in Scotland, in August, 1828, being three years after the date of the decree, an agreement was entered into by the heirs of Lady Mary Ker, and Sir Robert Williams Vaughan, for the sale of the Scotch estates, which were accordingly sold; and a sufficient portion of the purchase-money was applied in payment of the joint and several debts, but by such agreement the parties reserved their mutual claims of relief in relation thereto; and in 1833 the heirs commenced an action of relief, in the Court of Session in Scotland, against Sir Robert Williams Vaughan, the surviving representative of the Ladies Ker, and insisted that, by the law of Scotland, he was bound to relieve the heirs of Lady Mary Ker of her personal debts paid by them, and therefore prayed that he might pay to them one half of the sums which had been paid out of the proceeds of the freehold estates in satisfaction of the joint debts; and, it being objected that the heirs were not
[*296] entitled to the relief prayed, because Lady *Mary Ker died domiciled in England, the LORD ORDINARY, in February, 1834, directed a case to be submitted for the opinion of English counsel, who, upon the case stated, gave their opinion that the Scotch heirs were entitled, as against the executor and residuary legatees of the personal estate, to claim for it exoneration from the debts, or indemnity against them to their whole extent, but not so as to disappoint or prejudice any legatee, not being a residuary legatee.

Upon consideration of this opinion, and on the 18th of June, 1834, the LORD ORDINARY found Sir Robert Williams Vaughan liable in relief and payment to the heirs as libelled, so far as personal, to the extent of the executory funds of Lady Mary Ker, intromitted with by Lady Essex Ker, and Sir Robert Williams Vaughan; and it afterwards appearing that there was a balance of 1,499*l.* 3*s.* 0½*d.* arising from Lady Mary Ker's estate, and that the claims of the heirs against that estate exceeded that sum, the Court of Session, on the 11th of March, 1835, decreed

against Sir Robert Williams Vaughan for payment of the whole balance to the heirs.

Before the action for relief in Scotland was brought, and in 1827, the opinion of Mr. George Joseph Bell was asked upon the questions of Scotch law, which were mentioned in the English decree; and Mr. Bell's opinion was set forth in the Master's report.

After the termination of the proceedings in Scotland, another opinion was obtained from Mr. Bell, from the Lord Advocate Mr. John Murray, from Mr. Currie, and from Mr. Maitland; and in conformity with these opinions, the Master found by his separate report, that by the law of Scotland, there was a distinction between heritable and moveable debts, as to the payment out of the debtor's *real and personal estates, and that, by the law [*297] of Scotland, when creditors claiming moveable debts are paid out of the debtor's real estate in Scotland, or by the heir or person entitled to such real estate, the heir, or person entitled to such real estate is entitled to be repaid, regard being had to the domicile of the debtor.

To this report Sir Robert Williams Vaughan, the surviving executor, excepted, on the ground that no sufficient evidence was produced to the Master as to the law of Scotland, in respect to the matters directed to be inquired into by the decree.

Mr. Pemberton, *Mr. Griffith Richards*, *Mr. Hope*, and *Mr. Stuart*, in support of the exceptions. * * *

Mr. Tinney and *Mr. Everett*, *contrà*. * * * [303]

Mr. Pemberton, in reply. [308]

THE MASTER OF THE ROLLS (after stating the facts): 1838. *Jan.* 29.

The question in this case arises upon the fact that the debtor was not domiciled in Scotland, but in England; and it was argued both as a question of general law, and as a question upon the principles of Scotch law.

From the inquiry, directed by the decree, it seems that this Court considered that the question was to be determined by the law of Scotland; and from the inquiry directed by the LORD ORDINARY in the relief suit in Scotland, it seems that the

THE EARL OF WINCHELSEA v. GARETTY.

LORD ORDINARY considered that the question was to be determined by the law of England.

By the law of England, the personal estate is the primary fund for the payment of all debts contracted by the deceased person whose estate it was.

By the law of Scotland, moveable debts are primarily and properly chargeable upon the personal estate. The creditor may, indeed, enforce payment against the real estate in the hands of the heir; but, if he does so, the heir is entitled to relief against the executors out of the personal estate; in other words, according to the law of Scotland, the real estate, though subject to the payment of moveable debts, is only a subsidiary fund for the purpose of payment. Payment by the heir does not extinguish the debt, but vests in him a right to recover the amount against the personal estate, and constitutes him a
[*309] creditor against the personal estate; and whether *he can enforce payment against the personal estate, which is to be distributed according to the laws of another country, which makes the personal estate the primary fund for the payment of debts, is the question.

Primâ facie there would seem to be no difficulty; the heir, having by the law of the country in which the land lies, a right to relief or exoneration, would seem to be at liberty to make that right available in a country where the personal estate is the primary fund for the payment of all debts.

But it is objected, that, in all the opinions upon which the finding of the Master rests, it has been assumed that the law of domicile makes no difference, whereas it is clear that the domicile determines the law by which the personal estate is to be distributed; and that, although it be true that in England the personal estate must be applied in exoneration of the English heir of real estate, yet that the right of the heir to be exonerated is founded on the law peculiar to England, and that a foreign heir of foreign lands is not entitled to the same relief as an English heir of English lands. The law of England, it is said, affords no relief to foreign real estate out of English personal estate; and although the law of Scotland regulates the administration of the real estate, and provides that the real estate, if

applied in payment of personal debts, shall be exonerated out of the personal estate, the proposition must be limited to personal estate of which the distribution is regulated according to the law of Scotland, and consequently to the personal estate of debtors domiciled in Scotland.

Several cases were cited. They sufficiently establish the propositions, which are not disputed on either side; and *Drummond* v. *Drummond* (1) establishes that a Scotch *heir is ultimately [*310] liable to pay heritable debts which have, in the first instance, been paid out of the personal estate distributable according to the law of England; but no case has occurred in which it has been decided that the Scotch heir, having paid moveable debts, is entitled to be relieved out of the personal estate distributable according to the law of England; and that is the question here.

The personal estate is taken by the administrator, according to the law of England, subject to the payment of all the debts of the intestate.

The real estate is taken by the heir, according to the law of Scotland, subject to the payment of all moveable debts, but with a right of relief out of the personal estate, and subject to the payment of all heritable debts without such right of relief.

As to the heritable debts, in respect of which there is no such right of relief, the heir is not entitled to the benefit of the English law, which makes the personal estate subject to the payment of all debts. The Scotch law, which makes the heir ultimately liable to the payment of such debts, and which governs the distribution of the real estate, prevails in favour of the persons entitled to the personal estate distributable according to the law of England.

As to personal debts, in respect of which there is such right to relief, the English law subjects the personal estate to all debts; the Scotch law relieves the real estate as far it can consistently with the claims of the creditors. The heir, by paying, satisfies the creditor, but at the same time acquires for himself a right of demand against the executor; he may, if he pleases, take an assignation *of the debt, and make it available; but that is [*311] not necessary, because, without any assignation, his own claim

(1) 6 Br. P. C. 601.

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to relief subsists and constitutes him a creditor against the personal estate.

Under these circumstances the question does not appear to me to be fully stated, when it is said to be whether a foreign heir of foreign lands is entitled to the same relief as an English heir of English lands. The case is, that a foreign heir of foreign lands is, in respect of those lands, subsidiarily liable to pay debts to which the personal estate, distributable according to the law of England, is primarily liable; and that, having paid the debt, he is by the law of the country in which the land lies constituted a creditor upon the personal estate distributable according to the law of that country. And it is under these circumstances, and without reference to English tenures, or the title to exoneration which an English heir may possess, that the question arises, whether the subsidiary debtor, or the person who by the law of a foreign country is constituted surety for the payment of debts, primarily chargeable on another fund, and paying the debts by force of, and according to the law which constitutes him a creditor upon that other fund, is or is not entitled to make his title as creditor available in another country, where the personal estate is distributable, and where the law makes the personal estate primarily liable to the payment of all debts. And, upon consideration of the case, I am of opinion, that the right of relief or demand against the personal estate, which in the administration of the real estate by the law of Scotland is vested in the heir who has paid moveable debts, is capable of being made available in England, where the personal estate is the primary fund for the payment of all debts.

[312] In this case the personal estate seems to have been principally, if not wholly, in England; but whether in England or in Scotland, it was, by reason of the domicile, to be administered according to the law of England, and it was with reference to this, that the Judges of the Court of Session asked the opinion of English lawyers before their decision in the relief suit; and in relying upon that decision, and the several opinions which are set forth in the report, it does not appear to me that the evidence before the Master was not sufficient to support the conclusion at which he has arrived; and I am of opinion that the exceptions

must be overruled, and that, upon the petition, the report must be confirmed. And I think that an order should be made for the application of the personal estate of Lady Mary Ker in satisfaction of her share of the personal debts which have been paid out of the proceeds of her real estates in Scotland; and the amount thereof, if not already ascertained, ought now to be ascertained by proper inquiries before the Master. The argument having been employed upon the question of right, nothing was said upon the details, and without further assistance from the Bar I am unable to state whether the sums are correctly stated in the petition.

CHERRY *v.* BOULTBEE.

1838.
March 5.
April 6.

Rolls Court.
Lord LANGDALE, M.R.

(2 Keen, 319—325; S. C. 7 L. J. (N. S.) Ch. 178.)

[SEE the report of this case on appeal affirming the decision of the MASTER OF THE ROLLS (4 My. & Cr. 442).]

THE BANK OF ENGLAND *v.* ANDERSON.

1836.
Mar. 22—24.
1837.
Jan. 21, 23, 24.
April 19.

Rolls Court.
Lord LANGDALE M.R.

[328]

(2 Keen, 328—443; S. C. 7 L. J. (N. S.) Ch. 265; 3 Bing. N. C. 589; 4 Scott, 50; 6 L. J. (N. S.) C. P. 158.)

A copartnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from London, cannot, under the 3 & 4 Will. IV. c. 98, and the other Acts now in force respecting the Bank of England, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of giving such acceptance.

[THIS was a motion for injunction before the Master of the Rolls, who sent a case to the Common Pleas raising the question stated in the head-note. The case is fully reported in the Common Pleas in 3 Bing. N. C. 589. The MASTER OF THE ROLLS adopted the certificate of the Common Pleas and granted the injunction in accordance with the headnote. A petition of appeal was presented to the House of Lords, but was not prosecuted. The decision was subsequently considered and substantially affirmed by the House of Lords in the similar case of *Booth* v. *The Bank of England*, reported in 7 Cl. & Fin. 509, 6 Bing. N. C. 415, and see the next page.]

1837.
June 3, 6.
Aug. 5.

Rolls Court.
Lord
LANGDALE,
M.R.

HOLE *v.* ESCOTT.

(2 Keen, 444—465; S. C. 6 L. J. (N. S.) Ch. 355; 1 Jur. 424.)

[See the report of this case on appeal taken from 4 My. & Cr. 187, in a future volume of the Revised Reports.]

1837.
May 5.
June 16.

Rolls Court.
Lord
LANGDALE,
M.R.

Affirmed by House of Lords.
1840.
July 7, 9, 20.

THE BANK OF ENGLAND *v.* BOOTH (1).

(2 Keen, 466—496; S. C. 7 L. J. (N. S.) Ch. 261; affirmed by House of Lords, 7 Cl. & Fin. 509—548.)

A bank at Kingston, in Upper Canada, drew a bill payable at sixty days after sight, directed to G. P., manager, Joint Stock Bank, London, which was accepted by G. P., who was the manager of the London Joint Stock Bank, but not a shareholder or partner in that concern, in these words: "Accepted at the London Joint Stock Bank. GEORGE POLLARD." By an arrangement between the London Joint Stock Bank and the Canada Bank, the London Joint Stock Bank guaranteed the payment at maturity of all bills of exchange so drawn by the Canada Bank to the extent of 40,000*l.*

Held, that this transaction was a violation of the exclusive privileges of the Bank of England within the 3 & 4 Will. IV. c. 98, and the other Acts relating to the Bank. And an injunction was granted accordingly against the London Joint Stock Bank, G. P., and their agents.

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[THE purpose and object of this litigation, as well as the facts of the case, are sufficiently set forth in the following judgment of the MASTER OF THE ROLLS:]

June 16.

THE MASTER OF THE ROLLS:

[488] The object of the motion made by the Bank of England in this case is, to restrain the London Joint Stock Bank from borrowing, owing, or taking up, in England any sum or sums of money on their bills of exchange, payable on demand, or at any less time than six months from the borrowing thereof.

The London Joint Stock Bank is a partnership consisting of more than six persons, who carry on the business of bankers in London. Mr. George Pollard is their manager, but is not a partner or shareholder.

[489] The Commercial Bank of the Midland district is a banking partnership, carrying on business at Kingston in Upper Canada. Mr. John S. Cartwright is their president, and F. A. Harper is their cashier.

(1) See last preceding page.

In the spring of 1837, the Commercial Bank desired to employ the London Joint Stock Bank as their London agents, and to obtain from them advances of money to a large amount, and for that purpose to draw upon them bills of exchange sixty days after sight.

The London Joint Stock Bank, conceiving that to accept such bills might be a violation of the privileges enjoyed by the Bank of England, and, having been apprised by the Bank of England that it would be so considered (by letter, dated the 6th of May, 1837, and addressed by Pollard to Harper), proposed to the Commercial Bank to adopt either of these two expedients; first, that the Commercial Bank should issue promissory notes, payable at the London Joint Stock Bank; or secondly, that the Commercial Bank should draw upon "George Pollard, manager of the London Joint Stock Bank, London;" and that the due payment of the manager's acceptances should be guaranteed by the London Joint Stock Bank.

In answer to these proposals, the Commercial Bank in a letter, dated the 21st of June, 1837, and addressed by Harper to Pollard, expressed themselves as follows: "The Board have also taken into consideration both the modes you propose for valuing on you so as not to come within the power of the Act in favour of the Bank of England, and prefer that of drawing on you, as manager, at sixty days' sight, being the date at which bills are commonly negotiated, and which the public would prefer. Such being their decision, please send me the *guarantee of your bank to protect the drafts of the president of this institution." [*490]

In anticipation of the guarantee being sent, John S. Cartwright, the president of the Commercial Bank, drew upon George Pollard a bill of exchange, which was expressed as follows:

"1,000*l.* sterling. Kingston, Upper Canada, 25th July, 1837. Sixty days after sight, pay this, my first of exchange (second and third unpaid) to the order of F. A. Harper, cashier, the sum of 1,000*l.* sterling value received, which place to account of the Commercial Bank, Midland district,

THE BANK OF ENGLAND v. BOOTH.

with or without further advice. JOHN S. CARTWRIGHT, President, to George Pollard, Esq., Manager, London Joint Stock Bank, London."

About the time when this bill was drawn in Canada, the London Joint Stock Bank received the letter of the 21st of June, containing the information that the Commercial Bank preferred the mode of valuing by drawing bills on George Pollard, as manager; and thereupon, by letter dated the 29th of July, 1837, and addressed by Boyle, their secretary, to the president and directors of the Commercial Bank, they communicated to the Commercial Bank their approbation of the mode of drawing which the Commercial Bank had selected, and sent to Canada a guarantee signed by six trustees, and expressed as follows:

"To the Commercial Bank of the Midland district, Upper Canada, London, 26th July, 1837. GENTLEMEN,—In consideration of your keeping a banking account with the London Joint Stock Bank, we, as trustees of the company, hereby engage that the capital stock and funds of the company
[*491] shall be liable to you for, and shall make *good to you any balance that may become due to you on your current or other account with it; and that the said London Joint Stock Bank will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by your bank upon, and accepted by Mr. George Pollard, manager of the said London Joint Stock Bank. We are, &c." Signed by six trustees.

They also sent to the Commercial Bank the form of an agreement (which in the month of September following was duly signed), whereby the Commercial Bank agreed to pay to the trustees of the company on demand such sums of money as might at any time be due from them to the London Joint Stock Bank; and advertisements, stating the connection between the two companies, but not adverting to the peculiar nature of this arrangement as to bills of exchange, were published.

The bill of the 25th of July, 1837, was received by the Bank

of England about the end of September, and was presented for acceptance on the 2nd of October; and was then accepted by Mr. Pollard in the manner and form following:

"Accepted 2nd October, 1837, at the London Joint Stock Bank. GEORGE POLLARD."

The Bank of England objected to the form of this acceptance. Mr. Pollard refused to alter it, and after some discussion the bill was paid under discount.

The London Joint Stock Bank, however, now carry on, and claim to be entitled to carry on their business as agents of the Commercial Bank in Canada; and they make, and claim to be entitled to make, advances to the last-mentioned bank, upon or by means of bills of exchange, *drawn on George Pollard, and [*492] accepted by him under the arrangement and guarantee before mentioned; and the only alteration made, or proposed to be made, in the form of the bill, is to omit the word "Manager" in the address to George Pollard.

The question is, whether this course of proceeding is legal under the Bank Acts, the last of which is the statute 3 & 4 Will. IV. c. 98.

The third section of the Act permits any partnership (although consisting of more than six persons) to carry on the business of banking in London, provided that such partnership do not, during the continuance of the privileges of the Bank of England, borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof.

The effect of that clause was much considered in the case of *The Bank of England* v. *Anderson* (1), and, not being aware of any reason for doubting the judgment of the Court of Common Pleas in that case, I must, on the present occasion, assume that it was rightly decided. And the London Joint Stock Bank being a partnership consisting of more than six persons, and carrying on the business of banking in London,

(1) See *ante*, p. 271.

THE BANK OF ENGLAND v. BOOTH.

and the bills which are accepted by George Pollard in the course of the dealing before described, being payable sixty days after sight, the question seems reduced to this; whether, in the course of this dealing, and in respect of bills so accepted, the London Joint Stock Bank do or do not owe money in England on their bills.

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As the Bank Acts were made for the purpose of giving effect to an agreement between the Bank of England and *the public, for which valuable consideration was given by the Bank, they must be construed, and effect must be given to them, according to the intent and meaning of them, so far as the intent and meaning can be discovered by fair and just construction. And it must be observed, as was argued for the plaintiffs, that, if the expedient which has in this case been adopted for evading the statute should be successful, there seems to be no reason why the defendants, the London Joint Stock Bank, might not, in the name of their agent Mr. Pollard, issue promissory notes payable on demand to any amount; and it would not be difficult to suggest indirect means by which such notes might be made to circulate on the credit of the company.

It is admitted, on behalf of the London Joint Stock Bank, that their object has been, and is, to avoid the provisions of the Bank Acts. They allege that accepting bills in the manner before described is not within the strict letter and meaning of the Act; that they have a right to do everything which is not strictly and directly forbidden; and their argument is that, as the London Joint Stock Bank are not by that name, and in that character, parties to the bills, the bills are not "theirs," and they do not owe money upon them.

But admitting that an indorsee, a stranger to the transactions and arrangement between the London Joint Stock Bank and the Commercial Bank, who had not received the bill on the credit of the London Joint Stock Bank, would have no right to consider the London Joint Stock Bank as acceptors or parties to the bill, the question is not thereby disposed of.

It is to be considered what is the relation between Mr. Pollard, the London Joint Stock Bank, and the *Commercial Bank, in these transactions and in respect of these bills.

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Pollard is a mere agent without any personal interest; his office is to do something by which the two banks are enabled to transact their business together in the manner they desire; he does this by the authority, and for the profit, of the London Joint Stock Bank; he was never meant to be primarily, if at all, liable to the Commercial Bank, the drawers of the bills; as between him and them, he has entered into no contract to pay. He and they rely on the London Joint Stock Bank, who have not contracted to become liable in case of his failure to pay, but have contracted to provide funds for payment of the bills accepted by him at maturity. They do that which would belong to them or be their duty as acceptors; and the bills are avowedly drawn in the transaction, and for the purposes of their business as agents and correspondents of the Commercial Bank; and under these circumstances I think, that the bills may without impropriety or any strain of language be called *their* bills. Their names are not upon the bills as parties: but they are the persons who authorised the drawing—authorised the acceptance—are bound to provide for the payment—and are entitled to the profit arising from the acceptance and payment. I have no doubt that they consider these bills as their bills, at least in the sense of their having to provide funds for paying them; and for the purposes of the Bank Acts, I think that the law must also consider the bills to be theirs.

It appears to me, also, that they owe money upon the bills when accepted; for, although they are not parties, and may not be liable to an indorsee, who has not received the bills on their credit, yet, as regards the drawers, they are under an obligation to do that which *is equivalent to payment, namely, to provide the funds to enable their agent to pay. Their obligation arises upon the acceptance by their agent; they then owe or become liable to pay (in this case the expressions are equivalent) the sum which is due on the bills. In all transactions and accounts between the two

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THE BANK OF ENGLAND v. BOOTH.

banks, the existence of this obligation or liability must undoubtedly be recognised; and, for neglect of the duty which they thus contract to perform, they are answerable to the drawers.

It was argued, indeed, that the London Joint Stock Bank, not being parties to the bill, cannot be sued upon the bills themselves, and for that reason cannot be deemed to owe money upon the bills; that the engagement to provide the money for payment is collateral, and an obligation upon that collateral agreement is no obligation upon the bills.

I do not, however, think it necessary to give any opinion upon the question, whether the London Joint Stock Bank can be sued directly upon such bills as these or not.

For the reasons I have stated, it appears to me that they owe money on the bills; and I think that this conclusion is in no way affected by the form of the action or suit in which they might be compelled to satisfy their obligation.

On the whole, therefore, I am of opinion that the privileges to which the Bank of England is entitled by virtue of their agreement with the public, confirmed by the statutes, are violated by such acceptances as have been made in this case; and that an injunction ought to be awarded.

[496] Let an injunction be awarded to restrain the society or partnership called the London Joint Stock Bank, and every partner therein, and the defendant George Pollard, and every clerk, servant, or agent of the same partnership, from accepting, or causing to be accepted, in the name of the said partnership, or in the name of the said George Pollard, or any other name on behalf of the said partnership in the course of their banking transactions, any bill or bills of exchange payable on demand, or at any less time than six months from the acceptance thereof.

1840.

[This decision was affirmed upon appeal to the House of Lords under the title of *Booth* v. *The Bank of England*, as reported in 7 Cl. & Fin. 509—548.]

M'DONALD *v.* BRYCE.

1838.
July 3.

Rolls Court.
Lord
LANGDALE,
M.R.

(2 Keen, 517—520; S. C. 7 L. J. (N. S.) Ch. 217.)

[SEE note, *ante*, p. 259.]

LYNN *v.* CHATERS.

1837.
May 24.

Rolls Court.
Lord
LANGDALE,
M.R.

[521]

(2 Keen, 521—526.)

An agreement was entered into for the sale of a ship to A. and B., (one third share to A. and two thirds to B.), at the price of 750*l.*; and, if default should be made by the purchasers, for the resale of the ship, the deficiency, if any, upon the resale, to be made good by the defaulting purchasers. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from A., and two bills of exchange, drawn by the vendors, and accepted by A., for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase-money for the one third share and two third shares of the ship was expressed to have been paid by A. and B. respectively. The acceptances of A. were dishonoured, and he became bankrupt.

On a bill filed by the vendors, who had become entitled to the whole interest in the purchase-money, against B., who had become the sole owner of the ship by purchase from A.'s assignee, praying specific performance of the agreement, and payment of the unpaid purchase-money by B., or that the ship might be sold, and the proceeds applied in payment, the Court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase-money by B., or a resale of the ship, in default of payment in a limited time.

THE plaintiff John Lynn, his son James Lynn, and the defendant Cornforth, were the joint owners of a ship called the *Friends*, the share of Cornforth being mortgaged for more than its value to the plaintiff. They were desirous of selling the ship, and employed William Willins as their agent for that purpose.

William Willins, as agent for the plaintiff, agreed to sell; and John Wright, acting for himself, and also on behalf of the defendant Chaters, agreed to purchase the ship for the sum of 750*l.*; one third to be paid immediately in cash, one third in three months, and the remaining third in six months. It was understood that Wright and Chaters did not purchase in equal shares, but Wright was to have one third, and Chaters two thirds; and it was agreed, that if any default should be made by the purchasers, the money paid in part should be forfeited

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to the use of the sellers, who were to be at liberty to sell the ship again; and if, upon the resale, there should be any deficiency, the same was to be made good by the defaulting purchasers.

On the 16th of August, 1833, the parties met to complete the purchase; and the three bills of sale were executed (1). *The first related to the share of the defendant Cornforth; the substantial interest was disposed of by the two other bills of sale; by one of which the plaintiff John Lynn and his son, assigned two third shares, of the ship to Chaters, in consideration of 492*l.* 3*s.* 9*d.*, expressed to be paid by him; and by the others of which they assigned the remaining third share of the ship to Wright, in consideration of 257*l.* 16*s.* 3*d.*, expressed to be paid by him. All that was in fact then paid, was a sum of 250*l.*, which was paid by Wright by a cheque on his bankers: but Wright accepted two bills for 250*l.* each, drawn upon him by the plaintiff and his son, one payable in three and the other in six months. Upon this payment, and the delivery of these acceptances, the possession of the ship was delivered to the purchasers.

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James Lynn, the son, died on the same day on which the bills of sale were executed, and the plaintiff took out administration to his estate.

The two bills were dishonoured when presented for payment, and Wright became bankrupt.

Payment being demanded from Chaters, he refused; and, on an action being brought against him, he pleaded that, by the execution of the bill of sale, wherein the sum of 492*l.* 3*s.* 9*d.* was expressed to be paid, the plaintiff was precluded from alleging that the defendant Chaters had not paid for his shares of the ship. The plaintiff, being advised that this plea was good, abandoned his action, and filed this bill, which prayed, that the defendant Chaters might be decreed specifically to perform the agreement, and pay the amount of the two bills; or that the ship, of which (by purchase from the assignees of

(1) See now Merchant Shipping Act, 1894, ss. 24—26, 44, Sch. I., Part I.

Wright) the defendant had become the *sole owner, might be sold, and the proceeds applied in payment.

Two objections were raised, on the part of the defendant Chaters, to the relief sought by the bill: first, that * * the Court could not decree specific performance of a contract for a chattel. [Secondly that] when the possession of the ship was parted with, and the plaintiff received payment, partly in cash and partly in bills of exchange accepted by Wright, the plaintiff's claim in respect of the bills of exchange became a mere pecuniary demand, which lay altogether at law.

[*523]

* * * * *

Mr. Swanston, for the defendant Chaters.

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Mr. Pemberton, *Mr. Kindersley*, and *Mr. Paynter*, *contrà*.

THE MASTER OF THE ROLLS (after stating the facts):

On behalf of the defendant Chaters, it was alleged that the Court had no jurisdiction to give relief in such a case; but considering that the money, the receipt of which was acknowledged, was in point of fact, not paid; that the defendant has availed himself of that acknowledgment to defeat the plaintiff's claim; that by this defence the plaintiff was compelled either to submit to the abandonment of his just claim altogether, or come here, at the least, for discovery; and that there is an agreement which gives the plaintiff a right to sell the ship if the purchase-money were not paid; I am of opinion that this Court has jurisdiction to give relief if a proper case be made out.

The defendant Chaters, indeed, alleges that the plaintiff has been paid for the ship, by payment of 250*l.* in money, and the delivery of two bills of exchange, accepted by Wright, for 250*l.* each: but the delivery of bills of exchange is not payment in satisfaction of the debt, whatever the effect may be until failure of payment after the bills become due. But then he alleges, that by the agreement, he was not to be liable to pay the bills; and if this be so, this bill must be dismissed, for its sole purpose is to obtain, as against Chaters, payment of the money due on the bills.

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He says that he had money in Wright's hands, to be applied in the purchase of a ship; that this was known to the vendors, who agreed to give Wright some time for payment, allowing him to retain the defendant's money in his hands in the mean time; and it was in consequence agreed, that the bills taken in payment should be the bills of Wright alone, and that he, Chaters, was to have nothing to do with the payment of them, or of the amount thereby secured. The statement is not in itself probable: but the bills were accepted by Wright alone, and that fact affords at least some countenance to the defendant's statement. William Willins was the agent of the vendors; and it seems that Chaters was desirous not to be a party to the bills which were to be given; for on the 16th of August, 1833, he requested Willins to use his influence with the plaintiff, and his son James, to induce them to take the bills of Wright alone, for securing the unpaid purchase-money. To this Willins objected, saying it would not be regular; and he afterwards informed James Lynn, the plaintiff's son, of this proposal, and advised him not to accept it, but to get Chaters to draw on Wright, which James Lynn said he would do. Under what circumstances James Lynn afterwards, on the same day, took the bills of Wright alone, does not appear: he died suddenly of the cholera on that day.

But the evidence of Willins is distinct, that in arranging the payment, he proposed to Wright that the bills should be drawn upon him by Chaters; that Wright agreed to that, and said, "Certainly, it is the proper way;" and from his evidence I collect that he thought that arrangement had been carried into effect. Wright, who has been examined for both parties, distinctly says, in his deposition for the plaintiff, that there was no agreement between him and the agent for the vendors and Chaters, [*526] *or between Chaters and him, and the purchase-money should be paid or secured by his bills alone, in exoneration of Chaters. And Willins, in his examination for the defendant, states that he never, before the 16th of August, 1833, heard or understood from Chaters and Wright, or either of them, that Chaters would have nothing to do with the bills, or that Chaters had money in Wright's hands, to pay for Chaters's shares of the ship. Wright

also, in his examination for the defendant, says distinctly, that it was not part of the agreement that Chaters was not to be a party to the bills.

The simple fact, therefore, in support of the defendant's case is, that James Lynn took bills which were drawn upon and accepted by Wright & Co., the firm under which Wright carried on business, and in which Chaters had no concern.

James Lynn died on the same day on which this transaction took place; and Willins says he does not believe that James Lynn knew what he was about on that day. Upon that part of the evidence I place no reliance; but upon the evidence strictly applicable to the subject, and seeing that the reasons assigned by Chaters, for the acceptance of the bills, by Wright alone, are disproved, I am of opinion that Chaters remained liable for the payment of the unpaid purchase-money, notwithstanding the form of the bills given for the amount.

Decree therefore an account and payment, and declare that the plaintiff has a right to have the ship sold in default of payment by a limited time.

[The following reports to the end of this volume (2 Keen), were prepared by Mr. Beavan, who completed the volume in consequence of Mr. Keen's illness.]

MACKINNON *v.* PEACH.

1838.
April 21.
May 31.

(2 Keen, 555—563; S. C. 7 L. J. (N. S.) Ch. 211.)

Rolls Court.
Lord LANGDALE, M.R.

A bequest of chattels to two legatees, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to the other. One of the legatees died in the testator's lifetime: Held, that the other was absolutely entitled by survivorship.

[555]

THE question [stated in the head-note] arose upon the construction of the will of Charles Mackinnon, Esquire. The testator, at the date of his will, had two daughters, the plaintiff and her sister Maria Sophia; and by his will dated the 22nd of March, 1831, * * the testator thus expressed himself: "I request that my plate and plated ware, together with the pearls and other articles in

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MACKINNON v. PEACH.

my possession, may be divided between my dear daughters Maria Sophia and Sophia Jane, share and share alike; and upon the demise of either of them without lawful issue, then the share of her so dying shall go to her sister; and failing of my said dear daughters and their lawful issue, the said plate and plated ware, pearls, and other articles, are to be sold, and the proceeds or sale value is to be in the meantime laid out as a part of my estate, in the established parliamentary funds of Great Britain." * * *

[557] The daughter Maria died in June, 1833, unmarried, and on the 14th of September, 1833, the testator made a codicil to his will, in which he [noticed the death of his daughter Maria, and made further dispositions in favour of his daughter Sophia, but did not refer to the specific bequest hereinbefore mentioned].

[558] The testator died in 1833.

[The question was], whether the share of the plate, &c., originally given to Maria Sophia, in consequence of her death in the testator's lifetime, devolved to the plaintiff, the other daughter. * * *

Mr. Pemberton and *Mr. Renshaw*, for the plaintiff, contended that the plaintiff, the surviving daughter, was entitled to the plate absolutely. * * *

Mr. Tinney and *Mr. Beavan*, *contrà*, argued that the gift of the plate to the daughters, "to be divided between them," created a tenancy in common, and therefore the benefit of the gift would not pass to the survivor, unless by the express gift [*559] over upon the *demise of one without lawful issue. That the gift over was void, as it was to take effect upon an indefinite failure of issue. They contended that the gift of one half of the plate, &c., would consequently lapse and fall into and form part of the residue. They also contended that if the gift over were void in the first instance, the circumstances of the death of one of the daughters in the testator's lifetime would not cure its original invalidity. * * *

Mr. Richards, for the trustees.

Mr. Pemberton, in reply. * * * MACKINNON v. PEACH.

THE MASTER OF THE ROLLS [upon the point here reported said]: [560]

The gift is to two, to be divided between them, share and share alike; and if both had survived the testator, they would have been entitled as tenants in common; as one died in the lifetime of the testator, her share in one sense lapsed, as to her, and could not be claimed by her representatives; but, in the event of either daughter dying without lawful issue (and in this case the deceased daughter died unmarried), her share is given to her sister, *i.e.* to the survivor of the two daughters; and I am of opinion, that the circumstance of the deceased daughter having died in the lifetime of the testator, does not prevent the gift over to her sister from taking effect, and consequently, that the plaintiff is now entitled to *the whole of the plate and plated ware, [*561]
pearls, and other articles comprised in the clause of the will to which I have referred. * * *

EYRE *v.* MARSDEN (1).

1838.
June 6.
July 9, 10.

(2 Keen, 564—581; S. C. 7 L. J. (N. S.) Ch. 220; on appeal, 4 My. & Cr. 231—248.)

Rolls Court. Lord LANGDALE, M.R.

[SEE the report of this case on appeal, to be given in a later volume of the Revised Reports.]

JACKSON *v.* NOBLE (2).

1838.
March 26.

(2 Keen, 590—597; S. C. 7 L. J. (N. S.) Ch. 133; 2 Jur. 251.)

Rolls Court. Lord LANGDALE, M.R.

A testator gave real and personal estate to his daughter A., and to two other persons, upon trust, to permit A. to receive the rents and interest for life, for her separate use, and after her decease in trust to convey to her heirs, executors, &c.: but, in case A. should marry, and [590]

(1) *Hurst* v. *Hurst* (1884) 28 Ch. D. 159, 54 L. J. Ch. 190.

(2) *Gatenby* v. *Morgan* (1876) 1 Q. B. D. 685.

JACKSON v. NOBLE.

have no children, then the property to belong to D.; or in case of his decease before A., then to his children: Held, that A. took an absolute equitable estate, with an executory gift over, to D. and his children, and D. having died in the lifetime of A., leaving no children: Held, that A. was absolutely entitled to the property.

THIS was a bill filed by Mary Anne Jackson and others, against Mary Ann Noble and Edward Leslie, praying that the wills of David Russen, George William Russen, and Jane Russen, might be established, and that the rights of the parties to certain property given by the will of David Russen, to the defendant Mary Ann Noble, might be declared, and that consequential relief might be given.

On the 29th October, 1813, David Russen made his will, [and thereby gave and bequeathed certain freehold and leasehold property and 1,000*l.* 3 per cent. stock unto his daughter Mary Ann Russen, and Matthew Peter Davies, of Saint Martin's Le Grand, and George William Russen, of Aldersgate Street, Gentleman, their heirs, executors, administrators, and assigns, in trust to permit and suffer his said daughter, M. A. Russen, and her assigns, to receive and take the interest and dividends of the said 1,000*l.* stock, and the rents, issues, and profits of the said several estates, for her natural life, for her separate use. And from and after the decease of his said daughter, in trust to convey and assign the said several freehold and leasehold estates, and the said 1,000*l.* stock, unto the heirs, executors, and assigns of his said daughter, for and according to all his estate and right therein respectively. Nevertheless, in case his said daughter should intermarry and have no child or children, then the said estates and money in the funds should belong to his son George William Russen; or in case of his decease before his said daughter, then to such
[592] child or children as he might happen to have;] and after enabling his daughter to grant leases of the freehold and leasehold estates so given to her, and giving certain other legacies, he gave all the residue of his estate to his son George William Russen.

By a codicil, the testator gave to his daughter, Mary Ann Russen, a further sum of 1,000*l.* 3 per cent. Reduced Annuities,

subject to the like terms and conditions as before mentioned and described in his will.

The testator died on the 6th of February, 1819. He left his son George William Russen his heir-at-law and customary heir, and his daughter Mary Ann Russen surviving. The son George William Russen proved the will, and became legal personal representative [and] died without issue, having made a will [*593] [under which the plaintiffs claimed to be entitled].

Mary Ann Russen married, and was now the defendant Mary [594] Ann Noble, but she had no child, and on behalf of the plaintiffs it was contended,

That Mary Ann Noble took a life interest only in the freehold and leasehold estates, and the two sums of stock bequeathed to her by the will and codicil of David Russen; and that having married, and having no child, George William Russen became, and those who claim under him now were, entitled absolutely to those estates and stocks, subject only to the life estate of Mary Ann Noble, and the contingency of her still having issue. * * *

On the other hand, it was contended by Mrs. Noble,

That according to the true construction of the will, she took an absolute interest in the property devised and bequeathed to her, subject only to an executory devise over in the event of her marrying and having no child. That if she had never married, she would have had an absolute power over the property. *That [*595] in the event of her marriage, it was intended to protect her estate from her husband; and in the event of her having no child, to give the property over to her brother or his children surviving her; and that in the event which has happened, of her brother dying in her lifetime without children, she is now absolutely entitled. * * *

Mr. Tinney and *Mr. Elderton*, for the plaintiffs.

Mr. Pemberton and *Mr. Turner, contrà.*

Mr. Tinney, in reply.

* * * * *

JACKSON v. NOBLE.

THE MASTER OF THE ROLLS:

The first question is, what estate is given to Mrs. Noble? Is she entitled to an estate for life only, or to *an absolute estate, [*596] subject to be defeated by a contingent executory gift over? If the former, the plaintiffs are entitled to the claim, which they have made in this respect. If the latter, it is to be considered, whether the event on which the executory gift over was to take effect, can now happen.

It is admitted on both sides, that Mrs. Noble has an equitable estate for life. During her life it is the office of the trustees, to preserve for her, the separate and independent use of the income; after her decease, it is the office of the trustees, to convey and assign all the testator's interest to her heirs, executors, administrat rs, or assigns. It is not the case of an equitable or trust estate for life, with a use executed in the heir, upon the death of the tenant for life; but a case, in which the trustees have a duty to perform, after, as well as before, the death of the tenant for life; and in which the duty after the death of the tenant for life, is clear and defined, neither requiring nor admitting of any modification. There would, on the death of the tenant for life, be nothing for this Court to do, but to direct the conveyance or assignment to the heirs, executors, administrators, or assigns; and I think that upon the construction of this part of the will, independently of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators, and assigns; and that Mrs. Noble has an absolute estate, subject to be defeated by the executory gift over.

And if this be so, the question is, whether the particular event on which the vested estate was to be devested, can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion, that the gift [*597] over *was to take effect, only in the event of Mrs. Noble's marrying and dying without issue, in the lifetime of her brother, or of such child or children as he might happen to leave; and as he died in her lifetime, and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in Mrs. Noble cannot now be devested. * * *

ROGERS *v.* SOUTTEN.

1838.
March 16, 17.

Rolls Court.
Lord LANGDALE, M.R.

[598]

(2 Keen, 598—602; S. C. C. P. Cooper, 96; 7 L. J. (N. S.) Ch. 118.)

An executor denied assets, but his answer disclosed a personal liability for payment of the plaintiff's legacies. The Court made an order for immediate payment, without directing the accounts to be taken.

A testator became bound to the parish for the support of an illegitimate child of his son, and he made weekly payments until his death: Held, that he had placed himself *in loco parentis*, and that interest was payable from the testator's death, on a legacy given by him to the child, though made payable on attaining twenty-one.

WILLIAM BUCKLAND, the testator, by his will, dated the 1st of March, 1821, "gave and bequeathed the sum of 50*l.* each, unto the two illegitimate children of which his deceased son was the putative father;" and he gave the residue and remainder of his property to the defendant Edward Soutten, and appointed him his executor.

By a codicil to his will, dated the 11th of August, 1821, the testator "gave unto each of the two putative children of his deceased son the sum of 50*l.*, in addition to a like sum given to them by his said will, and to be paid to them on their attaining the age of twenty-one years." The testator died in 1824, and the defendant afterwards proved his will. The plaintiff, Susannah Rogers, who was one of the illegitimate children of the testator's son referred to in his will and codicil, attained her age of twenty-one years in March, 1831; and this bill was filed by her, to obtain payment of her two legacies of 50*l.*, and 50*l.* There were two questions argued at the Bar; first, whether, under the circumstances stated in the judgment of the MASTER OF THE ROLLS, and the defendant having denied assets, an order for payment of the legacies could be made against the defendant, without having the accounts of the testator's estate first taken; and, secondly, from what time interest was payable on the legacies.

Mr. Pemberton and *Mr. H. W. Busk*, for the plaintiff, asked for an order for immediate payment of the legacies, without exposing the plaintiff to the delay which would *arise from taking the accounts before the Master. They contended that, although there was no admission by the executor of sufficient

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assets, yet that the facts stated in the answer shewed that he was personally liable to the plaintiff for the payment of her legacies.

They contended also, that the testator having placed himself *in loco parentis* towards the plaintiff, interest was payable on the legacies from the death of the testator.

Mr. Cooper and *Mr. Hill*, *contrà*, insisted that the accounts of the testator's estate ought to be taken in the Master's office previous to any order being made for payment to the plaintiff. That, unless there was a clear admission of assets, it was not the practice of the Court to make any order for payment by an executor, until the preliminary inquiries had been completed.

Secondly, that interest was payable on the first legacy from one year from the testator's death; and on the second from the time of the legatee's attaining twenty-one.

Wetherby v. *Dixon* (1) was cited on the second point.

THE MASTER OF THE ROLLS:

This is a bill filed for the payment of two legacies of 50*l.* each, given by the will and codicil of William Buckland, and dated respectively the 1st of March, 1821, and the 11th of August, 1821; one legacy of 50*l.* was given by the will and 50*l.* was
[*600] given by the codicil, in addition *to the 50*l.* bequeathed by the will; and it is payable to the legatee on her attaining twenty-one. There were two questions raised in this case: first, whether the defendant is, at this time, liable to an order for payment of the legacies, he having, by his answer, in terms, denied assets. Now it is true, that ordinarily, when a defendant denies assets, the Court directs the accounts to be taken; but it does not follow that accounts are directed to be taken in those cases where, with the denial of assets, the answer discloses circumstances which shew a personal liability for what is asked. The question is, whether such circumstances exist in the present case. The testator, having given certain legacies by his will, gives to the defendant, his executor, the residue of his personal and all his real estate. After the death of the testator, his will

(1) 13 R. R. 228 (19 Ves. 407).

was disputed, and the defendant then thought right, to enter into an agreement with the relations of the testator, who were disputing the will, for a compromise, which was of this nature: That they should leave the defendant in undisputed possession of, and with an unimpeachable title to the real estates; and that the defendant should give to them all the personal estate, which is stated to have amounted to the sum of 2,500*l.*; this they received, and the defendant was left in possession, with a confirmed title to the real estates. Now the personal estate was subject to the payment of the testator's funeral and testamentary expenses, and his debts and legacies. The defendant dealt with it as his own, for the purpose of procuring for himself, an indefeasible title to the real estate; but he could not thereby deprive the plaintiff, or any person entitled, of any benefit or claim on the personal estate. It was, however, in 1826 when the defendant thus used the personal estate as his own, for his own advantage, undertaking to pay the debts and funeral and testamentary expenses, but, as it *is said, not the legacies: the [*601] transaction, however, took place under circumstances which could not, by possibility, defeat the claims of the legatees.

After this, he being in possession of the real estate, is called on for payment of legacy duty, which he pays even on the legacies in question; in the year 1830, and at various times, he pays the other legacies, and makes a compromise with another legatee, who was in the same situation as the present plaintiff. After the lapse of some years, he is called upon for an account, and he renders one; and he says the debts are so much, and the personal estate so much, leaving a large balance more than sufficient to pay the plaintiff: he does not however pay, because he says he has no assets; and for this reason, because he has given them to other persons, for the purpose of securing the real estates. He has truly denied, by his answer, that he has assets, for he has given them to other persons for the purposes I have stated. The question is, if this is such a denial of assets as to entitle the defendant to have an account taken of the testator's estate; and I am clearly of opinion that he has precluded himself from any title to an account in this respect.

The next question is, from what time interest is payable on the

ROGERS v. SOUTTEN.

legacies. If there are no peculiar circumstances, interest is payable from the expiration of one year from the death of the testator. As to the second legacy, it was to be paid in addition to a like sum which is given by the will.

It is said that the testator stood *in loco parentis*, or has assumed an obligation for maintaining the plaintiff. I do not recollect any case in which the circumstances of the present

[*602] have occurred. The son of the testator, *a very young man, who died soon after, at the age of twenty-one years, became the father of the plaintiff, in consequence of which he was bound to indemnify the parish from any liability. He was not able to do it; and the testator, his father, stepped forward, and entered into a bond to maintain the child, and pay 3*s.* a week; and this obligation he seems to have performed during his life, with small exceptions. There were some arrears at his death, which were paid by the defendant.

The testator thus voluntarily assumed a duty, for the sake of relieving his son, the effect of which was to contribute so much for the plaintiff's maintenance; and this was performed till his death; previous to his death, he had assumed the situation of one *in loco parentis;* and with this obligation pressing on him, he makes this provision for the children. The question is, whether this is not sufficient to extend the payment of interest on the legacies from one year after his death to the testator's death.

On the whole, I think there is sufficient to say, that interest ought to be paid from the death of the testator; therefore, let the interest be computed, and an order be made for the payment of the legacies, with interest, together with the costs of the suit.

FISHER *v.* FISHER (1).

1838.
Feb. 28.
April 6.

Rolls Court
Lord
LANGDALE
M.R.

(2 Keen, 610—614; S. C. 7 L. J. (N. S.) Ch. 176.)

Order of application of assets, real and leasehold property comprised in a charge of debts in exoneration of the general personal estate, and devised and bequeathed to seven persons as tenants in common. The lapse of one share by death does not alter the order of application of the real and leasehold property comprised therein, either relatively to one another or relatively to the other shares.

[610]

THE object of this suit was to have a declaration of the rights of the parties interested under the will of the testator Robert Fisher; and the principal question in the cause was, in what order the assets of the testator were to be applied in payment of his debts.

The will of the testator was dated the 13th day of January, 1824, and thereby, after giving certain annuities to three granddaughters, the testator devised his messuages, lands, tenements, and hereditaments, wherein he had any estate of inheritance as of freehold, and whether freehold, customary freehold, or copyhold, as to six undivided seventh parts thereof, to the use of his children, Jabez, Robert, Joseph, Roger, Samuel, and Elizabeth, as tenants in common in fee; and as to the remaining seventh part thereof, to the use of his daughter Elizabeth, in trust for his son Josiah for his life, but after his death for herself. And the testator empowered his executors, notwithstanding the preceding devises, to sell so much of his freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments as they should deem necessary to be sold, for payment, not only of the costs of the sale, but also of his just debts and funeral and testamentary charges and expenses; and he directed that the money so raised should be applied in payment of such debts, and funeral and testamentary expenses accordingly; and he *provided, that so much of the money, as should not be wanted for paying his debts, funeral and testamentary expenses, and costs of sale, should go and belong to, and be divided amongst, the persons, and in the manner, and for the respective interests, to and amongst whom, and in and for which, his freehold, customary freehold, and copyhold

[*611]

(1) *Stead* v. *Hardaker* (1873) L. R. 15 Eq. 175, 42 L. J. Ch. 317.

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hereditaments not sold as aforesaid, should go, accrue, belong, and be divided under the preceding devises and limitations; and then he gave his leasehold estates for all his interest therein, as to six seventh parts thereof, to his children Jabez, Robert, Joseph, Roger, Samuel, and Elizabeth, in equal shares, as tenants in common. And as to the remaining seventh part thereof, to Elizabeth, subject to a trust for Josiah, during his life. The testator then gave to his daughter Elizabeth, absolutely, all his ready money, securities, goods, chattels, rights, credits, and personal estates (except his leasehold messuages, chambers, lands, and tenements), freed, exonerated, and discharged of and from his debts and funeral and testamentary expenses; and he afterwards expressed himself as follows: "I do hereby subject and charge my freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments, as the primary fund, to and with the payment of my just debts and funeral and testamentary expenses; and I declare that my said leasehold messuages, lands, tenements, and chambers, shall be the second or auxiliary fund, for the payment of my debts and funeral and testamentary expenses."

The testator's son Jabez having died, he made a codicil, dated the 4th of August, 1830, and thereby gave to his daughter Elizabeth the share of his property which Jabez, if he had lived, would have been entitled to.

[612] The son Joseph died in January, 1835, and the testator died in the month of June next following, without having made any further alteration of his will.

The consequence was, that the share of his property given to Joseph lapsed, and his share of the freeholds and copyholds descended to the testator's heir-at-law, or customary heir, and his share of the leaseholds to the testator's next of kin.

It was argued for the plaintiff and others of the devisees under the will, that the lapsed share of Joseph was the fund first applicable to the payment of the testator's debts; that the law exempted the devisees and legatees, who were objects of the testator's bounty, at the charge of the heirs and next of kin, who were not objects of his bounty: and that the lapsed share must exonerate the shares effectually given. It was contended,

by those interested in the lapsed personal estate, that the descended real estate was the fund first applicable to the payment of debts; and the parties interested in the descended real estate insisted that the lapsed share of the leasehold should be first applied.

On the other hand, it was contended that the freeholds, customary freeholds, and copyholds ought to be first applied in payment of the debts, and funeral and testamentary expenses; and that no part of the leaseholds ought to be so applied, if the freeholds and copyholds were sufficient; and that nothing had lapsed but the share of the surplus of the real estate or of the leaseholds, which might remain after payment of the debts, funeral and testamentary expenses.

Mr. Pemberton and *Mr. G. L. Russell*, for the plaintiff, Roger Fisher.

Mr. Bethell, *Mr. L. Lowndes*, *Mr. Koe*, and *Mr. H. E. Sharpe*, for other parties. [613]

[*Milnes* v. *Slater* (1), *Williams* v. *Chitty* (2), *Waring* v. *Ward* (3), *Manning* v. *Spooner* (4), and other earlier cases (to which reference is no longer necessary) were cited.]

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS, after stating the circumstances of the case, proceeded:

Now, upon the construction of this will, in which the testator has expressly exonerated his personal estate (other than leasehold lands and tenements) from the payment of debts; and expressly subjected his freehold, customary, and copyhold estates as the primary fund; and declared his leasehold estates to be the secondary or auxiliary fund for the payment of his debts and funeral and testamentary expenses; I think, that the testator must be considered to have appropriated, first his freehold, customary freehold, and copyhold estates; and, secondly, his

(1) 7 R. R. 48 (8 Ves. 295).
(2) 3 R. R. 71 (3 Ves. 545).
(3) 5 R. R. 130 (5 Ves. 670).
(4) 3 R. R. 67 (3 Ves. 114).

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leasehold estates, as the special fund for the payment of his debts, and funeral and testamentary expenses: that Joseph, if he had lived, would only have been entitled to his share of so much of the freehold, customary freehold, and copyhold estates, as remained after payment of the funeral and testamentary expenses and debts; or in the event of the whole being insufficient for that purpose, to his share of so much of the leasehold [*614] estate, as remained after payment of the *debts, and funeral and testamentary expenses, remaining unsatisfied, after the application of the primary fund; and that nothing has lapsed, but the shares of the respective estates which Joseph would have been entitled to.

I am therefore of opinion that the debts, and funeral and testamentary expenses, are primarily charged upon, and ought to be borne by, the freehold, customary, and copyhold estates; and that if such estates be more than sufficient for full payment of the debts and funeral and testamentary expenses, one seventh part thereof, in consequence of the death of Joseph in the lifetime of the said testator, is undisposed of by the will, and has descended to the testator's heir-at-law, and customary or copyhold heir; and that if the freehold, customary, and copyhold estates, be insufficient for payment of the debts, and funeral and testamentary expenses, the deficiency is to be raised out of the testator's leasehold estate; and that one seventh part of the leaseholds, or of the surplus thereof, after payment of such deficiency, has lapsed, in consequence of the death of Joseph in the lifetime of the testator, and is undisposed of by the will.

1838.
July 21.
Aug. 7.

Rolls Court.
Lord LANGDALE, M.R.
[622]

HEWITT *v.* LORD DACRE.

(2 Keen, 622—631; S. C. 7 L. J. (N. S.) Ch. 295.)

A power to appoint among children, "subject to such regulations and directions, with regard to the settling the shares in trust for their separate use, and with, under, and subject to such powers, provisos, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them)," does not authorise an appointment to grandchildren.

A., widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children for life, with

HEWITT v. LORD DACRE.

remainder to their children; and in case any of her children died in her lifetime, she gave the share to his or her issue; and in case there should be no issue, the survivor's of A.'s children were to take: Held, that the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid.

IN this case, by an indenture bearing date the 3rd of March, 1799, certain funds were vested in trustees upon trust for Jane Webb, widow, and her assigns for life; [and, after her decease, upon trust to transfer the same unto, between, and amongst her six children, at such times, and in such shares and manners, and subject to such regulations and directions with regard to the settling the shares of her five daughters, or any of them, in trust for their respective separate use, and to such powers, provisos, conditions, and other restrictions and limitations over, (such limitations over being for the benefit of some or one of them), as the said Jane Webb, the widow, at any time, by deed or will, should appoint; and in default of appointment, equally share and share alike as tenants in common].

Jane Webb, the widow, by her will, dated the 30th of September, 1826, [after disposing of three sixths of the fund, as to the three remaining sixth parts, directed the trustees to pay the dividends arising therefrom half yearly into the hands of her daughters,] Elizabeth, Jane, the wife of Samuel Roberts, and Anne, the wife of James Fletcher, during the lives of the said Elizabeth, Jane, and Anne, to their separate use, in equal shares, share and share alike: and the testator afterwards directed, that "after the death of either of her said daughters, the trustees should apply the dividends, or the share of such of her daughters dying, in the maintenance and education of such child or children as she might leave, till twenty-one; and then, as such child or children arrived at that age, to pay or transfer the principal stock, or share of such her daughter so dying, to and amongst her children, share and share alike; and if there should be but one, to such only child; and if there should be no child who should live to the age of twenty-one, nor any who should leave lawful issue, the testatrix gave the principal stock to such of her own children as should be then living, and the issue of such of them as might be then dead, such issue

[623] [625]

HEWITT v. LORD DACRE.

to take the share of the parent only. And in case any of the testatrix's said children should happen to die before her, she gave the share of him or her so dying, unto his or her lawful issue, each taking the share of the parent only; and in case there should be no such issue, the survivors or survivor of the testatrix's own children to take."

After the date of the will, and in the life of the testatrix (namely, in July, 1833), Anne Fletcher died, leaving two children, who were parties to this suit; and in July, 1835,
[*626] in the lifetime of the testatrix, Elizabeth Webb *died without having been married. On the death of the testatrix, in 1836, several questions were raised as to the validity of the appointment. [One question was,] whether the appointment to the children of Anne Fletcher was a good execution of the power: and as to the share intended for Elizabeth, who died in the lifetime of the testatrix, without having been married, whether it had been effectively limited over by the will of the testatrix to her surviving children.

Mr. Tinney, *Mr. Pemberton*, and *Mr. James Russell*, for the plaintiffs [one of the daughters and her husband; and]
[628] *Mr. Kindersley* and *Mr. Bailey* [for another daughter and her husband, argued that] as to the limitation over, in the event of any of the children of the testatrix dying without issue in her lifetime, it was an appointment with a double aspect; and although void as to the grandchildren, it was valid as to the gift over to the surviving children who were objects of the power: *Crompe* v. *Barrow* (1).

Mr. Roupell, for the children of Anne Fletcher, argued, that, as the power authorised the settlement of the shares of the children, the appointment to the grandchildren was authorised: [*Cavendish* v. *Cavendish* (2), *Mallison* v. *Andrews* (3).]

[629] *Mr. Cole*, for the personal representative of Anne Fletcher, * * contended that the gift over of Elizabeth's share was not an appointment with a double aspect, but a remainder over,

(1) 4 R. R. 318 (4 Ves. 681).
(2) 2 Br. C. C. 25, *n.*
(3) *Ibid.* p. 27, *n.*

after a void gift to her issue, which was not accelerated by the failure of the prior void gift; he cited *Routledge* v. *Dorril* (1).

Mr. Chandless, for Jane Roberts and her husband.

Mr. Kenyon Parker, for the personal representatives of the testatrix.

Mr. Tinney, in reply: [630]

* * The power authorises a settlement, but the limitations must be for children, and not grandchildren.

THE MASTER OF THE ROLLS (after stating the case) [and deciding a point not included in this report, said:] *Aug.* 7.

Secondly; with respect to the share intended for Elizabeth, [631] I think that there is an alternative gift; the words seem to me to have the same effect, as if the testatrix had said, if my daughter die in my lifetime, and shall have issue, I give her share to such issue; but if she has no issue, I give her share to the survivors, or survivor of my own children: as to the latter alternative the appointment is good, in favour of the children surviving at the death of the testatrix.

Thirdly; I am of opinion that the appointment to the children, or issue of the children of the testatrix, is void: the grandchildren do not appear to me to have been objects of the power; and whatever inference may in some cases have been deduced, from the word "settled," in favour of grandchildren, is excluded in this case, by the express direction, that the limitations over were to be for the benefit of the children.

(1) 2 R. R. 250 (2 Ves. Jr. 357).

1837.
Nov. 5.
1838.
Feb. 13.

Rolls Court.
Lord
LANGDALE,
M.R.

[638]

CALVERT *v.* THE LONDON DOCK COMPANY.

(2 Keen, 638—645; S. C. 7 L. J. (N. S.) Ch. 90; 2 Jur. 62.)

A contractor undertook to perform certain works, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work: Held, that the sureties for the due performance of the contract, were released from their liability, by reason of payments exceeding three fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work.

THE bill, in this case, was filed by Mr. Calvert, as legal personal representative of Richard Laycock, deceased, and by Thomas Warburton, against the London Dock Company, Isaac Solly, stated to be their treasurer, and other persons, being the executor and executors of James Warre, deceased, and it prayed for a declaration, that the plaintiffs, and the estate of Laycock, were, in equity, relieved and discharged from the bond in the bill mentioned; or that the London Dock Company had not, by breach of the condition, sustained any damage, for which, in equity, the Company, or the representatives of the obligee on their behalf, ought to be permitted to put the bond in suit against the plaintiff: and that the defendants might be restrained, by perpetual injunction, from all further proceedings at law against the plaintiffs, respecting the matters in the bill mentioned.

The following were the circumstances of the case: By contract, in writing, dated the 29th day of September, 1829,

[*639]

Robert Streather, a builder, agreed with James *Warre, the treasurer of the London Dock Company, on behalf of the Company, to perform certain works, which were to be commenced twenty days after notice, and to be completed in twelve months from the commencement. Streather was to provide all materials and labour, in consideration of 52,200*l.*, and being allowed to appropriate certain materials mentioned: the engineer of the Company was to be the sole judge of the works, and was to employ competent persons to perform the works, if Streather failed to do so; and in that case, the costs thereof were to be deducted from the sum to become due to Streather under the contract: a provision was made for varying the price, on any variation being made in the work specified in the

contract: and Mr. Warre, for the Company, agreed to pay the 52,200*l.* by instalments; viz., three fourths of the cost of the work certified to be done every two months, and the remaining one fourth after the full completion of the contract.

On the 3rd of November, 1829, Streather, and Warburton, and Laycock, as his sureties, executed to James Warre, as treasurer of the Company, their joint and several bond for the sum of 5,000*l.*, conditioned to be void, if Streather should well and truly observe, perform, and keep, the promises and agreements contained in the contract, which, on the part of Streather were and ought to be performed, according to the true intent and meaning of the contract.

Notice having been given, Streather commenced the works on the 28th of December, 1829, but did not complete them in twelve months, or before the 28th of March, 1831, to which day, the time for completing the works was enlarged, with the consent of Warburton and Laycock.

The time having expired, the London Dock Company gave notice to the sureties that they would be called upon to pay the 5,000*l.* under the bond. [640]

On the 13th of April, 1831, Streather quitted the works, and left the Company in possession of engines, and implements, and materials of great value, belonging to him. He soon afterwards became bankrupt, and his assignees brought an action of trover against the Company for the engines, implements, and materials of Streather in their possession. In the action, and upon the proceedings under a reference which grew out of it, the assignees established their title to recover 316*l.*; but the bankrupt, Streather, appeared to be indebted to the Company in a sum exceeding 8,000*l.*

The Company alleged, that they had sustained damage to the amount of more than 7,000*l.*, by the default of Streather; and in January, 1835, they caused actions to be brought against the sureties, to recover the full penalty of the bond; and in the particulars of their demand, they stated that they had made payments on account of the contract, to the amount of 49,619*l.* 5*s.*, and in completing the works, 18,875*l.* 3*s.* 2*d.*, making together 68,494*l.* 8*s.* 2*d.*: that there had become due to Streather,

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on the contract, 52,200*l.*; for varied and increased work, 3,721*l.* 16*s.* 8*d.*; and for the implements, engines, and materials he had left, 4,857*l.* 3*s.* 9*d.*, making, in all, 60,779*l.* 0*s.* 5*d.*; and they represented the differences as the amount of their loss sustained by the non-performance of the works by Streather.

Under these circumstances the plaintiffs filed their bill; and [*641] after alleging that the referee in the action *against the Company, had stated, that although the payments made to Streather amounted to 49,619*l.*, the value of the work done by Streather was only 36,429*l.*, they charged, that in executing the bond, the sureties considered, and had a right to consider, that the Company, until the entire performance of the contract, would have retained in their hands, so much of the contract price, as by the contract, they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the Company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond; or at least, could not equitably recover against the plaintiffs, any loss which they might have sustained, by making such advances; and ought not to be permitted to sue the plaintiffs on the bond, for if they had not made such advances, they would not have sustained any loss by the non-performance of the contract.

The common injunction, for want of answer, was obtained, and no motion was made either to dissolve it, or to extend it to stay trial.

The actions were tried on the 20th of February, 1836. The plaintiffs there obtained a verdict, with only nominal damages. The plaintiffs in the action, who were the defendants here, applied to the Court of King's Bench to increase the damages; and the plaintiffs here prosecuted the suit to a hearing.

The cause came on to be heard on the 7th of March last, before the application to the Court of King's Bench had been disposed of. On that account the hearing was postponed; but the proceedings in the King's Bench having ended in an order [*642] that the *verdict should stand, the cause was brought on again.

It was now asked, that the common injunction which had been granted, might be made perpetual, and that the defendants might pay the costs of suit.

Mr. Tinney, *Mr. Kindersley*, and *Mr. Roupell*, for the plaintiffs, contended that the Company, by making advances to Streather of more than two thirds of the value of the work done, had varied the contract to the prejudice of the sureties, and thereby discharged them from their liability under the bond: *Rees* v. *Berrington* (1), *Mayhew* v. *Crickett* (2), *Bowmaker* v. *Moore* (3). That the defendants, by paying Streather before the time limited, had removed the inducement to him to perfect the works. And that if no more than two thirds of the value of the work had been paid to Streather, there would have been a reserved fund, to answer any default and to indemnify the sureties. * * *

Mr. Pemberton, *Mr. Phillimore*, and *Mr. Blunt*, for the defendants, insisted that nothing had been done in this case to release the sureties: that the Company had made the extra advances to the contractor, not under the contract, but as loans, which they were entitled to *do, and had thereby greatly facilitated the performance of the work. That so far from prejudicing the sureties, the Company had diminished their liability; for, but for these timely advances, the contract would long before have been abandoned, and the bond forfeited. * * *

[*643]

Mr. Kindersley, in reply:

The object of the Company in retaining one fourth of the price was a security to them that the contractor should complete the work. The sureties were entitled to the benefit of this security, and of this they have been deprived, by the mode in which the Company, without the sureties' consent, have dealt with Streather. If, at the time when Streather abandoned the work, the Company had had the intended reserved fund in their hands, the sureties would themselves have been enabled to have completed the works without loss, and even nominal damages would not have been recovered.

(1) 3 R. R. 3 (2 Ves. Jr. 540).
(2) 19 R. R. 57 (2 Swanst. 185).
(3) 21 R. R. 758 (3 Price, 214).

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THE MASTER OF THE ROLLS (after stating the case) proceeded:

The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they *say that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him, he was enabled to do more than he otherwise could have done—and that to assist him was to assist his sureties: and it was only for the purposes of affording that assistance, that the Company did more than they were obliged to do.

*644]

The argument however, that the advances beyond the stipulations of the contract, were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case, the Company were to pay for three fourths of the work done every two months; the remaining one fourth was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the Company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties.

[645]

What the Company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the Company, instead of keeping themselves in the situation of debtors, having in their hands, one

fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship.

I think therefore that the plaintiffs are entitled to have the injunction made perpetual; and that they are also entitled to the costs of this suit.

The plaintiffs appear not to have had a complete legal defence, though they had a case which reduced the damages to a nominal amount. They could not, however, anticipate the result of the action. They had an equitable defence; and, under the circumstances of this case, if an application had been made for the purpose, I do not think that the plaintiff in equity would have been ordered to give judgment; and, after the verdict with nominal damages, the application to the Court of King's Bench made by the plaintiffs at law made it important for the defendants there to proceed with their bill in equity.

GRIEVESON *v.* KIRSOPP (OTHERWISE KERSOPP).

1838. *July* 1. *Aug.* 7.

Rolls Court. Lord LANGDALE, M.R.

[653]

(2 Keen, 653—657; S. C. nom. *Grieveson* v. *Cursopp*, 6 L. J. (N. S.) Ch. 261.)

A power to sell, if really intended to be in the nature of a trust for sale, will work a conversion.

THE principal questions in this case arose upon the construction of the will and codicil of the testator John Carr. The will was dated on the 16th day of November, 1795, and was as follows: "I John Carr of, &c., do give and bequeath unto my wife Sarah Carr, during her natural life, should she remain in a state of widowhood, the sum or sums of money that may accrue from the interest of 300*l.* for her use and enjoyment, and after her decease my will and desire is, that the full and perfect sum of 300*l.* before mentioned be left to my son John Carr. Item, or likewise, I do give and bequeath unto Sarah Carr, my wife, the time she may hereafter continue my widow, for the benefit and advantage of my children, full discretionary power either to hold or dispose of my estate called Woodfoot and Slaley, as

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[*654]

she may find the same most convenient; but if at any time she should desire to dispose of the same, my will *and desire is, that every circumstance attending the same be transacted and managed by the gentleman in trust hereafter mentioned. Item, or likewise, I do give and bequeath unto my children, Barbara Carr, Susannah Carr, Sarah Carr, Mary Carr, and Frances Carr, the real and full sum of 100*l.* each, which sum or sums are to be paid from the lands of Slaley Woodfoot and Slaley before mentioned; and my will and desire is, that each and every of them, may have such sum or sums as before mentioned, at their own disposal, as they and each of them attain the age of twenty-one. Item, or likewise, I do give and bequeath unto my son John Carr all and every the rest, residue, and remainder of estates, properties, and effects, both here and elsewhere, which at any time, or from time to time, may become my true right and property. Item, or likewise, I do will and grant that all claims, demands, debts, or incumbrances, of what kind soever and wheresoever, be discharged from the effects and monies, that may arise from the personal properties, effects, or possession, upon or belonging to the estates commonly called and known by Slaley Woodfoot and Slaley; if such personal properties are insufficient, to discharge the before mentioned contingencies, my express will and intention is, that all and every the rest, residue, and remainder of claims, demands, debts, and incumbrances, of what kind soever or wheresoever, be discharged from the estates before mentioned. Item, or likewise, I do constitute and appoint Anthony Surtees, Esq., John Hall and William Hopper, gentlemen, in full power and trust with the disposal of my lands, woods, and estates, should my wife Sarah Carr think proper to dispose of the same."

The codicil was dated on the 23rd day of the same month of November, 1795, and was as follows: "And whereas by my

[*655]

said will I did give and bequeath to my *children certain sums of money as therein is mentioned, now my will and mind is, that my wife Sarah Carr, and I do hereby empower her, by and with the assistance and help of the trustees therein named, to sell and dispose of all my estates whatsoever, and the money arising from such sale or disposal, together with my personal

estate, she, my said wife, shall and may divide and proportion among my said children as she shall think fit and proper, or as she shall direct and order by any will or writing by her executed in the presence of two or more credible witnesses; and I do hereby make, constitute, and appoint her, my said wife Sarah Carr, sole executrix of my said last will and testament."

The testator died in 1805, and his widow lived till 1829. The property was not sold in the widow's lifetime; and she died without making any valid appointment of the property: although, by her will, she attempted to appoint it to a son-in-law, and to some of her grandchildren; they, however, not being objects of the power, the appointment was inoperative.

The bill, in this case, was filed by John Grieveson, as the legal personal representative of Barbara, his deceased wife, who was one of the daughters of John Carr, the testator in the cause, against John Kersopp, and various persons, claiming to be interested in the testator's estate; and it is prayed, that the rights and interests of the plaintiff and the other parties might be ascertained and declared; and that the defendant Sarah Carr Teasdale and John Carr Kersopp, who were the coheirs of the testator, might be declared to be trustees of the real estate for the benefit of the plaintiff and the legal personal representatives of the testator's children, subject to the mortgage securities affecting the same. The bill also prayed for an account of the personal *estate, and of the rents of the real estate, accrued since the death of Sarah Carr, the widow of the testator; and that the real estate might be sold, and for consequential directions. It had been ascertained by the Master, what children the testator left, and who now represented them, and also what assignment of the interests of such children had been made; and the cause now came on for further directions. [*656]

The two principal points discussed were, first, whether the power of sale and devise given to the widow were so imperative on the widow, as to create a trust for her children, which, in default of her execution of the power, would entitle the children to the unappointed property (1), and secondly, whether the

(1) See *Brown* v. *Higgs*, 4 R. R. 323 (8 Ves. 574).

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shares of the children who were dead, were, as between their representatives, of the nature of real or personal estate (1).

Mr. Spence and *Mr. Bailey*, for the plaintiff.

Mr. Hall, *Mr. Reynolds*, *Mr. Hallett*, *Mr. Anderdon*, *Mr. Bellamy*, *Mr. G. Richards*, and *Mr. Purvis*, for other parties.

[The judgment turned upon the construction of the will and did not refer to any of the numerous cases mentioned by counsel in reference to the points settled by *Brown* v. *Higgs* and *Ackroyd* v. *Smithson*.]

[657] THE MASTER OF THE ROLLS [after stating the facts]:

Upon the construction of these documents, I think that the widow took a life interest, with a power to sell the real estate with the assistance of the trustees, and to distribute the money arising from the personal estate and the sale of the real estate, amongst the children, and that the power was conferred in words, which made it the duty of the widow to execute that power, and by implication gave the money to the children. I am therefore of opinion, that the power was in the nature of a trust for the children, and that subject to such appointment as the widow might have made, the children were entitled in equal shares. She survived them all without having made any appointment; and I am of opinion, that her will, made after their death, and purporting to give the testator's estate to her grandchildren, is no execution of the power. It further appears to me that the direction to sell, expressed as it is, operated as a conversion of the real estate, and that the children were entitled to take the money, to arise from the sale, as personalty.

(1) See *Ackroyd* v. *Smithson*, 1 B C. C. 504.

MACKWORTH *v.* HINXMAN.

1836.
March 12.

Rolls Court.
Lord
LANGDALE,
M.R.

(2 Keen, 658—662; S. C. 5 L. J. (N. S.) Ch. 127.)

A testator bequeathed personalty to trustees, to pay the interest to Sir Gilbert A., Baronet, for life, and after his decease, to his eldest son; but in case he should die leaving no son, then in trust for the person on whom the baronetcy should devolve, so that each baronet should take the interest for life; and after the extinction of the baronetcy, to fall into the residue of his estate. At the death of the testator, Sir Gilbert A. and his two brothers, James and Robert, on whom the baronetcy successively devolved, were living. Sir Gilbert A. afterwards died without having had any issue: Held, that Sir James became absolutely entitled to the property.

[658]

It appeared in this case that Admiral Philip Affleck, by his will, dated the 14th of June, 1797, bequeathed to his executors his share and interest in the British Cast Plate Glass Manufactory, the British Fishery, and the Grand Junction Canal, in trust, to receive the interest, dividends, and profits thereof, as the same should from time to time respectively become due and payable, and pay the same unto his nephew, Sir Gilbert Affleck, Baronet, for and during the term of his natural life; and from and after the decease of the said Sir Gilbert Affleck, then in trust to pay the said interest, &c., as the same should from time to time be received, unto the eldest son of the said Sir Gilbert Affleck, lawfully begotten, for the time being; but in case the said Sir Gilbert Affleck should happen to depart this life, leaving no son lawfully begotten, then in trust to pay the said interest, dividends, profits, and produce of the said plate glass manufactory, fishery, and canal shares, unto the person on whom the baronetcy should devolve; it being his will and desire, that the said interest, dividends, profits, and produce should never be alienated from the title; but that each succeeding baronet of the Affleck family should enjoy the said interests, dividends, profits, and produce for the term of his natural life; and from and after the extinction of the said baronetcy, in case such an event should happen, he willed and declared, that the said shares and interest in the said plate glass manufactory, fishery, and canal shares, should fall into and constitute a part of the residue of his estate.

The testator died in 1799, at which time Sir Gilbert and his two younger brothers, James and Robert, were living; after the

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testator's death, Sir Gilbert Affleck continued to receive the interest and profits of the shares until 1808, when he died without having had any issue; and thereupon the baronetcy devolved upon his brother Sir James Affleck, who continued to receive the interest and profits of the shares until June, 1833, when he died without issue, leaving Sir Robert Affleck, his brother, surviving him, and on whom the baronetcy descended. The bill was filed by the executors of Sir James Affleck against Sir Robert Affleck, and the personal representatives of the testator, claiming to be absolutely entitled to the shares in the plate glass manufactory, fishery, and canal company; and also a gold snuff-box and some plate, which had been settled by the will of the testator, on the same trusts.

Mr. Kindersley and *Mr. Amphlett*, for the plaintiffs:

* * It has been decided that where a testator, intending a perpetuity, gives successive life estates, the effect is, to give an
[*660] *estate tail to the first taker, notwithstanding a life estate only has been limited to him: *Mortimer* v. *West* (1). * * There was a case similar to the present before Sir John Leach: *Lord Deerhurst* v. *The Duke of St. Albans*; it was afterwards carried
[*661] by appeal to the House of *Lords (2), where his decision was reversed. * * *

Mr. G. Richards (in the absence of *Mr. Pemberton*) contended that * * as Sir Robert and Sir James were the only persons in existence, who, by the rules of law, could take life estates under the dispositions of the will of the testator, he must have intended that, in the events which happened, they should take life estates only. That the last person, to whom a life interest in the property, capable of taking effect under the rules of law, was limited, would become absolutely entitled; and that Sir Robert Affleck was such party.

[662] *Mr. C. H. Maclean*, for the personal representatives of the testator.

(1) 29 R. R. 104 (2 Sim. 274).
(2) *S. C. nomine Tollemache* v. *Coventry*, 37 R. R. 260 (2 Cl. & Fin. 611).

THE MASTER OF THE ROLLS (without hearing a reply) said:

In all cases of this description, the question is, what is the general intention of the testator which the Court is to carry into execution? His intent here was, that the property should go on to all time with the baronetcy; he accordingly says, "His will is that it should never be alienated from the title, but that each succeeding baronet should enjoy it for life." That is, he has desired, that the person to whom the baronetcy should descend, should have an estate for life only; he has not particularised either Sir James or Sir Robert by name, though they were both living at the time; and he has not used expressions, applicable to any particular person on whom the baronetcy should devolve. The general intention expressed in his will, must have been defeated by giving successive estates for life. From the cases which have been cited, it is clearly shewn, that giving a life estate to each baronet successively, would have the effect of defeating the general intention of the testator; and for the purpose of accomplishing the intention, I think it must be held, that Sir James Affleck took a *quasi* estate tail in the property, and that the property, being personal, was absolutely at his disposal.

WOOD *v.* WHITE.

1837. *Dec.* 4, 5. 1838. *April* 23.

(2 Keen, 664—671; S. C. 7 L. J. (N. S.) Ch. 203.)

[SEE the report of this case before the Lord Chancellor in 4 My. & Cr. 460.]

HUTCHINSON *v.* TOWNSEND (1).

Rolls Court. Lord LANGDALE, M.R.

(2 Keen, 675—678; S. C. 6 L. J. (N. S.) Ch. 13.)

1836. *Dec.* 16.

Parties entitled to one fourth of an ascertained fund, vested in trustees, held entitled to sue for their one-fourth share, without making the parties entitled to the other three fourths parties to the suit.

Rolls Court. Lord LANGDALE, M.R.

[675]

THE testator in this case devised and bequeathed his real and personal estate to Robert Sherson and Bury Hutchinson, in trust to convert the same, and to divide the produce between his son Bury Hutchinson, Elizabeth Ursula Hutchinson and his three other daughters. The testator declared, that his trustees should

(1) R. S. C. Ord. xvi., r. 36.

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hold his daughter's shares, for their separate use, for life, with remainder for their children; and in case any one or more of his said four daughters should happen to die, without having or leaving any child or children, who should happen to become entitled to a vested interest, in the share or shares of and in the estate, and effects, thereby provided for such child or children respectively: then, he thereby ordered his trustees, to stand possessed of such share, or shares, in trust for such his other children, as should be then living, including his said son, Bury Hutchinson, and the child or children of any of them, who should happen to be then dead, leaving issue, equally to be divided between or among them, if more than one, share and share alike; the children to take their parent's share. Separate powers for the appointment of new trustees were given, as to the share of each daughter.

After the death of the testator, his will was proved by Bury Hutchinson alone, who set apart certain sums as the shares of Elizabeth Ursula Hutchinson, and the other daughters. The share of Elizabeth Ursula Hutchinson was vested in Bury Hutchinson together with Edward Townsend, who was appointed a new trustee; and the trusts of the appropriated fund, or any
[*676] further sum, *which might thereafter be appropriated, were duly declared by a deed, dated in 1808. James Townsend, who was subsequently appointed a new trustee, ultimately became the last surviving trustee of the funds.

Elizabeth Ursula Hutchinson died in October, 1834, unmarried, and her share thereupon became divisible between her brother and sisters, or their children; and Bury Hutchinson having previously died in 1824, one fourth part of the share of Elizabeth Ursula Hutchinson in the appropriated funds, devolved under the limitations in the will of the testator, upon the children of Bury Hutchinson, who were represented by the plaintiffs in this suit.

By this bill filed against James Townsend, the surviving trustee of the fund in question, they prayed payment of the one fourth part of the funds standing in the name of James Townsend, and which had been appropriated to Elizabeth Ursula Hutchinson; these consisted in the whole of the sum of 12,906*l.* 16*s.* 9*d.* Consols, 9,521*l.* 2*s.* 6*d.* Reduced, and 161*l.* 15*s.* 2*d.* Bank stock.

The defendant, by his answer, stated, that on the 9th of June, 1835, another bill was filed against him in this Court, praying generally, to have the said testator's will established, and the trusts thereof executed; and to have general accounts taken, of all the real and personal estate and effects of the said testator; and to have the same administered under the direction of the Court; and in which bill, claims were made, at variance with the claim set up by the said bill of the said plaintiffs, and which other suit was also then depending; and under the circumstances, the defendant was advised, that he could not safely execute the said trusts, or comply with the plaintiff's requests, except under the direction of the Court; *and he submitted, that the plaintiff's [*677] suit was insufficient in its frame, and defective for want of parties: as the relief they sought, was confined to one fourth part or share of the several sums of 12,906*l.* 16*s.* 9*d.*, 9,521*l.* 2*s.* 6*d.* and 161*l.* 15*s.* 2*d.*, alleged to have been invested for the one fourth share of Elizabeth Ursula Hutchinson deceased, of and in the residuary estate of the said testator; whereas, the defendant submitted, that the several persons interested in the remaining three fourth parts or shares, of the several specific trust funds, were necessary parties to the said bill; and moreover, that the said bill ought not to be confined to those specific sums, but ought to extend generally, to the ascertaining of the whole share of the said Elizabeth Ursula Hutchinson deceased, of and in the residuary estate of the said testator; and that all the persons then interested in the said residuary estate, would be necessary parties to the said suit for that purpose.

The cause came on for hearing, when

Mr. Girdlestone, for James Townsend the trustee, objected to this suit for want of parties: and contended, that the Court would not deal with this fund in parts, so as to occasion a multiplicity of suits; for if the present proceedings, which only related to one undivided fourth part of the fund, were allowed to proceed, there would be nothing to prevent the parties, entitled to the other three fourths, instituting separate suits for their distinct portions. That if the principle were once admitted, the only limit to the number of suits respecting the same fund,

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would be the number of claimants on it. He also contended, that the other existing suit formed an objection to this suit proceeding; and that it did not appear that the whole property of the testator had been divided and appropriated.

[678] *Mr. Pemberton* and *Wilbraham*, for the plaintiffs, and *Mr. Kindersley* and *Mr. Paton*, for a defendant in the same interest, contended that the fund having been ascertained and set apart, now formed no part of the testator's estate; they relied on the case of *Smith* v. *Snow* (1). * * *

The MASTER OF THE ROLLS said that it would be very inconvenient to encourage suits of this description; but considering the decision of the VICE-CHANCELLOR in the case cited; and that these funds had been distinctly appropriated, and that one fourth belonged to these persons, he must overrule the objection. His Lordship observed, that he should, however, be sorry to see suits generally, constituted as this was.

1838. *July* 23.

Rolls Court. Lord LANGDALE, M.R.

THE ATTORNEY-GENERAL *v.* WILSON (2).

(2 Keen, 680—686.)

[680] It is contrary to the policy of the Mortmain Acts and to the usual practice of the Court, to allow money belonging to a charity to be invested in land, even for the purpose of enlarging the charity, if any other mode is feasible.

THE object of this information was to carry into execution certain charitable trusts founded by the will of Dorothy Wilson, dated in 1710. By the decree of the 19th February, 1834, it [*681] was referred to the *Master, to settle and approve of a proper

(1) 18 R. R. 186 (3 Madd. 10).

(2) The Mortmain and Charitable Uses Act, 1891, has removed the statutory safeguard against improvident dispositions of real estate by dying persons to charitable uses, but it maintains the general policy of the Mortmain Acts by forbidding the retention in mortmain of land thus acquired, unless really wanted for actual occupation for the purposes of the charity (see sections 6, 7, 8); but where the charity was a corporation having a licence in mortmain to hold the additional lands, which were really required for the furtherance of the objects of the charity, the policy of the Mortmain Acts did not forbid the acquisition of the land: *A.-G.* v. *Earl of Mansfield*, 14 Sim. 601.—O. A. S.

scheme for the management of the charity estates, and enlargement of the charities; and for the application of the future rents and profits of the same estates; and the proper regulation of the schools and hospitals; and the Master was to state such scheme, with his opinion thereon, to the Court. The Court reserved to itself, the consideration, whether for the purpose of effectuating such scheme, it might or might not be necessary to apply for the aid of Parliament.

By the report, dated the 6th of March, 1838, the Master certified, amongst other things, that the relators had submitted to him, that the present hospital at Foss Bridge End, was only adapted for the reception of ten poor women; but besides the rooms occupied by such women, there was a room in which the meetings of the trustees were held; and a school-room, in which the boys were taught; and the dwelling-house, in which the schoolmaster resided, immediately adjoined the said hospital.

That in order to furnish accommodation in the said hospital for the reception of six women, over and above the number limited by the testatrix's will, thereinafter proposed to be admitted, the relators had submitted, that the said dwelling-house occupied by the master, and the said room used for the meeting of the trustees, should be respectively altered and fitted up, so that each of the said six additional women, might have a room appropriated for her own residence. That as the schoolmaster was required by the testatrix's will, to read prayers daily, to the inmates of the hospital, the trustees had submitted that in order to enable him to comply with the testatrix's directions, in that respect, and to attend *to his duties as schoolmaster, it was expedient that he should have a residence provided for him, adjoining to, or near the hospital, and that the school for the boys should be contiguous to his residence. That there were five freehold cottages, and a court or yard, and certain outbuildings thereto belonging, situate near Foss Bridge, in the city of York, belonging to William Whitehead, which immediately adjoined upon the hospital, buildings, and premises at Foss Bridge End; and the relators were advised, that by taking down part of the said cottages and buildings, and with a portion of the yard belonging to the hospital, an eligible site would be [*682]

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afforded, whereon to erect a school-house, sufficient for the accommodation of sixty boys, together with a house, suitable for the residence of the schoolmaster and his family. That the said William Whitehead had offered to sell to the relators the fee simple and inheritance of the cottages and premises above-mentioned, for the sum of 600*l.*; and the estimated expense of building a new school-house and schoolmaster's house, and of making the alterations in the hospital and present schoolmaster's house, and fitting up the same as thereinbefore mentioned, would not altogether exceed the sum of 500*l.* And the said relators therefore proposed, the following, as part of the scheme, for the management of the charity estates, and enlargement of the said charities, and for the application of the future rents and profits of the said estates, and the proper conduct and regulation of the said several schools and hospital; that is to say, that in order to furnish accommodation in the said hospital, for the reception of six additional women, the dwelling-house occupied by the master, and the room used for the meeting of the trustees, should be altered and fitted up, so that each of the said additional

[*683] women, might *have a room appropriated for her own residence. That in order to enable the schoolmaster to perform the duties imposed on him by the testatrix's will, he should have a residence provided for him. That the five cottages and land belonging to William Whitehead, should, on a good title being made thereto, be purchased for any sum not exceeding the sum of 600*l.*; and that, on the site thereof, a school-house sufficient for the accommodation of sixty boys, together with a house, suitable for the residence of the schoolmaster and his family, should be erected at an expense not exceeding the sum of 500*l.*

The Master approved of the scheme; and the cause coming on for further directions, it was proposed, that the report of the Master, and the scheme therein approved of, should be confirmed.

The charity property, it appeared, consisted of land producing 58*0l.* a year, and 1,720*l.* 3 per cent. Annuities.

Sir C. Wetherell and *Mr. O. Anderdon*, for the relators.

Mr. Wray, for the *Attorney-General*. A.-G. v. WILSON.

The question which arose, was whether it was con nant with the policy of the Mortmain Acts, and the usual pra tice of the Court, to order charity funds to be laid out in the purchase of land, which would thus become unalienable.

The second section of the Mortmain Act, 9 Geo. II. c. 36, and [684] *The Attorney-General* v. *The New England Company* (1), were relied on.

THE MASTER OF THE ROLLS (after stating the circumstances of the case): 685]

It is contended, that under the second section of the 9 Geo. II. c. 36, the proposed purchase of additional land may lawfully and properly be made, out of the 3 per cent. Annuities now belonging to the charity.

In support of the argument, the case of *The Attorney-General* v. *The New England Company*, which was heard before Lord Eldon on the 8th of August, 1808, was cited. The New England Company possessed land of the value of 1,250*l*., they had a licence to hold land in mortmain, to the value of 2,000*l*., and the Master approved of a scheme, whereby it was proposed, that certain South Sea stock, and 3 per cent. Annuities should be sold, and the money to arise from the sale thereof, should be laid out in the purchase of land in Great Britain for the benefit of the charity; Lord ELDON confirmed the report, and ordered that when a proper purchase should offer, wherein to lay out the accumulations of the charity fund, in Great Britain, the defendants were to be at liberty to apply to the Court, as they should be advised. It does not appear, that anything else was done in the cause, nor upon what argument, or under what circumstances, the order was made; and after considering the second clause of the statute, and the *observations of Lord [*686] HARDWICKE in the case of *Vaughan* v. *Farrar* (2), it appears to me, that although such a purchase as is now proposed, might be lawful, yet that it would be contrary to the policy of the statute, and contrary to the usual practice of this Court, to

(1) The circumstances of this case are stated in the judgment, *post*.

(2) 2 Ves. Sen. 182.

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sanction it; and I am therefore of opinion, that I cannot approve of the scheme and confirm the report, without a qualification or exception, as to that part, which relates to the proposed purchase, and referring it back to the Master, to approve of some other mode of providing an addition to the school, and a residence for the schoolmaster.

1838. *July* 4, 20.

Rolls Court. Lord LANGDALE, M.R.

[689]

PEACOCKE *v.* PARES (1).

(2 Keen, 689—701; S. C. 6 L. J. (N. S.) Ch. 375; 1 Jur. 575.)

An estate was limited to A. for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A.; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. A. had two sons, B. and C., and one daughter; B. attained twenty-one, suffered a recovery, whereby he destroyed C.'s estate in remainder: B. died in 1807, leaving his brother C., an infant, to whom he devised the estate for his life. A. died in 1833: Held, that C. was not entitled to participate in the portion.

By this suit, the plaintiff, Amelia Peacocke, claimed, under the settlement made on the marriage of her father Sir Thomas Hussey Apreece deceased, to be entitled to a portion of 6,000*l.*, to be raised out of the estates comprised in that settlement, by means of a term of 500 years vested in the defendants Pares, and Samuel and Thomas Miles. The defendant Sir Thomas

(1) See *Spencer* v. *Spencer* (1836) 42 R. R. 111 (8 Sim. 87), where SHADWELL, V.-C., held that a younger son was entitled to a portion expressly appointed to him, although he had acquired an interest in the family estates as heir-at-law of his elder brother, who had disentailed and heavily incumbered the estates. In *Macoubrey* v. *Jones* (1856) 2 K. & J. 686, a younger son was excluded from succeeding to the family estates on the death of his father by a disentailing deed and re-settlement under which the widow of the eldest son was entitled for her life, and PAGE WOOD, V.-C., held that the younger son was not excluded from a share in the portion fund. It has been suggested that *Peacocke* v. *Pares* is over-ruled by *Macoubrey* v. *Jones*, but the difference between the cases is obvious, and it is not yet safe to assume that a younger son who has succeeded to the family estates can claim a portion wherever the elder son has concurred in a disentailing assurance. The true rule appears to be that the younger son, having become the eldest, but losing the estate by the act of his elder brother, is not disentitled to a portion: *Reid* v. *Hoare* (1884) 26 Ch. D. 363, 53 L. J. Ch. 486, 50 L. T. 257.—O. A. S.

George Apreece was now, under another title, tenant for life of these estates, subject to the term: and he admitted that the plaintiff, Mrs. Peacocke, was entitled to a portion of 4,000*l.*, but insisted that she was not entitled to 6,000*l.*

By the marriage settlement dated in 1771, the estates were limited to Sir Thomas Hussey Apreece for life; with remainder to trustees to preserve contingent remainders; with remainder to trustees for a term of ninety-nine years, to secure a jointure to his wife; with remainder to the trustees for a term of 500 years; with remainder to the first and other sons of the marriage in tail male; with remainders over; and it was declared, that the estates were vested in the trustees for 500 years, on trust, in case there should be any child or children of the said Thomas Hussey Apreece, by the said Dorothea Ashby (other than and besides an eldest or only son), then the said two trustees should raise and levy, such sum and sums of money, for the portion and portions of all and every such child and children, (other than and besides an eldest or only son), as were thereinafter mentioned, (that is *to say); in case there should be but one such child, then [*690] the sum of 6,000*l.* for the portion of such one child; to be paid at such times, and in such manner as the said Thomas Hussey Apreece should in manner therein mentioned appoint; and in default of such appointment, to be paid to, and in such case, to be an interest vested in such child, being a son, at his age of twenty-one years, and being a daughter, at her age of twenty-one years or day of marriage, which should first happen; and in case there should be two such children, and no more, then the sum of 8,000*l.* for their portions; and in case there should be three or more such children, then the sum of 12,000*l.* for their portions; the said portions for two or more such children, to be paid and payable, to and between, or among them, in such shares, and in such manner, as the said Sir Thomas Hussey Apreece should, in manner therein mentioned, appoint; and in default of such appointment, then the same to be equally divided between or among them; the portions of two such children or more, in case of no appointment to the contrary, to belong to, and be an interest vested in such of the said children, as should be a son or sons, at his or their respective age or ages of twenty-one years;

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and in such of them as should be a daughter or daughters, at her and their respective age or ages of twenty-one years, or day or days of marriage, which should first happen; but to be payable and paid at the times thereinafter mentioned, (that was to say), the portion and portions of such younger son or younger sons, to be paid to such of them as should be under the age of twenty-one years at the time of the death of the said Thomas Hussey Apreece, when, and as, they should respectively attain the age of twenty-one years; and to such of them as should attain the age of twenty-one years, in the lifetime of the said Thomas Hussey Apreece, at the end of six calendar months next after his decease; with interest from his death, after the *rate of 3*l.* for every 100*l.* for a year. And the portion and portions of such daughter and daughters, to be paid to such of them as should be under the age of twenty-one years, and unmarried, at the time of the death of the said Thomas Hussey Apreece, at her and their respective age or ages of twenty-one years, or day or days of marriage, which should first happen; and to such of the said daughters, as should attain the age of twenty-one years, or be married in the lifetime of the said Thomas Hussey Apreece, at the end of six calendar months next after his death, with interest from his death.

[*691]

The settlement contained the following proviso: Provided always, and it is hereby agreed and declared that in case any of the younger sons, entitled to the portions under the trusts of the said term of 500 years, shall happen to die under the age of twenty-one years, or become an eldest or only son; or any of the daughters, shall happen to die under the age of twenty-one years and unmarried; then the portion or portions, hereby provided for every such child so dying, and for every such younger son so becoming an eldest or only son, shall, from time to time, accrue and belong unto, and vest in, the survivors or survivor, or others and other of the said children; to be equally divided between or among them, if more than one, and paid at such times, and in such manner, as is hereinbefore directed and provided, concerning his, her, and their original portion or portions; or so soon after, as such event or events shall happen; so as, in case there be but two such surviving or other children,

they shall have no more than the sum of 8,000*l.* between them for their portions; and in case there be but one such surviving or other child, he or she shall have no more than the sum of 6,000*l.* for his or her portion, by virtue of or under the *trusts, [*692] of the said term of 500 years. Provided also, and it is hereby further agreed and declared, that if any sum or sums of money, shall, by virtue of the proviso herein last before inserted and contained, vest in, and devolve upon, any such child or children, by way of survivorship or accruer as aforesaid: then, all such sum and sums of money, so vesting, devolving, and accruing as aforesaid, shall from time to time, as the case shall so happen, be subject and liable to such further right, condition, and contingency of accruer or survivorship, in favour, and for the benefit of the surviving, and other and others of the said child and children, as is hereinbefore declared, of and concerning the original portion and portions, of any of the said child and children as aforesaid; so as, in case there be but two such surviving or other children, they shall have no more than the sum of 8,000*l.* between them, and if there shall be but one such surviving or other child, he or she shall have no more than the sum of 6,000*l.* by virtue of or under the said trust. Provided always, and it is hereby agreed and declared, that no sale or mortgage shall be made by the trustee or trustees of the said term of 500 years, for the time being, of any part of the premises comprised in the same term, until some or one of the portions, to be raised under the trusts of the same term, shall become payable, or be directed to be paid as aforesaid.

There were three children of the marriage, Sir Shuckburgh Ashby Apreece the eldest son, Thomas George, now the defendant, Sir T. G. Apreece, the only other son, and the plaintiff Mrs. Peacocke, the only daughter.

On the 17th December, 1794, Shuckburgh Ashby Apreece attained his age of twenty-one years. He was *tenant in tail in [*693] remainder, and in September, 1798, being about to marry, it was agreed between him and his father, the tenant for life, to bar the estates tail limited by the settlement of 1771. Recoveries were accordingly suffered; the estates tail created by that settlement were barred and destroyed; and it was declared, that subject to

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the term of ninety-nine years for securing the jointure, and the term of 500 years for securing portions, the same recoveries should enure to the uses expressed in an indenture dated the 29th day of September, 1798, being the settlement made on the marriage of Shuckburgh Ashby Apreece. The uses, after a life estate in part of the property to Sir Thomas Hussey Apreece, were declared to Shuckburgh Ashby Apreece for life, with remainder (which never took effect) to the children of his marriage, with remainder to Shuckburgh Ashby Apreece in fee.

The ultimate remainders being thus limited to Shuckburgh Ashby Apreece in fee, and in the events which happened, the limitations to his children not having taken effect, Shuckburgh Ashby Apreece became (subject to the life interest of his father, Sir Thomas Hussey Apreece, in a portion of the estates, and to the incumbrances to which all the estates were subject,) absolutely entitled to them for his own use.

Under these circumstances, Shuckburgh Ashby Apreece made his will; and thereby he devised the estates, subject to the prior limitations and incumbrances, to the use of his brother, the defendant Sir Thomas George Apreece, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Sir Thomas George Apreece in tail male, with remainders over.

[694] The testator Shuckburgh Ashby Apreece died on the 5th of October, 1807, without having had issue, leaving the defendant Sir Thomas G. Apreece, his only brother, then under the age of twenty-one years, him surviving.

Mrs. Peacocke, his only sister, had married in August, 1801. Sir Thomas Hussey Apreece, the father, lived till 1833, and died on the 27th of May in that year, without having exercised any power, which he had, to affect the portions; and upon his death, the portion or portions, secured by the term of 500 years, became payable as in default of appointment.

Mr. Tinney and *Mr. Sidebottom*, for the plaintiff, contended that on the death of Shuckburgh Ashby Apreece, Sir Thomas George Apreece, having become the only son, ceased to be

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entitled to any portion; and that Mrs. Peacocke, as the only daughter, was entitled to a portion of 6,000*l.*

* * That in this case, nothing had vested in Sir Thomas George Apreece, at the time of his becoming an eldest son; but even if it had vested, still when a provision is made for a class of persons, to take effect at a future period, they must be ascertained, not at the period of vesting, but at the period of distribution, and *must sustain the character which qualifies them at the same period. [They cited *Matthews* v. *Paul* (1).] [*695]

That the Court must construe this settlement, without reference to the subsequent events; and the fact of a recovery having been suffered by the first tenant in tail, which defeated the subsequent limitation to the defendant, could not have the effect of altering the construction, *which, independently of that circumstance, the limitations would have received. [*696]

Mr. Pemberton and *Mr. Calvert, contrà:*

* * The estate limited by the settlement to Sir Thomas George Apreece, after the estate to his brother Shuckburgh, was destroyed by the recovery; Sir Thomas took the estate through the bounty of his brother, and not under the settlement, he is not therefore an elder son within the meaning of the settlement; and he will take no provision whatever under the settlement, unless he is allowed to recover a portion as a younger child.

Matthews v. *Paul* cannot govern the present case; there, the only question was, at what period the qualification of being a younger son, was to be ascertained; and whether at the date of the will, the death of the testatrix, or the time when the fund was directed to be distributed. No principal estate had been settled in that case; nor had the interest of the second son, as in the present case, been defeated by his elder brother. [697]

The estate which Sir Thomas George Apreece takes under the will of his brother, is different in its nature and in extent to that provided for him by the settlement. If he had taken under the latter, he would have been entitled to an estate tail, now convertible into an absolute estate in fee simple; but under the

(1) 19 R. R. 207 (3 Swanst. 328).

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will, he takes an estate for life only; in the case of *Fazakerly* v. *Ford* (1), it was held that a shifting clause did not take effect, because the estate upon the devolution of which, the other estates were to go over, did not descend unfettered, but came encumbered with a term, for securing a jointure and portions.

The sum of 8,000*l.* is therefore raisable under the trusts of the term, 4,000*l.* of which belong to the defendant Sir Thomas George as a younger son, otherwise unprovided for by the settlement; and the remaining 4,000*l.* to the plaintiff.

The cases of *Windham* v. *Graham* (2), *Teynham* v. *Webb* (3), *Hall* v. *Hewer* (4), *Loder* v. *Loder* (5), *Driver* v. *Frank* (6), *Chadwick* v. *Doleman* (7), and *Broadmead* v. *Wood* (8) were also cited.

[698] THE MASTER OF THE ROLLS (after stating the circumstances):

The plaintiffs alleged that on the death of Shuckburgh Ashby Apreece, Sir Thomas George Apreece having become the only son, ceased to be entitled to any portion; and that Mrs. Peacocke, as the only daughter, became entitled to a portion of 6,000*l.*

The defendant, Sir T. G. Apreece, alleged that the estates tail, limited by the settlement, having been barred and destroyed, he will take no provision under the settlement, if he be not allowed to recover a portion as a younger child; and that according to the rules of construction, adopted in such cases, he ought not to be excluded.

The effect of including him would be to make 8,000*l.* raisable for himself and his sister, and to reduce Mrs. Peacocke's portion.

There are many cases upon settlements and on wills providing for families, in which the Court has looked upon elder children as younger, and upon younger children as elder: it is presumed in these cases, that it was intended by the settlement or will, to

(1) 33 R. R. 129 (4 Sim. 390).
(2) 25 R. R. 62 (1 Russ. 331).
(3) 2 Ves. Sen. 198.
(4) Amb. 202.
(5) 2 Ves. Sen. 530.
(6) 15 R. R. 385 (3 M. & S. 25).
(7) 2 Vern. 528.
(8) 1 Br. C. C. 77.

make provision for all the children, and not to give a double provision to any; and to effectuate this intention, the child, taking the estate under the will or settlement, is considered, in equity, as the eldest, and every other child as younger. And in one of the cases, it is said that eldership, not carrying the estate along with it, is not such an eldership, as shall exclude, by virtue of clauses excluding the elder, from the provision intended for younger children.

[699]

But when it is said, that an elder child, unprovided for, shall be deemed a younger, it means, I conceive, an elder child unprovided for by the settlement or will itself: or by means, which were in the contemplation of the parties, making the settlement or will.

In the present case the estate was strictly settled. If the estate tail vested in the eldest son of the marriage, had not been barred, the second son, when he became eldest son, would have become entitled to the family estate under the settlement; and would not, in that event, have become entitled to any portion: he would not, it is admitted, take the estate and a portion also.

As the second son became eldest or only son, before he attained twenty-one years, *i.e.* before he acquired a vested interest in his presumptive portion, the question whether a previous portion, was devested on his becoming an only son, does not arise; but the fact that the second son, whilst he sustained that character, never had a vested interest in the portion, does not appear to me to be immaterial; when he attained his age of twenty-one years, his elder brother was dead without issue; and he was, according to the limitations of the settlement, if they had not been defeated, entitled to the settled estates in tail, in immediate remainder, after the life estate of his father.

The estate, which he would have enjoyed under the settlement, was defeated by means incident to the estates created by the settlement; but not by any defect of the settlement itself, in providing the means to carry the intention into effect. It does not appear to me, that the event of the recoveries being suffered by the tenant for life, and the first remainderman in

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tail, to bar the limitations of the settlement, can reasonably be considered *to have been in contemplation, at the time when [*700] the settlement was made; so as to entitle the only son, to the benefit of that which has been called the prodigious latitude of construction, which has been adopted in these cases, and appears to be founded on the presumption, that it was intended to provide for all the children of the marriage. That presumption is always to be had in view, and ought, I apprehend, to be acted upon, in all cases, in which a loss of provision occurs, by an event which can properly be supposed to have been in the contemplation of those, by whom the settlement was made, and within their intention to provide for.

All the cases appear to me to be consistent with that view. None of them go the length of deciding, that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction, upon the presumption to which I have referred; and the case of *Matthews* v. *Paul* decides the contrary. The difference between that case and the present, is that in the case of *Matthews* v. *Paul* the eldest son was not entitled to the estate, under the same instrument which gave the portions; but that difference does not appear to me to be material. The grandmother, at a time when the eldest son was entitled to an estate tail, gave the portions to the younger children; after her death, the eldest son died, having suffered a recovery of the estate tail, and devised the estate to his father: upon his death, the second became eldest; he had no estate, and yet was excluded from any share of the portions. In this case, as in the case of *Matthews* v. *Paul*, it has been suggested that inconveniences and hardships might, in particular events, have resulted, from any mode of continuing this settlement; and it must, I think, be admitted, that no mode of construction, [*701] can make the settlement wholly free from objection, in *every event that might have occurred; but, on the best consideration which I can give to the case, it appears to me, that the defendant, Sir Thomas George Apreece, having become an only son, is not, upon the true construction of this settlement, entitled to any share of the portions provided for the younger children of the marriage; and that Mrs. Peacocke, as the only younger child,

is entitled to a portion of 6,000*l.*; and consequently, that the trustees of the 500 years' term must be directed to raise that sum, and pay the same to the trustees of Mrs. Peacocke's settlement.

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LE JEUNE *v.* LE JEUNE.

(2 Keen, 701—703; S. C. 1 Jur. 235.)

1837. *Feb.* 2. *April* 10.

Rolls Court. Lord LANGDALE, M.R.

[701]

A bequest of copyhold and leasehold property to the testator's widow, for life; and at her death the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his share to be divided amongst the surviving children: Held, that the child of a son who died in the testator's life, was entitled to such share as her parent, if he had survived the widow, would have been entitled to.

THE question to be determined in this case, depended on the construction of the will of Arnoldus Le Jeune.

The testator, at the date of his will, had four sons, Charles, Anthony, Arnold, and Joseph, and one daughter, Mary.

By his will, which was dated the 10th day of November, 1813, he gave all his copyhold and leasehold *estates, and all other his [*702] estates, of what nature or kind soever, to his wife for her life; and he proceeded to express himself in the following words: "And at my said wife's decease, I order and direct, that the whole of my property be sold, if necessary, and divided into five equal parts or shares; one of which shares, I direct to be paid to each of my four sons, that shall be living at the time of her decease; and in case of either of their deaths, then the share of such so dying, to be paid to his issue, as they shall attain the age of twenty-one years; and in case either of my sons shall die without issue, then his share to be divided amongst the survivors of my five children, hereinafter named; to be paid to him in manner before mentioned." He then gave the other fifth part of his estate, together with the proportions of either of his sons shares who should happen to die without issue, for the benefit of his daughter Mary and her children.

The son Charles died in the year 1814, leaving a daughter, Mary Anne, his only issue surviving him.

The testator died in October, 1820, leaving his wife and the

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four children, Anthony, Arnold, Joseph, and Mary, and his granddaughter Mary Anne, the only issue of the deceased son Charles, surviving him.

The son Arnold died without issue in January, 1833; and the testator's widow, the tenant for life of his property, died in November, 1836.

The question was, whether Mary Anne, the child of the son Charles, who died in the testator's lifetime, took such share of the testator's estates, as Charles would have been entitled to, if he had been living at the death of the widow.

[703]

Mr. Pemberton and *Mr. Purvis*, for the plaintiffs.

Mr. Lynch, *Mr. Atkinson*, *Mr. Bird*, *Mr. Randall*, and *Mr. Lovat*, for the defendants.

THE MASTER OF THE ROLLS (after stating the above facts):

If Charles had survived the testator, and then died in the lifetime of the widow, Mary Anne would have been entitled to stand in his place, as substituted legatee.

Are the words, "in case of either of their deaths," necessarily referable, to the time, between the deaths of the testator and of the tenant for life; or may they not be referred to any time prior to the death of the tenant for life, even though the time should be in the lifetime of the testator himself?

Nothing is given to any son, who should not be living at the time of the death of the tenant for life; no interest was to vest in a son, on the death of the testator; and I think, that the death of the son, in the lifetime of the testator, did not defeat the gift to the issue of the son, in the event of the son's dying in the lifetime of the tenant for life; and consequently, that Mary Anne, as the only issue of Charles, is entitled to such share of the testator's estate, as Charles would have been entitled to, if he had been living at the time of the widow's death.

1837.
May 27.
Nov. 25.

Rolls Court.
Lord LANGDALE, M.R.

HODGSON *v.* HODGSON.

(2 Keen, 704—713; S. C. 7 L. J. (N. S.) Ch. 5.)

SEE *Bolton* v. *Salmon* [1891] 2 Ch. 48.

MONTEITH *v.* NICHOLSON.

(2 Keen, 719—721; S. C. 6 L. J. (N. S.) Ch. 247.)

1838.
May 9, 27.

Rolls Court.
Lord
LANGDALE,
M.R.

[719]

A testator bequeathed his personal estate to his brothers and sisters absolutely; and declared, that if any of them should die in his lifetime, or afterwards, without leaving lawful issue him surviving, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue him surviving, his share should be divided amongst his issue; and he declared, that none of the legatees should be entitled to any bequest until they attained twenty-one: Held, that on attaining twenty-one, the brothers and sisters took absolute interests, and that the limitation over was to take effect only in the event of the death of a legatee under twenty-one, in the lifetime of the testator, or afterwards.

WILLIAM COWEND NICHOLSON, the testator, by his will, dated in July, 1834, bequeathed as follows: "I give and bequeath unto and equally amongst all and every my brothers and sisters, living at my decease, all that the principal sum of 500*l.*, standing in the books of the Governor and Company of the Bank of England, in my name; also all the interest due and to grow due upon the same, to hold the same to them, my said brothers and sisters, their executors, administrators, and assigns, in equal shares and proportions, *as tenants in common, and not [*720] as joint tenants. I also give and bequeath unto all of them, my said brothers and sisters, all that my part, share, or interest in all the household goods and furniture, belonging to my father; also all and every the rest and remainder of all my personal estate absolutely; and I declare it to be my will and meaning, that if any of my said brothers and sisters die in my lifetime, or afterwards, without leaving lawful issue him, her, or them surviving, the share or shares of him, her, or them so dying shall go to, and be equally divided amongst the survivor or survivors of them; and if any of them, my said brothers and sisters, die in my lifetime or afterwards, leaving issue him, her, or them surviving, the share or shares of him, her, or them so dying, shall go to, and be equally divided amongst such issue, share and share alike, as tenants in common, such child or children taking their parent's share; and, moreover, I declare it to be my will, that none of the legatees, under this my will, shall be entitled to any bequest until they severally attain the age of twenty-one years."

MONTEITH v. NICHOLSON.

The question in this cause was, whether, upon the true construction of the will of the testator, William Cowend Nicholson, his brothers and sisters took absolute estates in the legacies given to them, on their attaining their ages of twenty-one years; or whether, they, at that period, took estates for life only, in all or any of those legacies.

Mr. Pemberton and *Mr. Wray*, for the plaintiffs, who were the brothers and sisters of the testator, claimed an absolute interest in the fund.

Mr. Kindersley and *Mr. Bacon*, for the executor.

[721]

Mr. Berrey, for William M. Monteith, the infant child of the plaintiff, James Monteith, insisted that the brothers and sisters of the testator, William Cowend Nicholson, took a life interest only under his will, in his personal estate.

May 27.

THE MASTER OF THE ROLLS:

The words of bequest, in the first part of the will, give to the legatees absolute vested interests in the 500*l.* stock, in the testator's share of his deceased father's furniture, and in his own residuary estate; the next clause in the will contains a limitation over (in the event of the legatee dying in the testator's lifetime or afterwards), to the surviving legatee, if the deceased legatee had died without issue; and to the issue of the deceased legatee, if the deceased legatee had died leaving issue. The testator then declares, that none of the legatees shall be entitled to any bequest until they severally attain the age of twenty-one years; and taking all the clauses together, I think that the effect is, to give an absolute vested interest to each legatee, on attaining the age of twenty-one years; and that the limitation over is to take effect, only in the event of the death of the legatee, dying under the age of twenty-one years, in the lifetime of the testator, or afterwards.

WEDDERBURN *v.* WEDDERBURN (1).

(2 Keen. 722—755; affirmed, 4 My. & Cr. 41—55; S. C. 8 L. J. (N. S.) Ch. 177; 3 Jur. 596.)

1836.
May 31.
June 1, 3.
Nov. 5.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
1837.
Nov. 10, 11, 13, 14.
1838.
Nov. 9.

Lord COTTENHAM, L.C.

An account of a deceased partner's share of profits directed after a lapse of thirty years and after repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested; the surviving partners being the executors of the deceased partner and guardians of the cestuis que trust, and the settlements being partial only, and founded on insufficient knowledge, by the cestuis que trust, of the partnership affairs and accounts.

Time is no bar in cases of direct trust; it may be otherwise, if there has been a direct and independent dealing between the trustees and cestuis que trust, after the relation has terminated.

THE circumstances of this case are so fully detailed in the judgment of the MASTER OF THE ROLLS, that it is considered unnecessary here to state them. [722]

Mr. Pemberton, *Mr. Koe* and *Mr. Williamson*, for the plaintiffs. [723]

Mr. Tinney, *Mr. Kindersley* and *Mr. Colvile*, for the defendants.

The following authorities were relied on: *Cook* v. *Collingridge* (2), *Crawshay* v. *Collins* (3), *Walker* v. *Symonds* (4), *Gregory* v. *Gregory* (5), *Champion* v. *Rigby* (6), *Chalmers* v. *Bradley* (7), *Downes* v. *Grazebrook* (8), *Ex parte Lacey* (9), *Cockerell* v. *Cholmeley* (10).

THE MASTER OF THE ROLLS: *Nov.* 5.

This is a bill filed by Sir James Webster Wedderburn, and other persons, the children, or representing the children, of David Webster deceased, against James *Wedderburn, since [*724]

(1) A note of some further proceedings in this litigation (reported 22 Beav. 84) will be found in the volume of Revised Reports containing 4 My. & Cr., and references to numerous subsequent cases of a similar character will be found in *Fyse* v. *Foster* (1874) L. R. 7 H. L. 318, 44 L. J. Ch. 37.—O. A. S.

(2) 23 R. R. 155 (Jac. 607).

(3) 10 R. R. 61 (15 Ves. 218).

(4) 19 R. R. 155 (3 Swanst. 1, 64—69).

(5) 14 R. R. 244 (G. Coop. 201); *S. C.* 23 R. R. 167 (Jac. 631).

(6) 31 R. R. 107 (1 Russ. & My. 539).

(7) 20 R. R. 216 (1 Jac. & W. 51).

(8) 17 R. R. 62 (3 Mer. 200).

(9) 6 R. R. 9 (6 Ves. 625).

(10) 36 R. R. 16 (1 R. & M. 418, 1 Cl. & F. 60).

WEDDERBURN v. WEDDERBURN.

deceased, Andrew Colvile and other persons, who are, or represent the surviving partners, and the executor of David Webster, or persons interested in the business in which he was concerned, and which was carried on after his death, and also against his widow, and her second husband; and the bill prays a declaration, that the children of David Webster, and those who represent them, are, under the circumstances, entitled to participate in the gains and profits made by carrying on the partnership business since his death: and that an account thereof may be taken, and that the plaintiff's share may be paid by the defendants, Sir David Wedderburn, James Wedderburn, Andrew Colvile and Alexander Seton. The bill also prays a general account of the estate of David Webster, and of the application thereof, and of what is due to the plaintiffs, under his will.

It appears that in 1796 John Wedderburn and the testator, David Webster, who had for some time before carried on business as merchants in partnership together, agreed to take the defendant, Sir David Wedderburn, into partnership with them; and it was agreed that the three should carry on business together, for seven years, if they should all so long live. The terms of the partnership were the subject of a deed, dated the 21st of May, 1796, and made between John Wedderburn of the first part, the testator, David Webster, of the second part, and the defendant, Sir David Wedderburn, of the third part; and thereby it was declared that during the continuance of the partnership, John Wedderburn and David Webster should be equally entitled to five sixth shares of the business; and David Wedderburn to one sixth share thereof; but if either John Wedderburn, or David Webster should die during the seven
[*725] years, then, from the 1st of May ensuing *such death, the survivor of them should become entitled to two thirds of the business, and David Wedderburn to the remaining one third. It was provided, that each of the partners, should at all times during the partnership, and at the determination thereof, enjoy a several share and interest in the business, and the capital thereof, and the profits to be produced thereby, and in the goods and debts thereof, according to their respective interests in the trade, that an account should be yearly made out and stated;

and that if any of the partners should die during the partnership, the executors of the partner dying should stand in his place, and be considered a partner, until the first day of May after the death of the deceased partner, when the partnership, as to such deceased partner, was to determine; but the executors of the deceased partner were not to act in the business, and the surviving partners were not to enter into new engagements, so as to prejudice or affect the executors of the deceased partner, or their interest in the capital. And upon the 1st day of May, next after the death of the deceased partner or in three months afterwards, the surviving partners were to make out a full and perfect account of the partnership business, property and liabilities, and deliver a copy thereof to the executors of the deceased partner; and the executors of the deceased partner, were to meet the surviving partners, and to examine the books; and finally adjust and settle the account, which was then to be signed; and as soon as might be, after the account was settled, payment was to be made of all debts due from the partnership; and after payment thereof, then true payment, partition and delivery was to be made, by and between the surviving partners, and the executors of the deceased partner, at their then house, or place of trade, according and in proportion to their several and respective shares and interests, of and in the trade or business, of all the clear *residue [*726] and surplus of the monies, securities, goods, wares, merchandises, property and effects whatsoever, which should then be due and belonging to the said joint trade, or business, or to the surviving partners and the executors of the deceased partners, in respect thereof, and also all outstanding debts, and sums of money, due and owing, or belonging to the surviving partners and the executors of the deceased partner, on account of the joint trade; and which, after all the debts from the partnership were fully paid, were to be shared and divided, between the surviving partners and the executors of the deceased partner, in proportion and according to their several and respective shares and interests in the said joint trade; and thereupon assignments and releases were to be made and given (1).

(1) And the deed contained a covenant from Sir David Wedderburn, to purchase one fourth part of the ships belonging to John Wedderburn and

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Upon these terms the partnership business commenced, and was carried on, under the firm of Wedderburn, Webster & Co. It appears that the partnership property consisted, to a considerable extent, of ships and shares of ships; and of debts owing to the concern, and particularly a very large debt, owing to the firm from the estate of James Wedderburn, deceased, under whose will *Mr. John Wedderburn was executor and residuary legatee.

[*727]

In 1798 the partners agreed to admit the defendant, Andrew Colvile, as a partner, on the terms of his being entitled to no share of the profits, during so much of the seven years, as he and John Wedderburn should jointly live, and being entitled to 1,000*l.* a year for his services.

On the 10th February, 1801, David Webster made his will, and thereby, after devising and bequeathing certain portions of his estates, he gave all the rest and residue of his monies, securities for money, stock in the public funds, parts and shares of ships and all other his personal estate and effects, charged with his debts, to his wife Elizabeth (now the defendant Lady Douglas), and his partners, John Wedderburn and David Wedderburn; on trust, to sell all such parts thereof as did not consist of stocks, or monies, or securities; and to invest the proceeds. And he directed that out of the dividends and interest, his wife should receive an annuity of 1,200*l.*, to be reduced to 500*l.*, if she married again; and subject to the provision made for his wife, he gave the residue of his estate, for the benefit of his children, in the particular manner mentioned in his will, and upon which no question is raised. He appointed his wife, John Wedderburn and Sir David

David Webster, at a valuation: and a further covenant, that if Sir David, by the death of John Wedderburn or David Webster, should become entitled to an increased share in the business, he would thereupon purchase an increased share in the ships and other property and effects, from the executors of John Wedderburn or of David Webster. And immediately after the ships, goods, wares, merchandises, property and effects which he was to purchase were valued and appraised, he was to give security for payment of the amount.

It did not, however, appear in what manner Sir David Wedderburn paid, or secured payment of that share of the partnership property which he was to purchase, nor, what were the particulars of the property, of which he was to purchase such share.

Wedderburn, joint executors of his will, and committed to them the guardianship, custody and tuition of his children, and of their several estates and fortunes, during their respective minorities.

Mr. David Webster died on the 21st March, 1801. His wife, now Lady Douglas, and his partners, John and Sir David Wedderburn, survived him, and he left *five children, James, [*728] Anne, Mary, Charles and David. The plaintiffs, Sir James Webster Wedderburn, Mrs. Mary Hawkins, and Charles Wedderburn Webster, are three of the children still surviving; the other two are dead, Anne having attained twenty-one, and married the plaintiff, Archibald Murray Douglas, who represents her; and David, who was born after the testator's death, having died an infant, his interest, under the will, survived to his brothers and sisters.

On the death of the testator, Mr. David Webster, it became necessary to consider, what was to be done with his interest in the firm of Wedderburn, Webster & Co. The partnership deed plainly provided, that notwithstanding the death of a partner, the business was to be continued on a joint account, till the first day of May next following, and it was then to cease, as to the interest of the deceased partner; probably, it would not have been easy, under any circumstances, to follow strictly the directions of the deed, for winding up the concern; but the accounts were directed to be settled between the surviving partners and the executors of the deceased partner, and assignments and mutual releases were to be made and given; but these assignments and these releases were to be transactions between the surviving partners of the one part, and the executors of the deceased partner of the other part; when the deed was executed, it was not contemplated that the surviving partners, and the executors of the deceased partners, would be the same persons.

Nevertheless, Mr. David Webster appointed his partners, John and Sir David Wedderburn, to be two of his executors, and the guardians of his children; and they, the surviving partners, alone proved the will, and thereby became the sole legal personal representatives; *and they thus rendered it impossible to act upon the [*729]

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provisions of the partnership deed, or to proceed in any mode that was satisfactory and safe, to wind up and settle the accounts and dependencies subsisting between them and their testator, and at the same time continue the trade. It would appear, however, that they did not consider that there was any difficulty, or any thing in their situation, to make it improper, or incompetent for them to adopt their own means of ascertaining the value; and to purchase, for their own use and benefit, and become the absolute owners of that share of the partnership ships, stock and effects, which belonged to the estate of their testator, David Webster; or from dealing, as between themselves and the estate of the testator, with the debts owing to the late partnership, in the manner they thought most convenient. They considered the partnership business as a concern which was to devolve to them, exclusively of the testator's estate, on the 1st of May next following the testator's death; and they determined that it should be carried on by themselves and Mr. Andrew Colvile (who had previously become a partner in the manner I have mentioned), under the firm of Wedderburn & Co.; and the defendants Colvile and Seton say, that for the purpose of winding up the affairs of the old firm of Wedderburn, Webster & Co., regular and just valuations were made, by competent persons appointed for that purpose, of the ships, shares of ships and other partnership stocks and effects; and they were taken, at such valuation, by Wedderburn & Co.; and the old firm was credited with the amount, in the books of the new firm, and a portion of the debts due to the old firm was transferred to the books of the new firm, and the old firm was credited therewith, in the books of the new firm; and the persons from whom they were due, were debited therewith. And certain
[*730] debts, to a much larger amount, due from *the old firm, and carrying interest, were, with the assent of the several persons to whom they were due, transferred from the books of the old firm, to their credit, in the books of the new firm; and in lieu thereof, the old firm was debited therewith in the books of the new firm; and a balance sheet was made up to the 1st of May, 1801, whereby it appeared, that the debts due by the old firm, and taken over by the new, so far exceeded the debts due to the

old firm, and taken over by the new, and the value of the ships, and shares of ships, and other partnership stock and effects of the old firm, that there was a balance, to the amount of 98,573*l.* 18*s.* 11*d.* due to the new firm by the old firm.

As the partnership accounts then stood, it was made to appear, that the whole assets consisting of property and debts belonging and due to the old concern, amounted to . £496,766 and a fraction, and that the whole liabilities amounted to . . . . . 410,782 and a fraction,

leaving a surplus of . . . . 85,983 14*s.* 11*d.*

which, when realized, was to be divided between the surviving partners, and the executors of Mr. David Webster, the deceased partner, in the shares following; that is to say,

To John Wedderburn	£24,407	10	4
To the executors of David Webster . . .	55,101	2	1
To Sir D. Wedderburn	6,475	2	6
	£85,983	14	11

and, from this statement, it appears that considerably *more than three fifths of the whole surplus, belonged to the estate of David Webster. [*731]

The defendants have examined witnesses, to prove that proper valuers of the ships, shares of ships and other property were appointed; that the valuations were duly and properly made; and that greater value could not have been obtained upon sale by an auction; and I do not question but that the surviving partners may have, really and *bonâ fide*, intended to settle every thing in a fair and honourable manner; but John and Sir D. Wedderburn were executors and trustees, as well as surviving partners; and in a case in many respects similar, *Cook* v. *Collingridge* (1), Lord ELDON says, "One of the most firmly established rules is, that persons dealing as trustees and executors, must put their own interest entirely out of the question; and this is so difficult to do, in a transaction in which they are

(1) 23 R. R. at p. 164 (Jacob, 621).

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dealing with themselves, that the Court will not enquire whether it has been done, or not; but at once says, that such a transaction cannot stand"—and, therefore, under the circumstances of this case, considering the characters, filled by John and Sir David Wedderburn, in such transactions incompatible — that there was no disinterested person to superintend, or check, on the behalf of David Webster's estate, either the valuation of the property, or the transfers of debts and credits, on the regulation of which, the connections and custom of a mercantile house may so much depend—I am of opinion, that the property and affairs of the firm of Wedderburn & Co. cannot be held to have been disposed of and settled under the provisions of the deed of 21st of May, 1796. The principal averment in the plea, "that no [*732] part of the *capital of Wedderburn, Webster, & Co., belonging, or due to the estate of the testator, was employed in carrying on the trade or business of the successive firms of Wedderburn & Co., Wedderburn, Colvile, & Co., and Colvile & Co., or any of them," fails (1); and the business of the new firm of Wedderburn & Co. having, after the 1st of May, 1801, and notwithstanding the paper transfer in the books, been substantially carried on, with the property, capital, and connections of the old firm of Wedderburn, Webster, & Co., I am of opinion, that after that time, the case would have been treated as the ordinary case, in which the surviving partners think fit, after the death of the deceased partner, to deal with the property, which, having belonged to the partnership, is not, in the contemplation of this Court, exclusively theirs, for the benefit either of themselves, or any other persons, whom they may take into partnership with them. I have no doubt, that if the case had been brought under the consideration of this Court before 1809, the sale would have been held to be void; and the partners in the new firm of Wedderburn & Co. would have been compelled to account to

(1) The defendants Colvile and Seton had put in a plea and answer; and on the argument of the plea, on the 7th November, 1832, it was ordered that the plea should stand for an answer, with liberty for the plaintiffs to except thereto, and the benefit thereof was thereby saved unto the said defendants till the hearing of the cause; and the plaintiffs, in excepting, were not to call for any account of the profits of the trade since the 1st of May, 1801.

the persons beneficially interested in the estate of David Webster, for a share of the profits made by carrying on the partnership business.

On the 31st of May, 1809, the plaintiff Sir James Webster Wedderburn, the eldest son of David Webster, *attained his age of twenty-one years; and the defendants Colvile and Seton represent, that thereupon, a general account in writing was made out, of the estates and effects of the testator, from the time of his death, up to the 1st day of May, 1809; and that thereby it appeared, that after payment of his debts and legacies, and reserving a sum for payment of the annuities bequeathed by his will, there would then be divisible, amongst the five children of the testator, on account of his residuary personal estate, a sum of 75,068*l.* 6*s.* 10*d.*; provided that the share, due to the testator's estate, of the debt then due to Wedderburn, Webster, & Co., from the estate of James Wedderburn deceased, were paid; and that the seven twenty-third parts or shares of the plaintiff Sir James, amounted to 22,846*l.* 17*s.* 10*d.*; and the four twenty-third parts or shares of each of the other children, to 13,055*l.* 7*s.* 3*d.*; that an account, in writing, was also made out from the books of Wedderburn, Webster, & Co., whereby it appeared what debts due to the firm, on the 1st day of May, 1801, were then uncollected, and what debts were then due by the firm, and unpaid; and what was then due to the estate of the testator, and divisible amongst his children; and that an account was also made up, in writing, to the 1st day of May, 1809, of all sums of money expended on account of the maintenance, education, and advancement of the plaintiff Sir James, and which amounted to 11,447*l.* 11*s.* 2*d.*

[*733]

Three accounts are thus professed to have been rendered; 1st, an account of the testator's estate and effects from his death to the 1st of May, 1809; 2ndly, an account of debts due to and from Wedderburn, Webster, & Co. on 1st May, 1809, and remaining uncollected and unpaid; and 3rdly, an account of sums paid for the maintenance, education, and advancement of Sir James. I must assume, that these accounts were made out under *the directions of John and Sir David Wedderburn, the surviving partners, and also the executors and guardians; but it is stated,

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that they were examined by the plaintiff Sir James, and carefully examined by Mr. Alexander Murray, since deceased, as solicitor, acting on behalf of the plaintiff Sir James, and the other children of the testator; and that after much investigation and enquiry, and particularly with reference to the large debt then outstanding, and due from the estate of James Wedderburn, Mr. Alexander Murray, and the plaintiff Sir James, acting under his advice, were satisfied with and approved of the accounts.

On the subject of these accounts, the defendants have produced evidence; Mr. James Keil was a confidential clerk and book-keeper of Wedderburn & Co., and he says, that in and previous to 1809, Mr. Alexander Murray acted as the solicitor of the plaintiff Sir James, and, to the best of his belief, for the other children of the testator; that the several accounts, relating to the testator's estate, mentioned in the answer of Colvile and Seton, being the accounts I have mentioned, were, as he knows, investigated and examined by Mr. Murray, to whom he delivered the accounts; and he saw him examine the same; he then says that the partnership books, and all other books and accounts of the firms of Wedderburn, Webster, & Co., and Wedderburn & Co., were open to the investigation of Mr. Murray; and he examined the same, for the purpose of ascertaining whether such accounts were accurate, and made out on a proper principle; and he did very narrowly examine such accounts, and investigate the principle on which the amount due to the estate of the testator, in respect of his share in the partnership funds of Wedderburn, Webster, & Co., was ascertained; and he was, after such investigation and examination, satisfied with *the accounts; and that the same were made out on a proper principle.

[*735]

Mr. William Loxham Farrer, another witness, without, as I understood his evidence, pledging himself to any personal knowledge of the facts, states his belief that Mr. Murray acted as solicitor for Sir James in 1809, and continued to act for him, and the other children of the testator till 1815; and that the accounts and the partnership books were examined by him, or by some accountant employed by him, or by the plaintiff Sir James; and, from Mr. Murray having indorsed the accounts furnished him, on the indenture of the 16th of September, 1809

(which I shall afterwards have occasion to notice), the witness says, he has no doubt that Mr. Murray was satisfied with the accounts, and that they were made up on a proper principle. From the great importance, in this cause, of the accounts indorsed on the indenture of the 16th of September, 1809, I have found it necessary to examine them minutely; they do not appear to contain any account of the estate of David Webster, at the time of his death, or of the assets, debts, and liabilities of the partnership, either at that time or on the 1st day of May next following; or of the dealings of the surviving partners and executors, with the partnership property, debts, and credits between the time of the testator's death, and the 1st of May, 1809; but, proceeding on the assumption that all was settled up to the 1st of May, 1809, and that after that day there were no concerns or transactions of the firm of Wedderburn, Webster, & Co., except those which related to the debts due to and owing by that partnership, it proceeds as follows: It first states the debts due to Wedderburn, Webster, & Co. on the 1st of May, 1809:

[736]

Good debts (exclusive of that due from estate of James Wedderburn).	£19,168	5	1
Due from the estate of James Wedderburn .	190,472	3	0
Balance of bad and doubtful debts after certain deductions	17,627	8	5
	£227,267	16	6

It then states the debts due by Wedderburn, Webster, & Co. on the same day (1st May, 1809):

Due to persons not members of the firm . .	£13,541	4	8
Stated to be due to John and Sir David Wedderburn, for balance of debts paid by them, since David Webster's death, after deducting certain sums stated to be due by them	138,433	14	1
And to be due to the estate of David Webster .	75,292	17	9
	£227,267	16	6

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Exclusively of the large debt due from the estate of James Wedderburn, the total amount of debts due to the concern (*i.e.* the good and bad together) amount to . £36,795 13 6
And the debts owing to strangers being . . 13,541 4 8

The difference is £23,254 8 10

And assuming that the sums to be received on account of debts due, would equal, but not exceed the 13,541*l.* 4*s.* 8*d.*, due
[*737] to strangers, this difference of *23,254*l.* 8*s.* 10*d.*, would have to be deducted from the sums previously stated to be due to the surviving partners, and the estate of the deceased partner, in the proportions following, viz.:

From the share of Sir David Wedderburn, $\frac{2}{12}$ths £3,875 14 10
estate of David Webster, $\frac{5}{12}$ths . . 9,689 7 0
John Wedderburn, $\frac{5}{12}$ths . . . 9,689 7 0

£23,254 8 10

To every item of debt contained in the aggregate I have mentioned, as well those which are stated to be due to or from strangers, as those stated to be due to or from J. and Sir D. Wedderburn, and due to the estate of Sir D. Webster, there is a reference to a folio in the ledger, from which it may be presumed, that some information respecting those items was to be obtained.

The account then, assuming that D. Webster's share of the computed deficiency is to be deducted from the amount standing to his credit in the ledger, *i.e.* deducting 9,689*l.* 7*s.* from 75,292*l.* 17*s.* 9*d.*, states the sum of 65,603*l.* 10*s.* 9*d.* as the balance to be paid to the estate of David Webster, by his executors, provided the debt due from the estate of James Wedderburn were paid by John Wedderburn; and the account then states, how that sum, when received, was to be appropriated; and it says, that 9,327*l.* 7*s.* 10*d.* is to be applied in payment of a debt due from the estate of the testator, David, to his son Sir James, and that the remainder, 56,211*l.* 2*s.* 11*d.*, was to be divided amongst the testator's children; the sums previously advanced to the children, are stated to amount to 18,857*l.* 3*s.* 11*d.*,

which being added to the 56,211*l.* 2*s.* 11*d.*, they make together 75,068*l.* 6*s.* 10*d.*; and this is the sum on which the shares of the children *are computed; the share of Sir James, being $\frac{7}{23}$rds of the whole, is stated to be 22,846*l.* 17*s.* 10*d.*, and deducting from that 11,447*l.* 11*s.* 2*d.*, the amount already advanced to him, the sum payable is finally stated to be 11,399*l.* 6*s.* 8*d.* [*738]

I think that this account, which affords no explanation of the dealing of the surviving partners with the interest of David Webster's share in the concern, is not such an account as John and Sir David Wedderburn, the surviving partners of David Webster, the executors of his will, and the guardians of his children, ought to have rendered to the eldest son, on his coming of age. Every thing ought to have been clearly and fully explained. Whether a clear and full account might have been obtained, by searching through the books, from the references contained in the accounts which were rendered, I do not know; but if the fact were so, I think that was not enough; I think that direct and clear information of all the transactions, and of his interest in them, ought to have been given to Sir James; and there is nothing to explain, what were the circumstances under which Mr. Alexander Murray became, and acted as the solicitor of Sir James, and as it is said, of the other children of David Webster, who were then infants; or what were the views and considerations, on which Mr. Alexander Murray was satisfied, that the accounts were made out on a proper principle, as Mr. Keil says he was.

The deed of the 16th of September, 1809, is made between John Wedderburn, described as surviving executor of James Webster deceased and one of the acting executors of David Webster deceased, of the one part, and the plaintiff, Sir James, then a cornet in his Majesty's 10th Regiment of Dragoons, and a legatee named in the wills of James Webster, deceased, and David Webster, deceased, *of the other part; it recites the circumstances under which the debt of 9,392*l.* 7*s.* 10*d.* had become due to the plaintiff, Sir James, from his father; and after reciting the will of David Webster, but taking no notice of the partnership deed of 21st of May, 1796, it stated the balance upon the accounts apparently due to the plaintiff, Sir James, to be 11,399*l.* 6*s.* 8*d.*, [*739]

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exclusively of the debt of 9,392*l.* 7*s.* 10*d.* (1). The deed then recited, that a considerable part of the personal estate of David Webster consisted in his share of a large sum of money due from the estate of James Wedderburn deceased, which would not be recovered, and could not be received and got in for some years to come; and that the plaintiff, Sir James, had urgent occasion for the sum of 9,392*l.* 7*s.* 10*d.* for the payment of his debts: and it had been proposed and agreed, that, in order to meet such his wants, John Wedderburn, as acting executor of David Webster, should pay that debt, with interest, to the plaintiff, Sir James, on or before the 1st day of August, 1810: and that the 11,399*l.* 6*s.* 8*d.*, the balance of his share of his father's residuary estate, should be paid by John Wedderburn to the plaintiff, Sir James, by seven equal annual instalments, with interest to be computed from the 1st day of August, 1809, and
[*740] the last instalment *being to be paid on the 1st day of August, 1816; it being understood, and expressly agreed, that John Wedderburn was to undertake for the payment of such instalments, not in his capacity of executor, but on his own private account, he being the legal personal representative of James Wedderburn, and also beneficially interested in his estate. The deed then witnesses the covenant of John Wedderburn to that effect, and further witnesses as follows: "That he the said James Webster Webster, (meaning the plaintiff, Sir James,) is now content and satisfied with the disclosure thus far made, and the accounts thus far given by the said John Wedderburn, of the personal estate of the said David Webster;" and of the sum of 9,392*l.* 7*s.* 10*d.*, and no more, being justly due from the said estate, on the account therein mentioned, and of the said principal

(1) The deed then recited, "that the residue of the personal estate of the said David Webster, after payment thereout of his debts, and amongst them, the said debt so due to the estate of the said James Webster, is considered or supposed to amount, to the sum of 75,068*l.* 6*s.* 10*d.* sterling, upon the account made up and indorsed on these presents, whereof the said James Webster Wedderburn did, upon his coming of age on the said 31st of May, 1809, become entitled unto $\frac{1}{23}$rd parts of the whole, amounting in the whole to the sum of 22,846*l.* 17*s.* 10*d.*," whereout being deducted the sum of 11,447*l.* 11*s.* 2*d.*, the advances to him, the balance upon the said accounts apparently due unto the said James Webster Wedderburn, from the estate of David Webster, was 11,399*l.* 6*s.* 8*d.*, exclusively of the 9,392*l.* 7*s.* 10*d.*

sum of 11,399*l.* 6*s.* 8*d.* being due to him, from the same estate, under the will of David Webster; and that as long as John Wedderburn performed his covenants, the plaintiff, Sir James, would not require, or by suit at law or in equity demand payment of the sums so agreed to be paid to him. And there was a proviso that the deed, or the agreement therein contained, was to be understood as applying only to the account and state of things as on the 1st day of May, 1809, and as then accounted for, and as not precluding or preventing him from claiming, or becoming entitled to, any further part or share, sum of money, and other personal estate under the will of James Webster and David Webster, or either of them, not as yet received, fallen in, or accounted for.

I conceive that the expressions in this deed, as to the supposed amount of the estate of David Webster, and to the estate not yet received, fallen in, or accounted for, were meant only to have reference to the uncertain amount of the debts, stated to be owing to the old partnership, which might be recovered. But after the most careful *consideration of the accounts, and of the [*741] provisions expressly contained in the deed, and having regard to the relation which subsisted between the parties, I am of opinion, that the plaintiff, Sir James, was not, by the execution of this deed, precluded from enquiring into the mode, in which the assets and property of the old firm had been dealt with by the new firm; or from claiming any benefit, to which he might be entitled, in consequence of such dealing.

In the year 1810, and before any of the other children came of age, John and Sir David Wedderburn, and Mr. Andrew Colvile, all of whom had been partners in the firm of Wedderburn, Webster & Co., and who then constituted the firm of Wedderburn & Co., admitted James Wedderburn and the defendant, Alexander Seton, into partnership with them, and this new partnership carried on the former business, under the same name of Wedderburn & Co. This new firm, with its additional partners, seem to have stood in the same relation to the old firm of Wedderburn, Webster & Co., and the estate of David Webster, as the first firm of Wedderburn & Co. did.

The daughter Anne, now deceased, the wife of the plaintiff, Archibald Murray Douglas, attained her age of twenty-one years

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in 1812. [The MASTER OF THE ROLLS here referred to the accounts furnished, and a deed of the 29th of August, 1812, executed by her, which did not materially differ from those affecting Sir James's share.]

I am of opinion that Anne Webster, by executing it, was not precluded from enquiring into the mode in which the assets and property of the old firm had been dealt with by the subsequent

[*742] partnerships, or from claiming *any benefit, to which she was entitled, in consequence of such dealing.

On the 13th of September, 1813, the daughter Mary, now the plaintiff, Mrs. Hawkins, attained her age of twenty-one years; the account stated to have been rendered to her, appears to have been similar to that which had been rendered to her sister Anne; and she executed a deed dated 24th of September, 1813, only 11 days after she came of age. [The MASTER OF THE ROLLS stated the deed executed by Mary Wedderburn Webster, which was similar to that executed by her sister.]

It is stated by the defendants, that on the 1st of May, 1814, a further account was made out, and a further dividend made amongst the children; but it does not appear, and is not alleged, that any further settlement was then made. In 1815, Sir David Wedderburn retired from the business, and the trade was afterwards carried on by the continuing partners, John Wedderburn, Andrew Colvile, James Wedderburn, and Alexander Seton, under the new style or firm of Wedderburn, Colvile & Co.; and by transfers, or entries made in the books, the debt due from the estate of James Wedderburn deceased, was then purported to be paid off. On the 1st of May, 1809, this debt was said to amount to 159,707*l.* 16*s.* 8*d.*; on the 1st of May, 1815, to 202,855*l.* 0*s.* 3*d.*; and on that day, the estate of James Wedderburn deceased was credited, in account, with 183,989*l.*, said to be due by Wedderburn, Webster & Co., to Wedderburn & Co., and transferred by them to the debit of James Wedderburn's estate; and also with 18,865*l.* 5*s.* 9*d.* said to be charged, in account, to John Wedderburn; but, except by those transfers in the books, no alteration seems to have been made in the relation which subsisted between

[*743] the firm and the old *house of Wedderburn, Webster & Co., or the estate of David Webster.

On the 15th of May, 1816, the infant son David died; and, thereupon, his expectant share of the testator's estate became divisible, under the will, amongst his brothers and sisters, in certain proportions. The defendants say, that the executors computed what was payable to the other children, in respect of David's share, up to the 25th of December, 1816, and made distribution accordingly, placing the share of Charles, the only remaining infant, to his credit. Charles attained his age of twenty-one years on the 10th of September, 1820, and the defendants say, that, thereupon, an account in writing was made out, of all sums of money expended for his maintenance, education and advancement in life; and also an account, of what was due for his share of the estate of the testator; and that the plaintiff Charles examined and approved of such accounts.

It appears, that he (Charles) executed a deed poll, dated the 13th of September, 1820, which, after reciting the will of his father, David, and that he had attained twenty-one years of age, and become entitled to a share of the residuary estate: and "that John and Sir David Wedderburn had submitted to him, an account of the residuary personal estate, and of all the receipts and payments respecting his expectant share thereof, during his minority, including the expense of his maintenance and education, and otherwise, all which he had examined and did fully approve;" and that he found that his share consisted of 29,160*l.* 10*s.* 3*d.* 3 per cent. Consolidated Bank Annuities, which had been transferred to him by John and Sir David Wedderburn: of 2,264*l.* 16*s.* 10*d.*, with interest from May then last, which had been paid to him by John Wedderburn: of 728*l.* 8*s.* 3*d.*, with interest *from May then last, which had been paid to him by Sir David Wedderburn: and of 329*l.* 6*s.*, which had been paid to him by the firm of Wedderburn, Colvile & Co., as the agents of John and Sir David Wedderburn; Charles Webster, in consideration of such transfer and payment, which were acknowledged, remised and released unto John and Sir David Wedderburn, all actions, claims and demands which he ever had, or then had, against them, or the representatives of David Webster, for, touching, or concerning the management and disposition of the residue of the personal estate of David Webster, or any part

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thereof, or any interest or annual produce by them received on account thereof; but with a proviso, that the release should not extend to any funds set apart to answer the annuity to Lady Douglas (1).

It does not appear that any account was indorsed on this deed; but on looking at the account, No. 11, which is marked on the back "Charles Webster—received from Wedderburn & Co., 12th July, 1820," and which in every thing, but a small difference in the amount of stock, and in the sum stated to be due from Wedderburn, Colvile & Co., corresponds with the results stated in the deed poll, and which, I presume, is the account therein referred to, it appears that the account of the 1st of May, 1809, is assumed to be correct; and that the fortune or sum payable to Charles, is computed on that as a basis; and I find no reason to think, that the nature of the proceedings, which took place between the testator's death and the 1st of May, 1801, were ever communicated to Charles; and having always regard to the relation subsisting between John and Sir David *Wedderburn, and Charles Webster, their ward, and cestui que trust, I am of opinion, that, according to the principles upon which this Court constantly acts, John and Sir David Webster were bound to communicate with Charles, fully and particularly, the nature of their dealing with the testator's estate, and also the manner in which his interest was, or might be affected by such dealing; and that, under the circumstances, Charles was not, by the execution of the release, precluded from farther investigation and claim.

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In the year 1821, John Wedderburn, one of the executors, guardians and surviving partners, died, having made a will, whereby he appointed his surviving partners in the firm of Wedderburn, Colvile & Co., viz. Andrew Colvile, James Wedderburn and the defendant, John Wedderburn, his executors. They proved the will, and also carried on the trade, and they afterwards took the defendant, John Wedderburn, into partnership with them. The business of this new partnership was carried on under the firm of Colvile, Wedderburn & Co.

In May, 1822, an account was come to, between the executors

(1) These consisted at the time of the sums of about 3,414*l.* 5 per cents., and 3,888*l.* 4 per cents., producing an income of 426*l.* a year.

of John Wedderburn, and Mr. and Mrs. Archibald Murray Douglas and their trustees. By the account and deed of 29th August, 1812, the sum of 9,891*l.* 17*s.* 5*d.* was stated to be due to the daughter Anne; and John Wedderburn covenanted to pay that sum, by instalments, the last of which was to be paid on the 1st August, 1816. In August, 1814, a marriage was agreed upon between Anne and the plaintiff Archibald Murray Douglas, and marriage articles, dated August 6th, 1814, were executed between these parties and their trustees, who were the plaintiff, Sir James, and a Mr. William Douglas, since deceased; and thereby it was covenanted, that the fund to which Anne Webster, *the intended wife, was entitled, should be assigned to the [*746] trustees, on the contemplated trusts. The marriage took effect; John Wedderburn died, without having fully paid what was due to Mrs. Douglas; George Hawkins was appointed a trustee in lieu of William Douglas; a settlement was executed pursuant to the articles; and, upon an account stated between the parties, it appeared, that 3,456*l.* 15*s.*, remained a balance due to Mrs. Douglas, or her trustees, in respect of the 9,891*l.* 17*s.* 5*d.* mentioned in the deed of August, 1812; and that sum was paid to the trustees, the plaintiff Sir James Webster Wedderburn and George Hawkins; and thereupon, an indenture, dated 22nd of May, 1822, and made between the plaintiffs, Sir James Webster Wedderburn and George Hawkins, of the first part; the plaintiff Archibald Murray Douglas and Anne, then his wife, of the second part; and James Wedderburn, and the defendants, Andrew Colvile and Alexander Seton, of the third part, was executed; and thereby, it was witnessed, that the trustees and Mr. and Mrs. Douglas released and discharged James Wedderburn, Andrew Colvile and Alexander Seton, and the estate of John Wedderburn deceased, from the 9,891*l.* 17*s.* 5*d.*, which remained due to Mrs. Douglas, as appeared by the deed of 29th of August, 1812; and which was thereby secured to be paid, by five instalments, as therein mentioned, and from all actions and demands in respect thereof, or relating thereto.

This was the last deed executed by any of the parties; on the occasion of its execution, no reference appears to have been made to the state of the accounts, between the old firm of

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Wedderburn, Webster & Co., or the estate of David Webster and the surviving partners, or the subsequent firms. It had relation only to the sum of 9,891*l.* 17*s.* 5*d.*, which, by the deed of 29th
[*747] of *August, 1812, appeared to be due to Mrs. Douglas, and the effect of it was, to admit that that sum was paid.

And, on a consideration of all these accounts and documents, I think that the accounts were not, and could not, by any of the parties, be considered as finally wound up and settled. They were all founded on the account of 1st of May, 1809, which was, in part, merely an hypothetical account, founded on a supposition that no more of the debts due to the concern, exclusively of that due from the estate of James Wedderburn, would be received, than was sufficient to pay the debts due from the concern, which it was assumed would all be paid; and it was necessarily intended to enquire, some time or other, how far this supposition corresponded with the event.

Moreover, the estate was subject, or supposed to be subject, to the payment of two annuities, one of 500*l.*, given by the will to the defendant, Lady Douglas, and the other of 20*l.*, payable to a Mrs. Young; and it is necessary to consider, what was done with respect to investments, to answer these annuities, not only, with a view to the liability with which the plaintiff seeks to charge the executors on that account, but also, with a view to the effect of the general transactions between the parties. [The MASTER OF THE ROLLS, after reviewing the facts relating to this part of the case, said:]

I think, that very long before they made any complaint, they (the children of the testator) were apprised of the sort of provision which was made for payment of the annuities; and, under the circumstances, I think that I cannot, at their instance, charge the executors and trustees with such loss, if any; and it appears to me that there was some, as was incurred by the
[*748] neglect to make *investments in the 3 per cent. Consols, as soon as practicable.

In the latter part of the year 1828, and the beginning of 1829, the plaintiff, Sir James, demanded some further accounts and explanations. As far as I can understand his letters, which I find in the admitted correspondence, his demands related only to

the debts which were unpaid in May, 1809, and to transactions which occurred subsequent to that time; but some accounts were delivered, and, before the 5th of May, 1829, had been subject to the examination of Messrs. North and Smart, who then hesitated to approve of them; and on the 2nd of the following month of November, they expressly allege, as I think, for the first time, that the accounts were not satisfactory, on these grounds; the first of which, was the use of the funds of the testator in the affairs of the copartnership, without accounting for the profits during the time such funds were so used. Whilst the question, thus raised, was pending, and in May, 1830, Mr. James Wedderburn retired from the concern, and the business was afterwards carried on by Messrs. Colvile and Seton, under the firm of Colvile & Co.

The bill was filed on the 1st of February, 1831, and, under all the circumstances of this case, and, after a careful examination of all the particular transactions between the parties, it appears to me, that the main question in the cause, whether the plaintiffs are entitled to participate in the profits of the trade carried on after the 1st of May, 1801, depends on the question, whether they are barred by the length of time which elapsed, before the bill was filed. The testator died in March, 1801, about thirty years before the bill was filed,—the plaintiff, *Sir James Webster Wedderburn, attained his age of twenty-one years in May, 1809, about twenty-two years before the bill was filed; and the plaintiff Charles Wedderburn Webster, the youngest surviving child, attained his age of twenty-one years in September, 1820, more than ten years before the bill was filed; various accounts had been signed, and the claims of the several children had been, at least to some extent, examined, and no claim for a participation of profits was ever made till 1829. [*749]

In *Gregory* v. *Gregory* (1), and *Champion* v. *Rigby* (2), the Court dismissed bills, upon which, if filed early, the plaintiffs would have been entitled to relief, on account of a delay of eighteen years; and it was justly argued, that the time is no bar, in cases of direct trust; it may be otherwise, if there has been a direct and independent dealing between the trustees and cestuis que trust, after the relation has terminated.

(1) 14 R. R. 244 (G. Coop. 201). (2) 31 R. R. 107 (1 Russ. & My. 539).

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In this case, notwithstanding the relation of trustees and cestuis que trust, and of guardian and ward, if complete and satisfactory information had been given; if I could have been satisfied, on examination of all the documents and evidence, that the children, respectively, on their coming of age, had been duly informed of the real nature and effect of the transactions, or seeming transactions, which the executors and surviving partners took upon themselves to arrange, between themselves and the estate of their deceased partner and testator; and if the relation between trustee and cestuis que trust had then ceased, I should have thought time would have been a bar; I should not have thought it right, to open the investigation of transactions so long

[*750] treated *as closed. But, on a review of the whole case, I am of opinion, that full information, such as trustees and guardians are bound to give, especially in a case where personal interests of their own were involved, never was properly communicated: and that, in fact, sufficient information was not obtained, till a short period before the time when the claim was made in 1829, and it is plain that the accounts were never finally settled: and that the relation between trustee and cestuis que trust, has not yet wholly terminated: and, under all the circumstances, I am of opinion, that the plaintiffs, as the persons beneficially interested in the estate of David Webster, are entitled to participate in the profits of the trade carried on after the 1st of May, 1801.

Considering, however, that the plaintiffs are entitled to participate in the profits of the concern after the 1st of May, 1801, it remains to be determined, how the profits, of which they are to partake, are to be computed; and how their share of such profits is to be ascertained.

It is one thing to say, that the sale by the executors to themselves, as surviving partners, is void, and to seek relief on that foundation; and another, and very different thing, to say, without seeking to set aside the sale, that the purchase money was insufficient, or that the amount of a large part of it, was retained and employed in the trade, and to seek relief on that ground.

If the sale of David Webster's share of the partnership property, by the executors to themselves, were to be treated as altogether void, the consequence would be, that his estate would

retain a continuing interest in the property, in specie, and it would have to be considered what ought now to be done with the property.

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But this bill is not framed like that in *Cook* v. *Collingridge*. It does not pray to have the sale declared void; it does not ask for any disposition to be now made of the property; and, as I understand its object, the plaintiff desires to obtain that which was intimated in the letter of Messrs. North and Smart, on account of the profits, during the time the funds of the testator were employed in the copartnership; meaning, I presume, by funds, the value of the testator's interest; and, considering this as the object, and as the species of relief to which the plaintiffs are entitled on their bill, it is to be seen, how the profits are to be ascertained upon that foundation.

Since the 1st of May, 1801, new partners have from time to time been admitted, and have retired; their personal services, in managing the concern, and the capital which they may have from time to time employed in it, must have contributed in the earnings of those profits in which the plaintiffs claim to share; and allowance must be made for them.

On the other hand, large sums of money have, from time to time, been taken out of the concern, and applied to the separate purposes of the estate of David Webster, or for the benefit of his residuary legatees; and considering these sums, as paid on account of profits and purchase money of capital, the contributions of the testator's estate, towards the earning of the profits of the concern, and the share of the future profits, to which the testator's estate would be entitled, would diminish with every payment on account of capital, and in proportion to it.

Having regard to the frame of this record, I think that the plaintiffs are not entitled to the sort of decree *which was made [*752]
in *Cook* v. *Collingridge*, but are entitled to have it ascertained, what was the value of David Webster's interest in the concern, on the 1st May, 1801; and to have a share of the profits subsequently made by the concern; such share of profits to be proportioned to the shares which that value, or so much of it as was, from time to time, left in the concern, bore to the capital of all the other partners, from time to time employed by them.

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If, upon consideration, the plaintiff should think that the valuations were justly and fairly made in the year 1801, a direction might be given not to disturb those valuations.

I think that the continuing firms are not entitled to any credit for any mere transfer, in account, between the books of themselves and the books of Wedderburn, Webster & Co.; but, that they are to be entitled to credit, and to be exonerated, in respect of every payment or investment made on the account of David Webster's estate, or any of the parties interested in it.

Refer it to the Master, &c., to take the usual accounts of the personal estate of the testator, David Webster, possessed or received by his executors, &c., and of their payments on account thereof.

Also, to take an account of the dealings and transactions of the partnership firm of Wedderburn, Webster & Co., up to the 1st day of May, 1801; not disturbing any account which he shall find to have been settled by the testator.

[753] Let him enquire what, on the 1st day of May, 1801, was the value of testator's interest in the concern.

Let him take an account of the profits of the trade, as the same have been, from time to time, carried on by the successive firms of Wedderburn & Co., Wedderburn, Colvile & Co., Colvile, Wedderburn & Co., and Colvile & Co., and the partners constituting those firms respectively.

And let him ascertain what sums of money were, from time to time, taken out of the said concern, and paid, applied, or invested, to or on account of the estate of David Webster, or any of the persons beneficially interested therein; and also, what was the amount of capital, from time to time, employed in the said firms respectively, by the several and respective partners therein: with liberty to state special circumstances.

Direct examination on interrogatories, and production of documents. And, in taking the accounts, the Master is to make, unto all parties, all just allowances; and as to such of the said allowances as are claimed, or objected to, before the Master, he is to state his reasons for allowing or disallowing the same.

Reserve further directions and costs—and liberty to apply.

[The defendants appealed from this decree.

Mr. Knight Bruce, *Mr. Kindersley* and *Mr. Colvile*, in support of the appeal.

The *Solicitor-General*, *Mr. Jacob* and *Mr. Koe*, in support of the decree.

Mr. Knight Bruce, in reply.]

THE LORD CHANCELLOR:

1838. *Nov.* 9.

Although the papers in this case are voluminous and the questions of great importance, the facts, so far as *they appear to me necessary to be considered, lie in a narrow compass; and the points to be decided are,

[4 My. & Cr. 42]

[*43]

1. What was the effect of the arrangement of 1801?

2. What were the rights of the plaintiffs independently of that arrangement?

3. What was the effect of the several deeds executed by the plaintiffs?

4. What ought to be the effect of the time that has elapsed?

5. If the plaintiffs are entitled to what they ask, what ought to be the form of the decree?

1. As to the arrangement of 1801, the facts are simply these. [His Lordship then stated the facts shortly, and continued as follows:]

Had the representatives of the testator not been his surviving partners, their duty would have been to have followed, as closely as possible, the provisions of the deed and the directions of the will; and any settlement they might have come to with the surviving partners would have been binding; but the union of the two characters in the same person rendered any binding settlement extremely difficult. A strict adherence to the provisions of the deed could hardly have been so conducted as to have excluded future investigation and inquiry; but they did not attempt to observe those provisions, or to follow the directions of the will, but assumed to themselves the power and right of selling as executors, and purchasing as partners, the testator's shares in the ships, and in such of the debts and other property belonging to the firm as they were desirous of becoming

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possessed of. But that was not all; for, instead *of setting apart and investing the sum assumed as the purchase-money, as directed by the will, they kept it as a debt due from the new firm, exposing the property of the infants to all the risks of trade. I am clearly of opinion that these transactions of 1801 had no effect whatever in altering the position of the testator's property and interest, and that the rights of his children are to be considered precisely as they would have been if no such transaction had taken place. If any authority were required for this purpose, the language of Lord ELDON, in *Cook* v. *Collingridge*, as quoted by the MASTER OF THE ROLLS (1), would be amply sufficient. Upon the first point, therefore, I entirely concur with the judgment of the MASTER OF THE ROLLS.

[*46]

2. How then does this part of the case stand, treating this attempted settlement as of no effect? John Wedderburn and David Wedderburn, as surviving partners, instead of separating the property of their deceased partner from the property employed in carrying on the business, continue to employ it in their own business. This, according to *Brown* v. *De Tastet* (2), *Crawshay* v. *Collins* (3), *Featherstonhaugh* v. *Fenwick* (4), *Cooke* v. *Collingridge* (5), and other cases, would have subjected them to an account for the profits made thereby; but, as personal representatives, they, instead of realising their testator's property, and investing it according to the directions of the will, employ it in their trade and business. This subjects them, as executors, to account for the profits thereby made; as in *Docker* v. *Somes* (6). In each of the two characters they held, they are subject *to the account decreed against them. Upon this second point, therefore, there is not, I think, any doubt of the propriety of the MASTER OF THE ROLLS' decree. It was, indeed, contended that there was no employment of the testator's capital, the capital of the trade consisting only of debts due; but why were they not called in, but for the interest of the survivors, and what enabled them to give the credit but the capital of the testator?

[*47]

(1) See *ante*, p. 337.
(2) 23 R. R. 59 (Jac. 284).
(3) 10 R. R. 61 (15 Ves. 218); 21 R. R. 168); 1 Jac. & W. 267); 26 R. R. 83 (2 Russ. 325).
(4) 11 R. R. 77 (17 Ves. 298).
(5) 23 R. R. 155 (Jac. 607).
(6) 39 R. R. 317 (2 My. & K. 655).

3. The effect of the deeds executed by the children is next to be considered, and first in date that executed in 1809, by the plaintiff, Sir James Webster Wedderburn. It is, in the first place, to be observed that the appeal is against so much of the decree only as directs accounts to be taken of the transactions of the several partnerships, except that it complains that the decree does not direct that if, in taking the accounts of and relating to the personal estate of the testator and the administration thereof, the Master should find any account stated, he was not to disturb or unravel the same. The direction thus suggested is not, as I conceive, adapted to the facts of this case, in which an account alleged to be a settled account, that is, the account indorsed upon the deed, is put in issue and proved in the cause. It is in such cases for the Court to direct what shall be the effect of such an account, and not to leave that question to the Master. Except as to this point the appeal would appear to be the appeal of the partners in the successive firms, and to complain only of the decree so far as it directed an account of the profits; but the deed of 1809 is not between Sir James Wedderburn and any other as partner in the business. but between him and the late John Wedderburn, as executor of James Webster, whose estate is not in question upon this appeal, and as one of the executors of David Webster, the testator; and that deed takes no notice of any claim the plaintiff *might have against the continuing or [*48] succeeding partners in the business, but deals only with the liability of John Wedderburn as personal representative; nor does it profess to state or settle any account of the personal estate of David Webster, but reciting that the residue of such personal estate, after payment of debts, was considered or supposed to amount to 75,068*l.*, upon the account made up and indorsed on the 31st of May, 1809; and that deducting what had been advanced to Sir James Wedderburn, the balance apparently due to him from the estate of the testator was 11,399*l.*, and reciting that a considerable part of the estate of the testator consisted of his share of a debt due from the estate of James Webster, of which John Wedderburn was executor and beneficial owner—John Wedderburn undertakes to pay this apparent balance by instalments, in consideration of which the

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plaintiff, Sir James Wedderburn, declares himself satisfied with the disclosure thus far made, and accounts thus far given, of the personal estate of David Webster, and of the said principal sum or balance of 11,399*l.* being justly due to him from the same estate under the will of David Webster; and that he, John Wedderburn, making the payments as agreed, he, the plaintiff, would not require payment from him or from the other executor of David Webster of the sums so agreed to be paid to him; but it is expressly provided that the deed and the agreement therein contained shall be understood as applying only to the account and state of things on the 1st of May, 1809, as then accounted for, and as not precluding him from claiming any further part, share, or personal estate, or sum of money, under the will of David Webster, not as yet received, fallen in, or accounted for.

The accounts scheduled are of debts due to and from the firm
[*49] of Webster, Wedderburn & Co. on the 1st of *May, 1801, and speculative calculations as to the amount of Sir James Wedderburn's share in his father's property upon various suppositions. So far as this deed is relied upon as excluding an account of the profits of the trade, or which have arisen from the use of the testator's estate, it would be a sufficient answer that the profits so claimed consist of sums of money not accounted for in the account scheduled to that deed. But in fact that deed is not any settlement of any account, but only provides the means of paying an estimated and speculative balance in a manner most advantageous to the accounting party. That deed therefore cannot, I think, operate as any bar to the account decreed.

The next deed is of the 29th of August, 1812, executed by one of the daughters, Miss Anne Webster. It is in most respects the same as the other; but it contains additional proof that there was no intention of settling any general account of the personal estate, and certainly not of the profits of the trade, because it does contain a release as to a certain sum invested and as to sums expended for the benefit of Miss Anne Webster; but the release is expressly confined to those two objects. There is also indorsed upon this deed an account of receipts and payments on account of the personal estate from 1809 to 1812; and that account may be *primâ facie* evidence of the items it

contained: but it cannot be treated as a binding account, the deed itself providing that it should not preclude any claim in respect of monies or personal estate not accounted for.

The next deed is of the year 1813, and executed by the daughter Mary, afterwards Mrs. Hawkins: it is in all respects similar to the last, and subject, therefore, to the same observations.

[50]

The last, and, in point of form, the most important of these deeds, is that executed by the plaintiff Charles Wedderburn Webster, dated the 13th of September, 1820. It purports to release John Wedderburn and Sir David Wedderburn from all demands on account of the personal estate of the testator David Webster, in the most general terms; and it recites that there had been submitted to him (Charles W. Webster) accounts of the said personal estate, and of all the receipts and payments respecting his expectant share thereof, all which he had examined and approved, and found, upon such examination, that his share of the testator's estate consisted of 29,160*l.* 3 per cents., and certain other sums of money specified; and it recites that he (Charles W. Webster) had attained twenty-one on the 10th of that month; and that this investigation of the accounts had taken place since. No accounts are attached to the deed, or proved in the cause, as being the accounts referred to. The MASTER OF THE ROLLS refers to an account marked No. 11 D, which he supposes to have been the account referred to; but I do not find any evidence of that fact. In the absence of all proof to the contrary, I must assume that the mode adopted upon all the former occasions of stating the account was followed upon this; and that the calculation proceeded upon the statement made in 1809; and if so, it is impossible that such a statement could bind the infant. If there had been any such investigation of the accounts as could have made the release binding, the defendants might have proved it. But though the transaction is impeached, they do nothing but produce the instrument itself; which, upon the face of it, purports to be a release, on the third day after the infant attained twenty-one, of the result of an account extremely complicated in its nature, and of the transactions of very many years, as it must have included the unsettled partnership accounts before the death of the

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*testator in 1801, upon the alleged investigation by the infant within two days, and of which account no evidence is given. It cannot be seriously questioned whether the infant can be bound [*51] by such an instrument under such evidence. It is, indeed, inconsistent with the whole of the case now made by the defendants that any such account should have been rendered as could alone make any settlement binding; the defendants having always disputed the right of the plaintiffs to any investigation of the subsequent transactions of the trade.

It was then argued that this release by Charles Wedderburn Webster, however liable to be impeached, is binding till set aside, and that the bill does not pray any such relief. If this objection should prevail, it would affect the share of Charles only; and if the Court had found itself compelled to yield to the objection, it would not have permitted the real justice of the case to be defeated, but would have enabled Charles Wedderburn Webster to renew his demand in another shape: but although there is some difficulty as to the form in which the case has been brought forward, I do not think that the objection ought to prevail against even the claim of Charles. The bill takes no notice of the deed; but it states that an account was made out of Charles's share, shewing that 13,085*l.* was the sum due to him, and charges that much more was due; and it then states that the defendants set up the settlement of the account and payment of the balance upon Charles's attaining twenty-one, and charges the contrary, and that he and the other children are entitled to other large sums, as would appear if accounts were rendered of the profits. The defendants, by their answer, state the deed, but dispute the claim to an account of the profits to which the deed does not profess to relate. I am of opinion that, under these circum- [*52] stances, the deed *and the settlement which it is alleged to include being in issue, and the latter impeached, it was competent for the Court to decree the relief it found the plaintiff to be entitled to, being of opinion that the title to such relief was not precluded by that deed. The decree might, in terms, have decreed the account, notwithstanding the provisions of that deed; and this would perhaps have been the most correct form, because the deed could not have been wholly set aside without

injustice to the defendants, as it will still be evidence against Charles Wedderburn Webster of the payments therein acknowledged to have been received, though treated as ineffectual for the purpose of precluding the account; and, looking at the pleadings and the decree together, I think that this is, in effect, the result, and that no alteration in the decree upon that point is necessary. I therefore agree with the MASTER OF THE ROLLS upon this point also.

4. If, then, the plaintiffs were originally entitled to the account prayed, and if they had not in fact released such title, are they precluded from asserting it by the time that has elapsed?

The case is one of trust. No presumption of payment or satisfaction or waiver can arise, because the title is in dispute at this moment; and the facts upon which the plaintiffs' title depends were not made known to them; and although the commencement of the transaction is of an early date, and one of the plaintiffs attained twenty-one in 1809, and the youngest in 1820, yet the transactions have never terminated or the accounts been finally closed. This appears from all the accounts rendered, all proceeding upon calculations of uncertain dependencies. No case has, under such circumstances, considered time as precluding the account from the commencement, namely, where the situation *of trustee and cestui que trust has [*53] continued—the transactions between them not closed, and the delay of the claim attributable to the trustee not having given that information to his cestui que trust to which he was entitled, and accounted with him in such manner as the Court is of opinion he ought to have done. This is not the case of an attempt to raise a constructive trust upon transactions closed many years before, but of a direct trust, of which the transactions are not closed.

In *Beaumont* v. *Boultbee* (1) an account was directed in 1800, which would commence in 1760. In *Townsend* v. *Townsend* (2), in *Beckford* v. *Wade* (3), and *Gregory* v. *Gregory* (4), this distinction is taken; and in *Chalmer* v. *Bradley* (5) Sir THOMAS PLUMER not

(1) 5 Ves. 485.
(2) 1 Cox, 28.
(3) 11 R. R. 20 (17 Ves. 87; see p. 97).
(4) 14 R. R. 244 (G. Coop. 201).
(5) 20 R. R. 216 (1 Jac. & W. 51).

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only recognised it, but, forty-five years after the testator's death, directed inquiries, with the view, if they should prove favourable to the claim of the cestui que trust, to afford him some relief. In this case the same necessity for previous inquiry does not exist.

5. The form of the decree only remains to be considered, and upon this point I have felt some difficulty, arising, principally from the impression I have that the testator's shares in the ships must be considered as part of his private property, and not as part of the joint partnership stock, and the doubt, therefore, whether any direction in the decree would meet this part of the case. The MASTER OF THE ROLLS seems to have thought that the purchase of these shares by the executors was not effectually impeached by the bill; and certainly if it shall appear to be for [*54] the interest of the plaintiffs to take the *amount of the valuation of those shares instead of the shares themselves, the defendants, the executors cannot decline so to account; but I do not think that the present is the stage of the cause in which that is to be determined; and I think that the decree, as it stands, will produce all such information as may be necessary to dispose of this question upon further directions; for it directs the Master to take the usual accounts of the personal estate, and he is to be at liberty to state any circumstances specially as he may think fit. The report, therefore, will no doubt bring forward all the necessary information; and as the plaintiffs have not complained of the decree, there might be some difficulty in altering this part of it.

As to the parts of the decree which are subject of the appeal, I think that they are well calculated to do justice between the parties. The account of partnership transactions up to May, 1801, is quite of course, supposing no settlement of that account to be binding upon the plaintiffs; and as the whole case proceeds upon the assumption that the subsequent trade was carried on in part with the testator's capital, which gives to the plaintiffs a right to participate in the profits of it, if it shall appear to be their interest to claim it, the inquiry directed as to the profits made is, I think, a necessary preliminary to any decree, adjudicating in what manner and to what extent the participation of the plaintiffs in such profits ought to be provided for; and the

amount of capital employed in such trade is a necessary part of such inquiry. I consider all these directions and inquiries as preliminary steps only to the final adjudication upon the rights of the parties; and I think that the plaintiffs have made out their title to such inquiries.

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[His Lordship then earnestly recommended the parties to settle the matters in contest between them by private arrangement and compromise, and [55]

Dismissed the appeal with costs.]

CASE *v.* DROSIER (1).

1837. *May* 24.

Rolls Court. Lord LANGDALE, M.R.

On Appeal. 1839. *May* 31. *June* 1. *Dec.* 17.

Lord COTTENHAM, L.C.

(2 Keen, 764—774; S. C. 6 L. J. (N. S.) Ch. 353; 1 Jur. 352; affirmed on appeal, 5 My. & Cr. 246—249; S. C. 3 Jur. 1164.)

The trusts of a term, limited previous to an estate tail, for raising extra portions on the death of a party without issue, was held invalid, as tending to a perpetuity: because, being limited antecedently to the estate tail, it could not be defeated by a recovery.

Two estates were devised to trustees, for 500 years, with remainder, as to one estate, to A. for life, with remainder to his first and other sons, in tail, with remainder to A.'s daughters, equally, in tail general, with remainder to B., for life, with remainder to his first and other sons, in tail, with remainder to his daughters equally, in tail general. The other estate was, *mutatis mutandis*, similarly settled on B. and his issue, with remainder to A. and his issue.

The trusts of the term were declared to be, to raise 2,000*l.* each, for C. and D., "and if A. or B. should depart this life without issue, whereby the survivor of them would become entitled to" the two estates, to raise a further sum of 2,000*l.* a piece, for C. and D.

B. died leaving issue, and afterwards C. died without issue, whereby the two estates centred in the issue of B.: Held, that the trust for raising the further sums of 2,000*l.* did not take effect.

[2 Keen, 764]

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

The testator, Benoni Mallett, by his will, dated the 28th of January, 1780, devised his estates at Middleton and Testerton, to trustees, for a term of 500 years, upon the trusts after declared; and subject thereto, the testator devised his estates at Middleton, in strict settlement, to his grandson Thomas M.

(1) See *Baker* v. *Tucker* (1849) 3 H. L. C. 106; *Sykes* v. *Sykes* (1871) L. R. 13 Eq. 56, 41 L. J. Ch. 25, 25 L. T. 560.

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Case, for life, with remainder to his first and other sons, in tail male, with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to Philip M. Case, for life, with remainder to his first and other sons, in tail male; with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to the testator's right heirs. The testator devised his tenements at Testerton, subject to the term, in a similar manner, to Philip M. Case, for life; with remainder to his first and other sons, in tail male; with remainder to his daughters, equally, as tenants in common, and the heirs of their respective bodies; with remainder to Thomas M. Case, for life; with remainder to his first and other sons, in tail male; with
[*765] remainder to his daughters, *equally, as tenants in common, and the heirs of their respective bodies; with remainder to the testator's right heirs.

The testator declared the trusts of the term of 500 years to be, as to the hereditaments in Middleton, to pay an annuity of 150*l.* a year to Martha Case, and to raise 2,000*l.* each, for his two granddaughters Pleasance Case and Susannah Sarah Case, payable at twenty-one, or marriage; and as to his hereditaments in Testerton, to raise an annuity of 100*l.* for the maintenance of Philip Mallett Case, until he should attain twenty-one; and he declared, "that all the hereditaments had been limited to his trustees for 500 years, upon further trust, that in case either of his grandsons, Thomas Mallett Case and Philip Mallett Case, should depart this life without issue, whereby the survivor of them would become entitled to all the said manors and premises comprised in the said term, as well at Testerton as Middleton, then that his trustees should, in like manner, raise and levy the further sum of 2,000*l.* a piece, for the increase of the portions of his granddaughters, Pleasance Case and Susannah Sarah Case, and pay the same to them at their respective ages of twenty-one, or day of marriage, which should first happen," with benefit of survivorship, in case of the death of either, before both, or either of the said sums of 2,000*l.* should be payable; and with a direction, that the last mentioned legacies of 2,000*l.* and 2,000*l.* should sink, and not be raised,

in case both his granddaughters should die "under age and unmarried."

The testator further directed, that the term of 500 years should determine and be void, upon the full execution of the trusts thereof.

The testator died in 1781, and left all his grandchildren surviving him. The testator's grandson, Thomas M. Case, died in 1800, leaving an only daughter, the defendant Mary, the wife of Thomas Wythe, who became entitled to the Middleton estate. The testator's other grandson, Philip M. Case, died in 1834, without issue, whereby the Testerton estate became likewise vested in Thomas Wythe, in right of his wife Mary Wythe, as tenant in tail, subject to the term of 500 years and the trusts thereof. [766]

Both granddaughters attained their majority. Susannah Case died unmarried, in 1802, and Pleasance Case died in 1821, leaving the plaintiff her only child and administrator.

The plaintiff, by this bill, insisted that, according to the true construction of the will of Benoni Mallett, the two further sums of 2,000*l.*, on the death of Philip Mallett Case without issue, ought to be raised; and, by this bill, he prayed, that the trusts of the term of 500 years might be performed; and that it might be declared, that in the events that had happened, the two sums of 2,000*l.* each, were a charge upon the estates comprised in the term of 500 years; and that the same, with interest, from the 4th of July, 1834, might be raised.

To this bill, Thomas Wythe and Mary his wife filed a general demurrer, for want of equity, which now came on for argument.

Mr. Tinney, *Mr. Pemberton* and *Mr. Gardner*, in support of the demurrer, contended * * that if the words "depart this life without issue," were not limited to the lives of the tenants for life, then the gift of additional portions would be void, for remoteness, being after an indefinite failure of issue: *Bristow* v. *Boothby* (1). * * The present case wants the circumstance, on which *Morse* v. *Lord Ormonde* (2) was decided; namely, a limitation of a term, immediately after the [767] [769]

(1) 25 R. R. 248 (2 Sim. & St. 465). (2) 25 R. R. 85 (1 Russ. 382).

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estates given to the issue; here the term to secure the portions precedes the estate tail. * * Such a term cannot be barred by a recovery suffered by a subsequent tenant in tail: *Eales* v. *Conn* (1); the trust, therefore, cannot be barred, and is void, as tending to a perpetuity. * * *

[770] *Mr. Kindersley*, *Mr. Richards* and *Mr. Heath*, in support of the bill:

[771] * * We do not argue that the words "without issue" mean without issue at the death of the party dying; but that they mean without such issue as would inherit under the prior limitations in the will.

After using the words "without issue," the testator adds explanatory words, shewing what would be the consequence of the failure of such issue; and he, in that way, designates the issue which he intended; he says, that the consequence of the [*772] failure of the issue which he *intended to designate would be, that the survivor of the grandchildren would thereby become entitled to all the manors as well at Testerton as Middleton. It is consequently evident, that he contemplated such a failure of issue, as would have the effect of carrying over the estate to the other branch. Here, then, is the intention expressed, which the VICE-CHANCELLOR looked for in vain in *Bristow* v. *Boothby*. * * *

[773] It is assumed by the other side, that because a term is so limited that it cannot be barred by the tenant in tail, it is void for remoteness; such is not the decision in *Eales* v. *Conn*; nor did the VICE-CHANCELLOR put it on that ground; no authority has been cited to shew, that if the term cannot be barred, that therefore, the charge limited after an estate tail cannot be defeated, or that the term is void.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS:

I must allow this demurrer. As to the intention of the testator, [*774] the doubt is, what he meant, and whether the *additional sums

(1) 33 R. R. 92 (4 Sim. 65).

should be raised so long as any person of the same line remained, or on a general failure of issue. The strong inclination of my opinion is, that he meant such issue as he had described in the former limitations; but, whether so or not, he has directed the sums to be raised on failure of that issue. It might be at a very remote period, and there are no means by which the charges, in this case, could be barred; they depend on a term, and that term is precedent to the estates tail, so that after a recovery, there would remain a term and a trust to be performed; a trust which could not be defeated, and a term which cannot be destroyed. It appears to me, on that ground, that the demurrer must be allowed.

Demurrer allowed.

[The plaintiff appealed from this decision as reported in 5 My. & Cr. 246, but the LORD CHANCELLOR affirmed the decision, saying:]

1839. *Dec.* 17.

After the appellant had concluded his case at the hearing of this appeal, I was so impressed with the impossibility of its being maintained, that I declined hearing the respondent, for the purpose of my considering the case in private. The result of that consideration has been to confirm the opinion I had so formed. The testator first created a term of 500 years, and, subject to that term, devised one estate to his grandson Thomas, for life, remainder to his sons in tail, with remainder to his daughters in tail general, remainder to his grandson Philip, with similar limitations; and he devised another estate in the same manner, only putting Philip before Thomas. And he declared the trusts of the 500 years' term to be that, in case either Thomas or Philip should *depart this life without issue, whereby the survivor of them would become entitled to all his estates comprised in the said term, that his trustees should raise 2,000*l.* for each of his granddaughters, through whom the plaintiff claims. Thomas died, leaving a daughter and Philip surviving, and afterwards Philip died without issue, whereby both estates became united in Thomas's daughter; and the plaintiff's case is that, therefore, the 2,000*l.* became payable. It is clear that the event

[5 My. & Cr. 247]

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upon which that sum was made payable has not happened; for, although Philip has died without issue, there was no survivor of Thomas and Philip to take both estates. To read the word "survivor" as "other" will not alter the case, both the grandsons having only life estates; but the appellant contends that the intention being to make the 2,000*l.* payable upon the union of the two estates, the provision must be considered as applicable to that event, though happening after the death of the grandsons and during the possession of their issue. If so, it must be applicable to the union of the two estates during the possession of remote as well as of immediate issue. Indeed, the dying without issue would mean an indefinite failure of issue, unless confined by the provision that it must happen during the life of the survivor, which restriction this argument excludes; so that the 2,000*l.* would, upon that construction, be payable either upon an indefinite failure of issue generally, or, at least, of the issue male, or issue of daughters who were entitled to take the estates (and I will assume that the latter is the true construction), and the appellant thereupon argues that this is only a legacy charged upon the estate upon the failure of an estate tail, which is not void for remoteness. But why is such a charge not void for remoteness? Merely because, being after an estate tail, it is barrable by recovery, as was the case in *Morse* v. *Lord Ormonde*; but, in this case, the 2,000*l.* is charged *upon or is part of, a term anterior to the estate tail, and therefore not barrable by recovery, but to be enjoyed only upon the failure of the issue male; or of the issue of daughters of one of the grandsons. There is no gift of the 2,000*l.*, except in declaring the trusts of the term, and that term would not be affected by the recovery. *Eales* v. *Conn*, affirmed by the LORD CHANCELLOR in 1831, is a direct authority upon that point, which I have no disposition to disturb. It is also to be observed, that the bill expressly contends that the term and the 2,000*l.* charged upon it are not barrable by a recovery. It makes the defendant pretend that a recovery had been suffered of the estate, first given to Thomas, and then charges that all the interests under the recovery are subject to the term; but if the term and the charge upon it be not barrable by recovery

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then there is no ground for contending that the charge is not too remote.

There is, therefore, no possible construction of the gift of the 2,000*l*., which, in the events which have happened, as stated upon the bill, would support the plaintiff's claim. I am, therefore, of opinion that the demurrer was properly allowed by the MASTER OF THE ROLLS, and that the appeal must be

Dismissed with costs.

IN THE KING'S BENCH.

1836. *May* 9.

[1]

THE GUARDIANS OF THE POOR OF THE CITY OF BRISTOL *v.* WAIT AND OTHERS (1).

(5 Adol. & Ellis, 1—9; S. C. 6 N. & M. 382; 5 L. J. (N. S.) M. C. 133.)

Governors of the poor, hiring a house without their district for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not.

REPLEVIN. The defendants avowed, as overseers of the poor of the parish of St. Philip and St. Jacob, in Gloucestershire, for distresses under justices' warrants, for poor rates stated to be made on the plaintiffs as occupiers of certain premises in that parish, for which they were rateable to the poor. There were [*2] *several avowries for different rates; and one of the avowries set forth part of a statute (1 Will. IV. c. iv., local and personal, public), whereby it was enacted that the plaintiffs might contract for the purchase of certain premises for an asylum for pauper lunatics, and that the same, when so purchased and appropriated, should be subject and liable to such rates as they were then subject and liable to, but should not be assessed to any rates at a higher rate or value than that at which they were at the time of such purchase rated or assessed; that the plaintiffs did purchase and appropriate the premises, and became and were, and from thence hitherto had been, and still were, the occupiers of the same; that the premises were, before the Act, liable to rates; and that the plaintiffs were also occupiers of other premises in the parish: allegation, that certain rates were made on the plaintiffs in respect of their occupation, which, so far as related to the premises purchased under the statute, were not higher than the same were rated at before the purchase: allegation of want of distress, &c. Pleas to each avowry, *de injuriâ* (2). Issue thereon.

On the trial before Alderson, B., at the Gloucestershire

(1) See the principle of this case finally affirmed in *Jones* v. *Mersey Docks Co.* (1865) 11 H. L. C. 443, 35 L. J. M. C. 1.—R. C.

(2) There were other pleas on each avowry, which led to issues in law, all of which were decided in favour of the defendants; see *The Governor, &c. of the Bristol Poor* v. *Wait*, 1 A. & E. 264.

Summer Assizes, 1834, the facts (as stated by the LORD CHIEF JUSTICE in delivering judgment) appeared to be these:

The plaintiffs, being governors of the poor of the city of Bristol, had taken certain property, out of the limits of the city, and within the parish of St. Philip and St. Jacob, for the purpose of putting out their poor, either simply to lodge them, or to employ them at their *discretion. It further appeared that, in some [*3] part of the property (houses and buildings), the poor had been employed in a manufacture, which was stated to have been a losing concern, and, in other parts, had been merely lodged. It further appeared that such property would have been rateable towards the relief of the poor of St. Philip and St. Jacob, unless the kind of occupation in this particular case exempted it.

The counsel for the plaintiffs contended that, this property being rated in each rate, all the rates were bad, inasmuch as, under these circumstances, the defendants were not such occupiers of it as to be rateable to the poor (1). The learned Judge

(1) Several other points were discussed, both at Nisi Prius and in Banc. Among these were, whether the objection to the rates could be taken otherwise than by appeal; whether the rates were formally made, and consistent with the distress warrant; and whether the overseers were properly appointed. Also, it appeared that, until the purchase under the local Act, part of the premises had been in the occupation of officers of the ordnance, for the service of the Crown; and it was contended that these premises were therefore not rateable at the time of the purchase, and consequently, under the terms of the local Act, not afterwards. The parties, on learning the opinion of the Court as to the point mentioned in the text, came to a compromise on the other points. Besides the authorities mentioned above, the following were cited: *Marshall* v. *Pitman*, 35 R. R. 630 (9 Bing. 595); the previous case between the present parties, 1 A. & E. 264; stat. 38 Geo. III. c. 69 (local and personal, public); *Rex* v. *Stubbs*, 1 R. R. 503 (2 T. R. 395); *Weaver* v. *Price*, 37 R. R. 454 (3 B. & Ad. 409; 1 Nol. P. L. 54, 59 (ed. 4th)); *Nichols* v. *Carter*, Cro. Car. 394; *Groenvelt* v. *Burwell*, 1 Ld. Ray. 454; *Milward* v. *Caffin*, 2 W. Bl. 1330; *Durrant* v. *Boys*, 3 R. R. 268 (6 T. R. 580); *Hutchins* v. *Chambers*, 1 Burr. 579; *Rex* v. *Sutton*, 4 M. & S. 532; stat. 17 Geo. II. c. 38, ss. 4, 7; *Rex* v. *The Hull Dock Company*, 3 B. & C. 516; *Rex* v. *Newbury*, 4 T. R. 475; forms in Burn's Justice, Poor (see ed. D'Oyl. & Wil. vol. iv. p. 223, forms (A), (C), (E)); *Rex* v. *Benn*, 6 T. R. 198; *Fawcett* v. *Fowlis*, 7 B. & C. 394; *Bonnell* v. *Beighton*, 5 T. R. 182; *Rex* v. *Morgan*, 2 A. & E. 618, note (*a*) (*S. C.*, as *Rex* v. *The Justices of Buckinghamshire*, 3 N. & M. 68); *Rex* v. *Trecothick*, 41 R. R. 460 (2 A. & E. 405); *Rex* v. *Greame*, 2 A. & E. 615.

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directed a verdict *for the plaintiffs, reserving leave to move to enter a verdict for the defendants. In Michaelmas Term, 1834, *Ludlow*, Serjt. obtained a rule accordingly.

[The case was argued in Hilary Term, 1836.]

[*4] [6] LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was an action of replevin, tried before my brother Alderson, at the Summer Assizes for the county of Gloucester, 1834, when a verdict was found for the plaintiffs, damages 4*l.* 4*s.*, with liberty for the defendants to move to enter a verdict for them, no fact (as is added in the report) having been in dispute.

The motion was made accordingly; and several points of inferior importance were raised before us upon the discussion; but the most material question was, whether the goods, the subject of the action, had been properly levied under a warrant of distress for a poor rate, or, in other words, whether the plaintiffs were the occupiers of rateable property in the parish of St. Philip and St. Jacob in the county of Gloucester, of which the defendants were overseers. (His Lordship then stated the facts.) It, there-

[*7] fore, became a *question, whether the managers of the poor (whether governors, as in this instance, or overseers generally), renting rateable property out of the limits of their district, city, parish, township, or place, are exempt from rateability, because such property is applied solely to the purpose of disposing of their own poor, with which, upon the statement already made, the place in which the property is situated has no concern.

Upon this question we were referred to, and pressed by, the cases well known, and so often referred to, of property held merely for public purposes, as stables taken by the colonel of a regiment merely for the use of that regiment (*Lord Amherst* v. *Lord Sommers* (1)), of property devoted to charitable purposes, as apartments held by the matron of the Philanthropic Society, merely to superintend the children (*Rex* v. *Field* (2)), or the like in the case of the superintendent of St. Luke's (*Rex* v. *Occupiers of St. Luke's Hospital* (3)); in each of which instances there

(1) 1 R. R. 497 (2 T. R. 372).
(2) 5 T. R. 587.
(3) 2 Burr. 1053.

was no occupation, beyond the public purpose in the former, and the charitable in the latter. With respect to which cases, it is enough to say that we accede fully and without reserve to the principle and authority of them all; observing, at the same time, that, so soon as any independent occupation for private advantage is discoverable, rateability immediately attaches. The case of the commanding officer of barracks (*Rex* v. *Terrott* (1)) furnishes a full illustration and confirmation of the latter remark. The absence of "beneficial occupation" was also much insisted upon; and it was contended that that is the true criterion to ascertain whether property be rateable *or not. It is not to be [*8] denied but that this phrase, "beneficial occupation," has been in frequent use; and, generally speaking, it serves tolerably well to convey rather a popular notion, than to give a certain rule for deciding the question of rateability in every instance. Because, if by beneficial be meant profitable, or anything like it, the expression is obviously fallacious: and upon this point all discussion is superfluous, because the case of an unprofitable and losing occupation (expressly so found) of a coal-mine, has been held no exemption from rateability (2), a coal-mine, by the words of stat. 43 Eliz. c. 2, s. 1, being subject to a rate. Without affecting the precision of an exact definition, it would probably be nearer the truth to say, that the presumptive liability arising from occupation is to be explained away in each case. Why is the coachman living in apartments, by permission of his master, not rateable, according to Lord KENYON, in the case of *Rex* v. *Field* (3)? It is his master's occupation. Why were not the matron and the superintendent, in the cases above referred to, rateable for the apartments they occupied? Because, as they had no more than was necessary to carry into effect the object of the establishment, in each instance, to rate them would, in reality, be to rate the charity children in the one case, and the lunatics in the other. It cannot be said that no benefit is derived. By the occupation of the portion of the building in each of the cases alluded to, the expense of a house, or lodging, elsewhere, is saved.

But, moreover, the question here does not arise upon a rate

(1) 7 R. R. 502 (3 East, 506). (5 T. R. 593).
(2) *Rex* v. *Parrot*, 2 R. R. 672 (3) 5 T. R. 592.

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imposed by the managers of the poor of Bristol *upon premises occupied by their own poor, within their own city. On the contrary, the rate in question was imposed by foreign overseers upon property situated in their own parish, and which, in the hands of an ordinary individual, would clearly be rateable to the relief of their poor. How does it concern the overseers and ley payers of the parish of St. Philip and St. Jacob, in what manner any person or persons manage the property taken and held in that parish? Suppose the governors of Bristol to have taken 100 acres of land only, and to have brought such of their paupers as were capable of labour from a poor-house in Bristol, to employ them upon the land, as a beneficial mode, according to their opinion, of disposing of the poor. Suppose, also, that the return, whatever it might be, was applied solely towards the maintenance of the poor who had laboured upon the farm, or of those who were unfit for labour, and had been left behind: how can this constitute a better claim to exemption from rateability in the parish where the property lies than a losing occupation, which, it is quite certain, does not affect the question of liability at all? The same rule must, of course, apply to every species of property.

We are, therefore, upon the whole, of opinion that the buildings so held by the plaintiffs in the parish of St. Philip and St. Jacob were rateable to the relief of the poor of that parish; and that a verdict, according to the leave reserved, should be entered for the defendants.

Verdict to be entered for the defendants.

1836. *June* 6. [61]

HARVEY *v.* GRABHAM AND ANOTHER (1).

(5 Adol. & Ellis, 61—75; S. C. 6 N. & M. 754; 2 H. & W. 146; 5 L. J. (N. S.) K. B. 235.)

In assumpsit, the first count recited an agreement that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c. which should be on the lands when possession was given up to defendant, should be valued to plaintiff by persons named respectively

(1) Referred to and distinguished in judgments in *Sanderson* v. *Graves* (1875) L. R. 10 Ex. 234, 237, 44 L. J. Ex. 210, 214, 215.—R. C.

by plaintiff and defendant, and the amount paid to plaintiff by defendant: that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party, making default in performance, should forfeit 300*l.*: mutual promises to perform the agreement: that defendant entered under the agreement, and took possession of the straw, &c.: that afterwards defendant proposed that the straw, &c., should be valued to plaintiff by D., on the respective behalves of plaintiff and defendant; that plaintiff assented: that the straw, &c., was valued to plaintiff by D.; that plaintiff was ready to grant the lease according to the agreement, but defendant did not pay the amount of the valuation. Second count for goods bargained and sold, and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant; and the proposal and assent that D. should value, only verbal. To the second count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement between plaintiff and defendant, according to which they were to be valued by persons chosen respectively by plaintiff and defendant; and that no such valuation had been made, but only a valuation by D.: that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication, 1, to the plea to the first count, that, by the proposal and assent, and the valuation accordingly made, plaintiff and defendant respectively waived performance of so much of the agreement as related to the valuation, and substituted the valuation by D.: 2, to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed, &c. (as in first count), and plaintiff assented, and D. valued accordingly: by means of which plaintiff and defendant waived &c. (as in the replication to the plea to the first count).

Rejoinder, to replication 1, that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder: Held, that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they appeared by the record not to have done so; and that a part of it could not be verbally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

ASSUMPSIT. The first count stated that whereas heretofore, to wit 6th February, 1834, by a certain agreement between the plaintiff of one part and the defendants *of the other, the plaintiff [*62] agreed to grant unto the defendants, and they agreed to accept and take of the plaintiff, a lease of all that messuage, &c., with the lands, &c., then held by one C., for a term which would expire at Michaelmas then next, at which time, or so soon after as the same should be obtained, defendants were to have and accept the possession

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of the said messuage, &c., and in such state and condition, and under such circumstances, as plaintiff should be bound to receive the same from C., to hold to defendants, their executors, administrators, and assigns, for twenty-one years from &c., at the rent of 500*l.*: such lease to contain all common and usual covenants, and particularly &c. (for rent and repairs): and it was by the said agreement further mutually agreed that the straw, fodder, chaff, and colder, which, at the time of the said C. quitting possession on the termination of his term, should [*63] *remain upon the premises unconsumed by cattle, together with the dung, manure, and compost, made or brought upon the said premises, should be appraised and valued to the plaintiff by such competent persons on the respective behalves of the plaintiff and the defendants as they should respectively appoint, or their umpire, in the usual way; and the amount of such valuation should be then forthwith paid to the plaintiff by the defendants: and it was thereby further mutually agreed, &c. (as to shares of the expenses of the agreement, lease, &c., the lease and counterpart to be prepared by the solicitor for the plaintiff); and that, on the execution of the said intended lease by plaintiff, defendants thereby agreed to accept the same as aforesaid, and to execute a counterpart thereof: and, lastly, that, in default of performance of any or either of the agreements before mentioned, the person or persons so making default should forfeit and pay unto the other or others of them 300*l.* The count then stated that, the said agreement being so made, afterwards, to wit on &c., in consideration thereof, and that &c. (mutual promises to perform the said agreements): and that afterwards, and after the making of the said agreement and promise of the defendants, to wit, 29th September, 1834, the said C. did quit the possession of the said premises, and his term terminated and expired; and that, at the time of the said C. so quitting possession, divers large quantities of straw, &c., remained upon the said premises unconsumed by cattle, together with divers large quantities of dung, &c., which had been made and brought upon the said premises: and that, under and by virtue of the said agreement, the defendants afterwards, to wit on &c., entered into and upon the [*64] said messuage, lands, &c., *and had and accepted the possession

of the same, and became and were possessed thereof for the said term of twenty-one years, and continued so thereof possessed for a long space of time, to wit, from thence hitherto; and the defendants then also took possession of, and had and retained to their own use, the said straw, &c., dung, &c., so then being in and upon the said premises; that afterwards, to wit on &c., defendants proposed to plaintiff that the said straw, &c., dung, &c., should be appraised and valued to plaintiff by one D. C., on the respective behalves of plaintiff and defendants; and, plaintiff having assented to such proposal, the said straw, &c., dung, &c., were afterwards, to wit on &c., by and with the mutual consent and agreement of plaintiff and defendants, appraised and valued to plaintiff by the said D. C., at a large &c., to wit 239*l.* 7*s.*, whereof (notice to defendants); and, although the plaintiff hath always, from the time of making the said first-mentioned agreement hitherto, been ready and willing to grant the defendants such lease as in the said first-mentioned agreement is in that behalf mentioned, and to prepare such lease and a counterpart thereof by such solicitor of him the plaintiff as aforesaid, and hath always hitherto (performance of the first mentioned agreement by plaintiff), yet the defendants, not regarding &c., have not, nor hath either of them, as yet paid to the plaintiff the said 239*l.* 7*s.*, being the amount of the said appraisement and valuation, or any part thereof, although often requested &c.

Second count, *indebitatus assumpsit* for goods and chattels bargained and sold by plaintiff to defendants, and by defendants, under and by virtue of that bargain and sale, had and taken to their own use.

[65]

Plea. And the defendants, by &c., say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the first mentioned agreement, in the first count of the said declaration mentioned, between the plaintiff and the defendants, was in writing, and signed by the plaintiff and defendants respectively, and that the proposal in the declaration alleged to have been made by the defendants to the plaintiff, that is to say, that the said straw, &c., and the said dung, &c., should be appraised and valued to the

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plaintiff by D. C., on the respective behalves of the plaintiff and defendants, and also the alleged assent by the plaintiff to such proposal, were, and such proposal and assent each of them was, by word of mouth only, and not in writing; and this they are ready to verify: wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And, as to the second count of the declaration, the said defendants say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the goods in the second count mentioned consisted of certain straw, &c., and certain dung, &c.; and that the said last-mentioned goods were bargained and sold by the plaintiff to the defendants under and by a certain agreement in writing made between the plaintiff and defendants, to wit, 6th February, 1834, by which said last-mentioned agreement it was mutually agreed between the plaintiff and the defendants that the said last-mentioned goods should be appraised and valued to the plaintiff by such competent persons on the respective behalves of the plaintiff and defendants as they should respectively appoint, or
[*66] the umpire of the *said competent persons, in the usual way, and the amount of such valuation should be then forthwith paid to the plaintiff by the defendants: and the defendants further say that no such valuation or appraisement has hitherto been made, according to the terms of the said last-mentioned written agreement, but that the said last-mentioned goods were valued and appraised, to wit, on &c., at the sum in the second count of the declaration mentioned, by one person only, to wit, the said D. C.; and that the defendants have, since the making of the said last-mentioned agreement, always being ready and willing, and have offered and proposed to the plaintiff, to wit on &c., and on divers others days &c., that the last-mentioned goods should be valued and appraised to the plaintiff according to the terms of the last-mentioned agreement; but that the plaintiff has hitherto wholly refused and declined to agree to the said last-mentioned offer and proposal of the defendants: and this the defendants are ready to verify: wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

Replication. As to the plea first pleaded, *præcludi non*, because he saith that, by means and in consequence of the proposal made by the defendants to the plaintiff, and the assent by the plaintiff to such proposal, as in the first count of the said declaration mentioned, and of the said straw, &c., and the said dung, &c., in that count mentioned, having been so appraised and valued by and with the mutual consent and agreement of the plaintiff and the defendants, as therein also mentioned, the plaintiff and the defendants did respectively waive and dispense with the performance of so much of the said first-mentioned agreement in the said first count mentioned as *related to the [*67] mode of appraising and valuing the said last-mentioned straw, &c., and the said last-mentioned dung, &c., and substitute another and different mode of appraisement and valuation in lieu thereof, to wit, an appraisement and valuation by the said D. C.; and this &c. (Verification.)

And, as to the plea secondly pleaded, *præcludi non*, because he saith that the said goods in the said second count mentioned were bargained and sold by the plaintiff to the defendants under and by virtue of the first-mentioned agreement in the first count mentioned; and that, after the making of that agreement, to wit, 29th September, 1834, the defendants proposed to the plaintiff that the said last-mentioned goods should be appraised and valued to the plaintiff by one person only, to wit, the said D. C., on the respective behalves of the plaintiff and the defendants; and, the plaintiff having assented to such proposal, the said last-mentioned goods were afterwards, to wit on the day and year last aforesaid, by and with the mutual consent and agreement of the plaintiff and the defendants, appraised and valued at a certain sum, to wit the sum in the second count mentioned, by one person only, to wit the said D. C.; and, by means and in consequence of the said last-mentioned proposal and assent, and of the said last-mentioned goods having been so appraised and valued by and with the mutual consent and agreement of the plaintiff and the defendants, the plaintiff and the defendants did respectively waive and dispense with the performance of so much of the said first-mentioned agreement as related to the mode of appraising and valuing the said last-mentioned goods, and

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substitute another and different mode of appraisement and valuation in *lieu thereof, to wit an appraisement and valuation by the said D. C. only: and this &c. (Verification.)

[*68]

Rejoinder. As to the replication to the first plea, that the alleged waiver and dispensation of the performance of so much of the said first-mentioned written agreement as related to the mode of appraising and valuing the said straw, &c., and the said dung, &c., and that the said alleged substitution of the said other and different appraisement and valuation in lieu thereof, in the replication mentioned, were, and such waiver, dispensation and substitution each of them was, by word of mouth only, and not in writing: and this &c. (Verification.)

As to the replication to the second plea, that the first-mentioned agreement in that replication mentioned was in writing, and signed by the plaintiff and defendants; and that the said proposal, in the last-mentioned replication alleged to have been made to the plaintiff, that the said goods in the said replication mentioned should be appraised and valued to the plaintiff by the said D. C., on the respective behalves of the plaintiff and defendants, and also the alleged assent by the plaintiff to such alleged proposal in the last-mentioned replication mentioned, were, and such proposal and assent each of them was, by word of mouth only, and not in writing; and this &c. (Verification.)

General demurrer, and joinder.

The case was argued in Easter Term [and the COURT took time for consideration].

[73]

In this Term (June 6th), Lord DENMAN, Ch. J. delivered the judgment of the COURT (1). After stating the pleadings, his Lordship proceeded as follows:

It was contended for the plaintiff that the first plea was bad, because it professed to be pleaded to the whole declaration, yet contained an answer only to part: but we think that it is plainly pleaded to the first count only, though in an informal manner, which might make it liable to a special demurrer. It is not

(1) Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

however competent to the plaintiff to take this objection on a demurrer to the rejoinder.

The real question raised by the demurrer is, whether the waiver of the mode of valuation is binding, not being in writing.

The original agreement was in writing, and necessarily so, for it related to an interest in lands; and, being an entire agreement, the whole was necessarily in writing: *Chater* v. *Beckett* (1). Now, assuming that it was competent to the parties to waive and abandon *the whole of the first agreement by a subsequent [*74] agreement not in writing (which is however doubted in *Goss* v. *Lord Nugent* (2)), yet here, as in that case, the parties have not waived and abandoned the whole; for it appears by the declaration that the lease is not yet granted; that the original agreement to grant it is still subsisting; and the plaintiff avers his readiness to grant it under that agreement. What has been done is a waiver and abandonment of part only; and, if that part had of itself required writing within the Statute of Frauds, the cases of *Goss* v. *Lord Nugent* (2) and *Earl of Falmouth* v. *Thomas* (3) are express authorities to shew that the waiver would not be binding. Here that part might have been good of itself without writing, by reason of the acceptance which is averred in the first count, though it may be otherwise as to the second count, which is for goods bargained and sold, not sold and delivered: and it is contended that, as it was competent to the parties to have made two contracts, in the first instance,—one in writing as to the lease, the other not in writing as to the straw, manure, &c.,—so it was competent to them afterwards, by agreement not in writing, to separate into two parts the subject-matters of the original agreement, and to substitute a new agreement, not in writing, as to the straw, manure, &c. We think that is not so: but that the agreement, being entire in the first instance, must so continue, and that it cannot be separated or altered otherwise than by writing. If it could, it would follow that, should the present plaintiff hereafter refuse to execute the lease, the present defendants, in suing for such refusal, would be *obliged to state the [*75]

(1) 4 R. R. 418 (7 T. R. 201).
(2) 39 R. R. 392 (5 B. & Ad. 58).
(3) 38 R. R. 584 (1 Cr. & M. 89; 3 Tyr. 26).

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altered agreement as the consideration, and aver a readiness to perform it, and would have to prove their case partly by writing, and partly by oral evidence; the very predicament which the Statute of Frauds was intended to prevent.

It was attempted to be argued that the original agreement was performed, inasmuch as one person named by mutual consent might be considered as "competent persons" respectively appointed by the parties: but we think that this construction cannot reasonably be put on the words of the agreement: neither has the plaintiff attempted so to treat it; for he has, both in his first count, and in his replication to the second plea, expressly alleged a waiver of, and substitution for, and not a compliance with, the original agreement. The judgment must be for the defendants.

Judgment for defendants.

1836. *May* 27.

[147]

TOMLIN *v.* THE MAYOR, JURATS, AND COMMONALTY OF THE TOWN OF FORDWICH.

(5 Adol. & Ellis, 147—152; S. C. 6 N. & M. 594; 2 H. & W. 172; 5 L. J. (N. S.) K. B. 209.)

Defendant agreed to grant, and plaintiff to take, a lease for a specified term of premises belonging to defendant: and the parties covenanted that the conditions should be named by an arbitrator, so that all questions between the parties might be determined; and they covenanted that all questions between them should be submitted to the arbitrator; that they would perform his award; and that either party, who should neglect to perform the award in all things, should pay 500*l.* as liquidated damages.

The arbitrator awarded that defendant should, within a time named, put the premises in good and tenantable repair to the satisfaction of M., and on a later day named execute a lease to the plaintiff, containing a covenant by plaintiff to keep in repair, and that plaintiff should accept a lease on those terms, and execute a counterpart.

Plaintiff declared in covenant, reciting as above, and averring that defendant had not put the premises in good and tenantable repair to the satisfaction of M., or in any other manner, nor executed a lease on the terms &c., or any other lease. Breach, nonpayment of the 500*l.*

On general demurrer, held a bad declaration, the award being bad as to the delegation to M., and that part not separable from the rest of the award.

COVENANT. The declaration stated that plaintiff was possessed for a term of years of a messuage, &c., under a lease from

defendants; that, about the period of the expiration of the lease, divers questions arose between defendants and plaintiff, touching a renewal, and the terms of such renewal; that, by articles of agreement between defendants, under their seal, of the one part, and plaintiff of the other, after reciting that, at a Court holden for the said town, at &c., on &c., it was ordered that a lease of the said house, &c., should be offered to the plaintiff for the term of thirty years, to commence &c., at such rent, and upon such other terms and conditions, as should be named by two indifferent persons, one to be named by defendants, and the other by plaintiff, with power for those two to name a third person in case of difference, and also reciting that plaintiff was willing to accept a lease of the said messuage, &c., for the said term of thirty years, and to accede to the terms of the said therein recited order in other respects, so that all questions and differences between defendants and plaintiff in the premises might *be determined and [*148] ended; it was witnessed that, in order to determine and put an end to all the questions and differences as aforesaid, and to prevent litigation, defendants, for themselves, their successors, and assigns, did thereby covenant, promise, and agree, to and with plaintiff, his heirs, executors, &c., and the said plaintiff did thereby, for himself, his heirs, &c., covenant, promise, and agree, to and with the said defendants, their successors, &c., that the said several questions and differences between the said parties thereto, relating to or concerning the matters aforesaid, should be referred and submitted, and they the defendants and the plaintiff did thereby refer and submit the same, to the judgment, award, arbitrament, final end, and determination of Stephen Elgar and George Moss therein described, or of such third person as they the said S. E. and G. M. should, in case of their disagreement, by writing, &c., appoint: and it was also by the said articles of agreement further witnessed, and covenanted and agreed by the said parties thereto, that the said parties, and each of them, should and would, in all respects, well and truly stand to, obey, abide, perform, fulfil, and keep the arbitrament, final end, and award, or umpirage, of the said S. E. and G. M., or of such third person so to be named as aforesaid; and that, if either of the said parties should neglect or refuse to stand to &c., the

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same arbitrament, &c., in all things, such party should and would, immediately on such neglect or refusal, pay or cause to be paid to the other of the said parties 500*l.* by way of liquidated damages, &c. The declaration then averred that Elgar and Moss took upon themselves the reference, and, on September 9th, 1834, made and published their award, &c., and thereby awarded
[*149] that *defendants should, within two calendar months then next ensuing, at their own costs and charges, put the messuage, &c., in good and tenantable order, repair, and condition, to the satisfaction of James Moyes of &c.; and they further awarded that the defendants should, on or before 11th November then next ensuing, under their common seal, make and execute to the plaintiff, his executors, administrators, and assigns, a good and valid lease of the said messuage, &c. (stating the term for which it was to be demised, and the rent), and they further awarded that in the said lease should be contained the following covenants on the part of the plaintiff, his heirs, executors, &c., viz. to pay the aforesaid rent, &c., to keep the messuage, &c., in good and tenantable repair at all times during the said term, the same having been first put in repair as aforesaid by the defendants, and so to leave the same at the end of the said term, and to insure from fire; with a clause enabling defendants to enter and view, a clause enabling them to enter in default of payment of rent, or of performance of covenants, and a covenant for quiet enjoyment: and Elgar and Moss did further award, &c., plaintiff to accept a lease of the premises under the terms and conditions aforesaid, and to execute a counterpart. The declaration then averred that defendants had notice of the award, but that they, not regarding &c., did not nor would, within two calendar months &c., or at any other time, put the said messuage, &c., or any part thereof, in good and tenantable order, repair, and condition, to the satisfaction of the said James Moyes in the said award mentioned, or in any other manner, but have hitherto wholly neglected and refused so to do; and that, although plaintiff was
[*150] always, *from the time of making the said award, ready and willing to accept a lease according to the award, and to execute a counterpart, nevertheless the defendants, well knowing &c. but not regarding &c., did not nor would, on or before the said 11th

November, or at any other time, make and execute to plaintiff a lease of the said premises for the term, at and under the rent, and subject to the provisoes and covenants, in the said award specified, or any other lease thereof, but have hitherto wholly neglected &c.: by means of which premises defendants became liable to pay the 500*l.* Breach, non-payment.

General demurrer and joinder.

Platt, for the defendants (1):

Assuming that the arbitrators had power to direct the corporation to perform the repairs, the award is not final. It orders that the repairs should be performed, not in any specified way, but to the satisfaction of a third party. This is a delegation of the power of the arbitrators, and therefore, bad: Com. Dig. Arbitrament, (E. 15). It will be said that the 500*l.* was, by the agreement, to be forfeited if either party should refuse to keep the award "in all things;" and that therefore the money becomes due upon the non-performance of so much of the award as is good. But it is clear that the award cannot be separated into independent parts. The lease, the non-execution of which forms the only other breach complained of, is to contain a covenant to repair; and it is impossible to say that this is independent of the state in which the premises were to be put. Neither can the award be supported by rejecting the part which *is bad; for, if so, matters submitted to the arbitrators, of which they had knowledge, will be left undetermined, which will vitiate the award: Com. Dig. Arbitrament (E. 4), (E. 5). [*151]

G. Hayes, contrà:

No direct authority has been cited which shews that the arbitrators could not order the repairs to be carefully performed, the completeness being to be tested by the approbation of a third party. Had they simply directed that the repairs should be completely performed, the completeness, if disputed, must have been tried by a jury; it cannot be said that the award is the less final because it names a single party, to save the recourse to a

(1) Some points were discussed which are not noticed in the report, the decision of the Court not having been founded on them.

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jury. In the instances given in Com. Dig. Arbitrament (E. 15), the authority to make the award itself was delegated or reserved; but here the party named is merely to judge hereafter of the fact, whether the award shall have been performed. Further, the reference to the third party may be rejected altogether, if illegal. The premises are to be put "in good and tenantable order, repair, and condition, to the satisfaction of James Moyes." If all after "condition" be rejected, there will be a perfectly good award. In *Manser* v. *Heaver* (1) an arbitrator directed certain works to be done by one party, and that, if the other party were dissatisfied with the way in which they were done, evidence might be brought before him the arbitrator; and this latter part was held bad, but the rest of the award good. It is true that one part of the complaint is the non-performance of the repairs to the satisfaction of Moyes; but the declaration adds "or in any other manner."

[152] LORD DENMAN, Ch. J.:

The objection is insuperable. We cannot detach the part in question. The only direction as to the repairs is that the premises be put in such good repair as will satisfy the third party. I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other; and each may be varied by the view which he takes of the whole. But here the award is clearly bad.

LITTLEDALE, J.:

The award is clearly bad upon this objection, without reference to the other points raised. The clause in question is of the body and essence of the thing, and cannot be rejected. It is true that a good award might raise a dispute as to the fact of performance, which might come to a jury; but the arbitrators could confer no power on a third party.

PATTESON, J.:

In *Manser* v. *Heaver* (1) the arbitrator directed that the defendants should cleanse out the bed of the stream; but he added,

(1) 37 R. R. 426 (3 B. & Ad. 295).

"as I cannot now tell what will be a sufficient cleansing, the parties, in case of dispute, may come before me;" and this latter part of the award was held to be void, but separable from the preceding. Here I do not see how the award can be satisfied without having recourse to the third party named. It is therefore a delegation.

WILLIAMS, J.:

This was an uncertain way of settling one point in dispute.

Judgment for the defendant.

REX *v.* THE LONDON DOCK COMPANY (1).

1836. *May* 28.

[163]

(5 Adol. & Ellis, 163—180; S. C. 6 N. & M. 390; 2 H. & W. 267; 5 L. J. (N. S.) K. B. 195.)

The London Dock Company were empowered by statute to make a new entrance to their docks, and to purchase houses, lands, &c.; and a jury was to assess (in case of disagreement) the purchase-money to be paid for houses, &c., and the compensation to be made for good-will, improvements, or for any injury to be sustained by any person interested in houses so purchased. By subsequent sections they were empowered to take down all houses, &c., to be purchased by them under the Act, to level the ground, and to stop up all ways on the lands to be purchased (with one exception); to stop or turn any highway interfering with their works, with consent of two justices, &c.; and to provide such sluices, bridges, roads, &c., communicating with the docks and works, as they should from time to time judge necessary. It was then enacted that, if any person having an estate or interest not less than a tenancy from year to year in any houses, lands, &c., should be injured in his said estate or interest by the making of any such cut, sluice, bridge, road, or other work, such person should be compensated by the Company for such injury, the compensation to be assessed by a jury in case of disagreement.

The Company, acting under the statute, pulled down a number of houses, and made a cut which intercepted several thoroughfares, and obliged those who had formerly used them to take circuitous routes. The tenants of a neighbouring public-house demanded compensation for injury to their estate and interest, inasmuch as the pulling down

(1) Referred to with approval in opinions of Lord CHELMSFORD, L. C., and Lord CRANWORTH, in *Ricket* v. *Metr. Ry. Co.* (H. L. 1867) L. R. 2 H. L. 175, 188, 38 L. J. Q. B. 205. But these opinions have been much criticised. See *Metropolitan Board of Works* v. *McCarthy* (1874) L. R. 7 H. L. 243, 43 L. J. C. P. 385; *Caledonian Ry. Co.* v. *Walker's Trustees* (1882) 7 App. Cas. 259; *Ford* v. *Metropolitan and Metropolitan Dist. Ry. Companies* (1886) 17 Q. B. D. 12, 20, 23, 28, 55 L. J. Q. B. 296.—R. C.

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of premises and the obstruction of access had diminished the resort of persons to the house; and also, as the occupiers of the house were cut off from thoroughfares to the house, formerly used; and thereby the value of the premises to sell or let as a public-house or shop, but not as a private residence, was lessened:

Held, that the claimants were not entitled to compensation.

THE Court in this case granted a *mandamus* calling on the London Dock Company to issue a precept to the sheriff of Middlesex to summon a jury for the purpose of assessing compensation to William Hartree and Ann Lammiman under the after-mentioned statute. The Company having made a return (1), the Court (by consent) directed the facts to be stated in a special case. The material parts of the case stated were as follows:

The *mandamus* recited stat. 9 Geo. IV. c. cxvi. (local and personal, public) "to consolidate and amend the several Acts [*164] for making the London Docks." By sect. 2 *of that Act, the London Dock Company, established by stat. 39 & 40 Geo. III. c. 47 (local and personal, public), were confirmed and established as a Company for maintaining, making, and completing the works in this Act mentioned. By sect. 46 they were authorised to make, complete, and maintain in, through, over, across, and upon any lands, tenements, or hereditaments already vested in or belonging to the said Company, or which should become vested in them under that Act, and the streets, roads, &c., situate within the limits thereof, or in, through, &c., any part thereof, according to such plan and in such manner as they should approve of, an additional entrance to and communication with the said docks from the river Thames, at or near Shadwell Dock, with basins, locks, cuts, quays, wharfs, warehouses, &c., and other matters

(1) The return, as originally made, recited sect. 84 of the Dock Act (see p. 389, *post*) as to stopping ways; it then made a short statement of the proceedings complained of, and added, that if the said W. H. and A. L. are injured by the premises, such injury consists only in this, viz., that the neighbourhood has become less populous, &c., and thereby the number of persons passing to the said messuage may have become diminished, and the profits may have become less, &c., but that W. H. and A. L. are not injured, save as aforesaid. On motion to quash the return (January 17th, 1835), it was objected that this form was hypothetical and uncertain; and the COURT (Lord DENMAN, Ch. J., LITTLEDALE and WILLIAMS, JJ.), gave leave to amend. The amended return is that mentioned above.

and things necessary or proper to carry into effect the purposes of that Act.

Sect. 50 empowered the Company to treat for the purchase of houses, lands, tenements, hereditaments, &c., mentioned in a schedule to that Act, and of such terms and estates therein as they should judge proper to be purchased for the purpose of executing their works. Sect. 54 authorised every tenant in fee, tail, for life, or for years, or other owner or proprietor, as also every tenant at will or from year to year, of any houses, lands, &c., comprised in the above schedule, which should be purchased or taken by virtue of that Act, to demand and receive satisfaction from the Company for the loss of the good-will of any trade or business carried on upon the premises, and for tenant's fixtures and improvements, and for any other injury or damage which should be sustained in consequence of the execution of the Act. Sect. 57 enacted that, if any *owners, occupiers, &c., or other [*165] persons seised or possessed of, or interested in any such houses, lands, tenements, or hereditaments, or any share, estate, or interest therein, should not agree with the Company as to purchase-money, compensation, &c., a jury might be summoned by the sheriff on warrant from the Company, and should assess the purchase-money or compensation to be given for the entirety or any share of or interest, &c., in such houses, &c., and also should separately assess the compensation, if any, for good-will, improvements, or any injury or damage whatsoever to be sustained by any corporation or person interested therein.

Sections 83 and 84 authorised the Company to take down all houses, and other erections and buildings which should be purchased or taken by virtue of that Act, and to level and clear the ground whereon the same should stand, and all other the ground to be purchased or taken by virtue of that Act, and to stop up, use, and enclose, or alter, all or any of such streets, roads, lanes, ways, courts, alleys, and passages as were situate and lay within the limits of the lands which should be taken or used under the authority of that Act, and as were comprised in the first schedule to the said Act, save and except that it should not be lawful for the said Company to stop up New Gravel Lane.

REX v. THE LONDON DOCK COMPANY.

Sect. 85 empowered the Company, with the consent of two justices, and of the commissioners of pavements, to alter, turn, stop, divert, widen, improve, or cross any road, street, highway, &c., interfering with their works. Sect. 87 enacted that the Company should and might make, provide, and maintain such sluices, bridges, roads, and other requisites, matters, and things on or leading to, or communicating with, the said docks, basins, [*166] entrances, and *works of the said Company, as they should from time to time judge necessary for the more convenient use of the said docks, basins, and entrances, and of the quays or wharfs and other works appertaining thereto.

Sect. 89. "Provided always, and be it further enacted, that if any person or persons having an estate or interest not less than a tenancy from year to year in any houses, lands, or hereditaments, shall be injured in his, her, or their said estate or interest, by the making of any such cut, sluice, bridge, road, or other work, every such person or persons shall be compensated by the said Company for such injury; and such compensation shall, in case of disagreement, be ascertained by a jury in the manner herein directed for ascertaining the value of premises to be taken by the said Company under the authority and for the purposes of this Act."

William Hartree and Ann Lammiman are the surviving trustees under certain indentures of lease and release (dated the 18th and 19th of April, 1828), of the fee-simple of a public house called "The Wheat-sheaf:" and Ann Lammiman is the occupier and tenant for life of the said public house, and carries on the trade of a victualler therein.

The messuage is included in the first schedule to the Act 9 Geo. IV. c. cxvi., and is situate at the corner of Star Street, and of another street called Lower Turning. Star Street ran to the southward from the premises in question to Wapping Wall. Lower Turning was carried on to the westward, by a street called Milk Yard, to New Gravel Lane; and, to the eastward, (before the making of the works executed under this Act,) by a continua- [*167] tion called Brewhouse Yard (now destroyed), *to another street, forming a further continuation to the eastward, called Lower Shadwell. From the line of streets, comprising Milk Yard,

Lower Turning, and Brewhouse Yard there ran (until the making of the last-mentioned works) four streets to the northward; viz. Farmer Street, Shakspeare's Walk, Great Spring Street, and Fox's Lane, giving access to carriages and horse and foot passengers, by various lines (described in the case and in a plan annexed) from Star Street, and the premises now in question, to New Gravel Lane on the west, and Shadwell High Street on the north. Star Street was a much frequented thoroughfare from Shadwell High Street, southward, to Wapping Wall and the Thames.

The London Dock Company, in pursuance of the last-mentioned Act, purchased lands and a great number of houses and buildings, which they pulled down; and made a new entrance to their docks, consisting of a cut with locks and other works. The cut ran from east to west, to the north of Milk Yard and Lower Turning, and parallel to them (1), passing opposite to the premises now in question. It was enclosed by a paling which ran at the average distance of twenty-two feet from the north side of those premises. The houses forming the north side of Milk Yard and of Lower Turning had been pulled down by the Company, in execution of stat. 39 & 40 Geo. III. c. 47, before 1813: the paling stood in part upon the ground thus left vacant. Two bridges were made over the cut, at New Gravel Lane and Fox's Lane, and at distances (as appeared by the plan) of 300 or 400 feet, east and west of the "Wheat-sheaf."

The consequences of these alterations were stated as follows: [168] That the premises in question were now confined to only one approach from the north by New Gravel Lane; that the Company had, in effect, stopped up Farmer Street, Shakspeare's Walk, and Great Spring Street at their southern extremities, and Lower Turning at the east (those streets being intercepted, at the points mentioned, by the cut and paling); and that, by reason thereof, the occupiers of the premises in question could not pass from Star Street along Shakspeare's Walk, or get into Farmer Street or Great Spring Street, or approach Shadwell

(1) It did not continue in a parallel line to Lower Turning, but made a bend to the south east, so that the paling after-mentioned cut off the line of that street on the eastward.

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High Street through any of those streets, without taking a circuitous route by one of the above-mentioned bridges. And that, in consequence of the pulling down of houses and buildings under the present Act, and the destruction of streets, courts, lanes, and allies, the said Ann Lammiman, as the occupier of the said public house and premises, "lost several customers who were inhabitants of houses so pulled down, and in the habit of frequenting the said public house, and, by reason of such pulling down of houses, the neighbourhood of Star Street is become less populous than it used to be; and, in consequence thereof, and of the stopping up of Farmer Street, Shakspeare's Walk, Great Spring Street, and Lower Turning, as aforesaid, and of the destroying of the said direct thoroughfare through Shakspeare's Walk and Lower Turning, and the indirect thoroughfares from Farmer Street, Great Spring Street, and Fox's Lane to Star Street aforesaid, part of the casual and local custom of the said public house and premises has become lost to the said Ann Lammiman, inasmuch as no passengers from Farmer
[*169] Street, Shakspeare's Walk, Great Spring *Street, and Fox's Lane, can now pass directly into Star Street; and the passengers along Star Street from the neighbourhood to the south of the house in question, towards the neighbourhood to the north of the house in question, and *vice versâ*, have become much less numerous, and by these means the profits of the business carried on by the said Ann Lammiman at the said public house and premises have been diminished, and the good-will of the trade or business lessened in value, and the pecuniary value of the said premises, either to sell or to let as a public house or shop (but not as a private residence), is also less." The works in question were necessary for the purposes of the Act, and had been carefully and properly done.

If the Court should be of opinion that the injuries above-mentioned, or any of them, entitled the owners and occupier of the said public house and premises to compensation under stat. 9 Geo. IV. c. cxvi. s. 89, or any other of the provisions of the said Acts, a peremptory *mandamus* was to issue; otherwise the rule to be discharged. The case was argued in last Easter Term.

Kelly, for the claimants. * * *

Sir F. Pollock, contrà. * * *

Kelly, in reply. * * *

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LORD DENMAN, Ch. J. now delivered the judgment of the COURT (1):

The question raised on this return is, whether the Company, in making certain works authorised by the 9 Geo. IV. c. cxvi., are made liable by the 89th section of that Act to compensate the complainants for the consequential injury resulting therefrom to their property.

Before adverting to the words of the clause, it is proper to state distinctly the injurious consequences alleged to have arisen from the acts of the Company. These are the destruction of neighbourhood by the formation of the basin and cut on ground before covered by houses, and the stopping up of several public thoroughfares, which gave a direct passage to and from and by the house in question. By these acts the case finds that the direct and casual custom of the premises is diminished, and their pecuniary value to sell or to let, as a public house or shop, but not as a private house, is less.

The 89th section is as follows. (His Lordship then read it.)

The question upon these words is, Have the Company, by the making of the cut, sluice, bridge, road, or other work, injured the complainants in their estate or interest in these premises? In the argument for the affirmative, much stress was not laid upon the loss of neighbourhood; indeed, it is clear that the Company, having become the lawful proprietors of the site, had full power to pull down the houses, to keep it uninhabited, or turn it to any use not a nuisance to the public or to individuals, which yet might deprive the tradesman in the vicinity of many advantageous customers. It was conceded also that an injury merely *to the good-will of the premises [*178] as a public house was not, as a substantive injury, within the words of the section; but it was alleged that the stopping up of any public way, by which the owner or occupier, or his customers, local or casual, had the most convenient and direct

(1) Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

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communication with his house, and the compelling them to go by a circuitous, or less convenient route, was an injury to such owner or occupier in his estate and interest in such house; and, that being so, the amounts of the usual resort before and since the act of stopping, might be considered as showing the *quantum* of damage sustained. In support of this argument, the case of *Wilkes* v. *Hungerford Market Company* (1) was relied on.

We see no ground to impeach the authority of that case; but it has no bearing on the present. There the act producing the injury was unauthorised by any statute for the period complained of; it was a public nuisance, which might have been indicted; and that was the difficulty cast upon the plaintiff, to which a sufficient answer was given by shewing that the specific injury of which he complained was one felt by him alone, and beyond the common and public nuisance. Here the act is in its full extent authorised; there is no public nuisance; and, if the injury by loss of trade be put out of the question, there is no private inconvenience sustained beyond the public. It is distinctly stated that it is only "to sell or to let as a public house or shop," in other words, in respect of its good-will, that the pecuniary value of the house is diminished.

We must, however, decide this question on the words of
[*179] *the section, calling in aid of course the other provisions of the Act. And, so considering it, we are of opinion that the case of the complainants is not brought within any reasonable construction of the section. The inconvenience they complain of is not only one common in a greater or less degree to every inhabitant in the neighbourhood, but it is the necessary consequence of the lawful act done by the Company. It was impossible to make the basin and cut, which it was the very object of the statute to enable the Company to make, without destroying the neighbourhood, and stopping up these thoroughfares. This necessary consequence must have been foreseen; and, if it had been intended to give any compensation for it, considering its very large and indefinite extent, it is hardly to be conceived that language should have been used so

(1) 2 Bing. N. C. 281.

hypothetical, and so vague in its meaning, as the language of the eighty-ninth section would be, if extended as the argument of *Mr. Kelly* requires.

But the language of the section is apt, and its hypothetical form proper, if we read it as intended to provide for the contingent and unforeseen, but direct injury, which might or might not be occasioned by some positive act of the Company, as if by their cut, or bridge, or any other work, they had weakened the foundation, darkened the lights, stopped the drains, or done any similar injury to the houses, lands, or hereditaments of any person having an estate or interest not less than a tenancy from year to year, the object of which limitation plainly appears to have been to exclude the vexatious claims likely to be made by persons having no permanent interest, on account of trifling *inconveniences which might be sustained in the progress of the works. [*180]

Upon the whole we are of opinion that the claim cannot be sustained, and that the return to the *mandamus* is sufficient.

Rule discharged.

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1836. *May* 28.

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(5 Adol. & Ellis, 180—190; S. C. 6 N. & M. 575; 2 H. & W. 209; 5 L. J. (N. S.) M. C. 100.)

Neither husband nor wife can be examined for the purpose of proving non-access during marriage.

Nor can either be examined as to any collateral fact, for the purpose of proving non-access. As, that the husband, at a particular time, lived at a distance from his wife, and cohabited with another woman.

ON appeal against an order of two justices, whereby Ann Tickle Soper, spinster, was removed from the parish of Lamerton in the county of Devon to the parish of Sourton in the same county, the Sessions confirmed the order, subject to the opinion of this Court on a case which was stated as follows:

The respondents proved the birth of the pauper, twenty-five years ago, in Sourton, and there rested their case. The appellants called John Tickle, who proved that he had been married to the pauper's mother in Sourton, seven or eight

(1) Compare *The Aylesford Peerage* case (H. L. 1885) 11 App. Cas. 1.—R. C.

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years before the pauper was born; which was further proved by an examined copy of the marriage register: he then proved that he had since gained a settlement by renting a tenement, which he had occupied about twenty-five years, at Clifton. The respondents relied on proving the non-access of Tickle and his wife, and thereby the illegitimacy of the pauper. They called one Soper; and, partly from his evidence, and partly from the cross-examination of John Tickle, the Sessions found the following facts: That the mother's general residence for a year previous to the *birth of the pauper was in Sourton; [*181] that the pauper went by the name of Ann Tickle, though she was called Ann Tickle Soper in the order of removal; that Tickle had removed from Sourton to Clifton (a hundred miles distant) about five years before the pauper's birth; and that his general residence from that period to the present had been at the latter place. It further appeared, from the cross-examination of Tickle, that during his residence at Clifton he had been living in incestuous intercourse with his wife's sister, who had borne him children. The Sessions were satisfied with the proof of non-access, if they were right in admitting the evidence of Tickle, without which they had not sufficient grounds to find the fact of non-access. If that evidence was inadmissible, the order was to be quashed; if it was admissible, the order was to be confirmed.

Praed, in support of the order of Sessions (1):

It has been said that, in a case of disputed legitimacy, the fact of non-access shall not be proved by the husband or wife: but there is no authority to shew that a husband may not prove facts tending to establish non-access. It is not shewn that the witness Tickle did more in this case. The Sessions drew their inference from all the facts brought before them.

(LORD DENMAN, Ch. J.: They do not profess to set out all his statement; and there does not appear to have been any thing from which they could infer the fact of non-access, unless it was distinctly stated in his evidence; for the husband

(1) The argument on this case was begun May 4th, but adjourned.

and wife were within reach of one another *during the time in question (1).) [*182]

Although access (in the sense of sexual intercourse) might be presumed from that circumstance, the Sessions were at liberty to form their conclusion from all the facts. The opinion delivered by the Judges in the *Banbury Peerage* case (2) was that the proof, to refute evidence of access, must be regulated by the same principles which are applicable to the establishment of any other fact; and that it was to be left to the jury, upon such proof, whether or not the husband was the father of the child. In *Goodright* d. *Tompson* v. *Saul* (3) the Court thought that a child born in wedlock might be proved illegitimate by circumstances which fell short of demonstrating that the husband could not have had access. Here, Tickle stated only facts which might lead the Court to the conclusion of non-access; and the question is, whether they were at liberty to attend to anything that he proved. The reason which has been alleged for excluding any evidence of the wife on this subject, namely, that she shall not bastardize her own issue, does not apply to the husband; since the issue, if a bastard, is not his. But the limit of the rule, as to either party, must be, that, where access might, in an ordinary case, be presumed, such party shall not be allowed to state directly that none took place.

(PATTESON, J.: You would have allowed the husband here to say that, during a certain period, he never left Clifton, and the wife to say that, during the same time, *she never went out of Sourton. But that is direct proof of non-access.) [*183]

The general rule must be, that each party may prove facts from which non-access may be presumed; and the Sessions, or jury, may infer it or not as they think proper. It has been decided, where legitimacy was in question, that the reputed husband or wife

(1) *Crowder*, who opposed the order of Sessions, admitted, at a subsequent period of the argument, that the question as to non-access was not put directly to the witness.

(2) 2 Selw. N. P. 749, 750, 8th ed. *Le Marchant's Case of the Barony of Gardner*, Appendix, Note (E), pp. 433—436.

(3) 2 R. R. 409 (4 T. R. 356).

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might, on some points, give evidence for or against it. Either may prove the supposed marriage invalid: *Rex* v. *Bramley* (1), *Standen* v. *Standen* (2); and in the latter case, where, after evidence given by the husband to impeach the marriage, the jury found for the party whose title depended on its validity, Lord THURLOW, who had directed the issue to try that fact, was dissatisfied with the verdict: *Standen* v. *Edwards* (3). Lord MANSFIELD lays it down, in *Goodright* d. *Stevens* v. *Moss* (4), as "a rule, founded in decency, morality, and policy, that" the father and mother "shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." There is no authority, except such as this *dictum* may furnish, for excluding the testimony of the father; and clearly the rule of decency does not prevent either party from proving facts from which non-intercourse may be inferred. In *Rex* v. *Bedel* (5), though it was agreed that the wife ought not to have been allowed to prove the very fact of non-access, it is nowhere laid down that her evidence was not to any extent admissible. In *Rex* v. *Reading* (6) it [*184] was held *that the wife's evidence was not admissible to prove the non-access of her husband, though she might prove an intercourse between herself and another man, such intercourse being a fact within her own particular knowledge, and probably not capable of being established by other evidence. In the same manner Tickle might be admitted in the present case to prove the intercourse between himself and his wife's sister, even though he might not be at liberty to prove that he had no access to his wife.

(PATTESON, J.: The proof of intercourse with the sister shewed merely an access to a woman having no relation to the child whose legitimacy was in question: the connection proved by the wife in *Rex* v. *Reading* (6) was with a man who might have been the father of her child.)

(1) 6 T. R. 330.
(2) 1 Peake, 45.
(3) 1 Ves. Jr. 133.
(4) 2 Cowp. 594.
(5) Ca. temp. Hardw. K. B. 379.
(6) Ca. temp. Hardw. K. B. 79. See Bull. N. P. 113; *Rex* v. *Luffe*, 9 R. R. at p. 408, *n.* (8 East, 196, *n.*).

That was not necessarily the reason for admitting her evidence. The fact proved by her might tend to shew that she was a woman of ill fame, and that the access of her husband at the time in question was therefore less probable.

In *Pendrell* v. *Pendrell* (1), as stated in Bull. N. P. 113, "Lord RAYMOND would not suffer the wife's declaration, that she should not know her husband by sight, &c. to be given in evidence, till after she had been produced on the other side; the fact of the marriage not being disputed, but only the legitimacy. In the same case the CHIEF JUSTICE admitted evidence to be given of the mother's being a woman of ill fame. The declarations of the wife without oath were properly rejected in that case, because they were not the best evidence. The husband was dead, and she might be *examined. Strange says, [*185] that the CHIEF JUSTICE would not allow the wife's declarations to be given in evidence, till she had been called, and denied them on cross-examination. After that they were evidence to impeach her credit. The reason here given, viz., 'because the fact of the marriage was not disputed, but only the legitimacy,' is not mentioned in Strange." In the present instance, Tickle was called to support the *primâ facie* case of legitimacy; then, on cross-examination, certain facts were drawn from him (like the evidence to contradict the woman in *Pendrell* v. *Pendrell* (1)) tending to impugn the legitimacy. He was clearly a good witness to prove the child legitimate, or at least born in wedlock; and, upon his giving such evidence, the respondents were entitled to cross-examine upon it, and could not be prevented from asking (not, perhaps, in direct terms whether he had had access to his wife at a particular time, but) whether he was not, at that time, a hundred miles distant. Suppose, in any other case, a witness were asked a question in the course of examination; could he decline answering it, on the ground that he might be asked something in cross-examination which would tend to bastardize his child by shewing that he was absent when the child was begotten?

(LORD DENMAN, Ch. J.: If the witness were *bonâ fide* called

(1) 2 Stra. 925.

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with a view to some distinct point in the cause, the case might be different; but here it does not appear how the evidence could be relevant, unless with reference to the question of access.)

In the cases where evidence by the wife has been objected to, the objection has been, that the illegitimacy ought not to be established by her testimony alone. In *Rex* v. *Reading* (1) it is said that the wife is not competent "to prove the whole fact;" and the orders of Sessions are held to be faulty, because "the wife is the only evidence to prove the absence and want of access of her husband." So in *Rex* v. *Rook* (2) it is said that a wife "shall not be admitted to prove that her husband had no access, because that may be proved by other persons, and an order of bastardy could not therefore be made upon her oath alone." And in *Goodright* d. *Stevens* v. *Moss* (3) it was held to be quite clear that the mother might be examined as to the time of the birth, though her evidence on that subject tended directly to bastardize the issue: the rule of decency and morality, afterwards laid down, is confined to the fact of connection: collateral circumstances may be proved by either parent. There could not be any objection to Tickle's proving his absence from Sourton at a certain period, though, when coupled with proof as to the birth of the child, it afforded proof of non-access by him at the time when the child was begotten.

[*186]

(PATTESON, J.: It will not be disputed that the parents may bastardize their issue by any evidence except of non-access.)

In *Rex* v. *Luffe* (4), where an order of justices was made concerning a bastard child, born July 13th, 1806, of Mary Taylor, and the order stated that it appeared to the justices, "upon the oath of the said Mary Taylor, as otherwise," that she had not had access to her husband from April, 1804, till June, 1806, this Court held the order maintainable on the supposition that

(1) Ca. temp. Hardw. K. B. 82. See Bull. N. P. 113; *Rex* v. *Luffe*, 9 R. R. 408, *n.* (8 East, 196, *n.*).
(2) 1 Wils. 340.
(3) 2 Cowp. 591.
(4) 9 R. R. 406 (8 East, 193).

Mary Taylor was not the only witness *called, and that she was examined "only as to those facts which she was competent to prove." In the subsequent case of *Rex* v. *Inhabitants of Kea* (1), which may be cited on the other side, it would seem that the wife's evidence (the reception of which was held to vitiate the order of Sessions) went to the very fact of non-access. Here, the whole of Tickle's evidence, as stated in the case, would not, by itself, have demonstrated that fact.

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There is a recognised distinction between evidence proving a fact, and evidence tending to prove it. It was held in *Rex* v. *Inhabitants of Cliviger* (2) that a wife could not give testimony even tending to criminate her husband; but that doctrine was questioned in *Rex* v. *All Saints, Worcester* (3); and in *Rex* v. *Inhabitants of Bathwick* (4) it was held that the tendency to criminate is no objection to the wife's evidence where there is no direct charge or proceeding against the husband. The wife, according to that case, might, on the trial of an appeal, give evidence tending to shew that her husband had been guilty of bigamy; for neither her statement at the Sessions, nor the decision there, could have been received in support of an indictment against him for that crime.

Crowder, contrà, was stopped by the COURT.

LORD DENMAN, Ch. J.:

It is desirable to shew, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule, cited in 2 Starkie on Evidence, p. 139, note (*x*), (2nd ed.), from *Goodright* *d. *Stevens* v. *Moss* (5) (supported also by *Rex* v. *Inhabitants of Kea* (1), cited in the same note), is that parties shall not be permitted after marriage to say that they had no connection. Then, it being clear and indisputable law that, for the purpose of proving non-access, neither husband nor wife can

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(1) 10 R. R. 448 (11 East, 132).

(2) 2 T. R. 263. LITTLEDALE and COLERIDGE, JJ., referred to *Hood's* case, 1 Moody, C. C. 281, and *Smith's* case, *Ibid.* 289.

(3) 6 M. & S. 194.

(4) 36 R. R. 690 (2 B. & Ad. 639).

(5) 2 Cowp. 591.

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be a witness, the question is whether the circumstances of the present case bring it within that rule. I wish the statement sent up to us had been clearer; but it is impossible not to see that the husband, being called for a different purpose, was cross-examined directly for the purpose of proving non-access. It is not necessary to say that, if he had been asked the questions that were put to him with a different object, the answers would not have been evidence: but, when he was asked where he lived at a particular time, with the avowed purpose of proving the fact of non-access, the rule prohibiting such inquiry became applicable. The Sessions have expressly said that they are satisfied with the proof of non-access if they were right in admitting Tickle's evidence, without which it was not sufficiently proved. They have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted and of obvious public utility, they could not receive as evidence from him. The order of Sessions must be quashed.

LITTLEDALE, J.:

I agree in the rule cited in 2 Starkie on Evidence, from *Goodright* d. *Stevens* v. *Moss* (1), that neither the wife nor the husband ought to be admitted to prove non-access. It may be a question whether the rule, as laid down, goes to anything more than the case of a party being put into the witness-box and distinctly asked the question. But I think that it *does [*189] extend farther, and excludes all questions which have a tendency to prove access or non-access. Suppose, in a dispute respecting legitimacy, it were an issue directed by the Court of Chancery, whether the husband and wife had or had not access to each other at such a time: I should say that neither of them could answer any question having a tendency to prove the negative or affirmative of that single issue. Here, the question was as to residence; but the avowed object was to prove non-access. It is not stated that the evidence was material for any other purpose; and the Sessions say that they are satisfied with the proof of non-access if Tickle's evidence was rightly received. I give my opinion on the

(1) 2 Cowp. 591.

ground that the object of the cross-examination was to prove non-access; and I think that the evidence was as much inadmissible as if the question had been put, whether or not the parties had had any connection.

PATTESON, J.:

It is much to be regretted that this case is stated so as to render it difficult to say what the Sessions meant to submit. It seems, however, that they meant to ask, whether the evidence of Tickle was admissible for the particular purpose of proving non-access. For some purposes it was no doubt admissible. In this, as in most settlement cases, there were many issues: on the marriage; on the birth; on Tickle's settlement elsewhere than at Sourton. Upon his examination in chief, he proved that he had rented a tenement at Clifton for twenty-five years. That was legitimate proof by him of a fact in the appellant's case. But then he was cross-examined; and, the question of access being distinctly raised, he was asked questions tending directly to prove the want of access. It is trifling to say that all inquiries *may be made of the witness, close up to the point [*190] of access or non-access, so that, by a variation of terms, the direct question on that subject be avoided. Whether the investigation arise upon an issue out of Chancery, or whether it be raised as it was in the present case, the question as to access is not to be asked at all in examining the husband or wife. If the witness here was not examined with a view to this point, but to one of the other issues in the case,—and something which he stated, and which was relevant to that issue, operated also upon the question of access,—the Sessions ought to have stated that to us.

WILLIAMS, J.:

It would have been desirable that this case should have been sent back to be more fully stated. But from the statement of the Sessions that, without Tickle's evidence, they had not sufficient grounds to find non-access, I conclude that he was examined with the intent of proving that fact by his evidence. And then it results from all the authorities, beginning with

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Rex v. *Reading* (1) (except so far as a doubt is thrown upon it in Mr. Nolan's treatise (2)), that non-access is a fact not to be proved by the husband or wife. As, therefore, Tickle's evidence was received with a view to the proof of that fact, it was inadmissible.

Order of Sessions quashed.

1836. *May* 30.

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WILLIAMS *v.* GIBBS (3).

(5 Adol. & Ellis, 208—212; S. C. 6 N. & M. 788; 2 H. & W. 241.)

In an action brought in an inferior Court, in Wales, upon a *concessit solvere*, though the declaration (according to the usage of such Court) state merely a promise and not a consideration, the plaintiff must prove a consideration arising within the jurisdiction.

It is not sufficient to prove that the defendant promised to pay within the jurisdiction, unless it appear that the promise was made upon an account stated, or other consideration arising, there.

CASE against an attorney for negligence. The declaration stated that plaintiff retained defendant to recover from one David Edward a debt of 39*l*., owing from him to plaintiff for goods sold and delivered; and that defendant did not prosecute the business with proper care and skill, but wrongfully and knowingly commenced an action for the recovery of the said sum in plaintiff's name against D. E., in a certain Court which had no jurisdiction over the said debt or cause of action, viz. the Court of the manor of Gower, the said debt having arisen out of the jurisdiction of the said Court, as defendant well knew; and that such proceedings were thereupon had, that afterwards, to wit &c., in consequence of defendant's negligence, plaintiff was obliged to have, and had, judgment of nonsuit signed against him, and was nonsuited in the said Court, &c. Plea, Not

[*209] guilty (4). On the trial before Williams, J., *at the Glamorganshire Spring Assizes, 1835, it appeared that the former action was upon a *concessit solvere* (5), and was commenced in the

(1) Ca. temp. Hardw. K. B. 79. See Bull. N. P. 113; *Rex* v. *Luffe*, 9 R. R. 408, *n.* (8 East, 196, *n.*).

(2) See 1 Nol. P. L. 334, *n.* (5), (ed. 4), citing *Clerk* v. *Wright*, 1 Bott, 438, pl. 496, 6th ed.

(3) Cited by WILLES, J. in *Mayor of London* v. *Cox* (1867) L. R. 2 H. L. 239, 261, 36 L. J. Ex. 225, 231.—R. C.

(4) There was another plea, denying that plaintiff was nonsuited.

(5) As to which see 1 Wms. Saund. 68, *n.* (2), to *Turbill's* case.

Manor Court of Gower; that the general issue was pleaded; that the cause came on for trial in that Court; that the debt, which the plaintiff came prepared to prove, was upon a score run up for beer at Swansea, out of the jurisdiction of the Manor Court; and that, on the objection being taken that no cause of action could be proved within the jurisdiction, the plaintiff submitted to a nonsuit (1). On the trial of the present cause, a witness was called to shew that the debtor had, within the jurisdiction of the Manor Court, made a promise to pay, of which the plaintiff could have given evidence; and this was admitted on behalf of the plaintiff. The learned Judge, in summing up, stated to the jury (among other observations) that it was clear that the goods on which the debt arose had been furnished out of the jurisdiction, and that the defendant knew it; and he directed them to find for the plaintiff, if they thought that the defendant had been guilty of gross negligence in bringing the action in the Manor Court of Gower under those circumstances, and in not warning the plaintiff of his danger, if the action was brought there by his desire. The jury returned a verdict for the plaintiff, damages 5*l.*; but leave was given to move to enter a nonsuit, upon points taken *during the trial. *Evans*, in the ensuing Term, obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had, on the ground, among others, that no negligence was proved, and that, the promise to pay being laid in the declaration to have been made within the jurisdiction, it was immaterial where the facts took place upon which the promise was founded.

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E. V. Williams and *C. Powell* now shewed cause, and contended that the defendant in this cause was guilty of gross negligence, having commenced the action in a Court where the plaintiff could have no chance of success, inasmuch as, where a

(1) It was a matter of dispute, on the argument of this case, whether or not there was any plea at the time of the trial in the Manor Court; and whether the termination of the cause there was equivalent to a nonsuit. It is unnecessary to state the discussion on these points: the view ultimately taken of them by this Court was, that a plea had been put in, and that the plaintiff had, in effect, been nonsuited in the Manor Court.

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suit is commenced in an inferior Court, not only the promise must have been made, but the cause of action must have arisen, within the jurisdiction: *Peacock* v. *Bell* (1).

John Evans and *Nicholl, contrà:*

It does not appear that there was any negligence. The action was on a *concessit solvere*, in which it is sufficient to allege that the defendant promised to pay. This action, therefore, was well supported by proof of such a promise made within the jurisdiction. In *Emery* v. *Bartlett* (2) the action was brought upon an *insimul computasset;* and the declaration alleged an accounting within the jurisdiction, but not that the sums of money were due there; on which ground error was brought. The Court, however, over-ruled the objection, "because the action was grounded upon the stated account, which was laid to be *stated within the jurisdiction." The promises admitted in the present case were equivalent to an account stated. And the plea of the general issue traverses the fact of the debt arising out of the jurisdiction within the defendant's knowledge: *Thomas* v. *Morgan* (3).

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LORD DENMAN, Ch. J.:

It appears to me that there was clearly a case of negligence. *Emery* v. *Bartlett* (2) is inapplicable. The debt, here, is the consideration for the promise. If, indeed, anything like an agreement to pay the debt, made upon an inspection and settling of the accounts between the parties, had been proved to have taken place, the case would have fallen within the principle of *Emery* v. *Bartlett* (2); for then the consideration for the promise would have been within the jurisdiction. But on *concessit solvere* we cannot infer, from a mere promise, a consideration for that promise within the jurisdiction.

LITTLEDALE, J.:

If two parties meet and settle accounts within a jurisdiction, it is not necessary to shew that any item arose within the jurisdiction: the action being on an account stated, it is enough

(1) 1 Wms. Saund. 73.
(2) 2 Ld. Ray. 1555; 2 Stra. 827.
(3) 4 Dowl. P. C. 223.

if it be stated, and the consequent promise to pay be made, within the jurisdiction. My only doubt has been, whether evidence of a promise to pay was evidence of an account then stated. But a mere promise to pay, such as one man might make to another whom he met in the street, would not be such evidence; though, if two parties were heard talking over the debt, and one of them promising to pay the *other, that might be sufficient evidence for the purpose. If the defendant did not carry his client's case as far as this, he did not bring it within the jurisdiction of the inferior Court.

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PATTESON, J.:

The declaration in *concessit solvere*, in Wales (though I believe it is otherwise in London (1)), is so general that it does not state the consideration: of course, therefore, it will not appear that the consideration arose within the jurisdiction. But there, as elsewhere, there must be some consideration in fact; a promise without consideration would not support the action. The consideration, therefore, must be within the jurisdiction. *Emery* v. *Bartlett* (2) shews no more: there the statement of account was the consideration. To shew, therefore, that the action is maintainable, it must be shewn that the consideration arose within the jurisdiction. That was not proved here; but only a promise. Suppose a man were heard to say "I promise to pay," is that enough? Certainly not: it is a *nudum pactum*, unless he was also heard to say "I owe." The action was therefore not maintainable in the Manor Court of Gower.

WILLIAMS, J.:

If the party, at the time of the promise, had had documents before him shewing the debt, that would have been evidence of an account then stated: but the only evidence of the consideration was, that a debt had accrued in Swansea.

Rule discharged.

(1) See note (2) to *Turbill's* case, 1 Wms. Saund. 68.

(2) 2 Ld. Ray. 1555; 2 Stra. 827.

1836.
June 1.

[250]

REX *v.* THE INHABITANTS OF WISTOW.

(5 Adol. & Ellis, 250—261; S. C. 6 N. & M. 567; 2 H. & W. 95.)

By an Inclosure Act, certain allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should be deemed equal in value severally to one fifth, one seventh, and one eighth of the annual net value of different classes of lands respectively, and a corn rent be assigned to the parson, equivalent to the annual value of the tithes:

Held, that the parson was rateable to the poor in respect of such corn rent.

ON appeal by the Reverend George Mingaye, rector of the parish of Wistow, Huntingdonshire, against a poor rate for the said parish, wherein he was rated for his corn rents or composition for tithes, the Sessions (January, 1835) quashed the rate, subject to the opinion of this Court upon the following case:

Before 1830, the appellant was entitled, in right of his rectory, to the tithes of corn, grain, and hay, and all other great and small tithes arising within the parish of Wistow. On May 3rd, 1830, an Act passed, 11 Geo. IV. and 1 Will. IV. c. 5 (Private), for inclosing lands in the parish of Wistow, and for extinguishing the tithes therein, which Act was to be considered as part of the case.

Sect. 25 enacts that the commissioner for enclosure, by the Act appointed, "shall and he is hereby required, within twelve months next after the passing of this Act, to ascertain and distinguish the yearly value of all the tithes, and of all moduses, compositions, and other *payments (if any) in lieu of tithes, which shall be arising, issuing, or renewing out of and from any of the said lands and grounds in the said parish of W. hereby directed to be divided, allotted, and inclosed, and out of and from all and every the gardens, orchards, and other ancient and inclosed lands and grounds in the said parish of W., and due and payable to the said rector; and in making such valuation the tithes of all such lands and grounds hereby directed to be divided, allotted, and inclosed, and of all the ancient and inclosed lands and grounds, (except the inclosed fen lands and grounds,) as shall be arable, shall be deemed equal in value to one fifth

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part of the annual net value of the said lands and grounds; and the tithes of all such inclosed fen lands and grounds shall be deemed equal in value to one seventh part of the annual net value of such inclosed fen lands and grounds; and the tithes of all other lands and grounds in the said parish shall be deemed equal in value to one eighth part of the annual net value of all such other lands and grounds, after deducting the lands or grounds set out for roads, and the allotments hereinbefore directed to be set out for the purposes of getting stone, chalk, gravel, and other materials; and the said commissioner shall and he is hereby required in the next place," "to ascertain what has been the average price of a bushel (imperial measure) of good marketable wheat in the county of Huntingdon for the period of seven years next before the passing of this Act, and shall in and by his award, or by some previous writing under his hand, and to be annexed thereto, ascertain and distinctly set forth what quantity and how many bushels of such wheat will in his judgment be equal to the annual value of the said tithes; and after *such valuation and ascertainment, the said [*252] commissioner shall and he is hereby required to determine what sum of money will be equivalent to the value of the quantity of wheat so ascertained by him as aforesaid; and such sum of money shall be charged and apportioned by the said commissioner upon such lands and tenements of each and every proprietor, and in such manner as the said commissioner shall think just and equitable; and such sum of money, when so apportioned and charged, shall be issuing out of the lands and tenements which shall be charged therewith by the said commissioner, and shall be paid and payable by the person or persons who for the time being shall be in the occupation of such lands and tenements to the said rector and his successors for ever, (unless the same shall be altered by the ways and means hereinafter mentioned and provided,) by four equal quarterly payments, (that is to say,) on," &c., in "every year, the first payment whereof shall be made on the 25th day of March next after the execution of the said award," or such earlier day as shall be directed by such award, or previous writing, "and the said rent hereinbefore made payable shall be and is hereby declared to be

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in lieu and full satisfaction and discharge of all and all manner of tithes, both great and small, moduses, compositions, and other payments in lieu of tithes, arising, growing, issuing out of, and payable in respect of all the homesteads, gardens, orchards open and common fields, meadows, pastures, commonable lands and waste grounds, ancient inclosed lands and grounds, and all other lands, tenements, and hereditaments whatsoever in the said parish of W. (except Easter offerings, surplice fees, and mortuaries); and from and after the *appointment of the said rent as hereinbefore provided, or at such other time as the said commissioner by any writing under his hand shall fix and appoint, all and all manner of tithes, and all former moduses, compositions, and other payments (if any) in lieu of tithes, within the said parish of Wistow, shall cease, determine, and be for ever extinguished; but in the meantime the said rector and his successors respectively shall be entitled to such tithes as he or they would have been entitled to if this Act had not been passed" (1).

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The commissioner, by writing under his hand and seal, dated October 3rd, 1832, ascertained and set forth the quantity of wheat in his judgment equal to the annual value of the said tithes (the quantity being estimated according to section 25), and determined the sum of money equal to the quantity of such wheat, and thereby charged and apportioned such sum of money upon the lands and tenements of each and every proprietor in the proportions set forth in the schedule to such writing. And he thereby directed and appointed the first quarterly payment of such sums of money or rent to be made on the 25th of December then next, and fixed and appointed that all and all manner of tithes, and all former moduses, *compositions, and other payments, if any, in lieu of tithes, within the said parish, had

(1) Sect. 24 enacts, "that the said commissioner shall allot and award unto and for the rector of the parish of W. aforesaid for the time being, and his successors, such share or proportion of the lands by this Act authorised to be inclosed, divided, and allotted, as shall in the judgment of the said commissioner be a full equivalent and compensation for the uninclosed glebe lands of the said rectory, and for all rights of common belonging to the said rectory in, upon, and over the lands and grounds hereby directed to be divided, allotted, and inclosed."

ceased, determined, and were for ever extinguished, at and from the 29th of September then last past. The commissioner's *general award was signed on the 17th of January, 1833, the previous writing of October 3rd, 1832, being annexed thereto. The appellant has ever since been, and is now, in receipt of the amount of the said corn rent in lieu of his former tithes, and, in October, 1834, was rated to the poor in respect of such corn rent.

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The question for the opinion of the Court was, whether the rector was liable to be rated in respect of such corn rent.

[After argument:]

LORD DENMAN, Ch. J.:

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I am of opinion that the objection to this order is well founded. The value of the tithe may indeed depend upon the meaning of the words used in the statute, "annual net value of the said lands and grounds:" but it does not follow that it will affect the question of rateability, whether the land be valued with or without the deduction of the poor-rate. I do not know whether the Legislature, if they had meant such a deduction to be made, would have estimated the tithe in this proportion. But I think it better to rest the decision on the more general ground, by the adoption of which we may hope to prevent future controversy. The proper principle is to be found in *Rex* v. *Boldero* (1); that, if a sum of money be given to the parson, in lieu of tithes which were rateable, "that money will also be rateable, unless the liability is taken away by express words in the statute." That furnishes a safe rule; and, applying the rule to the present case, the corn rent, not being expressly exempted from liability, is rateable to the poor.

LITTLEDALE, J.:

The question turns on the expression, "annual net value." The poor-rate is to be deducted from the gross value of the land; but the parson's proportion of the net value will be

(1) 28 R. R. 330 (4 B. & C. 467).

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still rateable. Suppose two parties to occupy land of precisely
[*259] *the same quantity and quality, requiring the same expense of cultivation, but the land of the one being tithe free, and that of the other not. In making a poor-rate, the occupier of the tithe free land would be assessed higher than the other; but the same quantity of poor-rate would be obtained from each land, because the tithe would be also rated, which is obtained from the land not tithe free. There the parson has one-tenth of the gross produce which he finds in the field after it has been cultivated; that tenth goes to his stack-yard, and he must pay the poor-rate on it. Here, instead of that tenth, he gets a certain proportion of the net annual value; that is, of the value of the land to the occupier. The occupier has to lay out so much in cultivation, before he gets the produce: this, and the poor-rate which he pays on his titheable land, will be deducted: then the question is, what he gets ultimately of the gross produce; that is, the "annual net value." The parson, therefore, is not rated twice over. In general, net value would be that which is left after deducting, besides the deductions I have mentioned, the tithes also: but that construction cannot be adopted here. The poor-rate, therefore, if the parson be rated for the rent which he receives in lieu of the tenth of the gross produce, will be the same on the farm which is tithe free and on that which is not tithe free; as it ought to be.

PATTESON, J.:

The last case on this question is *Mitchell* v. *Fordham* (1). There the question was, whether the enactment, that the corn rent should be "free from all taxes and other deductions what-
[*260] soever, except the *land tax," exempted it from parochial taxes; and it was held that it did. That was in accordance with *Rex* v. *Boldero* (2), where it was decided that whatever is substituted for tithe shall be rated, unless the liability be taken away by express words. Here it is said that the 25th section does take away the liability, by the words "annual net value of the said lands and grounds." Let us, therefore, consider the effect of the word

(1) 6 B. & C. 274. (2) 28 R. R. 330 (4 B. & C. 467).

"net," as here used. It is connected with the annual value of the land only, not of the tithe. The tithe is to be deemed to bear certain proportions to the annual net values of the several kinds of land. But it is not said that the net tithe is to be deemed to be in those proportions; and, as the Legislature uses the word "net" in one case, and not in the other, I must suppose that different things are meant. Therefore, the fifths, sevenths, and eighths of the annual net value of the respective sorts of land, are made equivalent to the tenth of the gross annual produce of such lands. How far such an estimate is just, I will not discuss. But, if this was not the meaning of the Legislature, the expression should have been "net annual value of the tithes." It is said that the intention of the Legislature was to exclude the risk of collision between the parson and the parishioners. In *Rex* v. *Lacy* (1), BAYLEY, J. places some reliance upon the circumstance that the rector's allotments were not exempted from rate. Here the same argument arises; for the rector has, by sect. 24, an allotment in lieu of the glebe, which is not exempted. In respect of that allotment, therefore, there must be the risk of collision.

WILLIAMS, J.: [261]

The question turns on a certain, and, if you please, an arbitrary mode laid down by the Legislature for ascertaining the value of the tithe. Its yearly value is to be deemed to be in a certain proportion to the annual net value of the lands. If the proportion be too small, that is the fault of the Legislature. Unless there be words expressly shewing that what is received in lieu of the tithe is to be exempt from rate, many cases have decided that the composition is to follow the fate of the tithe. Here there are no such words.

Order of Sessions quashed.

(1) 5 B. & C. 702, 708.

1836.
June 2.

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DOE d. THE BARON AND BARONESS DE RUTZEN *v.* LEWIS.

(5 Adol. & Ellis, 277—291; S. C. 6 N. & M. 764; 2 H. & W. 162; 5 L. J. (N. S.) K. B. 217.)

A lease of lands, &c., by A. to B., contained a general covenant by B. to repair, and a further covenant that A. might give notice to B. of all defects and want of repair, and, if B. did not repair the said defects within two months, A. might enter and do the repairs himself, the expense of which B. was to repay at the time of paying his next rent, and, if he did not do so, A. might distrain on him for the expense, as in case of rent arrear. There was also a power to A. to re-enter upon breach of any covenant. The premises being out of repair, A. gave B. notice to repair within six months, and that, if B. did not repair within that time, he would perform the repairs and charge B. with the expense. The premises were not repaired within the six months. During that time, a negotiation was entered into by A. and B.; and, after the expiration of the six months, A. gave notice to B., that, if he did not agree to certain terms in three days, A. would hold him to the covenants in his lease. B. did not agree:

Held, that A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain on B. for the expense, and the general power to re-enter not being revived by the three days' notice.

Semble, that, where a power of re-entry for breach of covenant is reserved in a lease, and the reversion descends to coparceners at common law, one alone cannot maintain ejectment for breach of the covenant.

EJECTMENT for messuages and lands in Pembrokeshire. The demise was laid on the 19th of November, 1831. On the trial, before Williams, J., at the Brecknockshire Spring Assizes, 1835, the case opened for the plaintiff was that the defendant held of the lessors of the plaintiff, at an annual rent of 71*l.*, as tenant under a lease by which William Knox demised the lands to John Morris for certain lives, and which contained a covenant, on the part of Morris, his heirs, executors, and administrators, to repair, and keep in repair, at all times during the continuance of the demise, the said messuage or tenement, with all and singular the houses, &c., then made and erected, or which at any time during the continuance of the demise should be
[*278] made or erected, upon the demised *premises, &c.; and, at the end or sooner determination of the demise, to yield up the premises in such like good repair, &c.; and that it should be lawful for Knox and his heirs or assigns, &c., at all seasonable times during the continuance of the demise, to enter upon the

premises, there to view the state and condition thereof; "and, upon every such view (if he or they shall think fit), to give or leave notice in writing at the said hereby demised premises, or any part thereof, to and for the said John Morris and his heirs, of all defects and want of reparation then and there found; and, in case he or they shall neglect or refuse to repair the said defects within two calendar months after such notice or warning left or delivered as aforesaid, then it shall and may be lawful to and for the said William Knox and his heirs, or his or their agent, with workmen and labourers, to enter upon the said demised premises, and to do such repairs as he, they, or either of them shall think necessary to be done; and that the said John Morris, or his heirs, shall and will repay to the said William Knox, his heirs and assigns, so much money as shall be expended by him and them for work and materials in doing such repairs, at the time of paying his or their next half-year's rent which shall become due after the said money shall have been so laid out and expended; and, in case the said John Morris or his heirs shall neglect or refuse to pay the same as aforesaid, then it shall and may be lawful to and for the said William Knox, his heirs or assigns, to enter the said premises, and to distrain for the same as in case of rent in arrear. Provided always that, if the said yearly rent of 71*l.*, or any part thereof, or any increase thereof, by breach of any covenant hereinbefore contained, *shall be [*279] behind-hand or unpaid by the space of fifteen days next after any of the said days whereon the same is reserved and made payable (although the same shall not have been demanded)," "or if the said John Morris and his heirs shall not in all things well and truly perform, fulfil, and keep all and every the covenants and agreements on his and their parts to be performed," &c., "then or at any time thenceforth, in every or any of the said cases, it shall and may be lawful" &c. (covenant for re-entry by Knox, his heirs or assigns).

The lease was, according to the plaintiff's case, forfeited by breach of covenant to repair. It was proved that the defendant had stated that he held under the lease formerly held by John Morris, and that he had paid the rent mentioned in the lease, taking receipts expressed to be for rent due to both the lessors of

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the plaintiff; and that one of the lives was still existing. On cross-examination, it appeared that the reversion had been assigned by Knox to Nathaniel Phillips, since deceased, who left two sons and two daughters; that both of the sons had been in possession of the reversion, and had died unmarried; that the Baroness de Rutzen, the lessor of the plaintiff, was one of the daughters, and that the other daughter, the Countess of Lichfield, was still living.

It was further proved that, the premises having become out of repair, the defendant, being then tenant, received from the agent of the lessors of the plaintiff the following notice, directed to him, signed by the agent, and dated 10th July, 1830. "Take notice, that on receipt of this you are required to fulfil all and every the [*280] covenants and agreements contained in your *lease or leases granted to you on the messuage, tenement, and lands, called" &c.; "and that, in case of your neglecting in anywise so to do, all and every building, hedge, &c., will be put in covenanted order and repair for you, and you will be charged with the costs, &c.; or, should there be any further breach of covenant, that it will affect the existence of your lease or leases." The repairs were not performed; and, in November, 1830, the defendant received the following notice, directed to him, signed by the agent, and dated 21st of November, 1830. "As you have not, in pursuance of the notice served on you on the 10th day of July last, repaired the messuage, tenement, and lands, which you hold under the Baron and Baroness de Rutzen, situate in" &c., "I hereby give you further notice to repair the hedges, gates, and fences, on the said premises, on or before the 30th day of December next, and the houses, offices, and other buildings on the said premises, on or before the 31st day of May next; and, in the event of your neglecting to make such repairs at such respective periods as aforesaid, I hereby, on the behalf of the said Baron and Baroness de Rutzen, give you notice that they will cause such respective repairs to be made, and charge you with the expenses of the same, according to the provisions in your lease or leases of the said premises for that purpose contained." Rent was received by the lessors of the plaintiff, from the defendant, which became due Lady Day, 1831;

but no later rent was received. It further appeared that, in December, 1830, a negotiation was entered into between the lessors of the plaintiff and the defendant as to changing the situation of the farm-house and buildings, and re-building them *at the joint expense of both parties in lieu of the expense of [*281] reinstating the premises in their former state. In August, 1831, the Baron de Rutzen gave a paper to the defendant, containing certain proposed terms of agreement on the matters above mentioned, and told him at the same time that, if he did not bring it back signed with three days, all negotiation must be at an end, and the defendant must be prepared to fulfil all the covenants in his lease. The paper was not signed by the defendant; and the present action was commenced in November, 1831.

The defendant's counsel objected, first, that the present lessors of the plaintiff were not entitled to bring ejectment for the breach of the condition of the lease, inasmuch as it appeared that the Baroness de Rutzen was coparcener with the Countess of Lichfield; and, secondly, that the general right of entry for breach of condition had been waived by the lessors of the plaintiff having elected to proceed upon the particular proviso which enabled them to perform the repairs and charge the tenant with the expense. The learned Judge gave leave to the defendant's counsel to move for a nonsuit; and he desired the jury to find for the plaintiff, if they thought that the premises had been suffered to be out of repair, and that the negotiations commenced in December had come to an end before the day of the demise in the declaration. The jury found for the plaintiff. In Easter Term, 1835, *Evans* obtained a rule to shew cause why a nonsuit should not be entered (or a new trial be had upon a point which it is not necessary to notice here).

[After argument]:

LORD DENMAN, Ch. J.: [286]

The lessors of the plaintiff are to shew, in the first place, that they represent the person who made the lease to the party represented by the defendant. Supposing the Baroness de Rutzen and her sister to be coparceners, there is no authority

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cited which shews that a single coparcener may recover in ejectment for breach of a condition. But it is unnecessary to enter into that question: I content myself with saying that no authority has been cited to support the proposition. The lessors of the plaintiff claim a right of entry for breach of condition by non-repair of the premises. The non-repair was proved; but the original lessor had reserved to himself a particular remedy, [*287] in *case of non-repair, by the proviso in the lease which enabled him to perform the repairs himself, and distrain upon the lessee for the amount expended, as so much additional rent. If the reversioner takes upon himself to repair, under a proviso like this, he waives the forfeiture for breach of condition; and this the lessors of the plaintiff have clearly done. They tell the tenant that, in the event of his not repairing, they will themselves repair, and charge him with the expense; and that, in case of further breach, the existence of the lease will be affected. The two months allowed in the lease for the performance of repairs by the tenant expire. No advantage is taken of this; but a second notice is given, which extends the term within which the defendant may perform the repairs, and tells him that, in default of his so performing them, the lessors of the plaintiff will perform them, and charge him with the expense. They put him, therefore, in this situation; that, after the expiration of the time, he will not be justified in repairing. In the mean time, the state of the premises may be growing worse and worse. The defendant has been put out of condition to perform the repairs, the lessors of the plaintiff having told him that, if he did not perform them by a certain time, they would. It does not even appear that he was afterwards told that they called on him to perform them; except that he is informed that, if he does not agree to certain terms in three days, he will be held to his covenant: and that is not a reasonable notice, such as could revive the right already waived. I am, therefore, of opinion that the lessors of the plaintiff, by giving the notice of November, 1830, took into their own hands a remedy incon- [*288] sistent with a right to insist on a forfeiture; and that *there has, consequently, not been any breach of the condition entitling them to recover in ejectment.

LITTLEDALE, J.:

I am entirely of the same opinion. The lease contains, first, a covenant to repair generally; secondly, a power for the reversioner, in case of non-repair, to give notice to repair, and, in case that should not be done for two months, to perform it himself, and distrain upon the tenant for the expense. By giving notice under this latter proviso, the lessors of the plaintiff have waived their right of proceeding under the general power. At the expiration of the notice, they might have entered for the purpose of repairing, and, under that right of entry, might have justified in an action of trespass, and might have charged the tenant with whatever they expended. Having placed themselves in the situation to do all this at any time after the expiration of the notice, they have waived the other right; and, under the proviso to which they have resorted, they have no right of entry, except to repair and distrain for the expense. They cannot enter as for a condition broken. With respect to the other question, I need not enter into it; but I feel very great doubt whether this point also be not against the plaintiff, on the assumption that the Baroness de Rutzen is a co-heiress with her sister. It is true that a condition may be apportioned in some cases, as is laid down in *Dumpor's* case (1), and in Co. Litt. 215 a; where the seventh resolution agrees with the position in *Dumpor's* case (1); "By act in law a condition may be apportioned in the case of a common person; as if a lease for years *be made of two acres, one of the nature of Borough English, [*289] the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken." There seems to be a very good reason for this; for each has an entire estate in the whole. But as to coparceners I doubt. They may join in bringing ejectment: and it seems odd that one alone should be entitled to recover in ejectment for condition broken. But on this I give no positive opinion.

PATTESON, J.:

I entirely agree on the point of waiver. *Roe* d. *Goatly* v. *Paine* (2) is the only case which has been cited, tending to shew

(1) 4 Co. Rep. 120 b. (2) 2 Camp. 520.

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that such provisoes as these are independent, so that ejectment may be maintained on one, though recourse has been had to the other. But there the notice required the party to repair "forthwith;" a circumstance which was relied upon in the comments made upon the case in the judgment of BAYLEY, J. in *Doe* d. *Morecraft* v. *Meux* (1). Certainly he does not say that the party, by proceeding on the special proviso, waives his right to proceed on the general one. But HOLROYD, J. does say so. In the case to which I alluded in the course of the argument, *Doe* d. *Rankin* v. *Brindley* (2), the facts were these. There was a general covenant to repair, but no specific power of re-entry for the breach of that covenant: then there was a proviso for re-entry in case of non-repair within three months after notice, or in case of breach of the other covenants. Notice was given to repair within three months; and ejectment was brought before the [*290] expiration of the three months. On the trial, *by consent of parties, an order of Court was made that a juror should be withdrawn, and the repairs be performed on or before the 24th of June. Afterwards rent accrued, which the landlord accepted: this was before the 24th of June; so that the forfeiture which was afterwards incurred by not repairing on or before the 24th of June, was not waived. The repairs not being performed on that day, ejectment was brought; and the plaintiff had a verdict; and this Court refused a rule for a new trial. It was held that the right of re-entry was, at all events, only suspended. PARKE, J., said that the lessor of the plaintiff had put an end to the first action by consenting to the order of Court. "It was the same as if the parties after the 6th of January (3), and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to the 24th of June: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time." Here the circumstances are otherwise; for the time is not enlarged for

(1) 28 R. R. 426 (4 B. & C. 609).
(2) 4 B. & Ad. 84.
(3) The date of the original notice to repair.

the benefit of the defendant. The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, or, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus has the option given him, and exercises it by not repairing. The relation of landlord and tenant is so far from being put an end to by this transaction, that it is *affirmed, [*291] the tenant being placed in a situation different from that in which he would have been if the general proviso had been insisted upon. On the other point I say nothing.

WILLIAMS, J.:

The landlord was, after the notice, not entitled to take advantage of the general proviso. He had two remedies, which, to a certain degree, were inconsistent. He was to choose which he would have recourse to: he has chosen to insist upon one, and therefore it is not competent to him to insist on the other, the re-entry as for a forfeiture.

Rule absolute.

DOE D. WILLIAM JONES AND WILLIAM DAVIES *v.* GEORGE WILLIAMS AND RICHARD HERBERT (1).

1836. *June* 2.

[291]

(5 Adol. & Ellis, 291—297; S. C. 6 N. & M. 816; 2 H. & W. 213; 5 L. J. (N. S.) K. B. 231.)

D. mortgaged land in fee to J., subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of stat. 3 & 4 Will. IV. c. 27 (1). Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment brought by the heir of J. within five years after the passing of the statute, the jury found that the mortgage money was unpaid: Held, that the ejectment was not barred by sect. 2, D.'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff having, by sect. 15, five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest.

EJECTMENT for messuages and lands in Cardiganshire. The declaration was of Hilary Term, 4 Will. IV. (1834). On the trial

(1) See this case cited in judgments in *Heath* v. *Pugh* (1881) 6 Q. B. D. 345, per Lord SELBORNE, pp. 359, 363, 50 L. J. Q. B. 473, 477, 480; affd. 7 App. Cas. 235.—R. C.

(2) See now the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 9).—A. C.

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before Williams, J., at the Cardigan Spring Assizes, 1835, it appeared that William Davies, the lessor of the plaintiff, was heir-at-law to one John Williams; and that, by indenture of release dated 2nd May, 1765, the premises were mortgaged by the then owner to, and to the use of, John Williams in fee, in consideration of 200*l.* advanced by John Williams, and subject
[*292] to a proviso of cesser upon payment of the *200*l.*, with interest, &c., on the 1st of March, 1786. Evidence was given for the plaintiff that, in May, 1814, the defendant George Williams, who was then in possession of the rents and profits, had offered to give a bond to William Davies for the money secured on the estate, which had not been accepted. Evidence was also given on the part of the defendants to shew that the money had been paid, and the estate reconveyed. The learned Judge directed the jury to find for the plaintiff, unless they were satisfied that the money had been repaid, and a reconveyance had taken place. The jury found for the plaintiff; and his Lordship gave the defendants leave to move to enter a nonsuit, on the ground that the plaintiff was barred, under stat. 3 & 4 Will. IV. c. 27, ss. 2, 3 (1), neither he nor his ancestor having been proved to have been in possession or receipt of the profits within twenty years, and no acknowledgment of the title in writing having been shewn, according to sect. 14, and the mortgagee's right having accrued, at latest, on the default of payment (March, 1786), which was more than twenty years from the commencement of the action. In Easter Term, 1835, *John Wilson* obtained a rule accordingly.

Evans and *E. V. Williams* now shewed cause:

It is admitted that the plaintiff is barred, under the 2nd and 3rd sections of stat. 3 & 4 Will. IV. c. 27, unless he is brought within the protection of other clauses of the statute; and he cannot, under the 14th section, avail himself of any acknowledgment of title not in writing. But the question is, whether there was any
[*293] adverse *possession against the lessors of the plaintiff at the time of passing the Act (24th July, 1833); for, if there was not, they

(1) Stat. 3 & 4 Will. IV. c. 27, received the Royal Assent 24th July, 1833.

have, by the 15th section (1), a right of re-entry for five years from that time; and this ejectment was brought within the five years. The question of adverse possession must be determined by the law as it stood before the Act passed. Now in *Hall* v. *Doe* d. *Surtees* (2) it was held that the fact of the principal being unpaid by the mortgagor to the mortgagee, on the day appointed for payment of the principal, prevented the possession of the mortgagor from being adverse to that of the mortgagee, though no interest was found to have been paid, and though twenty years had elapsed since the day appointed for payment. Here the offer to give the bond shewed that the principal was unsatisfied even at a date within twenty years of the time of the passing of the Act; there was therefore no adverse possession at that time. The mortgagor, at the time of the Act passing, was bailiff to the mortgagee.

John Wilson and *Chilton*, *contrà*:

This is an attempt to evade the provisions of the statute. The mortgagor's title accrued in May, 1765, or at any rate in March, 1786; and no possession, or receipt of the profits, or *written acknowledgment, has ever taken place. The possession, [*294] at the time of passing the Act, was therefore adverse. Even if the parol acknowledgment in 1814 can be set up, there was an adverse possession in July, 1833, though not one of twenty years, and that is sufficient to render the 15th section inapplicable; for that section speaks, not of a possession sufficient to bar an entry, but of a possession adverse at the time of the Act passing. The effect of the 40th section (3) would be also evaded,

(1) Stat. 3 & 4 Will. IV. c. 27, s. 15, enacts, "that when no such acknowledgment as aforesaid" (acknowledgment of title, in writing, according to sect. 14) "shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act."

(2) 24 R. R. 529 (5 B. & Ald. 687).

(3) Sect. 40 enacts that, after 31st December, 1833, "no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien,

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if this action were not barred; for by this ejectment the money might be recovered indirectly. That section must have contemplated the action of ejectment on mortgage; for this is the only way in which money can be recovered on the mortgage itself, that giving no right of action for the money, though the deed generally contains, besides the mortgage, a distinct covenant to pay. In *James* v. *Salter* (1) a devisee of an annuity charged by the devise upon land, who had never received any of the annuity, twenty years having elapsed from the devisor's death, was held not to be barred; but it is clear, from the judgment of TINDAL, [*295] Ch. J., that, if the *third section had not excepted the case of a will, the statute would have been held a bar. That case is, therefore, an authority in the defendant's favour.

(PATTESON, J.: Do you say that the possession was adverse as soon as twenty years had elapsed from the right accruing? Suppose interest had been paid on the mortgage regularly, the plaintiff, according to that construction, would nevertheless be barred.)

The statute excepts the case of a written acknowledgment; and the payment of interest is tantamount.

(PATTESON, J.: If the Legislature meant to except the case of payment of interest, it is very odd that they did not do so in express terms.)

LORD DENMAN, Ch. J.:

It is contended that the plaintiff is barred by the second and third sections of the Act. (His Lordship here read the second

or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." [See now sect. 8 of the Real Property Limitation Act, 1874.—R. C.

(1) 2 Bing. N. C. 505.

and third sections.) The fourteenth section provides that, if a written acknowledgment be given, the right shall be deemed to have first accrued from the time at which it is given. (His Lordship then read the fourteenth section.) Here no written acknowledgment was proved. But then the plaintiff is said to be protected by the fifteenth section. (His Lordship then read the fifteenth section.) Under this clause, the necessity of a written acknowledgment does not arise, if there be no adverse possession at the time of the Act passing, and the action be brought in five years from that time. But then it is said, on behalf of the defendants, that there was an adverse possession at the time of the Act, twenty years having elapsed without payment of interest. It seems to me that that is not so. The possession of the mortgagor is consistent with the right of the mortgagee; *and, therefore, the possession is not adverse at any [*296] assignable period, unless the jury, from renunciation by the mortgagor, or some other circumstances, are induced to find the fact of adverse possession. That argument, therefore, fails; and then there was no necessity to prove a written acknowledgment, and the statute does not bar the plaintiff.

LITTLEDALE, J.:

I think the Act does not prevent the plaintiff from recovering. The question as to the fact of an adverse possession, such as would bring a party within the fifteenth section, must be determined as it would have been if the Act had never passed. The conversation in May, 1814, was an acknowledgment amounting to a distinct recognition of the right of the mortgagee. The possession of the mortgagor therefore could not be adverse. If, at the time of the Act passing, twenty years had not elapsed from a payment of interest, or the making of an acknowledgment, there could not be an adverse possession at that time. That being so, the plaintiff had five years to bring the ejectment. The fortieth section is not applicable: for this action is to recover the land, whereas the fortieth section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it.

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PATTESON, J.:

From the language of the fifteenth section it plainly appears that something or other was, after the Act passed, to be considered as adverse possession, which was not so before the Act passed. For, in that section, it seems to be considered that [*297] the possession, *which, up to the passing of the Act, was not adverse as the law then stood, would, by the operation of the Act, become so on the very day after the Act passed; and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up. What is adverse possession at the time of the Act passing, in the sense of that section, depends therefore upon the law as it stood up to that time. One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge* v. *Bere* (1) such mortgagor is held to be tenant to the mortgagee; sometimes he is said be the bailiff of the mortgagee; and in a late case (2) Lord TENTERDEN said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee; and, therefore, I think that the fifteenth section applies to the present case. How far, under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all (3). If the third section was intended to comprehend the case of a mortgagee, it is very ill penned; and the fortieth section, if meant to apply to actions of ejectment, is still worse penned.

WILLIAMS, J. concurred.

Rule discharged.

(1) 24 R. R. 487 (5 B. & Ald. 604); and see note at the end of the case.

(2) Perhaps *Doe* d. *Roby* v. *Maisey*, 32 R. R. 548 (8 B. & C. 767).

(3) Stat. 7 Will. IV. & 1 Vict. c. 28, regulates the time at which entry may be made or action brought by a mortgagee of land within the definition of stat. 3 & 4 Will. IV. c. 27, s. 1, giving twenty years from the last payment of any part of the principal or interest, though the right of entry may have first accrued more than twenty years back. [And see now the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; and *Sutton* v. *Sutton* (1882), 22 Ch. Div. 511, 52 L. J. Ch. 333; *In re Frisby*, *Allison* v. *Frisby* (1889), 43 Ch. Div. 106, 59 L. J. Ch. 94.—R. C.]

SIR ROBERT CLAYTON, BART. *v.* GREGSON.

1836.
June 2.

[302]

(5 Adol. & Ellis, 302—316; S. C. 6 N. & M. 694.)

Lessees of a coal mine covenanted with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar sense, having reference to the drainage: Held, that evidence was admissible to shew the understanding of the term "level," used as in the above lease, among coal-miners.

It was referred to an arbitrator to receive evidence as to the meaning of the covenant, according to the custom and understanding of miners, and to state a case for the opinion of the Court. He found that the mine was situate within an extensive coal-mining district in the county of Lancaster; and that, "according to the custom and understanding of miners throughout that district," the terms "level," "deeper than," and "below," signified &c.; stating the construction of the terms, which was in favour of the defendant. It did not appear, as to some of the parties to the lease, that they resided within the district, and they were named, in the lease, as of other places.

Held, that the existence of the custom stated, in the district wherein the mine lay, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion; and that the Court could not give judgment for the defendant.

Semble, that they might have done so, if the arbitrator had found the custom of miners without limitation as to a district.

COVENANT on a demise, dated January 1st, 1807, of coal mines and other premises in the townships of Adlington and Blackrod in the county of Lancaster, for twenty-seven years. The declaration set forth a covenant, that the lessees, their executors, &c., "should and would, before the 30th day of December, 1832, get the whole and every part of the said several demised mines, beds, and veins of coal lying in or under the said messuages, tenements, closes, and parcels of land," &c., "therein-before mentioned to be situate, lying, and being in Blackrod aforesaid, and their appurtenances, not deeper than or below the level of the bottom of the said mine, bed, or vein of coal called the Arley mine, under a certain part or point (marked in the plan thereupon *indorsed with the letter A.) of the close in [*303] Blackrod aforesaid, called the Nearer Old Field, in the possession" &c., "and which point or part of the said close is 300 yards from the centre of the Lancaster canal aqueduct over the river

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Douglas, measuring the said 300 yards on the surface of the land, from the centre of the said aqueduct, in a straight line to" &c. And that the lessees should pay, at certain rates per acre (of the measure of eight yards to the rod), for all parts of the mines to be gotten under this covenant, for which no rent should have become payable under the previous reservations, whether such parts should be gotten or not. Breach (5th,) that the lessees did not get, before December 30th, 1832, the whole of the demised mines, &c., under the said messuages, &c., situate in Blackrod, not deeper than or below the level of the bottom of the Arley mine under the said part, &c.; and, on the said 30th of December, divers parts of the said mines, to wit &c., lying not deeper &c., remained ungotten, and for which no rent had become payable under the previous reservations; and thereupon a large sum, to wit &c., according to the above rates per acre, became due to plaintiff, and was in arrear. Plea: That the lessees did, before December 30th, 1832, get the whole of the demised mines, &c., in the indenture mentioned to be situate, &c., not deeper than or below the level, &c. Conclusion to the country, and issue thereon. There was another plea as to this breach, which it is unnecessary to state. The declaration also alleged the breach of a covenant by the lessees to work the demised mines, &c., fairly and orderly, and in a regular and workmanlike manner, and to get and raise all and every the said demised mines fully and clearly before
*304] them, and not *get and work any one or more of them and leave the other or others of them ungotten, but that they should and would, as they should get any one of the said demised mines, get the others and other of them. Issue was joined on this breach.

On the trial before Alderson, J., at the Lancaster Spring Assizes, 1834, it became a question, as to the first-mentioned breach of covenant, what portion of the coal in Blackrod the lessee was bound to get, as lying "not deeper than or below the level" of the bottom of the Arley mine under the point A. For the plaintiff it was contended that the word "level" must have its ordinary sense. The defendant's counsel maintained that, in this contract, the word "level," according to the custom and understanding of miners, had reference to the drainage; and

that every part of the mine which would require to be drained from a point lower than the bottom of the mine under A. was below the level of the bottom there, though it might be above the horizontal plane passing through such part of the bottom. They offered evidence to prove this understanding, but the learned Judge refused to admit it, there being no reference to such custom and understanding in the deed. The value of the coal ungotten, according to the plaintiff's construction, was 22,000*l.*; according to the defendant's, 5,000*l.* A verdict was taken for the plaintiff on the first-mentioned breach of covenant, for 22,000*l.*, subject to be reduced to 5,000*l.*, if the Court should ultimately be of opinion that the evidence offered was receivable, and that its effect was that contended for by the defendant. And it was agreed that the 5,000*l.* should be paid immediately, and costs up to that time; and that the evidence, if held admissible, should be referred to an arbitrator, *on whose report the Court should determine the case, or order a new trial.

[*305]

F. Pollock, in Easter Term, 1834, obtained a rule *nisi* for a reduction of damages or a new trial. In moving, he cited *Smith* v. *Wilson* (1).

Coltman and *Cowling*, in Easter Term, 1835, shewed cause: The evidence offered was not admissible; and the word "level" must be understood in its usual sense. It means the line at which water would stand. The principle on which explanatory evidence is admitted in the case of mercantile contracts (and the rules as to these bear, by analogy, on the present case) is stated by Lord HARDWICKE, in *Baker* v. *Paine* (2), to be, that "they have a style peculiar to themselves, which is short, yet is understood by them; and must be the rule of construction." And in *Blunt* v. *Cumyns* (3) he says of mercantile contracts, that, "where a doubt arises about them, the usage and understanding of merchants is read thereto." But the admission of such evidence has been watched with great jealousy; and Lord ELDON, in *Anderson* v. *Pitcher* (4), said that it was perhaps to be lamented

(1) 37 R. R. 536 (3 B. & Ad. 728).
(2) 1 Ves. Sen. 459.
(3) 2 Ves. Sen. 331.
(4) 5 R. R. 565 (2 Bos. & P. 164).

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(in the case of policies of insurance) that it should have been introduced at all. In *Cross* v. *Eglin* (1), where evidence was offered as to the meaning of "more or less" in a contract for grain, LITTLEDALE, J. said, "With respect to the evidence, I think there is considerable doubt whether it was admissible: it [*306] is true such evidence is often received to *explain mercantile terms; but 'about,' and 'more or less' seem to be words of general import, and I should have much difficulty in saying that evidence ought to be received to ascertain their meaning." In *The Attorney-General* v. *The Cast Plate Glass Company* (2), the Court of Exchequer held that evidence was not admissible to shew what the Legislature meant, in stat. 27 Geo. III. c. 28, by the "squaring" of glass. *Smith* v. *Wilson* (3) was the case of a word denoting number; and it is well known that words of number are often used arbitrarily in trade, as in the instance of "a hundred weight." There could be no doubt in *Smith* v. *Wilson* (3) that, if the word "thousand" had a particular sense, it was used in that sense. Where parol evidence is admitted to explain written documents, it is only on the ground of necessity; per GIBBS, Ch. J. (as to wills) in *Doe* d. *Oxenden* v. *Chichester* (4). Mercantile writings are not to be so explained, unless the Court can see, from the nature of the terms used, that there is something in them which requires such elucidation. In 2 Starkie on Evidence, 566 (5), it is said, as to the interpretation of such writings by extrinsic evidence, that if merchants "use plain and ordinary terms and expressions, to which a natural unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principles so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary." *Mitchell* v. *Baring* (6) confirms this view of the subject. And so, in the [*307] present case, if *the Court see that the words in question are plain and common ones, not obviously having reference to the usages of mining, such as "deeper," "below," and "level," they will not allow a recourse to explanatory evidence.

(1) 36 R. R. 498 (2 B. & Ad. 106).
(2) 3 R. R. 543 (1 Anstr. 39).
(3) 37 R. R. 536 (3 B. & Ad. 728).
(4) 16 R. R. 32 (4 Dow, 65).
(5) 2nd edit.
(6) 34 R. R. 307 (10 B. & C. 4).

(LORD DENMAN, Ch. J.: Some cases in Mr. Starkie's Appendix (1) are against you.

LITTLEDALE, J.: Surely "level" has a technical sense in mining; and, in other instances, it is not strictly confined to the signification of a horizontal surface; as, for instance, when a tract of country is called a "level."

COLERIDGE, J.: Every level in a mine is not horizontal. The adit level drains itself.)

Assuming that the word "level," here, does not of itself suggest a necessity for explanation, there is nothing in the context of the deed of demise, or in the circumstances of the case, to raise an ambiguity. None can arise from the covenant to work the mines fairly and orderly, and without improper preference; that clause is consistent with the words in question if interpreted in the plaintiff's sense, and not otherwise. (Some arguments which followed, on the terms of the deed and facts of the case, are omitted, the decision not having turned on these points.) If it had been intended to speak of a "level" in the defendant's sense, the parties would probably have used the expression "water level," which does occur in another part of the deed (2). So, where an acre different from the statute acre is spoken of, the deed expressly states the measure to be eight yards to the rod.

Sir F. Pollock, with whom were *Wightman* and *Joseph Addison*, *contrà*, was stopped by the COURT. [308]

LORD DENMAN, Ch. J.:

We are all of opinion that the evidence was receivable. The learned Judge who tried the cause does not seem to have had a strong opinion on the subject, but only to have put the question into the most convenient course for ultimate decision. The word

(1) See 2 Starkie on Evidence, Appendix, p. 1076, 2nd edit.

(2) There was a covenant that the lessees would, at the end of the term, leave open and in good order "all the drifts, hollows, water levels, and ranges," which should, during the term, have been made in the demised mines.

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"level" is not in itself a technical word; but it is used in a particular business in such a manner that it may, consistently with its general meaning, have a particular meaning also. It is a term which, in its general use, may have more than one meaning, and, as it is employed here, it clearly has a technical sense, and may properly be explained by evidence.

LITTLEDALE, J.:

I am of the same opinion. The word is like many others in the English language, which may have several meanings.

PATTESON, J.:

The word "level" must be taken *secundum subjectam materiam*. Here, it is a term used in mining, and, as such a term, requires explanation.

COLERIDGE, J., concurred.

The following order was made by consent. That the rule should be enlarged till the tenth day of the next Term, and that in the mean time it should be referred to a barrister (who was to be furnished with the notes of ALDERSON, J.), "to receive evidence of the meaning of the covenant on which the fifth breach was assigned, according to the custom and understanding of *miners, and to state a case for the opinion of the Court, to be turned into a special verdict if desired by either party."

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The arbitrator made an award, or certificate, commencing as follows: "By virtue of a rule" &c., "I, the arbitrator," &c., "having received evidence of the meaning of the covenant on which the fifth breach in the declaration in the said cause is assigned, according to the custom and understanding of miners, find and state as the effect of such evidence, that the coal mines mentioned in the pleadings are situate within an extensive coal mining district in the county of Lancaster. That, according to the custom and understanding of miners throughout that district, a coal level or water level is" &c.: the arbitrator then stated what such level was, and what was "the level of the bottom of a mine," under a given point. In subsequent parts of the award

he stated "that, according to the custom and understanding throughout that district, the terms 'deeper than' and 'below' do not depend upon relative perpendicular depth below the surface, but upon the inclination of the strata, and power of drainage;" and "that, according to such custom and understanding throughout the said district, the covenant on which the said fifth breach is assigned is to be thus construed and understood, and the coals not deeper than or below the level of the bottom of the Arley mine are to be thus ascertained and determined;" and the mode was then explained. In the ensuing Michaelmas Term (November 16th, 1835),

Sir John Campbell, Attorney-General, *Coltman* and *Cowling* stated to the Court that the arbitrator had *made his adjudication [*310] as above stated; and they contended that no special case could be framed upon it, but that the rule for a new trial must be made absolute. It was referred to the arbitrator to find the meaning of the covenant, "according to the custom and understanding of miners;" but he has found it only according to the custom and understanding of miners throughout "an extensive coal-mining district in the county of Lancaster." The award is not according to the power given. If there had been a general custom found, it might be presumed that the parties to this demise had chosen their expressions with reference to it. Here it is not even found that the lessors or lessees resided in the district mentioned; and the indenture itself shews the contrary (1). No case has established that a contract relating to premises may be explained with reference merely to the custom of the country in which the premises lie. In *Smith* v. *Wilson* (2) the "custom of the country" referred to appears to have been that of the country where the contract was made.

(1) The parties to the demise were, "Sir Richard Clayton of Adlington in the county of Lancaster, Baronet, Robert Clayton of The Larches within Wigan in the said county, Esquire, William Clayton of Wigan aforesaid, gentleman, and the Rev. John Clayton, clerk, rector of the parish and parish church of Frome Saint Quintin in the county of Dorset, of the one part; and Richard Worswick, banker, and Samuel Gregson, merchant, both of Lancaster in the said county of Lancaster, and John Wakefield of Kirkby Kendal in the county of Westmoreland, banker, of the other part."

(2) 37 R. R. 536 (3 B. & Ad. 728).

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(COLERIDGE, J.: Parties to such a contract may reside in different countries.)

And, therefore, it ought to be proved that the understanding is a very general one, before evidence of it is received on a question of this kind. In *Gabay* v. *Lloyd* (1) the custom and usage among insurers and underwriters in the habit of subscribing policies [*311] at *Lloyd's coffee-house was relied upon for the defendant as controuling the language of a policy which had been effected there; but the Court held that such usage could not bind the plaintiffs, since it did not appear to be the usage of the whole trade in the city of London, and it was not found that the plaintiffs were in the habit of effecting policies at Lloyd's, or knew of the usage.

(PATTESON, J.: It is not clear whether the arbitrator means that the custom is a general one, or that it prevails in the district, and not elsewhere.)

The statement is not clear; but it seems to be an affirmative pregnant.

Sir F. Pollock, contrà:

This is an attempt to argue the case prematurely. It is enough, for the present, if the finding of the arbitrator presents something upon which the Court may come to a decision when a case is stated. It was referred to him to receive evidence of the meaning of the covenant, according to the custom and understanding of miners, and to state, not that general custom and understanding, but a case, such as he is enabled to state by the evidence before him.

(PATTESON, J.: The objection is, that he has not stated the whole result of the evidence.)

The result is, that a certain custom prevails within the district referred to; what is the custom beyond it does not appear. A jury in the like case would not be bound to say what understanding did or did not prevail out of the district. The defendant is willing to argue the case upon the present finding.

(1) 27 R. R. 486 (3 B. & C. 793).

PATTESON, J. (1):

We cannot pronounce the finding to be such that a special case cannot be stated and *argued upon it, and therefore the rule of Easter Term, 1834, must be further enlarged, in order that the case may be stated. [*312]

WILLIAMS and COLERIDGE, JJ. concurred.

Rule enlarged.

The special case was stated accordingly. It set forth the material parts of the pleadings, the proceedings at the trial, the rules of Easter Term, 1834, and Easter Term, 1835, and the finding of the arbitrator; and it stated the question for the opinion of the Court to be whether the damages were to remain 22,000*l.*, or to be reduced to the 5,000*l.* paid by the defendant, or a new trial to be had. The special case was now argued.

Sir J. Campbell, Attorney-General, for the plaintiff, repeated the objection formerly taken to the finding of the arbitrator, and contended that either the verdict must stand, or a new trial be had (2). The COURT called upon

Sir F. Pollock, contrà:

The plaintiff, on the trial, had not entitled himself to a verdict. It was evident, from the whole contents of the lease, that the word "level," in the covenant in question, could not admit of the plaintiff's construction. (He then discussed the terms of the lease, with reference to this point.) Then *evidence was offered for the defendant to shew that, according to the usage of miners, the words, "below the level" of the bottom of the mine under the point A., related merely to the fact of the mine being drained from points above or below the bottom of the mine at the part mentioned. The evidence being [*313]

(1) Lord Denman, Ch. J. was absent.

(2) LITTLEDALE, J. observed (as shewing that the use of a word in a particular sense throughout one district of Lancashire was not conclusive as to its signification in another) that the word "acre" was used, in different parts of that county, as denoting the statute acre, the acre (commonly called the Cheshire acre) of eight yards to the rod, and an intermediate acre called the Lancashire acre.

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rejected, the COURT, on motion for a new trial, thought it admissible, and referred it to an arbitrator. If there has been any miscarriage before him, there must at least be a new trial; the verdict cannot stand. The direction to him was, to receive evidence of the meaning of the covenant "according to the custom and understanding of miners." He has found that there is an extensive mining district in which the mines in question are situate, and in which the terms in question have the meaning ascribed to them by the defendant. He was not bound to enquire what would be the understanding of the same terms in distant places, as in Scotland or Ireland. He was not in the situation of a person acting on a power which must be strictly pursued; he was put in the place of the Judge and jury at Nisi Prius, and was to shape his enquiry so as to meet the particular view with which the question was submitted to him. It must be taken that he examined those miners whose understanding on the subject would be of importance to the enquiry, and not others. It was not his duty to state that he had no information as to the general usage.

(LORD DENMAN, Ch. J.: Is not his statement, that the custom is such throughout a particular district, an affirmative pregnant, implying that the custom may be different in other districts, which districts may be near or remote?)

In *Smith* v. *Wilson* (1) the proof was that, according to the [*314] custom *"in that part of the country," a hundred dozen rabbits went to the thousand.

(LORD DENMAN, Ch. J.: The jury there had found for the defendant; and it was assumed that they had had evidence upon which their opinion might be formed.)

It was sufficient that the custom appeared to prevail in the district where the farm was. So here, if the arbitrator had expressly found that, in various districts of Lancashire, adjoining each other, there were various customs, and that in one of them, being that in which the mines in question were, the custom was

(1) 37 R. R. 536 (3 B. & Ad. 728).

as it is here stated, the conclusion of law would have been that parties to a lease of land situate there expressed themselves in such lease according to the custom of that district. The only object of the reference to an arbitrator was to fix the meaning of the parties; and it is fixed by the conclusion of law arising from the custom.

LORD DENMAN, Ch. J. (after stating the question submitted in the case):

I am most clearly of opinion that the evidence offered at the trial was fit to be received. I also think it clear that it was matter for the jury, on the whole evidence, whether or not the contract was made with reference to the particular custom alleged; and that the mere fact of the existence of such a custom, in the district in which the mines lie, was not sufficient to establish, as a matter of law, that the meaning of the contract was that insisted upon by the defendant. We cannot, under these circumstances, reduce the damages. It is fit that a jury should say what effect the existence of the custom has upon this contract. The result is that there must be a new trial. If the award had followed the words of the order, that the arbitrator should "receive evidence of the meaning of the covenant on *which the fifth breach was assigned, according to the custom [*315] and understanding of miners," I think his adjudication would have been final; but, as he has considered it his duty to modify his finding, a serious doubt remains. It may be that the lessees, or some of them, resided at places out of the district mentioned, and in which different customs prevail, and they may have had no idea of the understanding in this district: it is, therefore, possible (though perhaps not probable) that they did not mean to contract according to the custom proved. We cannot, however, put ourselves into the situation of a jury as to this question.

LITTLEDALE, J.:

The verdict for 22,000*l.* cannot stand, because the evidence rejected at the trial was admissible. Then as to the award. The order of reference did not confine the enquiry to any one

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part of the country, but directed it to the custom of miners generally, though, no doubt, with an understood application to coal mines. If the arbitrator had followed the words of the order, and found that the word "level" (which is capable of many different meanings) meant, "according to the custom and understanding of miners," so and so, judgment might have been given for the defendant: there would have been a result in law in his favour. But the finding is limited to a particular district; which is as much as to say that the word, which has a particular signification in this district, may mean differently in others: and, if that be so, it cannot follow as an inference of law that in the present contract it was used in the sense pointed out. It ought, therefore, to be shewn as a matter of fact that the parties so used it. Two of the lessees lived at Lancaster, and a third at Kendal; it might, therefore, be a subject of inquiry [*316] whether *they knew of the alleged custom. We are not in a situation to give judgment on the special case; and the matter must go to a jury, in order that the facts may be found more precisely.

PATTESON, J.:

I regret that this case should go to a new trial; but, if we were to give judgment on the special case, and it were then to be turned into a special verdict, it could only be stated in the terms of the arbitrator's finding; and then the verdict would be defective, and there must be a *venire de novo*. It is unfortunate that the rule of Court was so conceived as not to give the arbitrator power to determine the meaning of the covenant, as between these parties, by saying in what sense they used the terms in question. He was only to receive evidence of the custom and understanding of miners. *Sir F. Pollock* says that, the alleged custom being found to prevail in the district in which the mines lie, it is a conclusion of law that the language used by the parties in their contract had reference to that custom; but no decided case goes so far. The existence of such a custom in the district was strong evidence on the point, but did not raise a conclusion of law. If the arbitrator, in his award, had left out the reference to the particular district, the Court would not have had the

difficulty they are now under in disposing of the case; but still it was not in his power to find what was the meaning of the parties. Under the circumstances, there must be a new trial.

WILLIAMS, J. concurred.

Rule absolute for a new trial (1).

REX *v.* JOHN JOHNSON.

1836. *June* 4.

(5 Adol. & Ellis, 340—343; S. C. 6 N. & M. 727; 2 H. & W. 201; 5 L. J. (N. S.) M. C. 129.)

[340]

Overseers' accounts being allowed, and an appeal against them dismissed, the allowance and order of Sessions were brought up by *certiorari*, and an item appeared to be for the expenses of defending an appeal against overseers' accounts. This Court quashed the allowance and order, such an item being bad on the face of it, inasmuch as no supposeable facts could justify it.

IN the accounts of the overseers of Clotton Hoofield, in Cheshire, for the year 1833, 1834, the following item appeared:

		£.	s.	d.
1834. March 25.	Paid Mr. Hostage for preparing for trial, attending Sessions, counsellor, &c., defending the appeal against the overseer's accounts at the Quarter Sessions in July and October	23	11	4

The present accounts having been allowed by two justices, the Sessions, on appeal, confirmed the allowance. The accounts, and the order of Sessions, were brought up by *certiorari*; and *Chandless*, in Easter Term, 1836, obtained a rule to shew cause why the allowance and the order of Sessions should not be quashed.

W. H. Watson now shewed cause(2): [341]

The objections must be confined to matter appearing on the face of the accounts: *Rex* v. *James* (3). Every thing will be intended in their favour. It does not appear to what year the accounts referred to in the item belonged: even if they were the

(1) The cause was afterwards compromised.

(2) Some objections taken to the accounts, and not decided upon by the Court, are not noticed in the report.

(3) 2 M. & S. 321.

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accounts of overseers of a bygone year, there is nothing illegal in the allowance of the item. The overseers are not to be required to defend the parish accounts at their own expense. The parish may reasonably contribute from its fund. In *Rex* v. *Gwyer* (1) TAUNTON, J. says, "although the charges may have been reasonable, still, if the Court sees that they were not necessarily connected with the fulfilment by these parties of their office as overseers, they cannot be allowed;" and he cites Wilcock on the Laws, &c., of the Poor, where it is said (2) that the overseers are entitled to charge the costs of an appeal, though decided against them, unless they have been guilty of gross misconduct, or neglected to consult the vestry as to the propriety of proceeding.

Sir W. W. Follett and *Chandless*, *contrà*:

The passage cited states only that the overseers "are entitled to charge in their accounts whatever they have spent for the parish." This item relates, not to the parish, but to the overseers personally.

(PATTESON, J.: Might not the parish be interested?)

They might against the allowance, but not in its favour. The *342] overseer is to account *between himself and the parish. His remedy, if his accounts be improperly appealed against, is in the allowance of costs by the justices.

(LORD DENMAN, Ch. J.: Suppose the vestry had directed an overseer to incur a particular head of expense, and had engaged to indemnify him; and the Sessions, on appeal, were to allow it, but were to refuse costs, on the ground, for instance, of the question being new.)

In *Rex* v. *Gwyer* (3) the items disallowed had been actually authorised by the vestry

LORD DENMAN, Ch. J.:

I suggested the strongest case which I could conceive. But we think that even such a case would not justify the allowance

(1) 41 R. R. 426 (2 A. & E. 226). See, as to surveyors' accounts, the remarks of the Court during the argument in *Rex* v. *Fowler*, 1 A. & E. 836.
(2) P. 281.
(3) 41 R. R. 422 (2 A. & E. 216).

of this item. An overseer must take his chance of being repaid in the regular way; and the vestry cannot bind the parish to an extent not authorised by the Legislature. The overseer must perform the duty imposed upon him, and must take the consequences of acts done by him in his public character. The allowance or disallowance of his accounts is a matter entirely between him personally and the parish. The item cannot be allowed.

LITTLEDALE, J.:

The objection arises on the face of the accounts. If any supposition could be made justifying the allowance of this item, we would allow it. The strongest case put is that the vestry might have ordered the particular expenditure. Then the accounts having been objected to, an appeal against them is discharged, and no costs appear to have been given to the respondent. It is said that, upon such a state of things, the vestry should indemnify the overseer, and the parish make the payment. But, if the justices do not give *costs, we cannot [*343] allow the item by way of indemnity: the justices must exercise a discretion whether costs are to be allowed or not; and the overseer is confined to that remedy.

PATTESON, J.:

We should be bound to allow this item if any case could be supposed in which it was legal. But, if the whole vestry had assembled, and had directed the expenditure, and the present appellant himself had been there, and had assented,—which is a violent supposition,—still we cannot say that such an item should be allowed.

WILLIAMS, J.:

I can suggest no supposition of facts which would legalise such a payment.

Rule absolute.

1836.
June 6.

[350]

DOE D. WILLIAMS AND AYRANE *v.* SMITH (1).

(5 Adol. & Ellis, 350 — 353; S. C. 6 N. & M. 829; 2 H. & W. 176; 5 L. J. (N. S.) K. B. 216.)

Land and buildings were held by a yearly tenant, the land from 2nd February to 2nd February, the buildings from 1st May to 1st May. The landlord, on 22nd October, 1833, served him with a notice to quit the land and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice."

Held that, as to the lands, the notice was to be considered a notice to quit on 2nd February, 1835; and that the landlord might recover both land and buildings after that day, in ejectment.

EJECTMENT for messuages and lands in Denbighshire. The demises were laid on 4th February, 1835. On the trial before Bolland, B., at the Denbighshire Spring Assizes, 1835, it appeared that the defendant had been in possession of the premises, as tenant to Ayrane, the lessor of the plaintiff, under a demise of the lands from some day in May, 1832, to 2nd February, 1833, and of the buildings from May, 1832, to 1st May, 1833: and that he held on, after February and May, 1833, without any express contract. On 22nd October, 1833, Ayrane served the defendant with the following notice: "To Mr. Francis Smith. Take notice that you are to quit and deliver up to me, the undersigned, Henry Owen Ayrane, the possession of all that messuage or dwelling-house and tenement, with the outbuildings and lands thereunto belonging, now in your holding, situate" &c., "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice, whereof you have this notice, the 21st October, 1833.—H. O. AYRANE." It was objected, on the part of the plaintiff, that the notice was insufficient, because it referred to the *present* year's holding, which would expire in February, 1834, less than six months after the notice was served. The learned Judge *gave leave to move to enter a nonsuit. Verdict for the plaintiff.

[*351]

(1) *Doe* d. *Kindersley* v. *Hughes* (1840) 7 M. & W. 139. As to length of notice, see now the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 33. —R. C.

In Easter Term, 1835, *R. V. Richards* obtained a rule according to the leave reserved.

John Jervis now shewed cause:

If the words of the notice had merely been "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding shall expire," it might perhaps have been insufficient; for the tenant was certainly entitled to hold on after that half year, inasmuch as the half year would expire on the 22nd April, 1834, and then a fresh year's holding had commenced, since the tenant's term could only be put an end to in the February of some year. But the words which follow, "after the expiration of half a year from the delivery of this notice," remove the difficulty, and shew that it was intended to apply to some time six months after the notice, viz. February, 1835.

(PATTESON, J.: "Half a year" is the proper expression; "six months" might be construed to mean lunar months (1)).

The Court will give an interpretation to the notice consistent with the intention of the party serving it, if clear. In *Doe* d. *Duke of Bedford* v. *Kightley* (2) a notice, given at Michaelmas, 1795, to quit "at Lady Day, which will be in the year 1795," was held a good notice for Lady Day, 1796. In *Doe* d. *Lord Huntingtower* v. *Culliford* (3) the notice was dated 27th September, and served on the 28th; and it required the tenant to quit "at Lady Day next, or at the end of your current year." The current year, in fact, expired on the 29th September; but this was held *to be a six months' notice, on the ground that it could not have been intended to give a two days' notice. There the interpretation was founded on the mere fact of the term of the holding; here the words, "after the expiration of half a year from the delivery of this notice," suggest the interpretation from the notice itself. [*352]

R. V. Richards, contrà:

The notice, being delivered in October, 1833, was too late to determine the tenancy of the lands at the expiration of the

(1) See judgment of BAYLEY, J. in *Johnstone* v. *Hudleston*, 28 R. R. 505 (4 B. & C. 922, 932).

(2) 4 R. R. 375 (7 T. R. 63).

(3) 4 Dowl. & Ry. 248.

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"present year's holding," as that holding would expire in February, 1834, less than half a year from the notice. This might easily mislead the tenant, who in fact did hold the messuages from May to May, so that, as to them, the present year would expire after six months from the delivery of the notice. The rule is, that the notice must be such as cannot mislead the tenant. The question is, what he might have understood; not what the landlord may have meant.

LORD DENMAN, Ch. J.:

I think this notice was well enough. It is admitted that it would be a good notice for May, 1834. The half year would expire in April, 1834. It would therefore not be a good notice for 2nd February, 1834; but I think that, although the word "present" is used, the notice may be referred to 2nd February, 1835, which was after the expiration of the half year; and that there was no danger of the tenant being misled.

LITTLEDALE, J.:

This is certainly a lame and inaccurate notice; but, such as it is, we must endeavour to give it a rational interpretation. The [*353] lands are originally *taken to hold from May, 1832, to 2nd February, 1833, and then they are held on from year to year. On the 22nd of October, 1833, the notice is served. Notice to quit "at the expiration of half a year from the delivery of this notice" could not be a good notice as to the lands; for the year for which the lands were holden, at the time of the notice, expired in February, 1834. But then the notice goes on thus, "or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice." Now such other time at which a year's holding would expire after the expiration of half a year from the delivery of the notice would be, as to the lands, 2nd February, 1835; the word "present" must there be rejected as surplusage. If the 2nd February, 1835, was not meant by "such other time," what time could be meant? It must be some time after 22nd April, 1834; and no part of the "present" year, as to the lands,

would be after that day; the word "present" must therefore be rejected, or the notice will be without meaning.

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PATTESON, J.:

It is not required that a notice should be worded with the accuracy of a plea. This is not drawn with strict precision; but I think it is sufficiently clear.

WILLIAMS, J. concurred.

Rule discharged.

HAWKES *v.* RICHARD ORTON.

1836. *June* 9.

(5 Adol. & Ellis, 367—376; S. C. 6 N. & M. 842.)

[367]

Where plaintiff declares on a covenant, in a lease by defendant, that plaintiff shall have, occupy, and enjoy the demised premises from a day named, for and during a certain term, and alleges as a breach that plaintiff on the day entered upon the demised premises, and became possessed of them for the term, but that he was not able to occupy and enjoy the said premises in this, viz., that, plaintiff being so possessed, defendant entered into the premises and upon plaintiff's possession, and expelled and kept him out; to which defendant pleads that he did not enter and expel, &c.; such breach is not proved by evidence that plaintiff came to take possession, but was refused entrance by defendant, who continued occupying the premises, and never admitted him.

And it makes no difference that by a clause in the lease (stated in the declaration) it was agreed that, at a time previous to the above-named day, plaintiff should be at liberty to enter the arable lands fit for wheat, for the purpose of sowing, paying at a certain rate for such lands as should be sown; and that plaintiff had entered on a part of said arable lands, and sown before the day fixed for his taking possession of the premises generally, such entry being alleged in the declaration according to the fact.

COVENANT. The declaration stated an indenture of May 5th, 1832, between defendant of the first part, William Orton of the second part, and plaintiff of the third part, whereby defendant and William Orton demised to plaintiff a messuage and premises from April 6th, 1833, for twenty-one years, and defendant covenanted with plaintiff that he "should and might have, occupy, and enjoy the said demised premises from the said 6th day of April for and during the term aforesaid;" *and it was agreed [*368 that plaintiff should, from and after October 1st, 1832, be at liberty to enter upon the arable lands fit for wheat, for the purpose of sowing the same, paying to defendant (or William

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Orton) at the rate of half a year's rent and taxes for such lands as should be sown as aforesaid, and the plaintiff reserving to the defendant or W. Orton the like privilege, from and after October 1st next preceding the termination of that demise, they paying at the like rate: and it was further agreed that William Orton should have and retain the use of the barns, yards, and such of the outbuildings, being part of the demised premises, as might be necessary, till old May Day then next, for the purpose of threshing, &c. Averment, that plaintiff, on October 1st, 1832, entered upon divers, viz. 200 acres of the arable lands fit for wheat, for the purpose of sowing, and did sow, &c.: and that afterwards, viz. April 6th, 1833, "by virtue of the demise, he the said plaintiff entered upon the demised premises except the said barns, yards," &c., "and became possessed thereof for the said term so to him thereof granted," &c.: and although &c. (the usual averment of performance by the plaintiff), "the said plaintiff in fact saith that he the said plaintiff hath not been able to and could not have, occupy, and enjoy the said demised premises from the said 6th day of April, for and during the term aforesaid, in this, to wit, that, he the said plaintiff being so possessed of the said demised premises, the said defendant afterwards, to wit on the 7th of April, 1833, entered into the said demised premises and upon the possession of him the said plaintiff thereof, and expelled and removed him the said plaintiff
[*369] from his possession thereof, and kept out him the said *plaintiff from his possession thereof always from thence hitherto: by means of which said premises," &c.

Plea, "That the said defendant did not enter into the said demised premises and upon the possession of the said plaintiff thereof, nor expel or remove him the said plaintiff from his possession thereof, nor keep out him the said plaintiff from his possession thereof, in manner and form" &c. Conclusion to the country. There were other pleas, which it is not material to state.

On the trial before Lord Abinger, C. B., at the Cambridgeshire Spring Assizes, 1835, it appeared that the plaintiff, in the autumn of 1832, entered upon ninety-eight acres of the arable land, under the above lease, and sowed them with wheat; and

that, on April 6th, 1833, he went to the farm, which still continued in the defendant's occupation, and stated that he was come to take possession according to the lease. Some further conversation followed; and, according to the representation on behalf of the plaintiff, he at that time demanded possession of the premises not yet given up to him, and the defendant refused it. The plaintiff never obtained possession. He ceased to occupy the ninety-eight acres, and the defendant reaped the wheat. The LORD CHIEF BARON was of opinion that the plaintiff had not clearly shown any actual demand and refusal of possession, and that there ought to be a nonsuit. The plaintiff's counsel contended that there was a constructive eviction, inasmuch as the plaintiff must be taken (and was, in effect, admitted by the pleadings) to have entered upon the whole of the premises when he took possession of the ninety-eight acres, and the defendant, on April 6th, kept him out of the farm. The LORD CHIEF BARON then left it to the jury whether or not the plaintiff had gone to the farm on April 6th with a *bonâ fide* intent *to take [*370] possession, and whether the defendant had seriously expressed, and shewn by his conduct, an intention that he should not have it. The jury found for the defendant. In the ensuing term a rule *nisi* was obtained for a new trial on the ground of misdirection. The COURT (1) called upon

Storks, Serjt. and *Kelly*, in support of the rule. * * *

B. Andrews and *Byles*, *contrà*. * * * [372]

LORD DENMAN, Ch. J.: [374]

The plaintiff here declares in covenant, and states, as a breach, that the defendant entered upon his possession, and expelled and removed him. This is a perfectly intelligible breach; and other modes of breaking the covenant might have been stated with equal clearness if the plaintiff had thought proper to allege them. There is no evidence of the breach as stated. It is not necessary to say in what mode the facts of this case might have been alleged so as to make out a breach of covenant; the statement

(1) The argument was begun June 8th, and finished, and judgment given, June 9th.

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here is shewn by the evidence to be untrue. I think that there was no expulsion in law or in fact, and that the LORD CHIEF BARON even went out of his way in putting the case to the jury. He did so, however, indulgently to the plaintiff; and the jury have found for the defendant. The plaintiff has no right to ask for a new trial.

LITTLEDALE, J.:

It has been properly observed that the plaintiff, by alleging that the defendant broke his covenant "in this," has confined himself to proof of the particular breach stated after those words. That breach is, that, the plaintiff being possessed, the defendant entered into the premises and upon the plaintiff's possession, and expelled him from the possession. Upon that allegation issue is joined. Then as to the plaintiff's case. It is said that he entered. Clearly he did not enter in fact: but it is said there was an entry in law. Now it is true that, in an action by lessor against lessee for rent, the defendant cannot protect himself by simply traversing his own entry, [*375] because he had a *right to enter, by the lease. But here we are not considering the right in point of law, but the fact of entry, which the declaration brings into question. That fact was not proved. Whether, if the lessee went formally to take possession, and the landlord said he should not, that would be a disseisin according to the authorities, it is not necessary to say. And the cases in which a party may consider himself disseised or not at his election are different from this. Here an expulsion, which is a putting out, did not take place: a party who comes to claim, but has never entered, cannot be expelled. I think that it would be a sufficient answer to an action of debt for rent, to plead that the defendant was ready to enter upon the premises, but the plaintiff obstructed and would not allow him; though I never saw such a plea, and it is not necessary at present to say whether it would be good or not.

PATTESON, J.:

The LORD CHIEF BARON might properly have directed a non-suit. I agree that, according to the authority cited (1) for the

(1) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322.

plaintiff, where a party demises, and then by his misfeasance annuls the grant, he is liable in an action. But, where the facts are as in this case, the action must be, not for expelling, but for not letting in. How far the keeping out may be considered a disseisin, or ground for an action of ejectment, it is not necessary to say. This is an action of covenant; and, in stating the breach, the facts should have been alleged as they really were. The questions which the LORD CHIEF BARON left to the jury, on the supposition that this Court might not have decided for the defendant on the point of law, were rightly put: and, if I had been on the jury, I should have decided *as they did. *Quâcunque* [*376] *viâ datâ*, the plaintiff ought not to recover.

WILLIAMS, J.:

I am of the same opinion on both points. I cannot agree in the view of my brother *Storks*, who argues that there is no difference, for the purpose of this action, between an expelling and a keeping out.

Rule discharged.

REX *v.* NICHOLETTS.

1836. *June* 10.

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(5 Adol. & Ellis, 376—377; S. C. 6 N. & M. 827.)

The Court will not order a town clerk, against whom a criminal information has been filed for misconduct in his office, relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him; though it is suggested that the six months, during which the clerk is required by statute to keep the papers, will expire before the trial.

A CRIMINAL information had been filed against the defendant, who was town clerk of Bridport, for misconduct in his office, in a matter relating to an election of councillors of the borough. On this day,

Sir W. W. Follett, on the part of the prosecution, applied to the Court to order the voting papers in the defendant's official custody, which had been used in the election, to be impounded till after the trial of the criminal information. He stated that the defendant was not bound by the Act to keep the voting

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papers more than six months from the time of the election (1), which time would expire before the trial; and that, unless the Court made the order, these papers, the production of which at the trial would be most important, would probably not be forthcoming.

LORD DENMAN, Ch. J.:

[*377] The Court never interferes in this manner to compel a defendant to produce evidence *against himself. It will be matter of strong observation against the defendant, if the voting papers are not kept, and produced when called for at the trial.

LITTLEDALE, PATTESON, and WILLIAMS, JJ. concurred.

Rule refused.

REX *v.* THE COMMISSIONERS OF CUSTOMS AND ANOTHER.

1836. *June* 10.

[380]

(5 Adol. & Ellis, 380—382; S. C. 1 N. & P. 536; 2 H. & W. 247; 6 L. J. (N. S.) M. C. 65.)

The Court will not grant a *mandamus* to compel the Commissioners of Customs to deliver up goods placed rightfully in their custody to secure the duty, on a suggestion that the full amount of the duty has been since tendered or paid.

Per LITTLEDALE, J., a *mandamus* cannot be granted against a party acting merely as officer of the Crown (2).

JOHN JERVIS had obtained a rule, in this Term, calling upon his Majesty's Commissioners of Customs, and the Collector of Customs in London, to shew cause why a *mandamus* should not issue, commanding them to deliver to William George Legge certain tobacco, lately shipped in the *Sarah*, and wrecked near Torbay, the duties due in that behalf having been paid. From the affidavit in support of the rule, it appeared that the tobacco was in the custody of the officers of the Customs to secure the duty; that Legge, being owner of the tobacco, had proceeded to pass an entry in the usual way, and had tendered to the officers appointed to receive the duties (together with the charge for rent,

(1) Stat. 5 & 6 Will. IV. c. 76, s. 35. [Repealed by 45 & 46 Vict. c. 50, s. 5.—R. C.]

(2) See, on the general principle, *Reg.* v. *Lords Commissioners of the Treasury* (1872) L. R. 7 Q. B. 387, 41 L. J. Q. B. 178.—R. C.

and the fee) a sum which, as he contended, under the circumstances stated in the affidavit, was the whole duty payable on the tobacco; that the tender was refused, and the tobacco detained; and that Legge had paid the amount tendered into the hands of the officers of his Majesty's Treasury at the Custom House in London.

Sir John Campbell, Attorney-General, (with whom was *T. F. Ellis*) now shewed cause:

The applicant proposes to raise the question, whether the tobacco is liable only to the lower duty, as derelict or wreck, under stat. 3 & 4 Will. IV. c. 52, s. 50. But the question cannot be raised in this way; for no *mandamus* lies, even supposing the amount tendered and paid to be all that is *due. The officers [*381] are not called upon to perform a duty, but, according to the case of the applicant, to abstain from a wrongful act. If they are not entitled to retain the goods, they are wrong-doers, and the proper remedy is by some civil action, as, for instance, trover or replevin, which last remedy applies wherever goods are unjustly taken or detained: 2 Selw. N. P. Replevin I. p. 1184 (ed. 8), and note (2) there. (He was then stopped by the COURT.)

John Jervis, contrà:

Trover, at any rate, is not maintainable: the goods are in the hands of the Crown; and the Court will not put the applicant to a petition of right.

(LITTLEDALE, J.: Will a *mandamus* lie to the officer of the King?)

This is the simplest way of raising the question; and no objection to it can reasonably be made on behalf of the Crown.

(PATTESON, J.: We should object to issuing the writ, if not warranted.)

This is not a misfeasance, so as to be the subject of an action between party and party, but a nonfeasance by a public officer. It is not disputed that the goods were rightfully in the officers' custody till tender was made. There is no positive tort; neither

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will the law raise an assumpsit. It might have been otherwise, if the taking had been unlawful, as in the instances given by Mr. Selwyn, in the passage referred to.

(LORD DENMAN, Ch. J.: What do you say the nonfeasance is?)

The not delivering up, or giving an order for the purpose to the particular officer having the actual custody.

(The *Attorney-General* referred to *Whitelegge* v. *Richards* (1).)

[382] LORD DENMAN, Ch. J.:

Either the officer was justified in what he did or he was not. If he was, there is no grievance: if he was not justified, *mandamus* is not the proper remedy.

LITTLEDALE, J.:

I think we cannot here take into consideration the argument that there is no other remedy. The goods are in the hands of the officers of the Crown: a *mandamus* to them in this case would be like a *mandamus* to the Crown, which we cannot grant.

PATTESON, J.:

Mr. Jervis says that, as he has tendered and paid all that is due, he is entitled to have the goods. His client's course is then to ask for the necessary document for the purpose of having the goods delivered up; and, if that be refused, to seek his remedy for such refusal; but that is not the application now made.

WILLIAMS, J. concurred.

Rule discharged.

(1) 3 Brod. & B. 188; and in error, 2 B. & C. 45.

REX *v.* SANKEY, SMITH, AND WILLIAMS (1).

1836.
June 11.

(5 Adol. & Ellis, 423—429; S. C. 6 N. & M. 839; 2 H. & W. 275; 5 L. J. (N. S.) K. B. 255.)

[423]

A town clerk has a lien on papers of the corporation with respect to which he has done work as attorney or solicitor, but not on such as he holds merely as town clerk.

Semble, that, if property be granted to a corporation, subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of sect. 71 of stat. 5 & 6 Will. IV. c. 76 (2); and that sect. 68 applies, not to such property, but to cases where the payment has been made by the gift of the corporation itself.

MAULE had obtained a rule, in Easter Term last, calling upon Richard Nicholas Sankey, and Humphrey Smith, Esqrs., late bailiffs of the town of Ludlow, and Mr. John Williams, late town clerk of the same town, to shew cause why a *mandamus* should not issue, commanding them to deliver over to the present town clerk of Ludlow all books, minute books, books of account, rentals, maps, bills, receipts, vouchers, leases and counterparts of leases, securities, muniments, records, *and papers, and all [*424] plate and other articles of every description whatsoever, of or belonging to the borough and corporation of the said town, or relating to the property thereof, in the custody, possession, or power of them, or either of them.

The affidavit, on which the rule was obtained, stated that Sankey was the high bailiff, Smith the low bailiff, and Williams the town clerk, of the corporation of Ludlow, before and up to the passing of stat. 5 & 6 Will. IV. c. 76. That by the new town council, chosen under that Act, William Downes was elected town clerk. That by charters of Edward IV. and Edward VI. certain lands had been granted to the corporation. That, on the election of the new town council and town clerk, it became the duty of Williams, Sankey, and Smith, to deliver up to them all papers, books, deeds, muniments, plate, leases, counterparts of leases, &c., belonging to the corporation. That applications had been made to the three to do so, by order of the town council; but that they refused.

In answer, Sankey and Smith made affidavit that, by a charter

(1) Followed in *Newington Local Board* v. *Eldridge* (1879) 12 Ch. Div. 349.—R. C.

(2) See now the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 51, 135.—R. C.

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of 6 Edw. VI. (26th April, 1552), the King, for the relief and better sustaining the town of Ludlow, and for other reasonable causes and considerations, granted all the site, circuit, and precinct of the late house of the Palmers' Guild, &c., in Ludlow, and all the houses and premises within &c., and all messuages, &c., in the several parishes and hamlets of &c., to the Bailiffs, Burgesses, and Commonalty of Ludlow (the then style of the corporation), to hold to them and their successors for ever; and the said King understanding that certain burgesses, predecessors of the then burgesses, had erected the guild to be serviceable to [*425] pious uses, to wit, *for sustaining the poor and impotent, and also, for maintaining a grammar school, and for other pious uses, had granted the said messuages and premises to the said guild, he therefore willed that the said bailiffs, &c., out of the issues and profits of the premises, should keep and continue the said grammar school, &c., the same to be kept by one master and one usher, and should keep and maintain thirty-three indigent persons within the said town, giving to every of them 4*d.* every week, and one chamber for every one of them to live in, and also that a discreet and able person, learned in holy writ, should be appointed preacher of the said town, and that another able and fit person should be chosen to be assistant to the rector of the church of Ludlow, both which persons should be for ever maintained out of the issues and profits of the said premises. That some other estates, not granted by the above charter, had vested in the said corporation for charitable purposes, before its dissolution. That the late members of the corporation, as trustees of the said charities, had retained possession of the books of account relating to the said estates. That neither of the deponents had now, nor had had at any time since the dissolution of the late corporation, in their custody, possession, power, or control (excepting certain articles named, which they had given up, or offered, before the application for the *mandamus*, and been at all times willing, to give up), any property, real or personal, or any deed, paper, or document whatsoever belonging to the corporation, except that they had, since the dissolution of the late corporation, joined with the other persons, being members of the said corporation at the time of its dissolution, in

retaining possession of the said *estate and property so vested as aforesaid, and the said books of account, deeds, and papers relating thereto. [*426]

Williams also made affidavit that he had delivered up all books, deeds, and papers belonging to the corporation, except some few leases and counterparts of leases, upon which he had a lien for professional business done, and which came into his possession as solicitor to the corporation: that, after receiving a notice to give up the books and papers, he told the new town clerk of the above circumstances, and asserted his lien on the leases and counterparts, to which the latter answered, "very true," and appeared to acquiesce in the claim; and that he, Williams, therefore understood that neither the town clerk nor the present council would claim the leases or counterparts adversely to the lien. That, at the time of granting the rule, he had not, nor had now, in his possession, or under his control, any deeds, documents, goods, chattels, or effects of the corporation, except the said leases and counterparts.

Sir John Campbell, Attorney-General, *Sir F. Pollock*, and *Cleasby*, now shewed cause on behalf of Williams:

Williams has refused nothing which the applicants had a right to demand from him. He was attorney as well as town clerk: he had, therefore, a lien on all papers respecting which he had done work professionally; and the fact that he was town clerk cannot deprive him of it, though it might be said that no lien could exist as to muniments of the corporation which he held merely in the character of town clerk.

Sir W. W. Follett and *Chandless* shewed cause for Sankey and Smith:

It does not appear that Sankey or *Smith have any property in their hands which they have refused to give up. And the present applicants have no right to the estates in question, nor to the documents relating to them. By stat. 5 & 6 Will. IV. c. 76, s. 71, the old trustees are to hold the property on, till August 1st, 1836; after that their estate ceases; but the present corporation acquire no right even then. Besides, a *mandamus* [*427]

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is not the proper remedy for recovering the lands, even if they are not properly held in trust. And the documents are not such public documents as are the subject of *mandamus:* the proper remedy is trover: *Anonymous* case in Chitty's Reports (1).

Maule and *Erle*, in support of the rule:

Under sect. 65 the deeds, &c., are to be kept where the council direct: and the town clerk is responsible for the charge. The estates in question are not held on charitable uses or trusts: the property is granted to the corporation, with an injunction from the Crown to perform certain charitable acts. The corporation, therefore, retains its property: there is no new creation of a corporation by the Act. It is clear that the corporation never were trustees as to the whole property: and a mere injunction of this sort does not even make them trustees "in part," within the meaning of sect. 71. This is rather the case provided for by sect. 68; the corporation may be perhaps compellable to grant a bond for future payments. If this property were within the provisions of sect. 71, no case can be suggested to which sect. 68 would apply. As all the late members of the corporation claim to hold the property, it was necessary to join the town
[*428] clerk. As to the lien which *the latter claims on the leases, he must have obtained possession, in the first instance, as town clerk: he has no more right to retain them than to retain any book in which he has made a single entry.

LORD DENMAN, Ch. J.:

There is no ground for this rule. The town clerk clearly has a lien on the papers which he claims to retain, for all which he has done in his professional character. And indeed he has not actually refused to deliver them up: for, when he made the claim of lien, there was an apparent acquiescence. Then the other parties are not in possession of any thing which they have refused to deliver up. These facts make a short end of the case: and the rule must be discharged with costs. The question on sections 68 and 71 does not therefore arise. If it did, I should

(1) 2 Chitty, 255.

strongly incline to think that sect. 68 relates merely to grants made by the corporation themselves.

LITTLEDALE, J.:

I think the town clerk has a lien on the papers which he detains, though he would have none upon muniments with respect to which he had performed no service as attorney; for he would hold those only as servant to the corporation. Then the other parties have refused nothing. I think sect. 68 applies only to what the corporation itself gives. Sect. 71 provides for such property as is held "in whole or in part" upon charitable uses or trusts. The part for which this property is so held seems small: but in that the present corporation have no interest.

PATTESON, J.:

I have no doubt that a town clerk who does business as an attorney acquires a lien, *although he is town clerk, and although [*429] he has no lien on what he receives merely as town clerk, nor for business done merely in that character. I recollect no instance in which this distinction has been taken in the case of a town clerk: but it has often been mentioned in the case of a steward of a manor. In *Worrall* v. *Johnson* (1), Sir THOMAS PLUMER, Master of the Rolls, pointed out that an attorney's lien extended merely to debts due to him as attorney. Here is a lien, though not to a definite amount, apparently acquiesced in; so that there is no refusal by him. Therefore, as to Mr. Williams, the rule must be discharged with costs. As to the other parties, it is left doubtful whether they have anything in their hands. If they had, the answer to this application would be either that the documents were in Mr. Williams's custody as their servant, or that they were retained under sect. 71. But we are not compelled to decide as to the effect of such an answer. I should, however, agree with my Lord and my brother LITTLEDALE, that sect. 68 applies to cases where the grant is by the corporation, sect. 71 to cases where the corporation take property granted them by another wholly or partially in trust. This does not

(1) 22 R. R. 106 (2 Jac. & W. 214).

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mean, where some is granted to one trustee, some to another: for that case is provided for by the words "solely, or together with any person" &c.: but where the property granted is held in trust as to a part of that property.

Rule discharged, with costs (1).

1836. *June* 11.

[436]

WILLIAM GWINNELL *v.* EDWARD HERBERT (2).

(5 Adol. & Ellis, 436—441; S. C. 6 N. & M. 723; 2 H. & W. 194; 5 L. J. (N. S.) K. B. 250.)

The indorser of a promissory note does not stand in the situation of maker relatively to his indorsee.

The indorsee of a note cannot declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker.

ASSUMPSIT. The declaration stated that the defendant, on &c., made his promissory note, and thereby promised to pay the plaintiff 7*l.* 12*s.* 6*d.*, one month after date, which period had elapsed. There was also a count on an account stated. Pleas, that defendant did not make the said note in manner &c.; concluding to the country: and, as to the account stated, the general issue. On the trial before the under-sheriff of Gloucestershire, February 19th, 1836, the note was put in. It was payable to William Gwinnell or order, signed HERBERT HERBERT, and

[*437]

indorsed, in the defendant's handwriting, *E. HERBERT. Under that name was written WILLIAM GWINNELL. The note had an eighteenpenny stamp. The under-sheriff objected that, Edward Herbert not being named on the face of the note, but on the back as an indorser, he was not maker as stated in the declaration. For the plaintiff, *Penny* v. *Innes* (3) was cited. No notice of dishonour was proved to have been given to Edward Herbert. The under-sheriff stated to the jury that, on the authority of the case cited, Edward Herbert must be considered as a new maker; and that, as against a maker, notice of dishonour was unnecessary. The plaintiff had a verdict, but the under-sheriff certified

(1) Williams, J. was absent.

(2) See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 56, 89.—R. C.

(3) 40 R. R. 629 (1 C. M. & R. 439; 5 Tyr. 107).

(under stat. 3 & 4 Will. IV. c. 42, s. 18), to stay judgment till a new trial could be moved for. *Busby*, in the ensuing Term, moved for a new trial on the grounds that, assuming an indorser to stand in the situation of a new maker, he was not to be described in pleading as the maker; and that he was not, in effect, a maker. A rule *nisi* was granted.

R. V. Richards now shewed cause:

The under-sheriff's ruling, on the authority of *Penny* v. *Innes* (1), was right. In that case a bill drawn by Wilson, payable to his own order, and by him specially indorsed to Brookes and Penny, was next indorsed by Innes, and then by Brookes and Penny. Lord LYNDHURST there said "The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to Brookes and Penny to strike out their own indorsement; and then the bill would have stood *as a bill indorsed by the defendant in blank." *Plimley* v. *Westley* (2) may be mentioned as a contradictory authority; but there the note was not payable to order. Here, the instrument being negotiable, a new stamp was not necessary to render the indorser liable as a new maker. The note was a new instrument in some respects, but not in all. If a party is possessed of a note or bill without proper title, and transfers it, he is liable, because the law will not allow him to say "I have no title, and therefore my indorsee can have none against me." [*438]

(PATTESON, J.: Every indorser of a bill may be a new drawer; but the maker of a promissory note is an acceptor.)

Unless the defendant here can be sued as maker, there is no remedy; he ought not to be discharged merely because a person who ought to have indorsed has omitted doing so.

Busby, contrà:

By the custom of merchants, the indorser of a note stands in the place of the drawer of a bill, as is said in *Heylyn* v.

(1) 40 R. R. 629 (1 C. M. & R. 439; 5 Tyr. 107).

(2) 42 R. R. 614 (2 Bing. N. C. 249).

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Adamson (1); but he is never declared against as a drawer in fact. As to the maker of a note, Lord MANSFIELD observes, in the case just cited (1), that he is an acceptor (not a drawer), and that, when the note is indorsed, the indorser stands in the situation analogous to that of drawer of a bill. He could not, indeed, stand in the situation of acceptor, because then he and the maker would both fill that character; and there cannot be two acceptors: *Jackson* v. *Hudson* (2). It is not necessary, therefore, to call in question the authority of *Penny* v. *Innes* (3). Here, the defendant might have been sued upon the original consideration:

[*439] *but, if sued upon the note, he should have been declared against as indorser; in which case it would probably have been held that he was estopped from setting up as a defence the want of an indorsement to himself.

LORD DENMAN, Ch. J.:

The under-sheriff has acted upon a misapplication of *Penny* v. *Innes* (3). The law there laid down as to the effect of indorsement might be correct as to a bill of exchange, but does not apply to a promissory note. The judgment of TINDAL, Ch. J. in *Plimley* v. *Westley* (4) seems intended not to overrule any thing laid down in *Penny* v. *Innes* (3), but to be consistent with what was there decided.

LITTLEDALE, J.:

The declaration here charges Edward Herbert as the maker of the note. It must be taken that in point of fact the note was made by Herbert Herbert; then the question is, whether he is discharged, and a new instrument created, by Edward Herbert's name being put on the back of the note. I cannot understand how that should be so. It is said that, in the case of a bill of exchange, every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered a

(1) 2 Burr. 676.
(2) 11 R. R. 762 (2 Camp. 447).
(3) 40 R. R. 629 (1 C. M. & R. 439; 5 Tyr. 107).
(4) 42 R. R. 614 (2 Bing. N. C. 249).

new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing (1). But, supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker. The drawer of a bill is *liable only after presentment [*440] to the acceptor; but the maker of a note is in the situation of acceptor. In this case, therefore, it cannot be said that the indorser became a maker, or that the putting of Edward Herbert's name on the back of this bill had, for the present purpose, cancelled the engagement of Herbert Herbert. The observation, which has been referred to, of Lord ELLENBOROUGH, in *Jackson* v. *Hudson* (2), appears to me correct.

PATTESON, J.:

The issue here is, whether or not the defendant made the note. There is no conflict between the cases on this subject. The whole question turns on the distinction between a bill and a note. On a bill, each indorser is a new drawer, as was stated in *Penny* v. *Innes* (3); but the drawer of a bill is liable only on default made by the acceptor. The maker of a note is liable in the first instance; and, if each indorser became a maker, he also would be liable in the first instance. There is a difficulty, therefore, in the case of a note, which does not exist in that of a bill. The point in *Plimley* v. *Westley* (4) was, that, the note not being on the face of it negotiable, the persons whose names appeared on the back were not indorsers, and might have been treated as makers if the instrument had been properly stamped. Here the instrument was negotiable; so that the point discussed in *Plimley* v. *Westley* (4) does not arise. This case is more like *Jackson* v. *Hudson*, where, the drawee having accepted a bill, and another person, not a drawee, having accepted it also, it was held that the latter could not be sued as an acceptor. So, here, the defendant was not a maker, but, as was said *in that case, [*441] should have been declared against on his collateral undertaking.

(1) See the above passage cited by Lord BLACKBURN in *Steele* v. *McKinlay* (H. L. 1880) 5 App. Cas. 754, 769.—R. C.

(2) 11 R. R. 762 (2 Camp. 448).

(3) 40 R. R. 629 (1 C. M. & R. 439; 5 Tyr. 107).

(4) 42 R. R. 614 (2 Bing. N. C. 249).

GWINNELL v. HERBERT.

In the report of *Plimley* v. *Westley* in 1 Hodges (1), the LORD CHIEF JUSTICE says, "that a bill or note cannot be enforced against the original maker, by a person who takes by indorsement, unless the instrument contains words which authorise the indorsement." A proper distinction is there kept in view. Some confusion has arisen in many of the cases from not attending to the distinction between a bill and a note. The rule must be absolute.

WILLIAMS, J. concurred.

Rule absolute.

1836. *June* 11.

[441]

REX *v.* JAMES ISLEY, AND GRACE, HIS WIFE (2).

(5 Adol. & Ellis, 441—448; S. C. 6 N. & M. 730; 2 H. & W. 196; 5 L. J. (N. S.) K. B. 253.)

H., the father of two children, on his wife's death, requested her father and mother to come from America, where they were settled, to England, and there take charge of the children, which they did. About four years afterwards H. died, having made his will the day before, in which he left his property to trustees to be converted into money and divided between his two children when of age, the interest to be applied in the meantime, by the trustees, for their education, &c.; and he appointed the trustees guardians of the persons and estates of the children, and requested them to cause the children to be properly educated. 3,000*l.* Bank Annuities was vested in other trustees, for the benefit of the children, under the testator's marriage settlement. No real property passed to either child from the testator. The grandfather and grandmother, who, ever since their coming to England, had had the custody of the children, refused to deliver them up when demanded by the guardians. The Court, on *habeas corpus*, ordered them to do so.

While the *habeas corpus* was depending, the grandfather and grandmother filed a bill in Chancery on behalf of the children, against the guardians, for an account, and to have the children and their property put under the protection of that Court. The guardians put in their answer, about a month before the above decision.

Semble, that, if it had been shewn to this Court that a speedy decision in Chancery was to be expected, they would have delayed enforcing the writ.

IN last Hilary Term, the Court, at the instance of Samuel Gregory and William Wilkins, the guardians after named, granted a *habeas corpus* (returnable before a Judge at Chambers)

(1) 1 Hodg. 325.

(2) Followed, *In re Andrews* (1873) L. R. 8 Q. B. 153; *S. C.* nom. *In re Edwards*, 42 L. J. Q. B. 99.—R. C.

directed to James Isley and Grace *his wife, commanding them to bring up the bodies of Matilda Harris and Benjamin Harris. The writ was granted upon a statement, in substance as follows. [*442]

Benjamin Harris, the father of Matilda and Benjamin, died May 17th, 1835. By his will, dated May 16th, 1835, he bequeathed all his real and personal estate and effects to the said S. Gregory and W. Wilkins in trust to convert into money all his personal estate not consisting of money, and to sell the real estate, and to put out the proceeds (after payment of debts, &c.) at interest on Government or freehold security, "the principal to be divided between my two children, Matilda and Benjamin, share and share alike, and to be paid on his or her attaining the age of twenty-one years, the interest in the mean time to be applied for their benefit, advantage, and education, in such manner as to my said trustees or the survivor of them, his executors or administrators, shall seem meet." The will concluded as follows: "I appoint the said Samuel Gregory and William Wilkins executors of this my last will and testament, and also guardian and guardians of the persons and estates of my children. And I earnestly request that my said trustees and executors will, according to their discretion, cause my said children to be properly brought up and educated; and I authorise them, my said trustees and executors, to retain and reimburse themselves and himself out of the monies that shall come to their or his hands or hand by virtue of the trusts hereby in them reposed, all costs, charges, and expenses which they shall be put unto in execution hereof." Gregory and Wilkins proved the will and took upon themselves execution. The children were in the custody of James and Grace Isley, their grandfather and grandmother, *who refused, when required by the trustees, to give them up. [*443] The trustees now stated that James and Grace Isley were very improper persons to have the custody of the children, moving in a sphere of life below that to which the children's expectations authorised them to aspire (1); and that it was necessary that the children should be delivered up to the trustees, in order that they might carry into effect the testator's

(1) Isley described himself as "of Trowbridge, carpenter."

REX v. ISLEY.

intentions, and educate and provide for the children in a manner suitable to their fortune, and agreeable to the testator's wishes.

Isley and his wife claimed to retain the custody on the following grounds. That the mother of the children, who was Isley's daughter, died about five years ago, and on that occasion Isley came, with his wife and family, from America where he then resided, at a considerable inconvenience and sacrifice, on the testator's written request, for the purpose of taking care of the children, who were then placed under Mr. and Mrs. Isley's charge, and had continued with them ever since. That Mr. and Mrs. Isley came to England, and undertook this charge, in consequence of a promise to the mother, and would not have done so but for such promise. That the father had often, in his lifetime, expressed himself grateful for their care and attention, and declared his intention never to remove the children as long as they were kindly treated. That the children were aged respectively nine and six years, one of them weak in intellect, and both delicate in health and requiring much care: and that they had in fact been kindly and carefully treated by Mr. and Mrs. Isley. It further appeared that, by a settlement made on
[*444] the *marriage of the testator and his late wife, 3,000*l.* 4 per cent. Bank Annuities were vested in other trustees than Gregory and Wilkins, for the benefit (among other purposes) of the issue of the marriage, and that the trustees under the settlement continued so interested, for the benefit of the children Matilda and Benjamin.

The parties attended before Patteson, J. at Chambers, in pursuance of the writ, and, on February 16th, the learned Judge (after having taken time for consideration) stated that he felt so much difficulty in the case that he thought the question ought to be referred to the Court in the next Term. Shortly after this time, Isley, as the grandfather and next friend of the children, filed a bill in Chancery on their behalf against Gregory and Wilkins, as executors of Benjamin Harris's will, for an account, and for the purpose of placing the children and their property under the protection of that Court. Gregory and Wilkins filed their answer on the 9th of May.

Erle now moved, on behalf of the prosecutors, for the order of the Court: REX v. JSLEY.

An additional affidavit, by the testator's brother, was put in, stating that the testator had, before his death, expressed a wish that the children should not remain with their grandmother, whom he considered an unfit person, and had desired the deponent to ask Gregory and Wilkins if they would become the guardians of the children in the event of his death.

Cresswell and *Joseph Addison*, for the defendants:

It is a preliminary objection to any proceeding for the purpose of changing the custody, that a bill in Chancery is depending, which involves this very question. *And, further, [*445] it may be questioned whether Gregory and Wilkins can entitle themselves in this case as guardians under stat. 12 Car. II. c. 24, s. 8, for the statute seems to contemplate the appointment of guardians in those cases only where there might have been guardians in socage. In *Bedell* v. *Constable* (1) VAUGHAN, Ch. J. says, "I take the sense of the Act, collected in short, to be, whereas all tenures are now socage, and the next of kin to whom the land cannot descend is guardian until the heir's age of fourteen: yet the father, if he will, may henceforth nominate the guardian to his heir, and for any time, until the heir's age of one and twenty; and such guardian shall have like remedy for the ward, as the guardian in socage by the common law hath." But, even if the Court should think that these are guardians in socage, still this is not a case for interference on *habeas corpus*. The rule in cases of *habeas corpus* to bring up infants is stated by Lord MANSFIELD, in *Rex* v. *Delaval* (2), to be, that "the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to anybody nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." In a case referred to in *Lyons* v. *Blenkin* (3), Lord ELDON observed that there were circumstances which might have weight on an application made in a cause to

(1) Vaugh. 183.
(2) 3 Burr. 1436.
(3) 1 Jac. Rep. 254, *n.* (*b*).

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alter the custody of wards of the Court (as where their expectations from relatives might be interfered with by their continuance with the father), but which could not be attended to on a *habeas corpus*. Here, even if the father had been *alive, the Court would not have taken the children from the defendants at his instance, after the sacrifice they had made in consequence of his own arrangement. But this is a will made by the testator only the day before his death, in opposition to his formerly declared intentions. The bulk of the property, being in trustees under the marriage settlement, cannot be affected by the result of this application.

[*446]

Erle and *Leigh*, *contrà*:

The arrangement made by the father could be considered only as a temporary one. It must have been obvious that circumstances might arise (without any immoral or improper conduct on the part of the defendants) which would make the removal of the children expedient. Even supposing the facts to be such as would have entitled the defendants to sue the father, if still alive, for withdrawing the children, that would be no answer to an application for a change of custody with a view to the children's interest. An actual covenant by the father, in a deed of separation, that the children shall remain in a certain custody, is no answer to an application on his part by *habeas corpus* to have them delivered up to him: *Ex parte Earl of Westmeath* (1). As to the right of testamentary guardians under stat. 12 Car. II. c. 24, s. 8, where there could not have been a guardian in socage, the statute gives the father power to dispose of the custody and tuition of his child or children, while under the age of twenty-one, without any restriction of the kind which has been suggested. The limitation inferred from the *dictum* of VAUGHAN, Ch. J. in *Bedell* v. *Constable* (2) is not supported by any other *authority. Then, is the interposition here called for such as the Court has been accustomed to grant? *Rex* v. *Delaval* (3) shews that it is to be granted on proper occasions. *Rex* v.

[*447]

(1) 1 Jac. Rep. 251, *n.* (*c*), to *Lyons* v. *Blenkin*.
(2) Vaugh. 183.
(3) 1 W. Bl. 410; *S. C.* 3 Burr. 1434.

Johnson (1) is more in point. In the case before Lord ELDON, referred to on the other side, his Lordship said "that the jurisdiction which he had upon an *habeas corpus* was exactly the same as if it was before a Judge, and he apprehended that a Judge attended to nothing but cruelty or personal ill-usage to the child, as a ground for taking it from its father" (2). Whatever can be said of a father on this point applies also to testamentary guardians, who, according to many authorities, are *in loco parentis: Eyre* v. *Countess of Shaftesbury*, per Lord Commissioner JEKYLL (3); *Butler* v. *Freeman*, per Lord HARDWICKE, C. (4).

(LORD DENMAN, Ch. J. asked if there was any prospect of a speedy decision in Chancery. No answer was given, but by referring to the affidavit on this head, the substance of which has been stated.)

LORD DENMAN, Ch. J.:

There is no ground for arguing that this appointment of guardians was not really the will of the testator. He has clearly appointed the parties, now prosecuting, guardians to his children. Under these circumstances, although we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained, we think we ought not to make a delay *which might appear [*448] like tampering with the rights of the guardians. We have, I think, no choice as to the course we should pursue, but must order the children to be delivered up to them.

LITTLEDALE, J.:

I am of the same opinion. A guardian appointed as these are is in the same situation as a parent. We must enforce the right of the guardians, unless we could see that the will was made in a manner contrary to the real wish of the testator. But it appears that his intention in fact was to remove the children in the manner which the will points out. If we saw reason to

(1) 1 Str. 579; *S. C.* 2 Ld. Ray. 1333.
(2) 1 Jac. Rep. 254, *n.* (*b*), to *Lyons* v. *Blenkin*.
(3) 2 P. Wms. 115.
(4) Amb. 302.

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expect a decision in equity on the point, our course of proceeding might be different.

PATTESON, J.:

I was not satisfied at Chambers, nor am I yet, that the father really intended the custody of his children to be changed. But I think we have no choice as to our mode of proceeding. I hoped at first that, by not now changing the custody, we might give an opportunity for the point to come before the Court of Chancery; but, as there appears no likelihood of that, the strict legal right of the guardians must prevail (1).

An order was afterwards made (June 13th) that the defendants should deliver up the bodies of the children to the guardians.

1836. *May* 23.

[456]

CHARLES FREDERICK, BARON DE RUTZEN, AND MARY DOROTHEA, HIS WIFE, *v.* LLOYD.

(5 Adol. & Ellis, 456—468; S. C. 6 N. & M. 776; 5 L. J. (N. S.) K. B. 202.)

In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.

CASE for disturbance of the plaintiffs' market at Narberth, in Pembrokeshire, by setting up another market. Plea, the general issue. On the trial before Gurney, B., at the Pembrokeshire Spring Assizes, 1834, a verdict was found for the plaintiffs, damages 1*s.*, but leave reserved to move to enter a nonsuit. In the ensuing Term a rule *nisi* was obtained, according to the leave reserved, upon grounds which will appear by the

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judgment of the Court. * * On the rule for entering a nonsuit, cause was shewn in last Hilary Term, January 23rd, by *Sir John Campbell*, Attorney-General, *Cresswell*, and *Evans*, and the rule was supported by *John Wilson* and *E. V. Williams* (2).

(1) Williams, J. had left the Court.

(2) Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

The case (as regards the point decided) is so fully discussed in the judgment of the Court, that a detail of the arguments is considered unnecessary.

LORD DENMAN, Ch. J. in this Term (May 23rd) delivered the judgment of the COURT:

* * It appeared upon the trial that the legal estate in the market in question was not in the plaintiffs; and it was alleged that the legal estate was not deduced to the trustees, upon which it was contended that they alone could have maintained the action, and that, on the present evidence, it would have failed even if brought in their names, on account of the defect in the proof of their title.

As a preliminary answer to these objections, it was urged that this was only a possessory action, in which proof of title was superfluous; and that no failure to deduce *a regular title from [*458] the Crown ought to defeat their right to recover by reason of their possession.

The counsel for the defendant, in reply, did not dispute the general truth of the first of these propositions, but denied that it was applicable under the particular circumstances of the case: and the Court took time to consider of its judgment, for the purpose of looking into the evidence as to those particular circumstances, and the deduction of the title; and after such examination we are of opinion that the rule for entering a nonsuit cannot be made absolute.

It appeared that the Narberth market, till the year 1832, had been held in certain places within the town and manor, some descriptions of articles being usually exposed to sale in the streets, but the greater number within and around a market house, standing upon the soil of the defendant; and that the plaintiffs and those whom they represent had received the market tolls, wherever the articles were exposed, while the defendant, and those whom he represents, received stallage in respect of the stalls and standings within and immediately around the market-house. In November, *1832, the plaintiffs [*459] had opened a new market-house, erected by themselves, of convenient dimensions and in a convenient place within the

DE RUTZEN v. LLOYD.

town and manor, upon their own land. The defendant thereupon erected a market-house on the old site, and procured tollable articles to be exposed for sale there on the market day, for which injury the present action was brought: it appeared also that the plaintiffs, and those whom they represent, received payment from the shews standing at the fairs in any part of the town.

Upon this state of facts the counsel for the defendant contended that, as all the evidence of possession down to 1832 applied to a perception of tolls in the old market-house, and the places before used, the only inference of right thence to be drawn was of a right to hold the market there; and that it became necessary, in order to shew the market, in the place in which it was now held, to be legal, that a grant from the Crown should be produced authorising the removal. A charter was accordingly produced, giving the right to hold the market any where within the manor, to which, according to the doctrine of *Curwen* v. *Salkeld* (1), the right of removal would be incident. But then it was contended that this would avail nothing to the plaintiffs, because they failed to connect themselves with it by a regular deduction of title.

Unless, however, the first of these points be correctly made, the second is immaterial; the question therefore will be, whether, from the evidence of a market immemorially held in certain places within the manor by the apparent lord of such manor, and those whom he represents as *such, the necessary legal inference be that of a grant restrictively to hold it in such places only, and with no power of removal; or whether those facts are not premises from which a jury may properly infer a grant of the market to be held in any convenient place within the manor, and, of course, with the power incident thereto of removal from time to time. If the latter be the proper answer to this question, the present finding of the jury may, as regards this point, be sustained.

[*460]

The object of the inquiry would be to determine the extent and terms of the grant, the mere existence of which was already inferred from the user, all consideration of the charter actually produced, and of the defective title, being by the argument

(1) 7 R. R. 510 (3 East, 538).

excluded. Now, in conducting this inquiry, the jury would properly consider the character of the grantee, the lord of a manor, the nature of the thing granted, a market, and its object, the grantee's profit, and the general convenience of the resiants and the vicinage. Considering these, it appears to us the most reasonable conclusion of fact to be drawn, that the grant, whenever or by whomsoever made, had been of a market to be held generally, that is, at any convenient place within the manor. And if, upon the considerations just stated, that would be the reasonable conclusion to be drawn, we cannot see that it is necessary or even proper to infer a restriction upon the grant from the fact that the market appears always to have been held on any particular spot or spots within the manor. It is true that, where a grant is to be inferred from user alone, its extent as between the grantor and grantee is, in many instances, limited by the extent of the user, for it is not to be presumed against him that he has granted more than he appears to have permitted *the [*461] grantee to enjoy. But, even in such cases, we think the jury would be warranted in finding a grant, including all such terms as are usual and reasonable incidents to a grant of the description inferred. In the present case, however, where the jury is called upon to determine, not merely the existence of a grant from the Crown, but the terms of the particular grant in question, we do not see how they can forbear to take into account every circumstance legitimately tending to affect the probabilities of the case; and, if those circumstances point to wider limits than the mere user has extended to, but which are not inconsistent with such user, the jury may, indeed ought, to conclude in favour of such limits.

This reasoning will be found to be directly sanctioned by a well considered authority, the case of *Rex* v. *Cotterill* (1). A material point there to be decided was, whether the corporation of Walsall had rightfully removed their market from the High Street, in which it had been holden immemorially, to a new market-house. There, as here, no charter was produced, giving a market within any prescribed limits; but a charter of Charles II. granted "all and all manner of liberties, franchises, immunities, privileges, jurisdictions, markets, and hereditaments, which the

(1) 1 B. & Ald. 67.

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mayor and commonalty" "now hold, use, and enjoy, or have held," &c. What then was the market enjoyed at the date of the charter—a market to be held in the High Street, and so irremoveable from it, or one to be held within the borough, and so removeable to any convenient spot within it? That [*462] was the question—*which, in terms, the charter threw no light upon; and it was argued, as here, that the user alone was to determine it. The Court, however, held the other way, the different members attaching different degrees of weight to particular circumstances, but all agreeing in the principle that all the circumstances were to be taken into account, and no limits to be implied but such as might fairly be deduced as probable inferences from all those circumstances.

In that case some reliance is placed by the Judges on the fact, that the grantee of the supposed charter was a corporation and not an individual: that, however, was a fact only increasing the probability of a grant co-extensive with the borough: we are now only considering whether there was *any* evidence of a grant co-extensive with the manor: it is unnecessary, therefore, to observe that ABBOTT, J. seems to consider that an equal probability exists of a grant to the lord being co-extensive with the manor, as of a grant to a corporation being co-extensive with the borough.

We entirely agree with this case; and we think that the learned Judge not only was not called upon to nonsuit the plaintiffs, but, upon this evidence, and as to this point, would have been justified in directing the jury, that, if they were satisfied of the existence of the grant, it was most probably a grant to be exercised any where *infra manerium*.

It becomes, therefore, unnecessary to consider the second point, or to examine whether, if established in fact, it would have led to the consequences insisted on by the defendant; because the plaintiffs might have rested on their possessory [*463] evidence, and are not to be *prejudiced by having attempted and failed to make out a documentary title by purchase. The rule, therefore, will remain absolute in its original terms.

Rule as to entering a nonsuit, discharged.

* * * * *

REX *v.* MARSH (1).

1836.
June 13.

[468]

(CASE OF ALKINGTON POOR RATE.)

(5 Adol. & Ellis, 468—488; S. C. 6 N. & M. 668; 2 H. & W. 255.)

A parish was divided into four tithings, A., B., C., and D., A. containing the parish church. Each tithing maintained its own poor, and each had a churchwarden, elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own tithing, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except A., which was exempt) raised its own church rate, and paid it to the vestry clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own tithing.

A commissioner of inclosure under a local Act and the general Act, 41 Geo. III. c. 109, s. 3, made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he, within a month, served a description of the boundaries on a party then acting as churchwarden of tithing A. Until the order, the lands in question had been rated to tithing B.

On appeal against a poor rate made upon the above lands as situate in tithing B., notwithstanding the commissioner's order:

Held, that the description of boundaries had been sufficiently served according to the proviso of stat. 41 Geo. III. c. 109, s. 3, requiring such description to be served upon "one of the churchwardens or overseers of the poor of the respective parishes."

Although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.

Held, also, that the Sessions had acted rightly in rejecting evidence offered to shew that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 Geo. III. c. 109, s. 3.

ON appeal by John Marsh against a poor-rate for three pieces of land, signed by the churchwarden and overseers of the poor of the tithing of Alkington, in the parish of Berkeley, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The question was whether the lands were in the tithing of [469] Alkington, or in the parish of Leonard Stanley. Up to 17th November, 1832, they had been rated to Alkington. An

(1) Cited in judgment, *Vicar of St. Sepulchre* v. *Churchwardens of St. Sepulchre* (1879) 5 P. D. 64, 69.—R. C.

REX v. MARSH.

Act was passed, 11 Geo. IV. (1) (which was to be taken as part of this case) for the inclosure, *inter alia*, of lands in the parish of Leonard Stanley; and it recited the General Inclosure Act, 41 Geo. III. c. 109. The commissioner appointed under it made the following determination, with reference to the boundaries of the parishes of Berkeley and Leonard Stanley, on the 17th of November, 1832.

"Whereas by an Act passed" 11 Geo. IV., "entitled An Act for enclosing lands in the parishes of Stanley St. Leonard's, otherwise Leonard Stanley, and Eastington, or one of them, in the county of Gloucester, and for discharging from tithes lands in the said parish of Stanley St. Leonard's otherwise," &c., "I, the undersigned Daniel Trinder, was appointed commissioner for carrying the said Act into execution; and whereas disputes or doubts having arisen whether certain old inclosures called respectively The Ham, The Langett, and Motford (all of which are part of the estate of the Rev. Thomas Heberden, and are in the occupation of John Marsh, as his tenant), are parcel of the parish of Stanley St. Leonard's, otherwise" &c., "or of the parish of Berkeley: I the said D. T., in pursuance of the powers and in compliance with the provisions contained in the said Act and the therein recited Act, have ascertained the boundaries of the said parishes respectively where they adjoin each other: Now, therefore, I the said D. T. do hereby set out, determine, and fix that the said inclosures respectively *are parcel of the parish of Stanley St. Leonard's, otherwise" &c., "and that the boundary fences of the said inclosures respectively are the boundaries between the said parish of Stanley St. Leonard's, otherwise" &c., "and the said parish of Berkeley, where they adjoin each other.

[*470]

(Signed) DANIEL TRINDER."

The Sessions thought that under stat. 41 Geo. III. c. 109, s. 3 (2) it was necessary to have proof that the means of appeal had been afforded by a due service of the descriptions of boundaries as therein provided, but that, if this were done, no appeal having ever taken place, they could not now enquire by what means and

(1) C. 7, Private. (2) See p. 476, *post*.

through what steps the commissioner had arrived at his decision; and they interrupted evidence which had been commenced on that point, particularly as to his having examined witnesses without oath, and as to whether there had been any disputes, before his perambulation commenced, concerning the boundaries in question.

With regard to the proper services of the description of boundaries: Berkeley parish is divided into four tithings, Berkeley town, Alkington, Ham, and a fourth composed of Hinton, Hamfallow, and Breadstone. There is but one church, which is in Berkeley, and one chapel of ease, which is in Ham. Each of the tithings has separate poor-rates, and manages its poor separately, and removes paupers from one tithing to another. Berkeley, Alkington, and Ham have each one churchwarden and two overseers. Hinton and Hamfallow have one overseer each, and Breadstone two, and there is one churchwarden for the three. The churchwardens *for all are appointed [*471] at Berkeley. The following is the form of the appointment.

At a vestry meeting held in the vestry room of the parish church of Berkeley, this day of , the following persons were nominated as proper persons to serve the office of churchwardens for the town and tithings for the year ensuing, viz. A. B., C. D., E. F., G. H. In the presence of us (Here follow the names of the parishioners assembled in vestry).

The outgoing churchwarden generally nominates his successor for the same tithing; but, in case of dispute, inhabitants of one tithing do not vote in the election of the churchwarden of another. None are chosen churchwardens of either of the tithings but such as are inhabitants of that particular tithing. Berkeley church is repaired by church rates levied separately on the tithings.

The description of boundaries was served, 23rd November, 1832, by the commissioner, duly as regarded the parish officers of Leonard Stanley and the lords of the manors, but not on any churchwarden or overseer in respect of Alkington as distinct from the rest of the parish of Berkeley. It was served on one Seaborne, who had been duly elected churchwarden of Berkeley town for the preceding year, but whose original year of office

REX v. MARSH.

was expired, and who continued to act in consequence of the person appointed as his successor not having been sworn in, or served.

The questions were, 1. Whether the Quarter Sessions ought to have received evidence as to the steps taken by the commissioner, and the other circumstances prior to his adjudication? 2. Whether they were entitled to require proof of the due service [*472] of the description* of boundaries? 3. Whether, if so, service on the churchwarden of Berkeley was sufficient? 4. Whether Seaborne could be considered as such churchwarden?

The case came on for argument in last Hilary Term (1).

Sir J. Campbell, Attorney-General, and *Greaves*, in support of the order of Sessions:

The rate is correctly imposed on the appellant's lands as lying in Alkington, unless it be conclusively shewn that the commissioner made a valid order, fixing them in Leonard Stanley. He acted on a limited authority, and was bound (upon the principle recognised in *Bruyeres* v. *Halcomb* (2)) to perform strictly the conditions under which it was to be exercised. The authority in question is given, and the conditions prescribed, by stat. 41 [*473] Geo. III. c. 109, s. 3 (3). Then, first, the order is void, *as it

(1) January 27th. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

(2) 3 Ad. & El. 381.

(3) Stat. 41 Geo. III. c. 109, s. 3, after reciting that "disputes or doubts may arise, concerning the boundaries of parishes, manors, hamlets, or districts, to be divided and inclosed, and of parishes, manors, hamlets, or districts, adjoining thereto," enacts that the commissioner under any Inclosure Act shall, and he is thereby authorized and required, to enquire into such boundaries by examination on oath or affirmation, and by such other legal ways and means as he shall think proper; and, if it shall appear to him that the boundaries are not then sufficiently ascertained, to ascertain and determine the same. "Provided always, that such commissioner or commissioners (before he or they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts) shall, and he or they is and are hereby required to give public notice, by writing under his or their hands to be affixed on the most public doors of the churches of such parishes, and also by advertisement to be inserted in some newspaper to be named in such Act, and also by writing to be delivered to or left at the last or usual places of the abode of the respective lords or stewards of the lords of the manors in which the lands and grounds to be inclosed shall be situate, and of such adjoining manor or manors, ten days

does not shew, on the face of it, that the conditions have been fulfilled: *Rex* v. *Croke* (1). Secondly, if this be not so, still the parties relying on the order were bound to prove the performance of all the conditions. And, thirdly, at all events, the opposing party was at liberty to impeach the proceedings, by shewing that the directions of the statute had not been complied with, so as to make the act of the commissioner a lawful exercise of jurisdiction: *Welch* v. *Nash* (2). But the appellant, here, was prevented from giving evidence for that purpose. The description of boundaries in this case was not served upon one of the "churchwardens or overseers" of the poor of Alkington, as it ought to have been. The only service was on Seaborne, who had been churchwarden of Berkeley town. Alkington was a district separately maintaining its own poor, and for the present purpose a distinct parish. And Seaborne was not even churchwarden of Berkeley town at the time of the service.

W. J. Alexander and *Cripps*, *contrà*, were then called upon by the COURT as to the service: [474]

Stat. 41 Geo. III. c. 109, s. 3, requires the notice, after setting out the boundaries, to be delivered to "one of the churchwardens or overseers of the poor of the respective parishes." That has been literally obeyed. With nothing but this clause to guide him, the commissioner could serve the description of boundaries on the churchwarden only of the mother church. The notice, previous to ascertaining the boundaries, is to be fixed upon the

at least before the time of setting out such boundaries, of his or their intention to ascertain, set out, determine, and fix the same respectively; and such commissioner or commissioners shall, within one month after his or their ascertaining and setting out the same boundaries, cause a description thereof in writing to be delivered to or left at the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards." It is further provided, that, if any person "or persons interested in the determination of the said commissioner or commissioners respecting the said boundaries shall be dissatisfied" with the order, he or they may appeal to any general Quarter Session for the county, to be holden within four calendar months "next after the aforesaid publication of the said boundaries, by delivering or leaving such description as aforesaid;" and the decision of the justices shall be final, and not removeable by *certiorari* or otherwise.

(1) 1 Cowp. 26.

(2) 9 R. R. 478 (8 East, 394).

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doors of the parish churches: the parish church of Alkington is in Berkeley. According to *Spitalfields* v. *Bromley* (1), and PATTESON, J. (referring to that case) in *Rex* v. *Bishop Wearmouth* (2), magistrates in making an order of removal are not bound to notice the divisions of parishes into townships maintaining their own poor; *à fortiori*, a commissioner under the Inclosure Act is not called upon to observe them. Stat. 43 Eliz. c. 2, s. 9, preserves the authority of churchwardens over the whole parish, although there may be districts within it, which, for some purposes, have jurisdictions of their own; and the section was construed accordingly in *Rex* v. *Gordon* (3).

(COLERIDGE, J.: That section does not apply here. The service here is made necessary by a distinct Act of Parliament, for a purpose not contemplated by the former Act.)

Churchwardens are representatives of the body of the parish: 1 Bla. Com. 394; and they are sworn to execute their office within the parish generally.

(COLERIDGE, J.: That is said of the churchwardens of a parish.)

[*475] There is *no prescribed oath for a churchwarden of a township or tithing. The churchwardens of the district in which the parish church is have the charge of the registers. The parish chest is in their care: the indenture of an apprentice bound in one of the townships would come from their custody. It is sufficient here if the churchwarden of Berkeley was one of several persons, any one of whom might properly have been served. The case finds that Alkington and other tithings have each one churchwarden; and there may be a custom that each of the several tithings which make up the parish should elect one. But it does not follow that each acts only for his own tithing; or that, if the churchwarden of Berkeley were ill, the churchwarden of Alkington would not be compellable to act in his place.

(1) 18 Vin. Abr. 468, Removal, (H), pl. 5.
(2) 5 B. & Ad. 942.
(3) 19 R. R. 376 (1 B. & Ald. 524).

(WILLIAMS, J.: If you contend that the churchwarden of one of these districts may act in any other throughout the parish, *Rex* v. *Nantwich* (1) is against you.)

That case was decided with much doubt; and the only point determined was that stat. 13 & 14 Car. II. c. 12, s. 21, was not controuled by the certificate Acts subsequently passed. The difficulty which arose in that case was removed shortly afterwards by stat. 54 Geo. III. c. 107 (2), s. 2. There can be no exercise of the office of churchwarden with reference to a township, except for execution of the poor-laws. The office is properly one having relation to a parish church; and in *Rudd* v. *Morton* (3), where the question was whether Stratton was a reputed parish of itself or part of the parish of Biggleswade, it was held that, to make it a reputed parish within stat. 43 Eliz. c. 2, it must have had "a parochial chapel, *and chapelwardens" at the time when the statute passed; and because Stratton "had but one chapelwarden whose office it was to collect the rates taxed upon Stratton, and pay them to Biggleswade," it was held part of Biggleswade, and not a reputed parish within the statute of Elizabeth. Here the townships and tithings in question make up the whole of the parish; and the several churchwardens were the churchwardens of the parish.

[*476]

(LORD DENMAN, Ch. J.: It is objected, not only that Seaborne was not the right person, but that his year was out.)

By the 118th canon (4) (cited in 1 Burn's Eccl. Law, 410, 8th ed. tit. Churchwardens), "the office of all churchwardens and sidesmen shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them, be sworn." In practice this is so. And Seaborne, while churchwarden, would be overseer of Alkington, *ex officio*.

(*Greaves* referred to an *Anonymous* case (5), 1 Ventr., as shewing that the canon, as to churchwardens, had been overruled, and

(1) 16 East, 228.
(2) Repealed, S. L. R Act, 1873.
(3) 2 Salk. 501.
(4) 2 Gibs. Cod. 962.
(5) 1 Ventr. 267.

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that a churchwarden was in office, for the purpose of acting, before he was sworn; to which point he also cited *Rex* v. *Corfe Mullen* (1).

LORD DENMAN, Ch. J.: The case in Ventris only shews that the canon may be overruled by custom.

LITTLEDALE, J.: And that a churchwarden may execute his office before he is sworn. In Com. Dig. Esglise (F. 1), it is said that, "By the canon 1 Jac. 89 (2), they shall continue in office but one year, except chosen again in like manner. But, by can. 118 (3), they shall be reputed to continue till new churchwardens sworn.")

[*477] *The *Anonymous* case (4) in Noy, cited 1 Ventris, 267, does not authorise the position that the 118th canon has been overruled. In Prideaux's Directions to Churchwardens, 61, 2 (5), it is said that churchwardens can do no legal act as such till they are sworn.

As to the preliminary acts not mentioned in the order, it must now be presumed that they were rightly done, the time for appeal having been suffered to elapse. In *Rex* v. *St. Mary in Bury St. Edmund's* (6) the commissioners' award was not denied to be conclusive evidence as to the state of boundaries from the time of making the award. *Rex* v. *Whiston* (7) shews that any question as to notices not mentioned in the order is now too late, no negative evidence being given, as in *Rex* v. *Haslingfield* (8), to counteract the presumption that all was done regularly. In *Rex* v. *Croke* (9) the Act of Parliament was of a different nature from the present, and more directly affecting private property.

Greaves, in support of the order of Sessions, was then desired to proceed:

Stat. 41 Geo. III. c. 109, s. 3, clearly intended that the service should be upon persons interested in the determination. The

(1) 1 B. & Ad. 211.
(2) 1 Gibs. Cod. 215; and see note (*y*), *Ibid.*
(3) 2 Gibs. Cod. 962.
(4) Noy's Rep. 139.
(5) 10th ed.
(6) 23 R. R. 345 (4 B. & Ald. 462).
(7) 4 Ad. & El. 607; and see *Rex* v. *Witney*, 5 Ad. & El. 191.
(8) 15 R. R. 350 (2 M. & S. 558).
(9) 1 Cowp. 26.

words requiring service on "one of the churchwardens or overseers of the poor of the respective parishes," must contemplate persons who can, in some instance at least, have a joint interest. The churchwarden of Alkington, and the overseer of Alkington, have such a joint interest with respect *to the poor; but the churchwarden of Berkeley has no joint interest with the overseer of Alkington: churchwardens of a parish have no right of interference with the poor of individual townships within the parish: *Rex* v. *Clifton* (1), *Rex* v. *Nantwich* (2). Enactments have been made expressly enabling overseers appointed in townships to do the duty of churchwardens there: 2 & 3 Ann. c. 6, s. 3; 17 Geo. II. c. 38, s. 15. The authority of *Spitalfields* v. *Bromley* (3) has been much shaken. In *Rex* v. *Bishop Wearmouth* (4) Lord DENMAN, Ch. J. held that the removing magistrates ought to have sent the paupers to that township, in the parish of Bishop Wearmouth, which was bound to maintain them. Stat. 43 Eliz. c. 2, s. 9, does not apply to a parish in which there are several districts maintaining their poor, under stat. 13 & 14 Car. II. c. 12, s. 21.

[*478]

(COLERIDGE, J.: Upon whom do you say the service here ought to have been?)

Notice should have been given to some person representing the parish officers of Alkington. The appeal against the order is given to "any person interested." If it be sufficient to serve the description of boundaries upon the churchwarden of any one of these districts, it might be given to a party whose district was not affected by the proceeding, and who, therefore, had no interest in communicating the notice; or even to a party interested in withholding it.

(LITTLEDALE, J.: The Act, in prescribing the notice, seems not to contemplate any particular description of interest in the parties who are to be served; but to regard them merely as public officers. The interests contemplated seem to be those which commoners and others may have in the lands themselves.)

(1) 2 East, 168.
(2) 16 East, 228.
(3) 18 Vin. Abr. 468, Removal, (H), pl. 5.
(4) 5 B. & Ad. 942.

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[*479]

*The power of appeal depends on the service of notice, because the time for appealing is limited to four months next after publication of the boundaries.

As to the objection that Seaborne's year had expired. He was not *de jure* churchwarden, but his successor was. Two persons cannot be in of the same office; and if a man may execute the office of churchwarden before he is sworn, as was held in the *Anonymous* case in Ventris (1), and in *Rex* v. *Corfe Mullen* (2), it is only because he is in of such office. The canon is, inferentially, over-ruled by the later authorities. Churchwardens are a lay corporation, existing independently of the canons, by common law: *Dawson* v. *Fowle* (3), *Stutter* v. *Freston* (4), *Catten* v. *Barwick* (5). Swearing is a proper sanction introduced by canon, but not necessary to the lawful holding of the office. The appointment, here, is "for the year ensuing."

As to the preliminary proceedings, *Rex* v. *St. Mary in Bury St. Edmunds* (6), does not shew that any irregularity in them might not have been inquired into at the Sessions. In that case it was not suggested that the proceedings of the commissioners had not been regular.

LORD DENMAN, Ch. J.:

This is a question of great difficulty, and important in its consequences; and we wish the case restated so as to afford us more information as to the appointment of these officers, their oath, and the limits within which they act.

[480]

The COURT directed

That the orders returned with the writ of *certiorari* in this prosecution be sent back to the Sessions to be restated, the Court wishing to know,—Whether any custom prevails as to the election of parochial officers within the parish of Berkeley, and what is the precise form of their appointment, and the form of the oath of office taken by them; and also whether any of the officers act out of the tithings for which they are respectively

(1) 1 Ventr. 267.
(2) 1 B. & Ad. 211.
(3) Hardr. 378.
(4) 1 Str. 52.
(5) 1 Str. 145.
(6) 23 R. R. 345 (4 B. & Ald. 462).

appointed. In answer to these inquiries, the following addition was (by consent) made to the case:

1. By custom in the parish of Berkeley (divided as it is into the several tithings as mentioned in the case), there are four churchwardens, the customary mode of electing whom is as follows. A notice is given in the parish church that the churchwardens desire a meeting at the vestry on Easter Tuesday to choose churchwardens for the town and tithings for the year ensuing. At the meeting held in pursuance of such notice an inhabitant of each tithing is separately proposed and nominated as the new churchwarden for such tithing. The churchwarden for the tithing of Alkington is usually nominated first in order, and afterwards the rest one after another. It is customary for the outgoing churchwarden of each tithing to propose his successor; and the person so proposed is usually nominated without opposition; but, in case of opposition, the successor is nominated by the majority of the inhabitants, then present, of the tithing for which he is to serve, in which nomination the inhabitants of the other tithings never interfere. As far as living memory goes, each churchwarden has been an inhabitant of the tithing for which he served.

2. After the nomination of the churchwardens as aforesaid, a minute thereof is usually made, in the form set out in the case, for presentation to the archdeacon at his annual visitation. No other minute or appointment is made or delivered to any of the churchwardens. [481]

3. They are all sworn in together at the archdeacon's visitation. The oath administered is in the following form: "You and each of you shall swear truly and faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm, so help you God and the contents of this book."

4. No churchwarden ever acts out of the tithing for which he is appointed, except the signing the presentments annually made to the archdeacon of the state of repair of the church and other presentable matters, which are signed by all four churchwardens, can be so considered. There is no church rate made for the

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tithing of the town of Berkeley; but the church is repaired by rate out of the other tithings. When a sum of money is required for other expenses towards which the church-rate is applicable, the parish clerk, who is also vestry clerk, divides the amount required into three equal parts, and makes a separate rate for each of the three other tithings for one third, although the extent and value of such tithings are not equal. Such rate is allowed by the inhabitants of each of such tithings in vestry. The rate, when collected, is paid to the vestry clerk, who keeps separate accounts for each of the churchwardens of such tithings, and such accounts are allowed by the inhabitants of each of such tithings.

[482] The case was further argued in this Term (1).

Sir J. Campbell, Attorney-General, and *Greaves*, in support of the order of Sessions. * * *

[483] *W. J. Alexander* and *Cripps*, *contrà*. * * *

Cur. adv. vult.

[485] LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The question in this case has arisen out of the ascertainment of boundaries between certain parts of the parish of Berkeley in the county of Gloucester and the parish of Leonard Stanley in the same county, under the third section of 41 Geo. III. c. 109 (the General Inclosure Act), by a commissioner acting under it, and an Act of 11 Geo. IV. for the inclosure of the parish of Leonard Stanley. And it seems to us that the difficulty, which has arisen, is not attributable to any error or misconduct of that commissioner, but to the imperfection and confusion of the General Inclosure Act itself.

It certainly would seem probable that the settlement of boundaries would be equally useful and necessary in the case of an inclosure taking place in or adjoining to parishes divided into many districts, as where a parish consists of one undivided district. And, accordingly, the earlier part of the third section recites, that disputes may arise respecting the boundaries of

(1) June 4th. Before Lord Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

"parishes, manors, hamlets, or districts," about to be divided and inclosed; and, for preventing or adjusting those disputes, the commissioner, under the powers thereby conferred upon him, is to settle the boundaries. Previously, however, to his executing this duty, he is to give several very formal and public notices, to attract and ensure attention to the manner of his performance of it. Subsequently to the commissioner's settling the boundaries he is required by the Act to give a notice to *"one of the churchwardens or overseers of the poor of the respective parishes," omitting entirely any mention of the officers of districts; and out of this omission the question before us has arisen. [*486]

In the parish of Berkeley above mentioned, there are four districts called tithings, which districts, according to the statement in the case, have, so far back as memory goes, each nominated a separate churchwarden, who, after his appointment, uniformly acts within and for his own district, "except the signing the presentments annually made to the archdeacon of the state of repair of the church and other presentable matters, which are signed by all four churchwardens." They are also sworn to execute the office of churchwarden "within their parish." An inclosure having taken place within the adjoining parish of Leonard Stanley, the commissioners for settling boundaries had adjusted them between that parish and the adjoining part of the parish of Berkeley which lay in the tithing of Alkington, and, in so doing, had fixed certain lands, of which the defendant is occupier, to be in the parish of Leonard Stanley. And the single question is, whether the act of the commissioner was invalid; in which case the lands would remain in Alkington, and the defendant would be properly rated for them; otherwise not.

The Sessions, properly as we think, refused to hear evidence as to the giving or omitting the preliminary notices, and reserved for us the question, whether a notice served upon one Seaborne, who had been appointed churchwarden for the tithing of Berkeley, was a service upon a churchwarden of the parish of Berkeley.

It is said that there is no such person as a churchwarden of

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the parish of Berkeley; and, if that be said *truly, it follows that it was impossible for the commissioner to comply, literally, [*487] with the provisions of the statute: for it has been already noticed that no officer of a district is therein mentioned; and yet it cannot, we presume, be doubted but that the case was clearly within the contemplation and objects of the statute. It has been urged, in furtherance of the objection, that the commissioner should have served a notice upon an officer of each tithing, or, at least, upon that of Alkington. If he had adopted either course, we are by no means sure that he would not have been met by an objection, exactly the converse of this, that, by law, no such officer as a churchwarden of a portion of a parish can exist.

Placed, therefore, as the commissioner certainly was, in a difficulty, in a case too where he was, as certainly, meant to act, we think that we should see very clear and convincing reasons for considering his act invalid, before we arrive at that conclusion. And in the result we are not so satisfied. Generally speaking, the churchwarden is peculiarly, and emphatically, a parish officer. The nomination may be (not unusually is) by a portion of, or even by a person in, the parish; but the officer is not thereby affected. He is still of, and for, the parish. We think that this may be considered as a somewhat unusual case, of separate appointment, and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. They are sworn in as for the parish; the acts, before particularly alluded to, are for the parish; the general and undoubted character of the office is for the parish. Upon [*488] the whole, we are of opinion that the ascertainment *of boundary by the commissioner was, under these circumstances, well performed, and that the defendant was improperly rated in Alkington. The order of Sessions must therefore be quashed.

Order of Sessions quashed.

MARTIN *v.* STRONG, CLERK (1).

1836.
Nov. 8.

(5 Adol. & Ellis, 535—538; S. C. 1 N. & P. 29; 2 H. & W. 336; 6 L. J. (N. S.) K. B. 48.)

[535]

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication.

CASE for slander. The declaration stated that the plaintiff had been retained by Joseph Woollen, a man-midwife at Painswick, in his service and employment *as such man-midwife, and [*536] that J. W., but for the committing &c., would have retained him in his service, and would have given him a certificate of good and moral conduct at any time when he should have quitted that service; that, before the committing &c., there was a charitable society at P. for the relief of poor women, inhabitants of P., during their pregnancy; that J. W. was man-midwife to the society, and the plaintiff from time to time attended the patients, as assistant to J. W.; that the defendant, wishing it to be believed that the plaintiff had conducted himself unchastely and immorally towards the patients, in a conversation between the defendant and one Mrs. Hicks, concerning the plaintiff, and his conduct in his attendance, falsely, &c., spoke and published &c. (with inuendoes as to persons), "I am quite satisfied with his professional skill: but I can assure you the poor women are quite terrified at the thought of having him; and one poor woman said she quite shuddered at his name being mentioned;" and the defendant, being asked by Mrs. H. what the plaintiff had done, falsely, &c., answered, "it is too bad to mention;" by which the defendant meant that the plaintiff had been guilty of improper and immoral conduct in his attendance. Other words to the same effect were charged; and special damage was alleged, that J. W. had refused to retain the plaintiff in his service, and to give him a certificate of his good and moral conduct at his quitting; whereby the defendant was prevented from applying to the Court of Examiners of the Apothecaries' Company to be admitted to an examination for the purpose of obtaining a certificate to practise as an apothecary.

(1) Explained and dist. in *Kine* v. *Sewell* (1838) 3 M. & W. 297.

MARTIN v. STRONG.

Plea, Not guilty (with other pleas not material here).

On the trial before Littledale, J., at the last Gloucestershire
[537] Assizes, it appears that a meeting of the subscribers to the institution had been held for the purpose of determining whether Mr. Woollen should continue to be the sole accoucheur to the objects of the charity; that the defendant, who was a subscriber, was chairman; and that, either after or before he had left the chair, Mrs. Hicks, a subscriber, questioned the defendant as to some complaints which had been made, during the meeting, against the plaintiff with respect to his attendance upon the charity. The defendant answered, that he did not object to the plaintiff's professional character. Mrs. H. then asked what the objection was; to which the defendant replied, that it was too bad to name, and that he could not tell her. Mrs. H. then said, "I insist upon it: being one of the members of the society, I have a right to know." Upon which the conversation took place, substantially as set out in the declaration. The learned Judge told the jury that, supposing all which passed during the meeting to be in the nature of a privileged communication, the meeting was not necessarily over when the defendant left the chair: and he desired them to consider, whether the conversation was fairly a part of the proceedings of the meeting. The jury found for the plaintiff, damages 100*l.*

Sir W. W. Follett, in this Term (1), moved for a new trial, on the ground of misdirection, and of the verdict being against evidence; and he insisted that a communication made,
[*538] *bonâ fide*, by one member of the charity *to another, in answer to inquiries by the latter on matters relating to the charity, was privileged, although not made during a formal meeting; and that the jury should have been asked whether there were any circumstances rebutting the presumption in favour of privilege. He cited *Toogood* v. *Spyring* (2), *Wright* v. *Woodgate* (3), *M'Dougall* v. *Claridge* (4), *Bromage* v. *Prosser* (5).

(1) Nov. 4th. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) 40 R. R. 523 (1 C. M. & R. 181; 4 Tyr. 582).

(3) 41 R. R. 788 (2 C. M. & R. 573; Tyr. & Gr. 12).

(4) 10 R. R. 679 (1 Camp. 267).

(5) 28 R. R. 241 (4 B. & C. 247).

(LORD DENMAN, Ch. J.: You set up a very large claim of privilege; there may be a thousand subscribers to a London charity.)

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Cur. adv. vult.

On this day, Lord DENMAN, Ch, J., after adverting to another objection to the learned Judge's charge (not mentioned above,) and stating that it was founded on a misapprehension of what his Lordship had said to the jury, added, It is also said that the parties had a right to enter into the discussion simply as subscribers to the charity. We do not accede to that: such a claim of privilege is too large.

Rule refused.

REX *v.* JOULE.

1836. *Nov.* 8.

[539]

(5 Adol. & Ellis, 539—540; S. C. nom. *Rex* v. *Joul*, 1 N. & P. 28; 2 H. & W. 375; 5 Dowl. P. C. 435.)

A defendant, applying to remove an indictment from Sessions by *certiorari*, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; it is not sufficient to shew that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years.

THIS was an indictment for obstructing a common King's highway. The bill was found at the last Quarter Sessions for Salford.

Wightman for the defendant now moved for a *certiorari*, on an affidavit in which it was stated that the place in question had been long used by the defendant as a yard to his brewery, and that there was erected over part of it a building of the defendant, which had been built for thirty or forty years, and the enjoyment of which was very important to him; that, on the trial, the question would be whether the alleged highway were such; that the indictment was preferred at the instance of commissioners of police, acting for the township of Salford, and the surveyors of the highways, all residing in the neighbourhood of the place where the trial would be had, and of the alleged obstruction; that the deponent believed that their influence would prejudice the case if it were tried at the Quarter Sessions;

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and that he "is advised and believes that it will be proper, as well on account of the value of the object of the indictment, as of the questions of matter of fact and points of law which may arise, to have the same indictment tried by a special jury." *Wightman* now urged that the affidavit shewed grounds for the removal, especially as it suggested that there would be points of law to be determined.

(WILLIAMS, J.: What points do you suggest as likely to arise?)

It is not necessary to specify them on such an application; but
[*540] it is clear that *a question of non-user may, and probably must, arise.

(PATTESON, J.: It will be a mere question of fact, highway or not.)

That will probably raise difficult questions, whether the public rights (if any) have been affected by non-user. This is practically a trial of ejectment for property of great value.

PATTESON, J. (1):

You must shew specific grounds upon which legal difficulties will arise. The practice of allowing removals has perhaps been too lax.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule refused.

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DOE D. STILWELL *v.* MELLERSH.

(5 Adol. & Ellis. 540—542; S. C. 1 N. & P. 30; 2 H. & W. 341; 6 L. J. (N. S.) K. B. 41.)

A surrender of copyhold lands in the manor of F. was proved to have been taken by S., who stated that he held the office of clerk of the Castle of F., which was in the manor, by patent from the lord; that there was a custom for him to take surrenders; that the steward also took them, and that he, S., had a concurrent jurisdiction with the steward. The patent contained no authority to that effect: Held, evidence for a jury that S. was entitled by custom to take the surrender.

EJECTMENT for copyhold premises in Surrey. On the trial before Lord Abinger, C. B., at the last Guildford Assizes, it

(1) Lord Denman, Ch. J. was absent.

became necessary for the plaintiff to prove that a surrender had been taken of the premises at the copyhold Court of the manor of Farnham, in which manor the premises were situate. It appeared that the surrender was taken by a person named Shotter, who described himself as clerk of the Castle of Farnham, which is within the manor, and said that he derived his authority from the Bishop of Winchester, *the lord of the manor. He produced a patent, dated 1796, but which did not authorise him to take surrenders. He added, that there was a custom for him to take surrenders; that the steward of the manor also took them, but that the witness had a concurrent jurisdiction; and that the admittances were taken by the steward, who kept them, and from time to time sent the witness a copy of them. It was objected that this was not evidence of a valid surrender; but the LORD CHIEF BARON said that, with a custom, such a surrender was sufficient; and the plaintiff had a verdict.

[*541]

Wordsworth now moved for a rule to shew cause why there should not be a new trial:

The surrender was not formally taken. It does not appear that Shotter was an officer of the Court, or even a member of it. The law recognizes such surrenders only as are taken by the lord, or his steward, or the deputy-steward. These, with the tenants, constitute the whole Court.

(LORD DENMAN, Ch. J.: They might be taken by two copyholders.)

For that there must be a custom; and so there must for the taking a surrender by any one except the lord, or his steward, or deputy-steward. Here, the assertion of Shotter, that there was a custom for him to take them, could import only that he himself had been in the habit of taking them, which is the very practice, the legality of which is in question. The cases are collected in 1 Scriven on Copyholds, 153, Part I. ch. 4 (ed. 3rd). There is no authority for holding such a custom good; and the custom in point of fact is not established by legal proof.

DOE d. STILWELL v. MELLERSH. [542]

LORD DENMAN, Ch. J.:

Here is a person holding an office connected with the manor, who states that there is a custom for him to take surrenders. I know no rule of law contrary to such a custom; and there was evidence for the jury of its existence.

PATTESON, J.:

He is a sort of deputy-steward for this purpose.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule refused.

1836. *Nov.* 8.

[543]

GILBART AND ANOTHER *v.* DALE.

(5 Adol. & Ellis, 543—547; S. C. 1 N. & P. 22; 2 H. & W. 383; 6 L. J. (N. S.) K. B. 3.)

In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby consignor lost his goods, it is not sufficient to prove that they never reached their destination or were accounted for. The office-keeper's duty is to deliver to a carrier; and some evidence must be given, shewing specifically a breach of that duty.

A tradesman, having made up goods by order, delivered them at a booking-office, with the customer's address, and booked them, to be forwarded to him, not specifying any particular conveyance, and no particular mode of transmission having been pointed out by the customer. *Quære*, whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge?

ASSUMPSIT. The declaration stated that defendant, before and at the time of the making of his promise, &c., was possessed of a certain booking-office, for the booking and receiving and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might respectively be directed; and, defendant, being so possessed &c., the plaintiffs heretofore, to wit 5th June, 1833, at the special instance and request of defendant, delivered to said defendant, so being possessed &c., a certain box of said plaintiffs of great value, to wit &c., and containing divers goods and chattels, to wit &c., of said plaintiffs of great value, to wit &c., to be by him, the said defendant, taken care of, in order that the same might be forwarded to a certain person to whom the same was then directed, to wit, to one Thomas Jeffries, Esquire, Cott Moor, near Pembridge, South Wales;

and, in consideration thereof, and of certain reward to said defendant in that behalf, then paid by said plaintiffs to said defendant, he, the said defendant, being so possessed of the said booking-office as aforesaid, undertook &c. to take care of the said box, and of the goods and chattels therein, in order that the same might be forwarded to the person to whom the same was then directed, to wit to &c.; and, although said defendant, as such possessor of the said booking-office as aforesaid, then had and received the said box, and said goods and *chattels therein for the purpose aforesaid, yet [*544] defendant, not regarding his duty in that behalf, nor his said promise &c., but contriving &c., hath not taken care of the said box, or of the goods and chattels therein, in order that the same might be forwarded as aforesaid; but, on the contrary, defendant, being so possessed of the said booking-office as aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said box, and the goods and chattels therein, that, by and through the mere carelessness, negligence, and improper conduct of defendant in this behalf, the said box and goods were lost to the plaintiffs, &c. Pleas. 1. *Non assumpsit.* 2. That defendant did take care of the box and goods, and that the same were not by the carelessness &c. of defendant lost to plaintiffs in manner and form &c.: conclusion to the country.

On the trial before Lord Denman, Ch. J., at the sittings in Middlesex after last Trinity Term, it appeared that the defendant was the proprietor of a general booking-office (at the Gloucester coffeehouse, Piccadilly); and that the plaintiffs, who were tailors, left at the defendant's office, and paid twopence for booking, a box of clothes made by them for a customer, and addressed to him as stated in the declaration. No direction was given as to any particular conveyance; and it did not appear that any desire had been expressed on the subject by the consignee. The box never reached its destination or was accounted for. Upon this evidence it was objected: first, that the action ought to have been brought by the consignee (*Dutton* v. *Solomonson* (1), notes to *Wilbraham* v. *Snow* (2)); secondly, that *it appeared to have been the [*545] defendant's duty not to carry, but to deliver to a carrier, and

(1) 7 R. R. 883 (3 Bos. & P. 582).

(2) 2 Wms. Saund. 47 k, note (1), and note [*u*], 5th ed.

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that the non-arrival of the goods at their destination did not prove a breach of that duty: *Newborn* v. *Just* (1), *Upston* v. *Slark* (2). The LORD CHIEF JUSTICE directed a nonsuit on the points taken, and refused the plaintiffs' counsel leave to move to enter a verdict.

Platt now moved for a new trial:

First, under the new rules of pleading, the property in the goods was not put in issue by the plea of *non assumpsit*.

(COLERIDGE, J.: Is not the delivery of a box "of the plaintiffs" one of "the matters of fact from which the contract or promise alleged may be implied by law?" (3).

PATTESON, J.: If the defence is, that the contract was not a contract with the plaintiffs, that is clearly raised by the plea of *non assumpsit*.

LORD DENMAN, Ch. J.: If that defence is proved, the contract was not made *modo ac formâ* as alleged.)

Secondly, the property was in the plaintiffs originally, and was not out of them, according to the authorities cited on the trial, until there had been a delivery to a carrier. Here they were merely deposited for the purpose of being so delivered. There had been no such acceptance of them by the consignee, as would have been required by stat. 29 Car. II. c. 3, s. 17 (4): *Hanson* v. *Armitage* (5). In *Davis* v. *James* (6) and *Moore* v. *Wilson* (7), [*516] the carrier's contract was held *to be with the consignor.

(LORD DENMAN, Ch. J.: No doubt that may be so, under some circumstances. In *Moore* v. *Wilson* a contract with the consignor must have been proved.)

(1) 2 Car. & P. 76.
(2) 2 Car. & P. 598.
(3) Reg. Gen. Hil. 4 Will. IV. Pleadings in particular actions, I. Assumpsit, 1; 5 B. & Ad. vii.
(4) Repealed; see now Sale of Goods Act, 1893, s. 4.
(5) 24 R. R. 478 (5 B. & Ald. 557).
(6) 5 Burr. 2680.
(7) 1 R. R. 347 (1 T. R. 659). See the remarks on these cases in *Dawes* v. *Peck*, 4 R. R. 675 (8 T. R. 330); Long on Sales of Personal Property, ch. vii. p. 168. And see the cases collected in a note to *Coggs* v. *Bernard*, in Smith's Leading Cases, 103.

Thirdly, the plaintiffs made a sufficient *primâ facie* case against the defendant by proving that the box never arrived. In the case of a carrier that would have been clear: *Griffiths* v. *Lee* (1): and it cannot be said, here, that the plaintiffs ought to have sued the carrier; for it was not within their knowledge who the carrier was, if the goods were entrusted to one.

PATTESON, J.:

It is unnecessary to give any opinion on the point as to the consignor's title to sue, because the nonsuit was clearly right on the second ground of objection. Was there any evidence to sustain the charge of negligence against this defendant? Let us look at the contract. The defendant was not a carrier, but keeper of a booking office. His contract was, to take care of the box, that it might be forwarded, that is, that it might be delivered to some carrier, to be conveyed to its destination. To shew a breach of that undertaking by the defendant, it should have been proved by direct evidence that the box was taken away while in the booking-office, and lost, or that it was never delivered to any carrier. No such evidence was given. All the proof was, that it did not arrive at its destination: but, in this case, non-delivery to the consignee was not sufficient. The decision in *Griffiths* v. *Lee* (1), is correct, as applied to the case of a carrier, but not to that of a book-keeper. The default to be *proved against him was, non-delivery of the goods to a carrier. [*547]

WILLIAMS, J.:

I am of the same opinion. A carrier must discharge himself of his contract by delivering the goods to the consignee. Here the contract was, to deliver them to a carrier; and the evidence leaves it undecided, whether the goods were lost in the defendant's hands, or were delivered to a carrier and lost by him. There is, therefore, no sufficient proof of negligence in the defendant.

COLERIDGE, J.:

In the case of a carrier, the law presumes that he will do his duty; and a plaintiff, who charges him with the breach of it, must

(1) 1 Car. & P. 110.

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give some evidence of non-performance. The fact, that the goods have not reached the consignee, is such evidence against the carrier, and calls upon him to discharge himself by other proof. So in the case of the keeper of a booking-office; to call on him for an answer to such a charge as the present, some evidence must be given of the non-performance of his undertaking: but that is not done by merely shewing non-delivery of the goods to the consignee. Suppose goods were left with a carrier to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?

LORD DENMAN, Ch. J. concurred.

Rule refused (1).

1836. *Nov.* 9.

[559]

REX *v.* THE LORD OF THE MANOR OF HEXHAM, AND HIS STEWARD.

(5 Adol. & Ellis, 559—563; S. C. 1 N. & P. 53; 2 H. & W. 396; 6 L. J. (N. S.) K. B. 33.)

Where two adverse parties claim title, as devisees, to the same copyhold tenement, the steward may admit both, and, proper grounds being shewn, this Court will require him by *mandamus* so to do.

A RULE *nisi* was obtained, in a former Term, for a *mandamus* calling upon Thomas Wentworth Beaumont, Esq., the lord of the manor of Hexham, and James Losh, Esq., his steward of the said manor, to admit Richard Errington to certain copyhold premises within and parcel of the said manor, as the right heir of Elizabeth Armstrong deceased, the late tenant thereof, according to the custom of the said manor.

By the affidavits for and against the rule, the following facts appeared. Elizabeth Armstrong, being seised of the premises in fee, according to the custom of the manor, surrendered to the use of her will, which will she afterwards made (April 3rd, 1770), and died. The material devises were, to trustees (who were appointed executors) for a term of ninety-nine years, to cease when the trusts should have been discharged; and, from and after the determination of such term, to Thomas Scott for life;

(1) See *Syms* v. *Chaplin*, p. 523, *post*. That case, so far as it bears upon the present, was decided before it, November 2nd.

remainder to trustees to preserve &c.; remainder to the first and every other son and sons of the body of T. S. successively in tail male; remainder to William Scott for life; remainder to trustees to preserve &c.; remainder to the first and other sons of the body of W. S. successively in tail mail, in the same manner as to the sons of Thomas Scott; remainders over (which failed); remainder to the right heirs of the testatrix for ever. William Scott (who afterwards took the name of *Ord, in obedience to the will), became seised by virtue of the devise to him, and was admitted tenant. He surrendered to the use of his will, which will he made (dated December 24th, 1824), and thereby devised the premises in question to his wife Elizabeth for her life, remainder to his nieces, Barbara Poole and Elizabeth Poole, in fee, as tenants in common. He outlived his wife, and died, November 5th, 1832, without issue, leaving his said nieces him surviving. The nieces thereupon claimed title to the premises, as devisees in fee of William Ord. The present applicant, Richard Errington, alleged that, on the death of William Ord without issue, he became entitled as the right heir of Elizabeth Armstrong, and that the devise by Ord to his nieces could not operate, for that he took only a life estate under Elizabeth Armstrong's will. [*560]

At a Court holden for the manor, June 20th, 1835, Richard Errington and Barbara and Elizabeth Poole made their respective claims to admittance, whereupon a jury of the homage was sworn, and Errington adduced evidence of his being the heir of Elizabeth Armstrong. The nieces put in the will of W. Ord, and proved the execution. The steward in his affidavit, made in answer to the present rule, stated that the proof offered by Errington was not, in his opinion, conclusive; that it appeared by the court-rolls that W. Ord was not admitted as tenant for life merely, but pursuant to such limitations, and with such remainders over, as were contained in Elizabeth Armstrong's will (which was annexed to the affidavits in support of the rule), and that, at the time of the admittance of Barbara and Elizabeth Poole as after-mentioned, W. Ord was the last tenant of the *premises in question on the court-rolls of the manor. He also stated that Errington offered no evidence of his being the [*561]

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customary heir of W. Ord, the last tenant; and that the deponent's only reasons, save as before set forth, for refusing to admit Errington, were, that, at the time of his application to be admitted, there was a surrender on the rolls to the use of W. Ord's will; that W. Ord had devised the premises as before-mentioned; and that Barbara and Elizabeth Poole, as his devisees, were, at the time of the said application, entitled, and by their attorney claimed, to be admitted according to the custom of the manor, in preference to the said R. Errington. He further stated that lands in the manor descended as in free and common socage, and that such lands were not devisable without surrender to the uses of the will (except for the benefit of certain near relations and of creditors), until the passing of stat. 55 Geo. III. c. 192; and that, in the case of a regular devise by such will, the devisee was admitted.

Errington stated in his affidavit that the steward, at the above Court of June 20th, on refusing to admit him, observed that he was in a condition to prosecute his claim at law without admission, which the devisees were not, and, therefore, it was the steward's duty to admit them; but he said that he would direct the jury to find by their presentment, whether Errington had proved himself to be one of the heirs of Elizabeth Armstrong, or not. The jury afterwards found that Errington was proved to be her heir. The admittance of Barbara and Elizabeth Poole was postponed (in order that they might produce the probate of William Ord's will), and they were admitted, October 14th, 1835.

[562] *Bayley* now shewed cause:

It cannot be contended, after the cases of *Rex* v. *The Masters, &c., of the Brewers' Company* (1), and *Rex* v. *Wilson* (2), that a party being the heir to copyhold premises may not have a *mandamus* granted to admit him. But here the party does not claim as the heir of the last tenant on the rolls; and it is questioned by the steward, whether he actually be the heir of the party under whom he claims. William Ord was the last tenant on the rolls; and it appears that he was not admitted in the mere character of a tenant for life. His devisees have

(1) 27 R. R. 318 (3 B. & C. 172). (2) 34 R. R. 327 (10 B. & C. 80).

been admitted; and the steward deposes that it was consistent with the custom of the manor to admit them, and not Richard Errington.

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W. H. Watson, contrà:

Although the devisees of Ord have been admitted, Errington is entitled to be admitted also, because he claims as devisee of Elizabeth Armstrong, and cannot enforce or defend his right without admittance. It is true that he is her heir, and he has been so found by the homage; but he makes title as devisee, claiming under a tenant who has surrendered to the use of her will and has devised, ultimately, to her own right heirs.

(LORD DENMAN, Ch. J.: Have you any clear authority for saying that the steward may admit two parties laying claim in different rights to the same copyhold?)

It is necessary that he should, because the claimant, in a case like the present, cannot sue or defend without admittance. The admittance will not decide anything conclusively: it will only give a *primâ facie* right, and an opportunity to litigate the title.

(*Bayley:* The rule is, that where a party may take as devisee or as heir, he takes as heir.)

LORD DENMAN, Ch. J.: [563]

This rule must be made absolute. I should have liked to see some case in which two claimants had been admitted under circumstances like the present; but I think it follows, from the nature of the thing, that the steward must have power to grant such admittance, because otherwise, by admitting one party, he must exclude the other.

COLERIDGE, J. (1) concurred.

Rule absolute.

(1) Patteson and Williams, JJ. had left the Court.

1836.
Nov. 10.

[584]

REX *v.* THE MINISTER AND CHURCHWARDENS OF STOKE DAMEREL.

(5 Adol. & Ellis, 584—591; S. C. 1 N. & P. 56; 2 H. & W. 346; 6 L. J. (N. S.) M. C. 14.)

Quære, whether a *quo warranto* lies for the office of sexton?

Semble, per Lord DENYAN, Ch. J., that, if the right of electing a sexton be in the inhabitants of a parish, and a *mandamus* to hold a meeting for such election be grantable, the writ may be properly directed to the churchwardens, and not to the inhabitants in general.

Where a requisition had been directed to the churchwardens to call a meeting for such election, which they declined to do, on the ground that the minister had refused his consent, alleging the right of election to be in himself; *semble*, per Lord DENMAN, Ch. J., on motion for a *mandamus* to hold such election, that the demand and refusal were sufficient to warrant an application for a *mandamus* to the minister and churchwardens.

A *mandamus* was moved for as above, on affidavits making a *primâ facie* case of right in the inhabitants to elect, but affidavits were filed in answer stating facts to shew that the right was in the rector: Held, that a *mandamus* ought not to go, the evidence not being decisive in favour of the applicants, and there being another mode of trying the right, viz. by withholding the sexton's fees, or by submitting to the payment and bringing an action against him for the amount.

ERLE, in last Hilary Term, obtained a rule *nisi* for a *mandamus* calling upon the minister and churchwardens of Stoke Damerel, in the county of Devon, to convene a vestry meeting within that parish, for the purpose of electing a proper person to fill the office of sexton of the said parish.

The office, which is profitable and for life, became vacant, about October, 1835, by the death of John Garland, the last sexton, who had held it fifty years. On his decease, John Symons was appointed sexton by the senior curate, who claimed to make such appointment, as minister, the rector being absent, the living under sequestration, and curates having been nominated by the Bishop. The appointment was afterwards confirmed by the rector. Certain parishioners, being of opinion that the right of electing a sexton was, by ancient usage, in the rate-payers of the parish, sent a requisition to the churchwardens, in January, 1836, after the appointment of Symons, calling upon them to convene a vestry meeting for the purpose of electing a sexton. The churchwardens submitted the requisition to the senior curate, who stated the right to be in the minister, in the absence of any legal custom to the contrary, and therefore

*refused to allow a vestry to be called in the church for the proposed election. The churchwardens, consequently, declined to comply with the requisition, alleging the above refusal as a reason. The affidavits in support of the rule stated, as a matter of notoriety, that the right of election was in the parishioners; several persons deposed, from their own recollection, that Garland had been chosen by the parishioners, and not by the rector; and similar statements were made, upon hearsay, as to one Weston, Garland's predecessor. Affidavits were filed in opposition to the rule, contradicting the above statements as to the right, and alleging that both Garland and Weston had been elected by the rector and not by the parishioners. It was also stated that the parish books from 1740 to 1800, in which vestry meetings were entered, made no mention of any meeting for the election of a sexton, or of any appointment to that office, although, during that period, there had been four elections of sextons, not including the last. Subjoined to the last-mentioned affidavits was a notice from the rector, dated in October, 1835, mentioning Garland's death, asserting the rector's sole right to appoint a sexton, and warning all persons not to interfere with it; and it appeared that this notice, as well as the refusal of the senior curate, had been communicated to the parties making the requisition, when the churchwardens declined to call a meeting.

[*585]

Sir W. W. Follett, with whom was *Crowder*, now shewed cause:

In the first place, the office is full, and therefore a *mandamus* cannot be the proper course.

(LORD DENMAN, Ch. J.: Is this an office for which a *quo warranto* would lie?)

The claim to it is treated by the *applicants as a matter of public concern. If this were a corporate office, there could be no doubt that, the office being full, a *quo warranto*, and not a *mandamus*, would be the proper remedy.

[*586]

(LORD DENMAN, Ch. J.: In that case, if the office were full by an appointment clearly made without any authority whatever, a

REX v. THE MINISTER AND CHURCHWARDENS OF STOKE DAMEREL.

mandamus might go; though, generally, the plenarty would be an objection to the proceeding by *mandamus*.)

Rex v. *The Mayor of Colchester* (1) shews the rule adopted on that subject. A *mandamus* is not necessary here. A parishioner may try the validity of the appointment by refusing to pay the fees. And, further, this application is for a *mandamus* to the minister and churchwardens to call a vestry for the purpose of an election; the requisition being made in the first instance to the churchwardens. No precedent has been found of the granting of such an application. In an *Anonymous* case in Strange (2), a *mandamus* was moved for, to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry in Easter week for the election of churchwardens; "but the Court refused it: saying, there was no instance of such a *mandamus*, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed." In *Rex* v. *The Churchwardens of St. Peter's, Thetford* (3), a motion was made for a *mandamus* calling upon churchwardens to make a rate for repairs of a parish church; but this application also was refused, the Court saying that the matter was of ecclesiastical jurisdiction.

(COLERIDGE, J.: Who do you say has the power of convening the vestry here?)

Sir JOHN NICHOLL, in *Dawe* v. *Williams* (4), says that "vestries, [*587] *for church matters, regularly are to be called 'by the churchwardens with the consent of the minister.'" But, in fact, there is nothing here to shew who would be proper persons to convene a vestry for the purpose then contemplated.

(PATTESON, J. referred to *Rex* v. *Wix* (5).)

In that case the *mandamus* (to elect churchwardens) went to the inhabitants generally. No application has been made here to the minister of the parish, nor have the churchwardens been

(1) 1 R. R. 480 (2 T. R. 259).
(2) 2 Str. 686.
(3) 5 T. R. 364.
(4) 2 Add. Ecc. Rep. 139.
(5) 36 R. R. 545 (2 B. & Ad. 197).

called upon to act in concurrence with him. The only requisition has been to the churchwardens apart.

(LORD DENMAN, Ch. J.: Is not it sufficient if the churchwardens have refused, and the parties applying have learnt from them that the minister will not consent?)

The meeting, perhaps, could not be regularly held without the minister's consent; but it is not shewn that such meeting ought to be called by the minister and churchwardens, as proposed.

The office has been filled by the rector; and no person has proved that the right of appointment is in any one else.

Erle and *Wightman*, *contrà*, were then called upon to support the rule; the COURT intimating that they felt no doubt of there having been a sufficient refusal to ground the application:

As to the right of electing, the affidavits on the other side have not proved that it is in the minister.

(LORD DENMAN, Ch. J.: It lies on you to prove that it is in the parishioners.)

The statements in support of the rule prove this sufficiently. (They then went into the matter of the affidavits). There being, then, *a fair ground laid for this application, it should be shewn [*588] on the other side that there is some other mode of trying the question than by *mandamus*. *Rex* v. *Ramsden* (1), and the authorities collected in 2 Selw. N. P. Quo Warranto I., II. (2), prove that a *quo warranto* information would not lie. As to the suggested course of refusing the fees, it will be in the power of the officer to delay that remedy by forbearing to demand them of the adverse parties till the witnesses who speak to transactions of very remote date are all dead. A *mandamus* has been issued to churchwardens to restore a sexton: *Ile's* case (3); there is no difference in principle between such a *mandamus* and a *mandamus* to call a meeting for the purpose of electing. The Court will of

(1) 42 R. R. 431 (3 Ad. & El. 456).
(2) Pp. 1166, 1170, 9th ed.
(3) 1 Ventr. 153.

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itself take notice who are the proper parties to convene the meeting; and *Dawe* v. *Williams* (1) and *Rex* v. *The Churchwardens of St. Margaret and St. John* (2) shew that, in this respect, the present application is not erroneous.

LORD DENMAN, Ch. J.:

Some difficulties have been raised in this case, which are now removed. I think that there have been a sufficient demand and refusal to justify this application; and that, where the parishioners, or a considerable portion of them, wish a vestry to be called, it is reasonable that a *mandamus*, if grantable, should be directed to the churchwardens, and not to the inhabitants in general. Then, is this a case in which a *mandamus* ought to go? With respect to the custom alleged in support of the rule, that the [*589] parishioners *should elect, there is some evidence, though not strong, that at the last election such a custom was acted upon. But, on this occasion, the office is full by appointment of that person who, in the ordinary course, would have the power of appointing. The inhabitants who make the present application think the proceeding void. I own that, unless there were a very strong case to shew that it was so, and unless there were no other remedy, I think a *mandamus* ought not to go. In my opinion there is another remedy. Any person may dispute the right to the office by refusing to pay the fees, or by bringing an action against the officer if he takes them. We cannot look at any supposed consideration which may render it politic for him to forego his fees; nor can we assume that he will hold the office without regard to the emoluments. I think therefore that a *mandamus* ought not to be granted, inasmuch as there is another remedy, and as we ought not to sanction a supposed custom interfering with rights usually enjoyed, unless we had more cogent evidence than that now before us.

PATTESON, J.:

I am of the same opinion. I cannot at present find any reported case in which a *mandamus* has been granted to elect,

(1) 2 Add. Ecc. Rep. 130. (2) 4 M. & S. 250.

where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the Court is satisfied of the election being void (1). In *Rex* v. *The Corporation of Bedford* (2), where the corporation had elected a Mayor who would not attend to be sworn in, because *he had not qualified, the Court ultimately granted a *mandamus* to proceed to a new election; that, however, was after much doubt, and the office was expressly avoided by stat. 13 Car. II., stat. 2, c. 1, s. 12 (3). But I am confident that, if the question cannot be tried by a *quo warranto*, the course is to grant a *mandamus* for a new election, where the Court is satisfied that the first election is void. Where there is any other mode of trying the right, a *mandamus* ought not to go. Here, *primâ facie*, the appointment is right, being made by the rector, who, by the general law, is the proper person to make it. Strong evidence would be necessary to disprove his authority. There is, on the other hand, a custom alleged for the parishioners to elect; and some evidence, not conclusive, but amounting to a *primâ facie* case, has been given, to shew that the last election was by them. The office, however, is now full by the rector's appointment. If there were no other remedy, I should say that a *mandamus* ought to go; but there is such a remedy, by refusing the fees, or bringing an action for money had and received if they are taken. It cannot be supposed that the sexton will go on for five or six years refusing his fees, to prevent a trial of the right; at least the probability of it is not one which we can enter into. The rule must therefore be discharged.

WILLIAMS, J.:

The evidence in support of the rule is not sufficient to warrant us in granting a *mandamus*, there being another remedy. We must suppose that the sexton will endeavour to recover his fees. His forbearing to do so until the evidence against his title shall be extinguished, is a contingency which we cannot take into consideration.

(1) It seems to have been so understood in *Rex* v. *The Churchwardens of St. Pancras*, 1 Ad. & El. 80: and see there the judgments of PARKE, J., p. 100, and of PATTESON, J., p. 102.

(2) 1 East, 79.

(3) Repealed; 34 & 35 Vict. c. 48.

REX v. THE MINISTER AND CHURCH-WARDENS OF STOKE DAMEREL.

[591]

COLERIDGE, J.:

I will assume, for the purpose of this decision, that a *mandamus* would lie in this present case, and that a *quo warranto* would not; it is unnecessary to decide either point. Still I think that no *mandamus* ought to go. Here is an appointment by a person in whom, *primâ facie*, the right is to appoint. The affidavits in support of the rule do indeed bring that right into question in some degree, but the balance is rather in its favour; and I should expect to see the balance very strongly the other way before I granted a *mandamus*, if there were another remedy; and here there is another. That the sexton should refuse his fees, as has been suggested, is a state of things which we cannot take into our contemplation. If the parishioners think that the right is in them, it is probable that something will soon occur to raise the question.

Rule discharged.

1836. *Nov.* 10.

[591]

HART *v.* MARSH, CLERK.

(5 Adol. & Ellis, 591—602; S. C. 1 N. & P. 62; 2 H. & W. 341; 6 L. J. (N. S.) K. B. 9; 5 Dowl. P. C. 424.)

The Consistory Court of Hereford, upon articles exhibited against a beneficed clerk, pronounced sentence, declaring that the said articles were for the most part sufficiently and fully proved, and suspended him for three years. After sentence, a rule for a prohibition was obtained, on the suggestion that some of the articles contained charges cognizable in courts of common law; but it was not denied that others were of ecclesiastical cognizance:

Held that, after this sentence, it must be presumed that the Ecclesiastical Court had proceeded upon such matters as were within its cognizance; and the rule was discharged.

R. V. RICHARDS obtained a rule, in last Hilary Term, calling upon the plaintiff, and Charles Taylor, D.D., the vicar general and official principal of the Consistory Court of Hereford, and Sir Herbert Jenner, LL.D., official principal of the Arches Court of Canterbury, to shew cause why a writ of prohibition should not issue to the Consistory Court of Hereford,

[*592] and to the Arches Court of Canterbury, to prohibit the *said Court from further proceeding in the suit between the parties.

The suit, in the Consistory Court, was promoted by Robert Hart against the Rev. G. W. Marsh, the rector of a parish in the

diocese of Hereford, of which Hart was a parishioner and churchwarden. In the introduction to the articles, the articles, charges, interrogatories, &c., were stated to be "touching and concerning the lawful correction and reformation of your manners and excesses, and more especially for incontinence, profane swearing and cursing," &c., stating the general charges which are set out in the articles following, but without particulars of the offences. The contents of the articles, so far as it is material to extract them, were as follows:

1. That by the ecclesiastical laws, customs, and constitutions of the Church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, assaultings, quarrellings, fightings, profligacy, or any other excess whatsoever, and from being guilty of any indecency themselves, or encouraging the same in others; and, furthermore, they are enjoined and required to abstain from resorting to any taverns or alehouses, and not to give themselves to any base or servile labour, nor to drinking or riot; not to be absent from their benefices without supplying curates that are sufficient and licensed preachers; and, also, are enjoined and required to visit the sick, and to instruct and comfort them in their distress, and not to forsake their calling and use themselves in the *course of their lives as laymen; but [*593] that, on the contrary, they are enjoined at all convenient times to hear or read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, bearing in mind that they ought to excel all others in purity of life, and to be examples to other people, under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censure as the exigency of the case and the law thereupon may require and authorise, according to the nature and quality of their offences.

2. That the defendant was in holy orders, and rector of the parish, in the diocese.

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4. That the defendant was guilty of incontinence, with a person named in the article, and at times and places specified: and circumstances in corroboration were stated.

6. That the defendant had addicted himself to excessive drinking, and had frequented alehouses for the purpose of drinking, had been guilty of profane cursing and swearing, of quarrelling and fighting, had assaulted and sworn at many of his parishioners, and had made use of much profane language and many oaths.

7. That, at a time and place specified, the defendant was much intoxicated, and then insulted, assaulted and struck R. G., challenged him to fight, and cursed and swore at him.

8, 9, 10, 11. Charges of drunkenness, frequenting alehouses, swearing, fighting, challenging to fight, &c., the times, places, and circumstances being specified.

13. That "in the years 1819, 1820, and 1821, or in three, [*594] two, or one, of such years, you carried on the *trade and business of a maltster, in" &c., "and that you thereby wilfully gave yourself up to base and servile labour;" &c.

14. That, at the same time, "you also carried on the trade or business of a flannel manufacturer, at" &c.; "and that you also bought and sold wool for profit and gain, and thereby exercised yourself in the course of your life as a layman;" &c.

15. That, at the same time, "and for several years previous thereto, you unlawfully occupied a large farm, consisting of 200 acres and upwards, and tilled and cultivated the lands and grounds thereof, without any leave or permission from the Bishop of Hereford for the time being, or any other lawful authority; and that, during the time mentioned in the two next preceding articles, you continued to cultivate the said farm, and to carry on the said two several trades or businesses at one and the same period of time; and you were in the habit of attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares and merchandize, in your respective businesses, trades, or characters, of husbandman, maltster, wool dealer, and flannel manufacturer; thereby forsaking and neglecting your sacred duties of a priest or minister, and using yourself in the course of your life as a layman;" &c.

16. That, "in or about the year 1823, you were arrested and placed in prison; and that you remained there for the space of about six years; and that, by reason of your carrying on the several trades in the first, second, and third last preceding articles, or one of them, mentioned and stated, and of your having exercised yourself in the course of your life as a layman, *and of your having forsaken and neglected your sacred duties [*595] of a priest or minister, you were found and declared to be a dealer and chapman, and to have committed an act of bankruptcy, by the commissioners named in a certain commission of bankruptcy," &c. The article further stated that, by reason of such imprisonment and bankruptcy, great inconvenience and injury had been experienced by several of the parishioners, and particularly by the promoter in this cause, Robert Hart, and M. H., and R. H.; and that, by reason of Marsh's unlawfully exercising the trades aforesaid, he was the less able to attend his spiritual and ministerial duties, and greatly neglected the same, &c.

17. Charged omissions to do duty, and absence from his benefice without leave, and without providing a sufficient curate.

18, and 19. Charged him with applying the churchyard to improper and indecent purposes; and, on some occasions, during divine service.

20. Stated that, by reason of the immorality of the defendant's conduct in the preceding articles, he had given great offence to the parishioners, and the congregation had diminished.

21. "That for your said incontinence, profane cursing and swearing, indecent conversation, drunkenness, rioting, and immorality, for your lewd and profligate life and conversation, for the profane usage of the churchyard, for resorting to taverns and alehouses to drink and indulge yourself in loose and idle conversation, for the total omission and neglect of divine service on divers Sundays and Christmas Days, for absenting yourself from your benefice without leave of your ordinary for the time being for that purpose first had and *obtained, and without [*596] supplying your benefice with a curate that was a sufficient and licensed preacher, for neglecting to visit the sick, for your giving

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yourself up to base and servile labour, and forsaking the sacred calling of a minister, and using yourself in the course of your life as a layman, and depasturing cattle and turning out swine into the churchyard," &c., "and for your other vices, immoralities, and excesses, you ought to be canonically punished and corrected," &c.

22. That, by stat. 5 & 6 Edw. VI. c. 4, it was enacted (1) "that, if any person whatsoever, shall at any time after the 1st day of May next coming, by words only, quarrel, chide or brawl in any church or churchyard, that then it shall and may be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient," &c.

23. That, at specified times and places, the defendant had taken a part in riot and fighting, and encouraged fights between persons named.

24, 25. That he had cursed, sworn, brawled, &c. in the churchyard, (stating particulars as to time, person, &c.) and that he had thereby incurred the penalty of stat. 5 & 6 Edw. VI. c. 4.

28. That all the premises were true, public, &c.; of which legal proof being made to us the Judges aforesaid, and to this Court, we will that you be not only duly corrected, according to the force &c. of the statute hereinbefore mentioned, and the [*597] exigency of the *law, but also that you be duly and canonically punished and corrected according to the exigency &c.; and also be condemned in the costs, &c.

These articles were admitted by the consent of the defendant, and entered as admitted with such consent.

The introductory part of the sentence set out that the vicar-general and official principal had heard, &c., a certain cause, &c., against the Rev. G. W. Marsh, clerk, rector &c., for incontinence, for profane cursing and swearing, &c. (setting out the offences charged, in general terms, but not specifying the circumstances),

(1) Sect. 1.

and for neglect of his ministerial duty, as well by his carrying on of divers trades and businesses at one and the same time for a long period together, as also for unlawfully carrying on and exercising the trades or businesses of a dealer in corn, and buying and selling the same for profit, of a maltster, of a wool dealer, and also of a flannel manufacturer, and for farming and cultivating a farm consisting &c., without any leave, &c., and for his attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandise, as otherwise, and for relinquishing and forsaking the sacred calling of a minister, and using himself in the course of his life as a layman, &c.; as in the articles given and admitted in this cause are exhibited, &c. The adjudication proceeded as follows. "Forasmuch as the heads, positions, articles, charges," &c., "we have found, and it doth evidently appear to us are, for the most part sufficiently and in truth fully proved and founded, we," &c., "pronounce, decree, and declare, that the said articles," &c., "are for the most part sufficiently and fully proved and substantiated: and that the Rev. *G. W. Marsh, clerk, rector of," &c., "be [*598] suspended for the space of three years, to commence" &c., "from discharging all functions of his clerical office, and the execution thereof; viz. from preaching," &c., "in the said parish church and elsewhere within the diocese of Hereford, and from all profits," &c. The defendant was also condemned in the costs, &c.

The defendant appealed to the Arches Court of Canterbury.

Maule and *Cleasby* now shewed cause:

After sentence, the Court will not interfere unless the Ecclesiastical Court has manifestly proceeded upon matters not within its cognizance: *Carslake* v. *Mapledoram* (1). Now here the object of the suit, as appears by the first article, and by the sentence, is solely deprivation under the canons. A court of common law cannot enter into the question of deprivation: therefore, it is immaterial whether or not any or all of the articles charge matters of which the ordinary courts of law take

(1) 2 T. R. 473.

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cognizance for the purposes of criminal jurisdiction (1): *Slater* v. *Smalebrooke* (2), *Townsend* v. *Thorpe* (3), *Free* v. *Burgoyne* (4). Further, as to several charges, such as that of incontinence, it will be allowed that the Ecclesiastical Court has exclusive jurisdiction; and, therefore, even if that Court could proceed only on these, yet, as the sentence is not professedly grounded on all, this Court after sentence will presume that those charges [*599] only were proceeded *on which are within the jurisdiction. Objections will be made to the articles charging the defendant with trading. It is true that, by stat. 21 Hen. VIII. c. 13, s. 5, penalties are imposed on spiritual persons for trading in corn or any manner of victual or merchandise: that enactment was repealed by stat. 57 Geo. III. c. 99, s. 1, which Act, however, by sect. 3, imposes a penalty on any beneficed spiritual person, who shall "engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandise, by buying and selling," &c. But these statutes do not inflict deprivation; and, therefore, they cannot be construed to take away the jurisdiction of the canon law as to that. Indeed sect. 83 of the last-mentioned statute enacts that nothing in the Act contained shall affect the jurisdiction belonging to any Archbishop or Bishop, by virtue of any statute, canon, usage, or otherwise. Now there is a canonical prohibition, that ecclesiastical persons "shall not give themselves to any base or servile labour" (5). And the conclusion of the thirteenth article is, "that you thereby wilfully gave yourself up to base and servile labour." The preceding part of the article is merely a description of the particular act which brings the rector within the canon. So the fourteenth article concludes, "and thereby exercised yourself in the course of your life as a layman." Now, by canon, "no man being admitted a deacon or minister, shall" "use himself in the course of his life, as a layman" (6). The fifteenth article concludes like the fourteenth. So the sixteenth concludes with

(1) See *Searle's* case, and *Searle* v. *Williams*, Hob. 121, 288 (5th ed.); *S. C.* Cro. Jac. 430.
(2) 1 Sid. 217.
(3) 2 Ld. Ray. 1507.
(4) 5 B. & C. 400; *S. C.* on appeal, 31 R. R. 2 (2 Bligh (N. S.) 65).
(5) 1 Gibson's Codex, 162, tit. vii. ch. 3 (canons, 1603, lxxv.).
(6) 1 Gibson's Codex, 163, tit. vii. ch. 3 (canons, 1603, lxxvi.).

a charge of inability to attend spiritual and ministerial duties, and *gross neglect of the same. The gist of each article is an offence rendering the rector liable to deprivation by the spiritual Court. HART v. MARSH. [*600]

(LORD DENMAN, Ch. J.: They are so framed: but they state the act by which the offence is supposed to be committed; so that "thereby," and what follows, might be struck out.)

Whether a particular act be, or be not, an offence within the canon, is peculiarly a question for the Ecclesiastical Court. The first article is in fact a transcript from different canons: and the twenty-first article enumerates the offences in general terms, not specifying the particular act. "If the spiritual Court do proceed wholly on their own canons, they shall not be at all controuled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal." 3 Burn. Ecc. L. Prohibition, 2 (p. 219, 8th ed.). If any objection be taken to the form of the sentence (which, however, is the usual one), that is matter of practice, and can be discussed only in the spiritual Court (1) upon appeal. Further, it appears, by affidavit, that the defendant has consented to the articles, and an inquiry has been had on the merits: therefore, he cannot now object to them.

R. V. Richards, contrà:

The application for prohibition is never too late, if it be *pro defectu jurisdictionis: Offley* v. *Whitehall* (2), *Leman* v. *Goulty* (3). Now the *sentence refers generally to all the charges. Some of these are not of ecclesiastical cognizance, but of that of the common law. Thus the exercise of the trades specified is prohibited by statute, as admitted on the other side. So challenging to fight, as in the ninth article, is an indictable [*601]

(1) See *Ex parte Smyth*, 42 R. R. 509 (3 Ad. & El. 719).

(2) Bunb. 17.

(3) 1 R. R. 624 (3 T. R. 3).

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offence. It is said that the object of this proceeding is merely deprivation; but the Ecclesiastical Courts are not warranted in drawing to themselves cognizance of a matter cognizable by the common law, merely by affixing to it the penalty of deprivation. It is admitted that they cannot try the bounds of a parish: could they obtain cognizance of such a question by charging a beneficed clergyman, who should contest it, with thereby violating some canon, and so subject him to deprivation, and then insist that they are to judge whether it be a violation of the canon or not? Then, if there be want of jurisdiction as to any of the charges, the sentence, which leaves it uncertain on which charges it proceeds, is bad; and no jurisdiction certainly appears.

LORD DENMAN, Ch. J.:

Supposing some of the charges to be insufficient, as those of trading as a maltster, and as a flannel manufacturer, still there are several other charges; and the Ecclesiastical Court finds them for the most part proved. To get rid of the sentence of that Court, it is necessary to shew that it has adjudged on matters which are in the proper jurisdiction of the courts of common law. That we cannot find in the present case. It is clear that the Ecclesiastical Court had jurisdiction over some of the matters charged: only it is said that there are also some as to which objections might be taken to the jurisdiction. It is [*602] quite consistent *with the sentence that the Ecclesiastical Court may have acquitted on these. To set aside the proceedings after sentence, it should be shewn that the Court has clearly exercised a jurisdiction which it did not possess; and that is certainly not made out.

PATTESON, J.:

It is laid down by several authorities, and not denied now, that, after sentence, unless the want of jurisdiction be manifest, this Court will not interfere. Supposing some of these articles to be founded on charges not within the cognizance of the Ecclesiastical Court, that might have been shewn before sentence. By the sentence, the *onus* is shifted; and the party objecting has to shew that the Ecclesiastical Court proceeded on the

objectionable articles. There is no affidavit to that effect; so that the matter rests in uncertainty.

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COLERIDGE, J. concurred (1).

Rule discharged with costs.

REX *v.* ANDREW WHITE.

1836. *Nov.* 11.

(5 Adol. & Ellis, 613—619; S. C. 1 N. & P. 84; 2 H. & W. 403; 6 L. J. (N. S.) K. B. 23.)

[613]

The Court will grant a *quo warranto* information, at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although it be suggested that the same objections apply to the title of every member, and therefore that the application is, in effect, against the whole corporate body.

A RULE was obtained in Hilary Term last, calling upon Andrew White to shew cause why a *quo warranto* information should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of Sunderland, in the county of Durham, on the grounds, first, that George Stephenson, who made out the lists, was not the town clerk of the said borough, nor a person performing duties similar to those of town clerk (2): secondly, that the election of councillors of the said borough was held before Richard Spoor, who was not mayor or chief officer of the said borough.

The affidavits in support of the rule stated that Stephenson had acted as town clerk, in receiving and distributing the burgess lists, previously to the election of councillors in December, 1835; that on that election Spoor acted as chief officer of the borough; that the councillors then elected chose aldermen on the following 31st of December; that the said councillors and aldermen, and among them the said Spoor, did, on January 1st, 1836, elect Andrew White, one of the above mentioned councillors, mayor for the year ensuing; and that he had since acted as mayor; that, at the time of the passing of the Municipal Corporation Act, 5 & 6 Will. IV. *c. 76, there was no body corporate within the town of Sunderland, for the

[*614]

(1) Williams, J. was absent.

(2) Stat. 5 & 6 Will. IV. c. 76, ss. 15, 16. (Repealed; 45 & 46 Vict. c. 50, s. 5).

REX v. WHITE.

regulation or governing of the town or any part thereof; nor was there any reputation of the existence of any such corporation; nor was there any mayor or other person having or claiming, or reputed to have, any authority or power in the municipal regulation or government of the town; and that there was at no time any person filling, or reputed to fill the office of town clerk therein, or whose duties in the borough were similar to those of town clerk; that charters were granted to the town in the twelfth century, and in 1634, but that (as the deponents believed) no muncipal officers were elected under the latter, and that, at all events, for a hundred years past, there had been no municipal officers in the town, nor any municipal corporation, in fact or by reputation; that the only office filled by Stephenson was that of clerk to the county magistrates acting as justices in the town; and that Spoor, before the said election of councillors, never filled, or pretended to fill, any office for the municipal or public or other regulation or government of the town; that there was in the town a body assuming to be a body in the nature of a private corporation, under the style and name of the freemen and stallingers of Sunderland, of whom Spoor was one; but that they never interfered, nor was it their corporate duty to interfere, in the rule or government of the town, nor did they exercise or claim any corporate or other powers over the inhabitants; and reference was made to the proceedings on an application for a *quo warranto* against them in 1829 (see *Rex* v. *Ogden* (1)), in the course of which Spoor had made affidavit that they never

[*615] *interfered, &c. (as above), nor claimed to exercise any corporate or other powers within the town, except over their own members, and with regard to their own affairs.

Affidavits were filed in opposition to the rule, stating that the freemen and stallingers of the Borough of Sunderland were an ancient corporation, having possessions on the town moor, &c., and consisting of twelve superior, and eighteen inferior, freemen; that, before the passing of the Municipal Corporation Act, and before the proceedings brought in question by this rule, there had been no officers bearing the names of mayor or town clerk, but that "the senior freeman for the time being of the said

(1) 34 R. R. 375 (10 B. & C. 230).

town" had acted as the chief officer of the corporation of stallingers; that Spoor, as the senior freeman of the said corporation (willing to officiate), had been called upon by the burgesses to act as chief officer of the borough at the first election of mayor, aldermen, and councillors: and that Stephenson, for thirteen years past, had been solicitor to the corporation of stallingers, and had on various occasions, as such solicitor and with reference generally to the affairs of the town, performed duties similar to those of a town clerk.

Sir J. Campbell, Attorney-General, and *Wightman*, now shewed cause:

The objection now taken would affect the title of every member of the corporation. It is, in effect, that no valid corporation exists in Sunderland. Now it was decided, in *Rex* v. *The Corporation of Carmarthen* (1), that a private relator cannot bring a *quo warranto* information against a corporation as such: and in *Rex* v. *Ogden* (2), where such an information was applied for against the corporation of stallingers mentioned in the *present affidavits, Lord TENTERDEN said (referring to the *Carmarthen* case (1)) that, "if any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation, as a body, to shew by what authority they claim to be a corporation, can be brought only by and in the name of the *Attorney-General*." And *Rex* v. *Ogden* (2) shews that a motion against individuals which is virtually a motion against the corporation falls under the same rule. If the statute 5 & 6 Will. IV. c. 76, had never passed, and corporate officers had been elected for Sunderland, the Court would not have allowed a private relator to bring *quo warranto* on the ground that the charters had never before been acted upon, and that no corporation existed. The statute makes no difference in this respect. The complainant here does not point out any person who could have discharged the functions exercised by Spoor and Stephenson. According to him, if judgment of ouster went against White,

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(1) 2 Burr. 869; *S. C.* 1 W. Bl. 187.

(2) 34 R. R. 375 (10 B. & C. 230).

REX v. WHITE.

there could be no re-election. But the statute 9 Ann. c. 20, s. 4, empowering private relators to proceed in *quo warranto*, applies only to cases where there is a corporation admitted to exist, which may, after the judgment of the Court, be restored to its proper state by a regular election. Other cases are for the *Attorney-General*. Then, upon the merits of this election, the affidavits in opposition to the rule furnish a complete answer; or, if the objection on behalf of the relator is, in itself, entitled to attention, it is met by the interpretation clause, 5 & 6 Will. IV. c. 76, s. 142. (They also referred to the mention of Sunderland in schedule (A) of the statute. The further arguments on this part of the case are omitted.)

[617] *Sir W. W. Follett, contrà:*

First, there is no ground for assuming that this application affects the whole corporation of Sunderland; the "mayor, aldermen, and commonalty of the borough of Sunderland" being one of the bodies recognised by stat. 5 & 6 Will. IV. c. 76, s. 1, and sched. A., and to which continuance is given by sect. 6. It would seem, therefore, that the *Attorney-General* could not now call in question the existence of a corporation in Sunderland, and consequently that the claim of any individual to be mayor, alderman, or councillor, under the circumstances now presented to the Court, may properly be contested by a private relator. It is not, however, to be conceded that such a relator might not prosecute a *quo warranto* against any member of this corporation, even though the result of a successful prosecution might be to dissolve the whole body. In *Rex* v. *The Corporation of Carmarthen* (1) the motion was made, in terms, against the whole corporation; and it was said that there was no instance of a *quo warranto* information being brought "against any corporation as a corporation:" but motions were afterwards made against the individual members respectively, and rules granted. And it is well known that, in practice, *quo warranto* informations are often applied for where the prosecution will not lead to any new election, and even where the success of it will destroy the corporation: though the Court, where that is so, will require a

(1) 2 Burr. 869; *S. C.* 1 W. Bl. 187.

strong case to be made for granting the application. In *Rex* v. *Ogden* (1) the persons against whom the motion was made did not exercise or claim any public powers or authorities; and the application was against a number *of individuals for acting as a corporation; the assumption of which franchise (as Lord TENTERDEN pointed out) can be called in question only by the *Attorney-General*. In both respects that case differed from the present. (He was then stopped by the COURT.)

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LORD DENMAN, Ch. J.:

I think that *Rex* v. *Ogden* (1) has been satisfactorily distinguished from the present case. There is great good sense in the rule there laid down; but the question directly brought before the Court was, whether a private relator could file a *quo warranto* information against parties for acting as a body corporate. In *Rex* v. *The Corporation of Carmarthen* (2) an attempt was made by a private relator to raise such a question, and the Court held that it could not be done; but they allowed an information to go against the members individually. Then, upon the facts in this case, I think there is doubt enough to make a further consideration of it proper. The rule will therefore be absolute.

PATTESON, J.:

In *Rex* v. *Ogden* (1) the information would have called upon the parties to shew why they acted as a corporation at all: and, besides, they did not claim to exercise any powers of government or municipal authority over the other inhabitants of the town. That case therefore entirely differs from this. Then is it any answer here, that every member of the corporation may be in the same predicament with the party moved against? I think there is no instance in which the Court has so held, where the objection applied to the party individually.

WILLIAMS, J.: [619]

There have been many instances in which the Court has allowed a *quo warranto* information, where the consequence

(1) 34 R. R. 375 (10 B. & C. 230). (2) 2 Burr. 869; *S. C.* 1 W. Bl. 187.

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might have been the loss of an integral part of the corporation, and where, if that part were lost, the whole was lost.

COLERIDGE, J. concurred.

Rule absolute.

1836. *Nov.* 11.

[619]

REX *v.* BARDELL AND OTHERS.

(5 Adol. & Ellis, 619—623; S. C. 1 N. & P. 74; 2 H. & W. 401; 6 L. J. (N. S.) K. B. 30; S. C. nom. *R.* v. *Shillibeer*, 5 Dowl. P. C. 238.)

Stat. 3 & 4 Will. IV. c. 42, s. 39 (1), which takes away the power of revoking a submission to arbitration, does not extend to a reference, agreed to on the trial of an indictment; but, where such reference has been made at Nisi Prius, with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revoke his submission.

The Court, however, will not, upon such revocation, make a rule to restrain the arbitrator from proceeding.

THE defendants were indicted for a conspiracy to obstruct George Shillibeer and another in carrying on their business as owners of omnibuses. The indictment was removed into this Court by *certiorari*, and the case came on for trial, May 15th, 1834, when an order of Court was made (entitled, "*The King* on the prosecution of *George Shillibeer* and another, against *James Bardell* the younger and twelve others"), stating that, by consent of parties, the jurors were discharged from giving a verdict, subject to the award, order, &c., of A. B. Esq., barrister-at-law, to whom all matters in difference between the prosecutor and the defendants, or any or either of them, were thereby referred, to order and determine what he should think fit to be done by the said parties respecting the matters in dispute, &c.; the costs of the prosecution and defence, and of the reference and award, to be in the arbitrator's discretion: and it was ordered that the Court might be prayed to make the order of reference a rule of this Court. After the lapse of a year and some months (during which proceedings were had among the

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parties *themselves for the purpose of arranging their disputes, but no final agreement was come to), a meeting took place before the arbitrator, and a notice was served upon him, subscribed by

(1) See now the Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1, 14; under which it seems that the above case is still an authority.—R. C.

one of the defendants, and by persons signing as attorneys for the others, stating that the undersigned defendants and their attorneys thereby revoked the authority given to the arbitrator by the order of reference. The arbitrator, considering it doubtful whether he could go on with the reference or not, recommended an application to the Court; and, in Hilary Term last, a rule was obtained calling upon the prosecutors and the arbitrator to shew cause why the arbitrator should not be restrained from further proceeding in the reference, on the ground that his authority had been revoked; or why the defendants should not be at liberty now to revoke his authority.

Bompas, Serjt., and *Platt*, now shewed cause:

The question is whether, this being a criminal prosecution, any of the parties had power, notwithstanding stat. 3 & 4 Will. IV. c. 42, s. 39, to revoke their submission to arbitration. That section takes away the power to revoke without leave of the Court or a Judge, where an arbitrator is appointed by rule of Court, Judge's order, or order of Nisi Prius, "in any action" but it adds, "or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record." This order of reference contains such an agreement; for the clause which provides for making the order a rule of Court is (like all the other terms of the reference) consented to by the parties; and such a consent, in an order of this kind, is an agreement, under the sanction of *the Court. Besides, even if [*621] the parties themselves could have revoked, persons claiming to act as their attorneys could not do it on their behalf, in a criminal prosecution.

Sir John Campbell, Attorney-General, and *Humfrey*, *contrà*:

In the case of an indictment, parties have still the same power of revoking a submission to arbitration which they had at common law. Stat. 3 & 4 Will. IV. c. 42, s. 39, contemplates two descriptions of cases: the one, where there are proceedings in Court; the other, where the matter is referred out of Court. If it had been intended, in the first class of cases, to include

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those arising upon indictment, express mention would have been made of them: but the language used is "in any action now brought or which shall be hereafter brought;" and the words which describe the remaining class evidently relate to submissions by bond or other private agreement. Here, the reference was made by order of Nisi Prius, but not in an action; and the case, therefore, falls within neither provision of the statute.

(PATTESON, J.: Is there any instance in which the Court has interfered to restrain an arbitrator from making an award, after revocation? The award may be a nullity when made; but that is a different point.

Platt: Search has been made for precedents; but none has been found.)

LORD DENMAN, Ch. J.:

I am clearly of opinion that this case of revocation is not within the statute. To take away the power of revocation which parties had at common law, the enactment ought to be very clear.
[*622] The thirty-ninth section of stat. 3 & 4 Will. IV. c. 42, applies *to two distinct cases; first, where the parties consent to a rule of Court, Judge's order, or order of Nisi Prius, in any action; secondly, where there is a submission containing an agreement for making it a rule of Court. This case does not fall within the first branch of the enactment; and the clause which has been relied upon does not constitute an agreement within the second. But, as to the rule before us, we cannot avoid disposing of it; and I think that it must be discharged.

PATTESON, J.:

I have not the slightest doubt on this subject. The thirty-ninth section is evidently framed to apply to civil actions. The whole Act is so. The words, "any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record," evidently point to stat. 9 & 10 Will. III. c. 15, and the "submission" there spoken of. In 1 Chitty's Statutes, 33, it is said, in note (*b*) to stat. 9 & 10 Will. III. c. 15, that "criminal offences which are personal, such

as assault," &c., "for which an action of damages would lie, may, it is said, be submitted to arbitration;" "and if an indictment has been preferred in any such case the matter of complaint may still be referred by leave of the Court." But that is at common law, not under the statute. We cannot, however, avoid discharging this rule. It would be a stretch of our authority to restrain the arbitrator.

WILLIAMS, J.:

Whether or not the Legislature intended to include references on indictment in the thirty-ninth section of stat. 3 & 4 Will. IV. c. 42, is immaterial; but the proceeding is so rare that it probably was not thought of. The section clearly refers to cases where there is an action *in Court, or where parties to an action have [*623] consented to a clause for making the submission a rule of Court, and such consent has been given, not through the order of Nisi Prius, but by agreement between themselves.

COLERIDGE, J.:

The provisions of stat. 3 & 4 Will. IV. c. 42, s. 39. are for references of actions at common law, and references under the statute of William III.

Rule discharged.

SYMS *v.* CHAPLIN AND OTHERS (1).

1836. *Nov.* 15.

(5 Adol. & Ellis, 634—645; S. C. 1 N. & P. 129; 2 H. & W. 411; 6 L. J. (N. S.) K. B. 25.) [634]

Plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford, to be forwarded to Melksham. The postmaster received 2*d.* to book the parcel, and sent it by a mail cart to the "King's Arms" Inn at Melksham. He was accustomed so to take in parcels for the mail cart. The innkeeper at M. booked the parcel for London, charging 2*d.* as "booking," for his own trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail coach, of which the defendants were proprietors, to London. Several coaches used to stop at the "King's Arms;" the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other

(1) Cited by Lord ESHER, M. R. in *Stephens* v. *London and South-Western* Ry. Co. (1886) 18 Q. B. Div. 121, 124; 56 L. J. Q. B. 171, 173.—R. C.

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coach. No regular booking-office was kept at the "King's Arms." The parcel was lost:

Held, first, that, for the purpose of taking in the above parcel, the "King's Arms" was a receiving house of the defendants, within the Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68). Secondly, that the plaintiff might properly sue the defendants on a contract to carry from Melksham to London.

The defendants pleaded *non assumpsit*, and that the parcel contained property within the description in stat. 11 Geo. IV. & 1 Will. IV. c. 68, s. 1, above the value of 10*l.*; that it was not delivered at a receiving house of the defendants, but to their servant; and that plaintiff did not, at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate of charge for it. Replication, *de injuriâ*. The jury found that the house was a receiving house of the defendants, and it appeared that no notice was affixed there pursuant to sect. 2 of the statute. The defendant, in moving for a new trial, contended that, independently of the enactments in those sections, the plaintiff could not recover, not having declared the value of the parcel to their servant, and such declaration being, by sect. 1, a condition precedent to the recovery of damages for loss of any goods there mentioned, exceeding 10*l.* in value:

Held that, on the third plea, and the finding of the jury, this objection could not be maintained.

And that, since the new rules of pleading, Hil. 4 Will. IV. (1), such defence was not open on *non assumpsit*.

ASSUMPSIT. The declaration stated that the plaintiff had become bankrupt and obtained his certificate, and that, the said certificate being of great value, viz. &c., plaintiff caused the same to be delivered to defendants (they then being common carriers of goods for hire in and by a certain coach from Melksham to London), to be taken care of and safely carried and conveyed by defendants as such carriers as aforesaid, in and by the said coach, from M. aforesaid to London, and there to be safely delivered by defendants for plaintiff; that, in consideration thereof, and of certain reward &c., defendants, being such carriers, undertook and promised plaintiff to take care of the said certificate, and safely carry the same in and by the said
[*635] coach from *M. to London, and there, to wit at London aforesaid, safely deliver the same for plaintiff. And, although defendants, as such carriers, then had and received the said certificate for the purpose last aforesaid, yet defendants, not regarding their duty &c., nor their said promise &c., have not &c. (stating breach

(1) [The "New Rules" of 1834, which, under pretence of reform, made pleading far more complicated than it was before.—F. P.]

of the alleged promise in its several particulars), but, on the contrary thereof, defendants, being such carriers as aforesaid, so carelessly and negligently behaved and conducted themselves with respect to the said certificate, that, by and through the mere carelessness, negligence, and improper conduct of defendants and their servants in that behalf, the said certificate, being of the value aforesaid, afterwards, to wit on &c., was lost. By means whereof, &c. (alleging special damage).

Pleas. 1. That defendants did not promise &c. 2. That plaintiff did not cause the said certificate to be delivered to defendants for the purpose in the declaration mentioned in manner and form &c. 3. That the said certificate was delivered by plaintiff for the purpose of being carried and conveyed as in the declaration mentioned, after the passing of a certain Act made in the first year of Will. IV., intituled &c. (1); and that

(1) Stat. 11 Geo. IV. & 1 Will. IV. c. 68, is entitled "An Act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof." Sect. 1, after reciting that, by reason of the circumstances there mentioned, the responsibility of mail contractors, stage coach proprietors, and common carriers for hire, is greatly increased, and that, "through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors," &c. "by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties *with knowledge of notices published by such mail contractors," &c., "with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" enacts that no mail contractor, stage coach proprietor, &c., shall be liable for the loss of any article of property of the descriptions following, viz. &c. (enumerating a number of articles, among which are "writings"), "contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles of property aforesaid contained in such parcel or package shall exceed the sum of 10*l*., unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such

[*636, *n*.]

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*the said certificate was and is a certain writing within the meaning of the said Act, and that the value thereof exceeded 10*l.*; and that the said certificate was not delivered at any office, [*636] [*637] warehouse, or receiving house *of defendants as such common carriers as aforesaid, but that the same was delivered to and received by a certain then servant of defendants in that behalf; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of defendants as aforesaid, declare the value and nature thereof, nor did the plaintiff then, or at any other time, pay to defendants, or to their said servant who so received the said certificate, or to any other person or persons on behalf of defendants, any increased rate of charge over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever; nor did defendants, or any or either of them, or the said servant who so

increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Sect. 2 enacts, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and [*637, *n.*] receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect. 3 enacts, among other things, that, if "such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible *as at the common law, and be liable to refund the increased rate of charge."

Sect. 5 enacts, "that for the purposes of this Act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor," &c.

received the said certificate as aforesaid, or any person on behalf of defendants, then or at any other time accept any engagement to pay the same. Verification.

Replication to the third plea, that defendants of their own wrong, and without the cause by them in their last plea alleged, were guilty of the breach of promise, &c., in manner and form &c. Conclusion to the country.

On the trial before Williams, J., at the last Summer Assizes for Wiltshire, it appeared that the defendants *were the pro- [*638] prietors of the Bath and Bristol mail. The certificate in question was enclosed in a parcel, addressed to a house in London (but with no special direction as to the coach by which it should go), and was sent to the post-office at Bradford, Wilts, from whence it was forwarded to Melksham. The postmaster of Bradford, Johnson, received it in the post-office; the servant who brought it paid 2*d.* to book it. No notice was put up at the post-office as to parcels. Johnson was accustomed to receive parcels, and deliver them to the driver of a mail cart, who carried them to Melksham, six miles distant. The cart was employed by Tucker, the mail contractor at Melksham, (who was not one of the present defendants); Johnson received the parcels for Tucker, and knew nothing of the defendants. If any person wished to pay carriage to London, he received the money. The driver of the mail cart, who accounted with Tucker, received the parcel in question with others from Johnson the postmaster, and delivered them at the "King's Arms" Inn, Melksham. The innkeeper at Melksham, Bird, took in the parcel in question, and delivered it to the coachman of the London mail. The carriage from Bradford to Melksham was charged upon the parcel; the coachman paid Bird the amount, and "charged it on." Bird used to receive parcels to be forwarded by the mails, and by other coaches; he booked them, and kept 2*d.* for the booking, as a recompence for the care of the parcels. He had no authority from the mail-coach proprietors to book, nor had he ever been applied to by them to receive parcels. When the carriage from Melksham forward was paid at the "King's Arms," he delivered the money to the coachman. There was no regular booking-office; parcels were taken in at the *bar; and there was no notice exhibited as to the rate [*639]

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of charges. Several coaches used to call at the "King's Arms"; for two years and a half the mail had been accustomed to pull up there, but not to change horses. No statement was made on the plaintiff's behalf, as to the value of his parcel, either at the Bradford post-office or at the "King's Arms."

The defendants' counsel contended that the plaintiff ought to be nonsuited, upon grounds which will appear from the following report. The learned Judge reserved leave to enter a nonsuit, and left the case to the jury, directing their attention particularly to the third plea, and to the question raised by that plea, whether or not the "King's Arms" was a receiving house of the defendants: and he told them that, if it was, the third plea was not proved. The jury found a verdict for the plaintiff; damages 25*l*.

Bompas, Serjt. in this Term (November 3rd) moved for a rule to shew cause why a nonsuit should not be entered:

First, on the facts proved, the "King's Arms" was not a receiving house of the defendants. The postmaster of Bradford received no direction that the parcel should go by any particular coach. He sent it by a mail cart, the driver of which received a separate payment for the carriage from Bradford to Melksham; and that payment was made by the landlord of the "King's Arms," who received the amount again from the coachman to whom he delivered the parcel. Several coaches stop at the "King's Arms," and it was in the landlord's discretion to select the coach by which the parcel should go. He receives no payment from the defendants, and has no commission from them to take in packages for them. If the owner himself [*640] had left the certificate at *the "King's Arms," it would not have been taken in there as at a receiving-house for the defendants.

(COLERIDGE, J.: If there is an office at which three or four coaches call, is not it a receiving house for each?)

The defendants here had not in any way appointed the "King's Arms" as their office. The mail did not even change horses there; it only pulled up.

(LORD DENMAN, Ch. J.: The mail stops where the proprietors direct; it is an understood transaction.)

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That does not make the inn a receiving house for the mail.

(LORD DENMAN, Ch. J.: If the landlord received the parcel generally, the receipt would become a receipt on behalf of the mail, when he put the parcel into the coachman's hand.)

If so, there could not have been an extra charge made at the "King's Arms" on behalf of the defendants, under stat. 11 Geo. IV. & 1 Will. IV. c. 68, s. 1, at the time when the parcel was delivered there, no person being then authorised to make such charge for the defendants; nor was the "King's Arms" a place at which notice of such charge could be given, under sect. 2; and accordingly the third plea avers that the delivery was, in fact, not made at a receiving house or office of the defendants, but to their servant, that is, to the coachman at the time when he received it from the landlord.

Secondly, this being an action of contract, and not for a breach of duty, it is material to shew a contract between the plaintiff and the defendants. If he contracted, it was with Johnson the Bradford postmaster. Johnson received money for the booking of the parcel at Bradford; he forwarded it to Melksham, and the carriage from Bradford to Melksham was paid by the defendants. The contract declared upon is to carry from Melksham to London. Now, the defendants' contract at Melksham was with Johnson only: it was to pay the charges already *incurred by him, and [*641]
to send the parcel for him to London. If the plaintiff was party to any contract, it was when the parcel was delivered at Bradford, and at that time Johnson clearly was not the agent of the defendants. He was not bound to send the parcel to them, more than to any other person; and if he transmitted it by an improper conveyance, he was liable to the plaintiff for any consequent damage.

Thirdly, it is a condition precedent to the right of recovery against any carrier described in stat. 11 Geo. IV. & 1 Will. IV. c. 68, for the loss of goods there specified, that the value, if above 10*l.*, should in all cases have been declared according to sect. 1.

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That is an independent enactment, and not affected by the particular provisions of sects. 2 and 3. Sect. 2 has reference entirely to the increased rate of charge demandable in the cases there mentioned; and sect. 3 prescribes the terms and conditions to be observed where the increased rate is demanded. The words, "shall not have or be entitled to any benefit" "under this Act," refer to the case where the carrier has made the increased charge without performing the conditions. But it is not necessary that that charge should be made, nor, consequently, that the conditions should be fulfilled where the carrier does not make it. He is at all events entitled to the protection of sect. 1, if the article lost be of such a description and value as bring it within that enactment.

(COLERIDGE, J.: It was so held in *Owen* v. *Burnett* (1).)

The question here may be, whether this defence is available under the third plea, the jury having found that the parcel was delivered at a receiving house, which the plea denies. But, upon
[*642] the true construction of sect. 1, *that point is wholly immaterial.

(LORD DENMAN, Ch. J.: It would be difficult to bring the case, as now put, within the third plea. The plea raises a different defence.)

Enough was proved to raise this defence; and the plea is applicable if the merely superfluous parts be rejected.

LORD DENMAN, Ch. J.:

On the first point, I cannot entertain a doubt. The "King's Arms" was an inn used by the defendants, had been some time in the habit of taking in parcels which were sent by their coach, and was adopted by them as their receiving house. I think it came within the third class of places ("office, warehouse, or receiving house") spoken of in the first two sections of the Act, having been adopted as such a place by the defendants. As to the second point, I think that there was a contract between the defendants and the plaintiff. A carrier receiving goods undertakes to carry them to the party whose address is upon them;

(1) 39 R. R. 794 (2 Cr. & M. 353; 4 Tyrwh. 133).

the fact of their coming to him through a series of agents does not prevent his being liable to the sender. He cannot throw back the liability upon the earliest agent. The third point is important, and is difficult with regard both to the construction of the Act, and the effect to be given to the plea. We will take time to consider of it.

PATTESON, J.:

It appears that the mail-coach was in the habit of stopping at the "King's Arms," but did not change horses there; if it had, the case would have stood more favourably to the defendants, because then it might have been said that the mere adventitious circumstance of the coach occasionally taking in a parcel while changing horses did not make the inn a receiving house for the mail coach proprietors. But here it seems that the coach stopped for the express purpose *of taking parcels. The mode of [*643] remuneration for what had been done previously in respect of the parcel can make no difference. As to the persons contracting, the evidence shews that the postmaster at Bradford did not undertake to convey the parcel to London, but only to forward it to the inn at Melksham; his responsibility would cease there; and it is clear upon the evidence that that was the understanding. On the delivery at Melksham the innkeeper there became the agent; and, if the inn was a receiving house of the defendants, he was their servant for the purpose of receiving the parcel. On the third point there is some difficulty.

COLERIDGE, J.:

The plaintiff in this case, wanting to transmit a parcel to London, sends it to Johnson, the postmaster of Bradford, who receives twopence on account of it, and delivers it to a person by whom it is carried to the inn at Melksham. What is the inference from these facts? That there was a contract between the plaintiff and Johnson, not for sending the parcel to London, but for sending it to Melksham to be forwarded. When that was done, Johnson had performed his duty and earned his reward. Then as to the house at Melksham. It seems that for two years and a half the mail had stopped there to receive parcels. In all

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common understanding that made it a receiving house for the mail. We must take it that the coach stopped there by direction of the proprietors. It is said that the inn was not a receiving house for them, because other coaches stopped there, and the innkeeper had his option of sending the parcel by any, and that, not receiving for one in particular, he could not be the agent of
[*644] that one. But, construing the facts as reasonable *men, we must say that, as soon as the innkeeper determined upon the coach by which he would send, he became, for that purpose, the agent of the proprietors. On this part of the case we may dismiss from consideration what occurred up to the delivery of the parcel at the inn. It would have made no difference if the plaintiff had brought it there with his own hands, or sent it by his livery servant.

WILLIAMS, J.:

The great contest at the trial was, whether or not the inn was a receiving house of the defendants. I agree with the rest of the Court, that the facts equally dispose of both the first and the second objection. The fifth section of stat. 11 Geo. IV. & 1 Will. IV. c. 68, says that "every office, warehouse, or receiving house which shall be used or appointed by any mail contractor," &c., for the receiving of parcels shall be deemed the receiving house of such contractor, &c. No formal appointment is required. The contract of the defendants began from the place where their coachman received the parcel.

As to the remaining point,

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The question which remained for our consideration in this case was, whether, upon the third plea, the plaintiffs were entitled to recover, and we think they are, the jury having found that the parcel was taken in at a receiving house of the defendants. Then the question is, whether the defence which was suggested
[*645] under that plea can be made available under the general *issue. *Owen* v. *Burnett* (1), which was referred to in moving, was decided

(1) 39 R. R. 794 (2 Cr. & M. 353; 4 Tyr. 133).

before the new rules of pleading. Since the new rules (1), we think that this defence cannot be admitted on a plea of *non assumpsit*. No rule, therefore, can be granted.

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Rule refused (2).

DOE D. MUDD *v.* SUCKERMORE (3).

1836. *Nov.* 17.

(5 Adol. & Ellis, 703—754; S. C. 2 N. & P. 16; W. W. & D. 405; 7 L. J. (N. S.) K. B. 33.)

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Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an Ecclesiastical Court, and several other signatures, were shewn to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

Per Lord DENMAN, Ch. J. and WILLIAMS, J.: Such evidence was receivable.

Per PATTESON and COLERIDGE, JJ.: It was not.

EJECTMENT for messuages, &c., in Suffolk. On the trial before Vaughan, J. at the Suffolk Spring Assizes, 1835, a verdict was found for the defendant. In Easter Term, 1835, *Storks*, Serjt. obtained a rule for a new trial on the ground of an improper rejection of evidence.

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On this day, cause was shewn by *Kelly* and *Gunning*; and *Storks*, Serjt. and *Byles* were heard in support of the rule. The COURT took time to consider; and, in Trinity Term, 1837 (June 8th), their Lordships, differing in opinion, delivered judgment *seriatim*. The facts, and the grounds of argument on each side, will sufficiently appear from the judgments delivered.

(1) The rule referred to was as follows: "In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." See now R. S. C. Ord. XIX., r. 20.—R. C.

(2) See *Gilbart* v. *Dale*, p. 492, *ante*.

(3) See now the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8, which (notwithstanding the statutory short title) applies, by s. 1, to all Courts of Judicature as well criminal as all others.—R. C.

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COLERIDGE, J.:

This was a motion for a new trial, on the ground that evidence had been improperly rejected by my brother VAUGHAN under the following circumstances. The question in the cause was the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, Stribling, was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions (1) made by him in proceedings relating to the same will in another Court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard, were shown to him; and he said he believed they were all of his handwriting. At the time he gave this evidence, another witness was in Court, and, the cause lasting to the second day, was called. He had never seen Stribling write, nor had any other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced: this he had made on the first day, and, from this, he stated that he thought he had [*705] *acquired a knowledge of the character of his handwriting; and he was asked whether he believed the attestation to the will to be the handwriting of Stribling. This was objected to, and, on argument, determined to be inadmissible: in my opinion, after much consideration, the evidence was properly rejected.

The rule as to the proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus. Either the witness has seen the party write on some former occasion, or he has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of

(1) These depositions were not read in the present cause.

his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; *either supposition giving reason to believe [*706] that he writes at the time, not constrainedly, but in his natural manner.

Upon these grounds directly, as I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. It is familiar to lawyers that many attempts have been made to introduce this mode of proof, according to the practice of the civil and ecclesiastical laws; and a text writer, to whose opinions I shall always pay the greatest respect, Mr. Starkie I mean, has given this mode of proof the sanction of his authority, as preferable on principle to our own: 2 Starkie on Evidence, 375 (1). But, after some uncertainty of decision, the attempts have finally failed. *Rex* v. *Cator* (2), though a Nisi Prius decision, brings this matter very fully under review; and, to the extent at least of what it rejected, has always since been considered as laying down the rule correctly. In my humble judgment that ought not to be departed from. Assuming that no dispute exists as to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting. The two specimens may be much alike, or very different; yet, in the former case,

(1) Ed. 2. (2) 4 Esp. 117.

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they may proceed from different hands, in the latter from the same. But, if the points which I have just supposed to be conceded, be brought into question, other and most serious objections arise to this mode of proof. If the genuineness be disputed, a collateral *issue is raised, and that upon every paper used as a standard; an issue too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counter-proof. It is easy to see too, as has been well observed by Mr. Starkie, that this inquiry might lead to an endless series of issues each more unsatisfactory than the preceding. If the fairness with which the standard has been selected be disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice be given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into.

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It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury; and that we have no provisions for limiting the standard of comparison, or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted. It will be found not at all irrelevant to the present inquiry to observe these provisions in the ecclesiastical and French laws; for they seem, not only to fortify the rule of our law, constituted as our mode of trial now is, but, by their apparent inadequacy in many supposable cases, and, in the case of the ecclesiastical law, by the alterations which it has been found expedient to introduce into the practice, to make us satisfied with its present constitution.

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From 1 Oughton's Ordo Judiciorum, tit. 225, De Comparatione Literarum &c. ad probandum manum testatoris, ss. 1, 2, 3, 10, 11, it appears that, when the handwriting of a testator or other principal party was disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments.

These instruments of comparison were required to be proved *by witnesses who saw them written* (1); it was for the Judge to decide whether they were sufficiently proved; and then the comparison was made by sworn comparators whom he appointed, to the number of four or six è senioribus procuratoribus, et *peritioribus in arte scribendi*. The provision, that the witnesses must have seen the party write the documents which were to form the standard of comparison, would in our law make any comparison unnecessary; and the act of comparing here, as in the French law also will appear to be the case, was considered, not so much the function of a witness, as the exercise of skill in a particular art by ministers of the Court accredited by it, and, it should seem, in the absence of conflicting evidence, conclusively deciding the point in question. This mode of viewing the matter does indeed relieve it from some of the inconveniences above pointed out; but it is obviously inapplicable to the trial by jury: and, as the cause might turn entirely on the will or other instrument being signed by the testator or other party alleged, it in effect left its decision, not to the Judge, but to the delegated comparators who proceeded in his absence. Oughton's work was published in 1728, and, I apprehend, is considered to have *faithfully represented the practice then prevailing. I have [*709] been at some pains to ascertain what the present practice is, and I find that that whole proceeding which Oughton describes has long been entirely obsolete. But that is not all. In 1813, the case of *Spear* v. *Bone* came before the delegates, between the next of kin and executors in a will. On the face of the will alterations appeared; and a third party, being the sole executor as it originally stood, intervened: and the allegation which he gave in raised the very question of comparison of handwriting; and the admission of this allegation was the matter in discussion before the delegates. I have been favoured by Dr. Nicholl with the printed papers of Dr. Arnold, one of the delegates, and his MS. note of the arguments. The Court, after a very learned argument and much discussion, directed the allegation to be reformed; and I am enabled to state that the reformation was

(1) Testes qui poterint deponere, quòd viderunt testatorem subscribentem hujusmodi scriptis, &c., s. 3.

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settled with the full concurrence of the delegates. Dr. Arnold's paper book, which I have, contains the allegation as altered in his own handwriting. In 1816 the cause came on again; and the allegation stands reformed in the printed paper as settled in MS.; and that has ever since been considered the only proper form of pleading. The allegation originally alleged that, upon an accurate examination of the said will by writing-engravers, and others, accustomed accurately to examine the formation of the letters of different handwriting, from their general occupation of making engravings of handwriting, facsimile, and otherwise, and otherwise best able to judge accurately thereof, it manifestly appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but that the same, though in many respects *very like the writing of the other parts of the will, bears the appearance of having been touched with the pen a second time, as if done by some one endeavouring to copy or imitate the handwriting of another person. It was thus reformed,—That, upon an examination of the said will, it appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but are in a feigned handwriting; and that the same is well known to persons skilled in handwriting.

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From all this it appears that, although comparison of handwriting is still an admitted mode of proof in the Ecclesiastical Courts, yet they have found it expedient to contract rather than to enlarge the limits of its admissibility, bringing their rule more and more near to that which has hitherto prevailed in the courts of common law; a reason, as it seems to me, of no little weight against our admitting such a head of evidence into our practice.

The ecclesiastical law appears to have made no limitation as to the quality of the instruments which might be made the foundation of the comparison: "alia scripta, quamvis omnino impertinentia ad causam institutam" (1).

The French law is more precise. It defines, not only the persons who are to make the comparison, sworn experts, three in number, appointed by the Court or agreed on by the parties,

(1) 1 Oughton, Ord. Jud. tit. 225. s. 3.

but the writings to be submitted to them. In the Code de Procédure Civile, Part I. l. 2, tit. 10, s. 200, are found the provisions on this latter point. The writings must either be of a public nature, *such as signatures made before a notary, or Judge, &c., [*711] or papers written and signed in some public capacity; or, if private papers, they must be admitted in the cause, by the party to whom they are attributed, to be of his own handwriting: a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the inconvenience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the power of the party to exclude such from the comparison. Pothier, indeed, in his Traité de la Procédure Civile, Part 1, c. 3, sect. 2, art. 1, § 2 (1), seems to consider private writings or signatures as practically forming no standard of comparison on this last ground. It is obvious in how many cases it would be impossible to produce writings of an individual answering to the description here given of public writings.

I have been thus (I fear tediously) minute in stating the general rule, and the principles on which I conceive it now rests; and I think it unnecessary to cite any authorities in support of it, because no question is now made whether that rule exists, or is well founded; but it is contended that the facts of the present case fall within it. It is not denied that immediate comparison is inadmissible, or that the witness must speak from a knowledge of the general character of the handwriting; but it is asserted that here there was no such comparison; and the evidence tendered was founded on such knowledge. In order to determine this, it was necessary to *have the rule, and the principle of the [*712] rule, distinctly in view; and it was desirable to see whether it rested on a sound foundation. Disregarding extreme cases, from which no inference can be safely drawn, and bearing in mind the mode of trial with reference to which it has been framed, I confess I have no desire to see the rule altered or narrowed; nor am I disposed to take any case out of it on account of a

(1) Œuv. Posth. tom. iii. p. 46 (ed. 1809).

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merely colourable difference in the facts, if they still remain within the principle.

Now, in the present case, it must be conceded that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures selected by one party, and had acquired an impression of some general character pervading the whole: he had heard it proved that those were written by the witness Stribling; and, from these materials, he was to speak. It is asked, how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be? With respect to the assumption, there will be a fitter place to point out the distinction; but I answer, here, that the two cases differ in that which is essential, in the undesignedness of the one, the fact that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose in some future unknown cause; and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance that the witness has the materials for ascertaining the general character of the handwriting, which is the knowledge to be acquired: *and the facts are in this respect similar in principle to those of *Stranger* v. *Searle* (1), where Lord KENYON would not allow a witness to speak, from the knowledge which he had acquired even by seeing the party write several times previously to the trial, because it was done for the avowed purpose of shewing, as he alleged, his true manner of writing. Those were in truth selected specimens, though beyond all doubt genuine; but they could not be safely trusted to as giving the general character of the handwriting.

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But this is not all. No fraud is imputed in the present case; but I cannot forge that we are called on to lay down a rule applicable to all civil and criminal cases; and I ought to be careful, therefore, that I do not so lay it down as to open a door to fraud of the most fatal kind. In the present instance, the

(1) 1 Esp. 14

writer himself admitted the signatures to be his; but that was only one mode of proof: it cannot be contended that the case would have been altered in principle, if a third person had proved them; or, if they had purported to be the signatures of the testator, or of the party in the cause, and so necessarily proved by witnesses other than the supposed writer. If such evidence be good for any, it is good for all, purposes; if it be receivable in confirmation of other testimony, it is receivable alone; if to disprove handwriting, it is equally so to prove it. And a conviction of forgery might pass on the opinion, which a single witness might form, founded solely on the examination of signatures, or a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial to explain when and where *such specimen had been [*714] procured, or from how many selected, the prisoner, on the other hand, being wholly unprepared to enter into this explanation. It is no answer to this to say, that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once: that is an extreme case upon a principle unobjectionable in itself; for no one can deny that the seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here the danger is in the principle itself, that selected specimens may be made the standard from which the witness is to judge.

Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard, is itself disputed? Is the counter-evidence to be received at once as to this point; and the opinion of the jury to be taken on the preliminary and collateral issue, before the evidence is heard as to the principal document? Or is that to be gone into after the *primâ facie* proof on the collateral issue, and to be received, subject to being entirely displaced by the answer on the other side? Or, lastly, is the Judge to decide this question of fact? I believe it is impossible to answer these questions without either introducing a most inconvenient novelty in our procedure at Nisi Prius, or involving the jury in a complication

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of issues from which it is too much to expect that they should escape safely.

Again, and connected with this last remark, I have always understood that papers cannot be submitted for the purpose of
[*715] comparison, even to the jury, except they *be evidence on the issue in course of trial before them. This was so decided by this Court in *Doe* d. *Perry* v. *Newton* (1), in affirmance of some previous decisions. But, in the present case, the documents were not evidence in the principal cause; yet they must have been submitted to the jury, who, before they listened to the evidence of the witness as to the attestation to the will, must have been required to decide in their own minds the collateral issue raised on every signature, whether it were that of Stribling or not. It will be asked, whether, when the witness speaks from knowledge acquired in the course of correspondence, the jury must not also decide in their own minds whether the assumption be a just one, that the letters purporting to be written by the individual were in fact written by him. The answer is that, although, if it were shewn to the jury that the witness was mistaken in the supposition he had made, his evidence must undoubtedly fall to the ground, yet the law makes it, in the first instance, a presumption that the letters of a correspondence, carried on in the ordinary course of business, where the acts done on the faith of it are ratified by the parties, are written or signed by those whose signatures they purport to bear. And this, in the absence of all design or selection, is a reasonable presumption. The whole, too, depends on the same witness; and no more embarrassment, therefore, is created to the jury than where the witness says he has seen the party write, in which case they must also determine whether they believe that preliminary statement, before they consider the weight of his evidence as to the particular document. This assumption, no
[*716] *doubt, may sometimes proceed on a mistake, but so may the most direct evidence on handwriting; there is nothing so difficult to put beyond question, as the fact that a particular instrument, which the witness has not seen to be signed, was signed by a particular person. In *Eagleton* v. *Kingston* (2) Lord ELDON

(1) 5 Ad. & El. 514; 1 Nev. & P. 1. (2) 8 Ves. 438, 473.

states the rule of evidence as to handwriting, when he first came into Westminster Hall, with great minuteness, and limits it even more narrowly than my argument requires. But he mentions a remarkable instance, as regarded himself, of the uncertainty of testimony to this point. A deed was produced at a trial, on which much doubt was thrown, as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord ELDON himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity; yet Lord ELDON had never attested a deed in his life.

In a matter so open to mistake and fraud, and where the consequences are so serious, I have no desire to widen the door of admission. Is there then any real distinction, either in principle or consequences, between the facts now before us and a direct comparison? If, instead of two days, the trial had lasted one; if, instead of an examination of the signatures on the first day, and out of Court, the witness had only seen them in Court, and immediately before he was shown the will; would not this have been clearly a case of direct comparison, however the question had been framed or the answer worded? And can it be affirmed that the *alteration last stated would have in any respect [*717] differed the character of the evidence? Do they remove any one of the objections which have prevailed to exclude direct comparison from our rule of evidence?

Upon the grounds, therefore, that our rule is a sound one, and well established, both in what it admits and what it rejects, sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of it, I am of opinion that the learned Judge rightly rejected the evidence tendered. I could have wished to examine in detail the decisions bearing upon the question, but the importance of the subject, and the difference of opinion which exists in the Court, have induced me (I hope excusably) to examine the principle so much in detail, that I must forbear; and I do so the more readily, because I have no doubt that that part of the argument will be thoroughly illustrated by another member of the Court. I will say this

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only, that I am not aware of any case, of now recognized authority, which lays down any principle conflicting with those on which I have relied.

I will only add, that I do not feel pressed by the case of ancient writings, in which a direct comparison is admitted. First, I observe that, if that proves anything, it proves more than is now contended for; for direct comparison of modern documents is not now insisted on. But, in truth, as to ancient documents, the necessity of the case, and the difference of circumstances, have introduced a different rule of evidence. You cannot call a witness who has seen the party write, or corresponded with him, nor is there much danger, in resorting to comparison, of an

[*718] unfair selection of specimens. Further, it *is obvious to remark that, in ancient documents, it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary.

With real diffidence, therefore, as to the soundness of my judgment, but having formed it with much consideration, I think this rule ought to be discharged.

WILLIAMS, J.:

This was an action of ejectment, to try the validity of a will; and, upon the trial, one of the subscribing witnesses (A.) to the will was called, to prove the due execution by the testator, and his own attestation. The fact of his attestation being, on behalf of the lessor of the plaintiff, disputed, and, in consequence, the genuineness of his (A.'s) signature brought into question, he was asked, upon cross examination, whether certain signatures, to the number of twenty (then shewn to him), were of his (A.'s) handwriting; and they were by him stated so to be. The cause having been adjourned, these signatures were shewn to a second witness (B.) professing to have knowledge and skill in handwriting, who was directed carefully to examine the same; and, upon the day following, B. was called on behalf of the plaintiff, and was asked whether, from such examination, he had acquired

a knowledge of the character of A.'s writing; and, in answer, he said he had. And, thereupon, the following question was proposed to him, whether, from the knowledge he had (so) acquired, he believed the signature of the attestation in question to be A.'s handwriting. Upon objection, *the learned Judge considered the [*719] evidence to be inadmissible, and it was rejected accordingly. And, upon a motion for a new trial, the propriety of that decision is brought under our consideration.

And the question (important as it is, being connected with principles and practice regulating the admissibility of evidence) seems mainly to be reduced to this point, whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. It is quite superfluous to remark that with the admissibility only is our concern. How far the evidence, if received, might have answered the intended object, or fallen short of it, with what observations it might, or ought to, have been accompanied, I think it wholly unnecessary to inquire.

Now, that proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability upon which it is found to be unsafe to act, it may be, and constantly is, so submitted. From continued and habitual inspection, or correspondence, or both, carried on till the trial itself, down to a single instance, or knowledge twenty years old, evidence may be received: I allude, of course, to the case of *Garrells* v. *Alexander* (1), where the execution of a bail bond was held by Lord KENYON to furnish means of knowledge. The authority of this case is, indeed, questioned by Lord ELDON, upon another point, because the witness would not go so far as to express any belief; but, as to the competency of *a witness [*720] founding himself upon a single instance (and *Burr* v. *Harper* (2) is to the same point), we have his (Lord ELDON'S) important and prevailing testimony. In the case of *Eagleton* v. *Kingston* (3), he thus expresses himself as to what he considered the rule and

(1) 4 Esp. 37.
(2) 17 R. R. 656; Holt, N. P. 420.
(3) 8 Ves. 473.

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course of proceeding in such cases. "You called a witness; and asked, whether he had ever seen the party write. If he said, he had, whether more or less frequently, if ever, that was enough to introduce the subsequent question, whether he believed the paper to be his handwriting. If he answered, that he believed it to be so, that was evidence to go to the jury." "You might call one, who had not seen him write for twenty years; and if he said, he believed it was the writing of the person, that evidence might go to the jury; but to be affected by all the rest of the evidence; as it is the nature of all evidence to be more or less convincing."

The observations above applied to knowledge gained by seeing a party write must, I presume, be admitted to be applicable to knowledge gained from correspondence, "acted upon," as the phrase has been, or, in other words, where there has been something to shew that it was, really, the writing of the party, whose, on the face of the letter, it purports to be. Subject to the qualification of Lord ELDON, which seems to be the criterion and to decide the question in each case, I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for. To the jury it must [*721] go, in *the language of Lord ELDON, from the highest to the lowest. That the evidence, therefore, ought to have been rejected from the slender and inefficient nature of it, would not be contended; indeed, the very objection implies the contrary. The question therefore comes, as I stated at the outset, to the means by which the knowledge of the witness was acquired. And the objection is twofold; first, that it was acquired merely by the comparison of writing; and next, that, at all events, it was not acquired by either of the legitimate and recognised modes, already referred to, having seen the party write, or corresponded with him.

As to the first, if the objection is to be understood in the sense in which it has been (2 Stark on Ev. 374 (1), *Roe* d. *Brune* v.

(1) Ed. 2.

Rawlings (1), *Doe* d. *Tilman* v. *Tarver* (2), from the time of the reversal of Algernon Sidney's attainder (3), which recites that the jury were directed to believe a certain paper to be the prisoner's, from comparing it with other writings of his, it is to be observed that it does not apply. Whether what was *done be equivalent, is another question. The witness, not having before compared the disputed signature with those admitted, but having acquired some knowledge by an attentive examination of them (the admitted ones), is first called upon in Court to inspect the questionable signature, and give an opinion from such knowledge, and not from comparison by juxta-position of the signatures themselves. I beg to be understood as by no means intimating an opinion that the rule, which has obtained with respect to the comparison of handwriting, should be disturbed, because, upon examination, it may appear to depend upon reasons not perfectly satisfactory. It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting, in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof. What is

[*722]

(1) 8 R. R. 632 (7 East, 279, 282).

(2) Ry. & Moo. 141.

(3) Stat. 1 W. & M. sess. 1, c. 7 (Private). The recital of this Act is as follows: "Whereas Algernon Sidney, Esq. in the term of St. Michael, in the thirty-fifth year of the reign of our late sovereign lord King Charles the Second, in the Court of King's Bench at Westminster, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them, for want of freehold, and without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness, to be written by him; but the jury was directed to believe it by comparing it with other writings of the said Algernon; besides that paper so produced, there was but one witness to prove any matter against the said Algernon; and by a partial and unjust construction of the statute, declaring what was his treason, was most unjustly and wrongfully convicted and attainted, and afterwards executed for high treason:" &c.; 9 Howell's St. Tr. 996.

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to be said, where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant, and (in proportion to the length of time) faint image in the mind with the writing in question? I will only refer to the observations of Mr. Starkie (1), in his learned and valuable work, and those of Mr. Phillipps (2) on the same subject. In a still earlier work, which the author used to say was more used by other writers than noticed, I mean a [*723] treatise *upon the law of evidence appended to his edition of Pothier by the late Sir W. D. Evans, I find the following remarks, with others to the like effect. "But where, in point of reason, is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" . . . "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made not with this imperfect and fallacious copy, but with an indisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford" (3). I would repeat that I doubt the propriety (not to say the right) of this Court, upon plausible objections merely, to disturb long-established practice and usage, in a case, too, of such frequent occurrence; but, for the sake of the rule itself, and its security, I would confine it to the case of actual collation and comparison, which, when done in Court and before the jury, is supposed to be attended with inconvenience as to them ("unless a jury could read, they would be unable to judge of the supposed resemblance:" DALLAS, Ch. J. in *Burr* v. *Harper* (4)), which furnishes a reason against such comparison altogether.

The recency of the information and acquaintance acquired in [*724] this case can surely not operate as a valid *objection. Suppose

(1) 2 Stark. Ev. 375 (2nd ed.).
(2) 1 Phil. Ev. 472 (6th ed.).
(3) 2 Evans's Pothier's Law of Obligations, p. 185, Appendix, Numb. xvi. sec. 6.
(4) 17 R. R. 656 (Holt, N. P. 421).

a person to have seen another sign or write a paper, or to have received one or more letters from him, but, from length of time, his general recollection was become so faint and indistinct that he should be unable to form an opinion; might he not peruse and study those authentic documents, if in his possession, to improve and refresh his knowledge before he was called upon to give evidence respecting the writing of that person, by whom such paper or letters, as above supposed, were confessedly written? I apprehend he certainly might. Up to the extent of the above observations, if not beyond them, the very point has been decided in the case of *Burr* v. *Harper* (1). In truth the reference was made, in that case, not to revive and refresh, but to *gain* knowledge. And would such perusal be admissible if made a week or a month before the trial, but not so if made an hour before the witness went into Court to give his opinion upon the particular writing in question?

The case of ancient documents, it must of course be admitted, depends upon a ground distinct from our present enquiry, necessity. Some considerations, however, not wholly foreign, perhaps, from our present subject, may be collected from that head of evidence. That an attentive observation of writing assumed to be that of a particular person, to constitute knowledge of his character, so as to enable a person to give evidence of opinion and belief, is allowable, must, I presume, be considered as placed beyond a doubt. In *Brookbard* v. *Woodley* (2), YATES, J. is said to have decided the contrary; but Lord HARDWICKE'S (3) authority is expressly in favour *of it, and so are the more recent [*725] decisions, without exception. Whether, by studying the assumed handwriting, the witness should have acquired a knowledge of the handwriting, and, then, apply himself to the writing to be proved, or whether an actual comparison may be made, and so a foundation of knowledge laid, does not seem equally clear. HOLROYD, J., than whom a more sound and safe authority cannot be quoted, was of the former opinion: *Sparrow* v. *Farrant* (4); the latter course was pursued by Lord TENTERDEN in *Doe* d. *Tilman* v.

(1) 17 R. R. 656 (Holt, N. P. 420).
(2) Note (*a*) to *Macferson* v. *Thoytes*, 1 Peake, 21.
(3) Bull. N. P. 236.
(4) Note (*x*) in 2 Stark. Ev. 375 (2nd ed.).

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Turner (1), who at the same time quoted a case before LAWRENCE, J. to the same effect. But, whichever course be the correct one, I apprehend it to be clear that no objection can be made from the time at which the information is obtained, upon which the proof is given. In the two last cited cases, it is obvious that the witness was called upon to pronounce an opinion in the midst of the trial, without any preparation before.

I come now to consider, whether the witness in this case had *any* legitimate means of knowledge to authorise the question, the answer to which was rejected.

It has been said that the specimens selected may have been garbled and fallacious, "calculated to serve the purpose of the party producing them, and, therefore, not exhibiting a fair specimen of the general character of the handwriting." And this, it will be recollected, is the second usual objection to the admissibility of the comparison of handwriting (DALLAS, Ch. J. in *Burr* v. *Harper* (2)), the first having been before noticed. I have before endeavoured to explain why, in my opinion, the [*726] objection arising from such comparison was not applicable, *in fact, to this case. Supposing, however, for the present purpose, that it is, I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then *some* proof that they were of the witness's handwriting? And, if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters, written, the one ten, the other five, years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has, in some manner, authenticated them to be his. Why might the witness have been asked the proposed question in this instance? Because the witness had sworn that the papers were of his handwriting. In each case, it is from the perusal of papers (and perusal only)

(1) Ry. & Moo. 141. (2) 17 R. R. 656 (Holt, N. P. 421).

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that the knowledge is acquired. In each case there is some proof that the papers to be perused, in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and enquiry arise. To which of the two species of proof preference should be given, is a matter upon which opinions may vary, and foreign to the present purpose. The only question, as it seems to me, is, whether in both cases there is not some.

When speaking of the facts necessary to introduce knowledge of handwriting, not from actual inspection *but from correspondence, I adverted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters "must have been acted upon." If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, act done, the observation is without foundation, for nothing of the sort is necessary. This was expressly decided by HOLROYD, J. to the value and weight of whose opinion I have given my unnecessary, though sincere testimonial. Any thing, I presume, from which the identity of the writer is established, may suffice. If then, from such proof, whence a reasonable inference may arise that the letter or signature is by such or such person, an opinion of his handwriting may be given, the question recurs, whether there be not some foundation for opinion, where the party has upon his oath declared that the papers perused by the witness were written by himself. That no person has, hitherto, been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write, or received writing from him), may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, has it ever arisen before? If not, we are called upon, as in the various and ever varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject, to this fresh question.

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It is hardly necessary for me to observe that the view which I have taken of this case secures me from touching, *at all, upon

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the authority of the recent decision of this Court in *Doe* d. *Perry* v. *Newton* (1), and of the Exchequer in *Griffith* v. *Williams* (2). I quite accede to the propriety of rejecting the evidence tendered in the former case, and of the line of distinction established in the latter. It is still less necessary, after what has been observed, —but, at the hazard of repetition, I am desirous to avoid the possibility of all misconception,—to say that I have, throughout, assumed the rule with respect to the comparison of handwriting to be perfectly fixed and established. Whether, after all that has been said and written against the comparison of handwriting, opinion and belief are not virtually formed, in a great variety of instances, upon comparison, and that not of the most satisfactory kind, is another question. The rule I find absolutely settled; and that is enough for me. If by argument, or upon further consideration, I could have been satisfied that the rule would have been infringed upon by the admission of this evidence, my task would have been easy, and a conclusion speedily arrived at. It is precisely because, as it seems to me, the admission of this evidence would have been according to and in pursuance of the rule, I think the rejection improper.

Whether the objection was worth the making, when the value of the evidence is considered, I will not undertake to say; but the question has arisen and must be disposed of. If it should be thought so, this only resembles another instance, not unconnected [*729] with it (*Goodtitle* d. *Revett* v. *Braham* (3), *Carey* v. *Pitt* (4), **Rex* v. *Cator* (5), *Gurney* v. *Langlands* (6)), the opinion of an expert upon the genuineness of handwriting; where the difference of opinion upon the admissibility of the evidence has been much greater than the importance, which, by universal consent, ought to be attributed to it if received.

That the present case is, in its precise circumstances, new, must, I presume, be admitted. Such an occurrence, however, must perhaps, from the nature of things, be deemed unavoidable. The saying of Lord MANSFIELD (7), when pressed by some

(1) 5 Ad. & El. 514; 1 Nev. & P. 1.
(2) 1 Cr. & J. 47.
(3) 4 T. R. 497.
(4) 4 R. R. 895 (2 Peake, 130).
(5) 4 Esp. 117.
(6) 24 R. R. 396 (5 B. & Ald. 330).
(7) In *Lowe* v. *Jolliffe*, 1 W. Bl. 366.

citations from them, that he did not now sit to receive rules of evidence from Siderfin and Keble, may possibly be considered as rather bold; but I have no doubt that it was a true one of Lord KENYON, in deciding a fresh point of evidence, *Keeling* v. *Ball* (1), that it is "the business of courts of justice to apply the general principles of the law to new cases as they arise."

Upon the whole, with sincere respect for the contrary opinions, I think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON, J.:

In this case, one of the attesting witnesses to a will having been called, and having sworn to the publication and his own signature, twenty documents were put into his hand, in cross examination, all of which he swore to have his signature. None of these documents were used as evidence in the cause, nor could have been, unless with reference to the handwriting of this witness, or, as regards two of them, for the purpose of contradiction, those being the witness's depositions in *the [*730] Ecclesiastical Court. The twenty documents had been previously shewn to an inspector from the Bank of England, and, after the examination of the witness, were again submitted to the same person. The cause was not concluded on that day; and, the next day, the inspector was placed in the witness-box for the purpose of swearing to his belief that the signature as attesting witness to the will was not the handwriting of the witness who had been examined the day before. He was asked how he had acquired a knowledge of the handwriting of the witness, when he stated it to be in the manner above mentioned, and none other. The learned Judge rejected his testimony; and the question is whether he was right in so doing.

All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in ques- with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or

(1) 2 Peake, 88, 89.

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weaker according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname: *Garrells* v. *Alexander* (1), *Powell* v. *Ford* (2), *Lewis* v. *Sapio* (3); or the knowledge may have been acquired by the witness having seen letters or other documents

[*731] professing to be the handwriting of *the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party (*Lord Ferrers* v. *Shirley* (4), Buller's Nisi Prius, 236, *Carey* v. *Pitt* (5), *Tharpe* v. *Gisburne* (6), *Harrington* v. *Fry* (7)), evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover, in our law been considered sufficient to entitle a witness to speak as to his belief, in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that

(1) 4 Esp. 37.
(2) 2 Stark. 164.
(3) M. & M. 39.
(4) Fitzg. 195.
(5) 4 R. R. 895 (2 Peake, 130.)
(6) 2 Car. & P. 21.
(7) Ry. & Moo. 90.

a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix *an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards shewing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words. [*732]

The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord KENYON in *Stranger* v. *Searle* (1); and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely by a direct communication with the party.

The other mode of satisfying the witness, viz., by the information of third persons, is equally open to objection, *as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair. [*733]

The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the

(1) 1 Esp. 14.

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papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally be required to be proved; and so it is obvious that the same process, as is now attempted, might be repeated *ad infinitum*, and lead to no conclusion. But, if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it but a comparison of handwriting?

Now a direct comparison of handwriting by a witness has been, with the exception of one or two supposed cases, uniformly rejected: and it is only in very recent times that a jury has been allowed to institute such a direct comparison; and even
[*734] that has been confined to a *comparison between documents proved and given in evidence in the cause, being relevant to the issues raised on the record, and which being before the jury, it is hardly possible to prevent a comparison being instituted: *Griffith* v. *Williams* (1), *Solita* v. *Yarrow* (2), *Rex* v. *Morgan* (3), *Allport* v. *Meek* (4), *Bromage* v. *Rice* (5). One authority to the contrary is to be found in *Allesbrook* v. *Roach* (6). But this Court recently, in the case of *Doe* d. *Perry* v. *Newton* (7), has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so.

I know that it is thought by many persons that direct

(1) 1 Cr. & J. 47.
(2) 1 Moo. & Rob. 133.
(3) Note to *Solita* v. *Yarrow*, 1 Moo. & Rob. 134.
(4) 4 Car. & P. 267.
(5) 7 Car. & P. 548.
(6) 1 Esp. 351.
(7) 5 Ad. & El. 514; 1 Nev. & P. 1.

comparison of handwriting is more satisfactory than I am disposed to consider it. In a work of great merit, Starkie on Ev. vol. ii. p. 375 (1), there is this passage: "It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with a faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention." I agree to that passage in its very words: there the weakest possible degree of knowledge which can arise from seeing a person write is contrasted with *the strongest possible degree which can arise from [*735] a direct comparison; and it is assumed that the specimens are fair and satisfactorily proved, which, I will venture to say, they will not be in one case in a hundred. But, generally, I am of opinion that the comparison, even of an admitted fair specimen with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison; some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste, or deliberation, with which the same person writes at different times. To my mind, I confess, the knowledge of the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by one side or the other with a particular object.

I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary. It is indeed said, by *Pemberton*, Serjt., in *The Trial of the Seven Bishops* (2), that "in every petty cause, where it depends upon the comparison of hands, they use to bring some of the party's handwriting which may be sworn to, to be the party's own hand, and then it is to be compared in Court with what is endeavoured

(1) Ed. 2. (2) 12 How. St. Tr. 297.

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to be proved, and upon comparing them together in Court, the jury may look upon it, and see if it be right;" and he *was arguing against any such comparison in a criminal case. If such was the practice, it has long ceased to be so; and the distinction between civil and criminal cases, as to rules of evidence, is no longer recognised. However, on looking to the report of the *Seven Bishops'* case, it is plain that no question of direct comparison arose: the question really was, whether witnesses, who had never seen the parties write, but had seen writings supposed to be theirs, were admissible. The Court constantly said that they were not, and compelled the Crown to prove the writing by other evidence; and, accordingly, an admission by all the defendants of their signatures to the alleged libel was proved. So, in *The Trial of Algernon Sidney* (1), no evidence of direct comparison of handwriting was given; and some of the witnesses swore that they had seen him write (2). Yet, in the bill for reversing his attainder, it is stated that he was convicted by illegal evidence of comparison, which, so far as it goes, shews that such comparison was not at that time considered to be legitimate evidence.

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Comparison of handwriting has, indeed, been allowed in the proof of very ancient documents, where, from lapse of time, no living person could have any knowledge of the handwriting from his own observation; as in *Roe* d. *Brune* v. *Rawlings* (3), *Morewood* v. *Wood* (4), *Taylor* v. *Cook* (5), *Doe* d. *Tilman* v. *Tarver* (6). But this has been allowed from absolute necessity, and the impossibility of better evidence being adduced. Direct comparison by a witness was expressly rejected by Lord KENYON in *Stranger* v. *Searle* (7), and by Lord TENTERDEN *in *Clermont* v. *Tallidge* (8); and it was conceded in argument at the Bar, in the present case, that the uniform practice in the Courts for many years has been not to receive such evidence. In the case of *Burr* v. *Harper* (9) Lord Chief Justice DALLAS allowed what I consider to have been comparison of handwriting; and

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(1) 9 How. St. Tr. 818.
(2) P. 854.
(3) 7 East, 282, *n.* (*a*).
(4) 12 R. R. 537 (14 East, 327, *n.*).
(5) 8 Price, 650.
(6) Ry. & Moo. 141.
(7) 1 Esp. 14.
(8) 4 Car. & P. 1.
(9) 17 R. R. 656 (Holt, N. P. 420).

I do not think that decision right: it was never brought under review, because the verdict was against the party in whose favour it was made.

I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested, and, for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned Judge was right in rejecting the evidence.

LORD DENMAN, Ch. J.:

A person, whose name appears as an attesting witness to a will, is called by the defendant at the trial, and swears that he attested the will and saw the testator execute. The plaintiff's case is that the will was not genuine, imputing fraud, if not conspiracy, to some of the parties concerned. To this attesting witness he professes not to impute perjury, nor participation in the fraud; his theory is, that the witness attested some paper, and believes the will produced to have been that paper; but the defendant says that the witness was herein deceived, that the paper which he signed was not the will, though he thought so, and that the will, produced with his name, was never seen by him before. In connection with other facts, *from which he [*738] draws this inference, he proves by the same witness many of the genuine signatures of that witness, and then calls a second witness, who, obtaining from these an acquaintance with the character of the attesting witness's handwriting, is to be called upon afterwards to pronounce an opinion, whether the attestation to the will is in the same person's handwriting. That is, he is expected to give in substance the following testimony: "I have gained a knowledge of the handwriting of A. from examining all the proved signatures, and I am of opinion that the signature to the will is not of the same character of handwriting;" from which, among other things, the jury were required to conclude that the will was not in fact attested by A.

The effect of this evidence is not under consideration. When the witness, with unimpeached character and unimpaired intellect, came to swear positively to facts on which mistake

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was scarcely possible, and to that handwriting with which no living person could be so conversant as himself, one can hardly imagine any position of the cause in which any matter of opinion could afford any formidable contradiction to his direct proof. In the present case, however, such a state of things doubtless existed; for the learned and able counsel for the defendant took the objection; and we are bound to consider whether, as a matter of strict law, the plaintiff had a right to lay before the jury the evidence that was withholden from them.

In the first place, I think it was not contended at the Bar that evidence of opinion on this subject was not receivable, though in opposition to a positive statement of fact. And, indeed, however specious at first sight, such an argument [*739] could not be maintained a moment. *There is nothing binding in the most positive assertions of the most knowing witness: they may be untrue from ill intention or mistake; and, if untrue, the party interested should be allowed to offer evidence that they are so, which may consist of a variety of circumstances, including the character of handwriting. Suppose, *exempli gratiâ*, a man to have sworn that he saw a party sign and execute a bond; the evidence of all who were best acquainted with the party's writing, that the signature was not, in their opinion, his, would surely be admissible.

Taking it, then, as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had sufficient materials for forming one, to be admissible for that purpose. And he appears to stand in exactly the same situation as he would have done, if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it; nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his hand: 2 Starkie on Ev. 372 (1). Such is the rule, as Mr. Starkie understands it, not in terms warranted by the page

(1) Ed. 2.

of Buller's N. P. (1) cited in his note, but fairly resulting from the practice.

Within what narrower limits can the line be drawn? The letters forming one side of a correspondence do not prove the handwriting, because addressed to a particular *person: that [*740] person's evidence may be requisite to shew that A. had in some way recognised the letters bearing A.'s signature, and was, therefore, probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from A. or any other. The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me.

In a Nisi Prius case, *Smith* v. *Sainsbury* (2), it was necessary to prove the handwriting of an attesting witness. The defendant's attorney was sworn, and said that he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's counsel at an earlier stage of the cause. PARK, J. overruled an objection to the evidence, observing, "If it was a mere comparison of handwriting, it would not do. But it is not so, the witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence."

In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness, speaking from that knowledge, may give an opinion whether any particular writing was made by the same person. The process is *therefore recognised as one which may enable [*741] one man to form a competent opinion as to the writing of another.

Pausing here for a moment, I must fairly say that I think

(1) Bull. N. P. 236. (2) 38 R. R. 802 (5 Car. & P. 196).

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the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulged by competent authority, I should at once have yielded my own views. I find no such rule laid down; nor can I deduce one from the mere circumstance that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Suppose, for example, that, instead of Lord ELDON (1), some person of very inferior rank had appeared to be the attesting witness; that he was dead at the time of the trial; that conspirators, who forged the deed, had been entirely unacquainted with his mode of writing. The production of the instrument, and a perjured oath that he in fact attested, would set up the forgery: a clear knowledge of the character of this man's writing would at once defeat the fraud. But the means of obtaining such knowledge might be unattainable from any one who had either seen him write, or held any correspondence with him. From documents satisfactorily proved to have been written by the witness, possibly never heard of till the eve of the trial, complete demonstration might be obtained. Similar evidence, proving the genuineness of a disputed attestation, might save the *life of a person accused of forgery. I adopt, therefore, the rule in Mr. Starkie's work, which I think as important as it is intelligible.

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No single authority cited in opposition to the rule, was applicable to this point, or rather was favourable to the defendant's argument. *Lord Ferrers* v. *Shirley* (2), if it proves any thing, is against him; for there the Court would have received evidence of a witness's opinion on the handwriting to an attestation, if the papers on which the opinion was founded had been traced to the attesting witness. It was the proof of identity that failed. *Stranger* v. *Searle* (3) was before Lord Kenyon in 1793. The defence, to an action brought on the acceptance of

(1) See *Eagleton* v. *Kingston*, 8 Ves. 476.

(2) Fitzg. 195.

(3) 1 Esp. 14.

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a bill, was forgery of the supposed acceptor's name. The usual evidence of belief having been given by the plaintiff, the defendant produced other writings as his, for the purpose of comparing them with the bill sued on. The objection here taken was a preliminary one, that "it did not appear which was the real handwriting of the defendant, those bills, or those upon which the action was brought, both being proved by witnesses; and that it was besides, judging from a comparison of hands." The reporter says, "Lord KENYON ruled, that the witness should not be allowed to decide on such comparison of hands." This ruling appears correct on both grounds; but it does not touch our present argument. For here the other documents were proved genuine by the witness himself; and the inference was not sought to be drawn from comparing the papers, but from enabling another witness to obtain a knowledge of the handwriting from the papers so proved, and then apply it to the paper in dispute. *There was however, in that case, a direct [*743] tender of evidence of opinion so formed; for the defendant's counsel then observed that the witness had seen the defendant write several times; but, on his adding that this was when the defendant had written his name for the purpose of shewing to the witness his manner of writing, Lord KENYON rejected the evidence, "as the defendant might write differently from his common mode of writing his name, through design." This objection scarcely required the acuteness of that great Judge; but is quite foreign to the present discussion.

In *Allesbrook* v. *Roach* (1) a similar defence was made. After the usual evidence of belief, and apparently for the purpose of strengthening it, "another witness was called, who had in his possession five bills of the defendant's, which had been proved under his commission, he having been a bankrupt. Upon being shewn the bill upon which the action was brought, he said he did not think the acceptance was the defendant's handwriting." This appears precisely similar to the evidence rejected in the present instance. The reporter adds, "upon comparing these bills with the acceptance of the bill in question, they were

(1) 1 Esp. 351. See, as to this case, *Doe* d. *Perry* v. *Newton*, 5 Ad. & El. pp. 517, 518.

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evidently dissimilar." He does not say by whom the comparison was made; we must take this (I think) to have been done by consent. Then, on the defendant's part, a witness, who had seen defendant write, declared his belief that the acceptance was not his writing. Then the counsel offered to the jury several other bills, admitted to be of the defendant's writing, and desired the jury to compare them; a course which was objected
*744] to, but allowed *by Lord KENYON. This case surely does not assist the plaintiff's objection here, since the course there passed unquestioned which was here declared inadmissible: and the opinion of the learned Judge, that the jury might compare writings, does not make out that he would have excluded opinion founded on other documents proved *aliundè* to be genuine.

The next case in order of time, which never fails to be mentioned when evidence of handwriting is debated, *Goodtitle* d. *Revett* v. *Braham* (1), furnishes, however, by no means so valuable an authority as we might expect to find in a trial at Bar. The questionable evidence there received was withdrawn by the Court from the attention of the jury. And shortly after, in *Carey* v. *Pitt* (2), Lord KENYON expressly pronounced it inadmissible.

Rex v. *Cator* (3) is in its circumstances very near the present case. And, though only a Nisi Prius decision, I apprehend that it has always been considered good law. The defendant was tried for a libel said to be written in a feigned hand. A person from the post-office, supposed to be skilful in the detection of forgeries, was asked to look at certain writings in the defendant's natural hand, and then at the libel, and give his opinion whether the libel was in the same writing. HOTHAM, B., after hearing a very extended argument, rejected the evidence. If this witness had been desired to look at those papers the day before, in order to gain acquaintance with the character of the writing, that case would have been identical with the present. Can this
[*745] difference between the modes of questioning *the witness make the evidence receivable in one case, and not in the other? I apprehend that it may.

The distinction is doubtless very subtle; and in practice the

(1) 4 T. R. 497.
(2) Peake, Add. Ca. 130.
(3) 4 Esp. 117.

two operations of the mind will be likely to run into each other. But there is an essential difference between casting our eye at the same moment on two objects placed before us in order to judge of their resemblance, and acquiring familiarity with a certain character of handwriting in order to judge afterwards whether a document bears that character. Mr. Starkie thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forger might counterfeit every line and angle so correctly that, to a common eye, no discrepancy should betray itself; and yet one who has an intimate knowledge of the individual might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, in taking a witness's opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxta-position looks like a mechanical proceeding, a mere act of measurement. Whether these reasons may be thought satisfactory or not, there can be no doubt that in former times the law, while it daily acted on opinion derived from knowledge of the character, regarded comparison of hands as extremely dangerous.

The Legislature, in stat. 1 W. & M. c. 7 (private), declared accordingly the attainder of Algernon Sidney void as against law, because (1) the jury were directed to believe the writing his, by comparing it with other writings of *his. Mr. Starkie (2) [*746] seems to think this recital incorrect, according to our present notion of comparison of hands: and so it certainly is, if the report of the trial in the State Trials is faithful. Whether it is or not, we have no means of deciding. Jefferies is charged with falsifying these reports in some instances; and it is extraordinary that his summing up omits all mention of Sheppard, the first of the three witnesses said to have spoken to the prisoner's writing on the trial (3). None of the numerous pamphlets, however,

(1) See *ante*, p. 547, *n*.

(2) 2 Stark. Ev. 374 (2nd ed.).

(3) See, however, 9 How. St. Tr. p. 892, where, in the report of Jefferies's summing up, Sheppard's evidence, and the fact that he had seen the prisoner write, are shortly noticed.

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impute to the report any misrepresentation in this matter of law. On the other hand, when the Act for reversing Sidney's attainder passed, the memory was green of the atrocious trial which produced it, and the foulness of the admitted proceedings rendered all exaggeration or misstatement superfluous. But, at any rate, the Act is a legislative declaration, sanctioned, as we must believe, by Somers and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting.

And, though there may be a mistake in supposing that course to have been pursued in Sidney's trial, no other sense can be assigned to the words of the statute, but that which Mr. Starkie states as the present meaning of comparison of hands, *i.e.* "an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person" (1).

[*747] Cases to this effect are collected in a note in the same page (2), though, in the following page (3), an extract is *given from the chapter on evidence in Buller's Nisi Prius, which speaks of proving the writing of one instrument by a comparison with others; and LE BLANC, J. twice admitted a comparison of ancient documents (*Roe* d. *Brune* v. *Rawlings* (4)), observing that at that distance of time no better evidence could be obtained. Whether better or not I will not undertake to determine; but plainly HOLROYD, J. (one of the most accurate lawyers and profound thinkers that ever sat on the bench) was aware of a different mode of proceeding with ancient documents, and one more conformable with what appears to have been the ancient practice; for he, in the same note, appears to have ruled differently in such a case. A witness produced who was able to swear, from his having examined several of such signatures, that he had obtained sufficient knowledge, was permitted to give an opinion with respect to handwriting without an actual comparison: *Sparrow* v. *Farrant* (5).

(1) 2 Stark. Ev. 374 (2nd ed.).
(2) Note (*q*) to 2 Stark. Ev. 374 (2nd ed.).
(3) Note (*x*) to 2 Stark. Ev. 375 (2nd ed.).
(4) 8 R. R. at p. 635, *n.* (7 East, 282, *n.*).
(5) Note (*x*) to 2 Stark. Ev. 375 (2nd ed.).

The same note (1) indeed refers to a most remarkable case of *Doe* d. *Tilman* v. *Tarver* (2), in which Lord TENTERDEN directed a person producing a paper bearing a steward's signature, to compare it with other signatures of the same steward, in books belonging to the manor, and say, upon oath, whether he believed that the writings were by the same person, observing that he remembered LAWRENCE, J., at Worcester, directing a Mr. Benjamin Price, accidentally present, to compare a certain ancient writing with others purporting to be written by the same person, and give his opinion on the identity of the *writing. I [*748] presume that the same course was taken in *Roe* d. *Brune* v. *Rawlings* (3). It does not appear, however, that any objection was made to this method of forming an opinion on the writing; nor can it be supposed that any party would be interested in preferring the one mode of proof to the other; nor, indeed, is it quite clear in fact that the method prescribed by HOLROYD, J. was not adopted by the three other learned Judges who have been named, and the comparison made with the idea in the witness's mind, not with the paper itself. Even if it was not, and supposing the direct comparison to be right, it would not follow that that method was wrong, since both may be proper and admissible; and if it was not inadmissible, I am at a loss to discover any difference between that evidence and the evidence which has been excluded on the trial now under consideration.

But we are not now concerned in deciding between two methods of arriving at a knowledge of handwriting; but whether, when the genuineness of it is in issue, the knowledge that may be derived from other productions of the same hand is to be altogether excluded from the inquiry. Now, for my own part, I am ready to avow my entire concurrence in the sentiments of my brother Peake on this point, but that my opinion goes much farther than his. He says (4) (reviewing the cases of *Macferson* v. *Thoytes* (5), *Rex* v. *Cator* (6), and others of the same period), "the analogies of law, however, appear strongly to support the

(1) Note (*x*) to 2 Stark. Ev. 375 (2nd ed.).
(2) Ry. & Moo. 141.
(3) 8 R. R. 635, *n.* (7 East, 282, *n.*).
(4) Peake's Ev. 105.
(5) 1 Peake. N. P. 29.
(6) 4 Esp. 117.

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admissibility of this evidence; for opinion, founded on observation and experience, is received in most questions of a similar
[*749] *nature. There is a certain freedom of character in that which is original, which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to the subject, than by another who has never given his mind to such pursuits. It does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence."

With regard to the form in which the question was proposed in the late trial, if the examples of Lord KENYON, LE BLANC, J., and LAWRENCE, J., and Lord TENTERDEN, render it doubtful whether it was the only proper form, I think, on tracing the subject through the books, that it was the most proper form. If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury, which every one of them, even though illiterate, might as well perform for himself. But, if he is a person of some skill (however low in degree, and however generally shared with him), he does what possibly the jury may be incompetent to do. Even in these times, some may serve on juries who cannot read and write; but to produce a person, who could barely read and write, to speak of his own knowledge and judgment in handwriting, would rather tend to throw ridicule than any degree of light on the cause. The witness must be conversant with handwriting, a banker, a printer, the officer of a court of justice (which was the description, I believe, of Mr. Price, when Lord TENTERDEN attended the Oxford circuit as a barrister, and Mr.
[*750] Justice *LAWRENCE placed the documents in his hand) (1), to be entitled to any degree of authority.

From the substitution of a witness for the jury, in forming an opinion on the genuineness of handwriting, an advantage follows so great and obvious, that it would form a strong motive for so framing the rule of evidence; I mean the prevention of that

(1) See *Doe* d. *Tilman* v. *Tarver*, Ry. & Moo. 143.

distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. If this could be done, a legitimate argument might be raised from the internal evidence of the contents of each paper, and the nature of each transaction alluded to therein. On these points the party could not be expected to come prepared; and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to *Doe* d. *Perry* v. *Newton* (1), in which we refused a rule *nisi* for a new trial, moved for on the ground that my brother COLERIDGE had excluded papers tendered in evidence for the mere purpose of being compared with some which were proved. Indeed, in *Griffith* v. *Williams* (2), which was urged as an authority for receiving such evidence, the Court of Exchequer drew precisely the line which I think the true one, observing that the Court and jury might compare letters when they had been admitted for the general purposes of the cause, though witnesses are only permitted to compare them with the character of handwriting impressed on their own minds.

The same effect, I am aware, might possibly be produced, if the writings, from which the handwriting was judged of, were in Court; for I apprehend the jury *might then desire to see the [*751] documents on which the witness judged: and my brother PARKE has informed me that at Nisi Prius he has felt himself bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse; and, when exposed in broad daylight, would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is, in its own nature, evidence.

Some other matters were discussed at the Bar, connected with this interesting subject, which do not require a detailed notice. On the question whether handwriting, looked at by itself, is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion, and *Gurney* v. *Langlands* (3)

(1) 5 Ad. & El. 514; 1 Nev. & P. 1.
(2) 1 Cr. & J. 47.
(3) 24 R. R. 396 (5 B. & Ald. 330).

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is a correct decision, I think of WOOD, B., supported by the *dicta* of Lord TENTERDEN and HOLROYD, J., that such an opinion cannot be received from one not acquainted with the handwriting supposed to be imitated. I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence.

I know not whether any argument was raised on the knowledge being gained *post litem motam*. But the judgment is almost always formed *post litem motam*, both on handwriting and other subjects of speculation. There seems no reason why the know-

[*752] ledge should be *not obtained in the same stage; indeed, the opinion of medical men is constantly taken on facts brought to their knowledge during the trial.

On the whole, I think the question regular, and the exclusion of the evidence improper; but, the Court being equally divided, the rule for a new trial must be discharged.

Rule discharged (1).

[752, *n.*] (1) The apparent inaccuracy in the statute reversing Sidney's attainder is noticed by Mr. Phillipps in 1 Phil. Ev. p. 466 (6th ed.), and 2 State Trials, p. 111; and had before been pointed out in p. 184 of Sir W. D. Evans's treatise (cited p. 548, *ante*), and in a note to 9 Howell's St. Tr. 864. Mr. Hallam, too, observes upon it, in his "Constitutional History of England," vol. ii. p. 620, 2nd ed., where, after stating that the evidence of handwriting, "unless the printed trial is falsified in an extraordinary degree," was such as would be received at present, he adds, in a note, "Though Jefferies is said to have garbled the manuscript trial before it was printed (for all the trials, at this time, were published by authority, which makes them much better evidence against the Judges than for them), yet he can hardly have substituted so much testimony without its attracting the notice of Atkins and Hawles, who wrote after the revolution. However, in *Hayes's* case, State Trials, x. 312, though the prisoner's handwriting to a letter was proved in the usual way by persons who had seen him write, yet this letter was also shown to the jury, along with some of his acknowledged writing, for the purpose of their comparison. It is possible, therefore, that the same may have been done on Sidney's trial, though the circumstance does not appear. Jefferies indeed says, 'comparison of hands was allowed for good proof in *Sidney's* case:' *Id.* 313. But I do not believe that the expression was used in that age so precisely as it is at present; and it is well known to lawyers that the rules of evidence on this subject have only been distinctly laid down within the memory of the

present generation." Mr. Starkie also suggests (2 Stark. Ev. 374, 2nd ed.) that at, and for some time after, the period of Sidney's attainder, the terms "comparison of handwriting" were understood as including that which is now considered the legitimate course of proof.

Whether actual comparison in Court was or was not resorted to on Sidney's trial, the objection there taken seems to have extended to all the evidence offered on this branch of the case. When Sheppard deposed to Sidney's handwriting, and stated, as his means of knowledge, that he had seen the prisoner write several indorsements, Sidney objected that "similitude of hands can be no evidence:" 9 How. St. Tr. 854; and in his defence he repeated that "there is nothing but the similitude of hands offered for *proof:" 9 How. St. Tr. 864, adding, p. 865, "The similitude of hands is nothing: we know that hands will be counterfeited, so that no man shall know his own hand." In Sir John Hawles's remarks on Colonel Algernon Sidney's Trial, printed 9 How. St. Tr. 999, from a work published in 1689, the objection is thus stated: "And as this indictment was an original in one part," "the evidence on it was an original in another part, which was proving the book produced to be Col. Sidney's writing, because the hand was like what some of the witnesses had seen him write; an evidence never permitted in a criminal matter before:" p. 1003. It is remarkable, that while Hawles, condemning the course taken at Sidney's trial, makes at least no express complaint of any "comparison" in the modern sense of the term, North, who defends the proceedings against Sidney, alludes to this part of them as follows: "I may justly say there was not only the common proof of the opinion of witnesses, but writings produced and sworn to be his hand, as bills, and letters, and compared in Court; but the prisoner made a considerable defence against that sort of evidence."—Examen, Part. II. c. 5, s. 150, p. 409, ed. 1740.

It seems probable that the objection pointed at by the Act of Reversal was considered by all parties as applying, not to the process by which the similitude of handwritings was ascertained, but to the practice of allowing that similitude to go to the jury at all as proof in a criminal case, unless as an adjunct to other evidence upon the point to which it was adduced; mere opinion of handwriting, however formed, being thought, by the objecting party, too slight a testimony to countervail the ordinary presumption in favour of innocence. Burnet, in his "History of his own Time," says (referring to the trial of Sidney): "As for the book, it was not proved [753, *n.*] to be writ by him; for it was a judged case in capital matters, that a similitude of hands was not a legal proof, though it was in civil matters," vol. ii. p. 396, ed. 1823; to which is subjoined, from a note by Speaker Onslow, "*Quære*, whether that was a mistake, and so now allowed?" (The mention of a "judged case" may perhaps be an inaccurate reference to that of *Roy* v. *Da. Ma. Carr*, 1 Sid. 418, on an information for perjury, which was cited by Sidney on his trial.) On the *Trial of the Seven Bishops*, the objection to "comparison" of handwriting was not only that the evidence offered was unsatisfactory, but that it was so because the case was a criminal one (see pp. 557, 558, *ante*); which argument was adopted by POWELL and HOLLOWAY, JJ., 12 How. St. Tr. 305, 306. The supposed distinction between civil and criminal cases, with the reason drawn from the balance of presumptions, will be found fully stated in Gilbert's Law of Evidence, p. 46 (of the 6th ed.). The author

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there observes, that, in a case of perjury assigned on an answer in Chancery, though there be no witness to prove directly that the party swore it, the perjury may be "illustrated" by a comparison of hands, "which possibly may be evidence in concurrence with other proof," shewing, independently of the document itself, the identity of the party: and he then proceeds to state his opinion of the law as to comparison of hands, pronouncing it to be good proof in civil cases, but not in criminal, because [*754, n.] *of the presumption in favour of the defendant, and concluding as follows: "Therefore, when the comparison of the hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing."

Consistently with this doctrine, in *Rex* v. *Crosby*, 12 Mod. 72 (*S. C.* 1 Ld. Ray. 39), on an indictment for high treason, several treasonable papers being produced which witnesses swore they believed to be the handwriting of the prisoner, and a question arising, "whether comparison of hands were sufficient?" the Court said, "It is not sufficient for the original foundation of an attainder, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my *Lord Preston's* case," (*Trial of Sir Richard Grahme* and others, 12 How. St. Tr. 726, 736), "his attempting to go with them into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of *Colonel Sidney's* case." And, in the case of Sidney, it would appear that he himself conceived the error on this subject to lie in permitting any proof of handwriting, founded merely on opinion, to pass as substantial and independent evidence. For, in "The Apology of Algernon Sidney in the Day of his Death," (written between his trial and execution, and published with his "Discourses concerning Government," London, 1763; also printed in 9 How. St. Tr. 916), he states, among the points of law which he was desirous of raising at the trial; "7thly, that, supposing the Lord Howard to be a credible witness, he is but one: no man can be thereupon found guilty, as appears by *Whitebread's* case;" (see 7 How. St. Tr. 120); "the papers cannot be taken for another witness; similitude of hands is no evidence, whosoever writ them; they can have no concurrence with what is said, being unknown to him, written many years since," &c., 9 How. St. Tr. 931. And he makes no complaint of the manner in which the "similitude" was established. In the Report to the House of Lords, December 20th, 1689, from the "Committee for Inspections of Examinations, concerning the Murders of Lord Russell, Colonel Sidney," &c., Lords' Journals, vol. xiv. p. 377, 9 How. St. Tr. 951, three depositions are set out, detailing the acts of injustice committed on Sidney's trial; in none of these statements is any comparison of documents in Court by witnesses, or by the jury, mentioned; but one of the deponents, who had been "of counsel for Colonel Sidney," states that, after the conviction, Sidney told him, "'that they proved the paper which they accused him of, for being his handwriting, by a banker, who had only once his hand to a bill; and to that he quoted the *Lady Carr's* case;" (1 Sid. 418, but not as here cited; and see, as to that case, 16 How. St. Tr. 200—204, and 546); "wherein it was adjudged, 'That, in a criminal case, it is not sufficient for a witness to swear he believes it to be the hand of the party; but that he saw the party write it.'"

See also the discussions on this

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(5 Adol. & Ellis, 755—758; S. C. 1 N. & P. 168; 2 H. & W. 339; 6 L. J. (N. S.) K. B. 31.)

Where a wife, ill-treated by her husband, indicts him for assaulting and imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessaries.

Otherwise, *semble*, if she exhibit articles of the peace against her husband.

ASSUMPSIT for money laid out and expended, at defendant's request, in and about the finding, carrying on and prosecuting a certain bill of indictment preferred by one Mary Godmond, then and now being the wife of defendant, against the said defendant and others, for assaulting and imprisoning the said Mary Godmond, then and still being the wife of defendant, in pursuance of a certain recognizance before then entered into by her the said Mary Godmond for that purpose: and on an account stated. Plea, *non assumpsit*. On the trial before Alderson, B. at the York Spring Assizes, 1835, the following facts appeared. The defendant, having ill-treated his wife, was indicted as above mentioned, on her prosecution, at the Beverley Sessions, together with some other parties. He was convicted, and sentenced to twelve months' imprisonment, and to pay a fine of 50*l*. The wife had requested Johnson, an attorney, to carry on the prosecution for her, which he had refused to do unless money was advanced: she then applied to the plaintiff, her brother, and he paid 66*l*. towards the costs of the prosecution, and made himself liable for the residue of Johnson's bill (1). The particulars of demand were for cash paid in the course of the prosecution, on account of witnesses' expenses; for monies paid to Johnson in respect of his disbursements; and for the balance of Johnson's bill; the whole demand amounting to 115*l*. It was insisted, on behalf *of the defendant, that the action did not lie. A verdict [*756]
was taken for the plaintiff for 115*l*., with leave to the defendant

point of *Sidney's* case, in the trial of *Layer*, 16 How. St. Tr. 200, 203, 4; and the argument of Mr. Wynne, counsel for Bishop Atterbury, 16 How. St. Tr. 544—548.

(1) The facts of the case, as above, were admitted without proof.

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to move to enter a nonsuit; the bill to be taxed if the verdict stood. A rule *nisi* for entering a nonsuit was obtained in the ensuing Term.

Cresswell now shewed cause:

Shepherd v. *MacKoul* (1) shews that an attorney, who has acted for a wife in exhibiting articles of the peace against her husband, may recover against him for the business done, if it be clear that the proceeding taken was necessary for her protection. If any evidence of such a necessity appeared in the present case, there could not be a nonsuit. In exhibiting articles of the peace, the intention obviously is to avoid an impending evil; but in prosecuting an indictment, also, the object is, not merely to punish for what is passed, but to be secured from future injury; and an indictment, successfully prosecuted, would be even more effectual for this purpose than the exhibition of articles. It was clearly necessary, here, to prevent a repetition of the violence complained of. In *Williams* v. *Fowler* (2) it was held that an action lay against a husband for the costs of proceedings against him on the prosecution, and at the suit, of his wife. In *Harris* v. *Lee* (3), although it was admitted that a wife cannot at law borrow money, even for necessaries, so as to bind her husband, it was held that, the money having been applied to the use of the wife for necessaries, the lender must, in equity, stand in the place of those who had supplied her, and who would otherwise have been creditors of the husband. The demand here for the 66*l.* [*757] actually paid comes directly within the authority of *the cases cited; the residue, which is still owing to the attorney, and for which the plaintiff is liable, falls under the same principle; for the assistance was necessary, and the wife actually received it.

(COLERIDGE, J. mentioned *Jenkins* v. *Tucker* (4).)

There the debts were strictly the wife's; the necessaries had been contracted for and supplied before the plaintiff advanced his money; the wife gained no advantage by his interposition.

(1) 14 R. R. 752 (3 Camp. 326).
(2) M'Clel. & Y. 269.
(3) 1 P. Wms. 482; *S. C.* (*Anonymous*) Prec. in Chanc. 502.
(4) 1 H. Bl. 90.

Here the required services could not have been obtained but for the advances and undertaking of the plaintiff.

Alexander, with whom was *Wightman*, *contrà*, was stopped by the COURT.

LORD DENMAN, Ch. J.:

We are all satisfied that this action cannot be maintained. It is impossible to say that, under any circumstances, a prosecution of the husband is necessary for the wife, within the rule on this subject. If she apprehends ill-treatment from him, she has another mode of proceeding open to her, by exhibiting articles of the peace: in the case of her doing so, *Shepherd* v. *MacKoul* (1) would be an authority. In *Williams* v. *Fowler* (2) there was evidence of an express agreement by the husband to pay the bill if reasonable. In *Harris* v. *Lee* (3) the question was whether trustees for discharging the husband's debts were liable to the plaintiff for money lent by him to the wife to pay surgeons for curing her of a disease; and the MASTER OF THE ROLLS, considering that what had been done was in the course of obtaining necessaries, held that the plaintiff *should stand in the place of [*758] those who would have been creditors if the money had not been advanced. Unless the indictment here was a necessary, the defendant cannot be charged.

PATTESON, J.:

It is clear that all the authorities apply to the case where necessaries have been obtained for the wife. It cannot be said that an indictment against the husband for assaulting his wife is a necessary.

WILLIAMS, J.:

I am of the same opinion. There is nothing here to raise an assumpsit in law.

COLERIDGE, J. concurred.

Rule absolute.

(1) 14 R. R. 752 (3 Camp. 326).
(2) M'Clel. & Y. 269.
(3) 1 P. Wms. 482; *S. C.* (*Anonymous*) Prec. in Chanc. 502.

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MANNING *v.* WASDALE (1).

(5 Adol. & Ellis, 758—764; S. C. 1 N. & P. 172; 2 H. & W. 431: 6 L. J. (N. S.) K. B. 59.)

The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a *profit à prendre*, but a mere easement.

Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken.

CASE. The first count stated that, whereas the plaintiff, before and at the time &c., was, and from thence hitherto hath been, and still is, an inhabitant residing and inhabiting within the parish of St. Ives in the county of Huntingdon, to wit in and upon a certain ancient messuage with the appurtenances there situate, and being the occupier thereof, and, by reason thereof, during all the time aforesaid, of right was entitled to the use, benefit, privilege, and easement of washing and watering his
[*759] cattle in a certain pond in the parish aforesaid, *to wit &c. (naming the pond), and also of taking and using the water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of his said messuage and premises, every year and at all times of the year, at his free will and pleasure; yet the defendant, well knowing &c., whilst the plaintiff was and continued to be an inhabitant and residing within the said parish in manner aforesaid, and so entitled to the said privilege and easement, to wit 10th October, 1815, and on divers other days and times between &c., wrongfully and unjustly encroached upon and closed up, contracted and narrowed, and filled up, lessened, and obstructed the said pond, to wit by putting, placing, and throwing therein and thereon divers large quantities of bricks, &c., and thereby diminished, soaked up, and absorbed divers large quantities of the water of the said pond, and continued and kept the same pond so closed up, &c., and the water thereof so diminished, &c., for a long space of time, to wit from the day and year aforesaid hitherto, and thereby rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy.

The second count claimed the use, benefit, privilege, and easement of washing and watering the plaintiff's cattle in the

(1) Followed, *Race* v. *Ward* (1855) 4 E. & B. 702; 24 L. J. Q. B. 153, 158.

said pond, and of taking and using the water thereof, for his domestic and other purposes, at all times of the year; and described the nuisance to the pond somewhat differently.

Second plea to the first count. That the plaintiff has not, nor have the owners or occupiers of the said messuage for the time being, in the said first count mentioned, at any time within twenty years next before the *committing of the grievances in the said first count mentioned, used, exercised, or enjoyed the said use, benefit, privilege, and easement, in the said first count mentioned, in manner and form, &c. Verification. [*760]

Seventh plea, to the second count, like the second plea, *mutatis mutandis*.

Demurrer, assigning for cause that non user alone, as alleged, for twenty years, is insufficient to destroy the rights and easements; and that the pleas allege mere matter of evidence, which at most would only found a presumption in law of a release or other conveyance or abandonment of the rights; and that the defendant, if he means to rely on lapse of time as evidence of a release, destruction, or extinguishment of the right, ought to have distinctly pleaded the legal effect of such evidence; and that neither of the pleas alleges that the plaintiff has at any time acquiesced in any interruption to or disturbance of his rights, nor in fact that there ever has been at any time any interruption; nor do the pleas deny that the plaintiff has continually asserted his right during the whole period of the said twenty years; and that it is consistent with the pleas, that the rights and easements claimed continue altogether undisturbed and unaltered. Joinder in demurrer.

The COURT called on

Wightman, for the defendant:

The declaration is bad. The right claimed is divisible. The plaintiff claims, by reason of his occupancy of a messuage, the right to take the water for washing and watering his cattle, and for culinary purposes. This is a claim to take as much water as he pleases for cattle whencesoever they come, and for culinary purposes in as many places as he pleases. *The first claim should have been limited to cattle *levant* and *couchant*; the [*761]

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second to culinary purposes in the plaintiff's house. Otherwise the pond might be exhausted. This is the rule as to all *profits à prendre*. Every claim to take on the soil of another, as, for instance, turbary, must be so limited that the concurrent rights of others may not be encroached upon: *Valentine* v. *Penny* (1). Thus it is said, in an *Anonymous* case in March's Reports (2), that "Prescription to have common for all his cattle commonable is not good, for thereby he may put in as many beasts as he will. But a prescription to have common for his cattle commonable *levant* and *couchant*, is a good prescription." *Jeffry* v. *Boys* (1) and note (3) to *Mellor* v. *Spateman* (3) are to the same effect. That the claim is too large appears from the language of Lord ELLENBOROUGH in *Wilson* v. *Willes* (4), though that was the case of a custom; but the judgment there did not turn upon the objection to the claim of custom, as opposed to prescription. The principle therefore applies, even considering this as a prescription. But, as a custom (simply claimed for an inhabitant, and not for the occupier of the particular messuage), it is clearly bad, being a claim to take profits *in alieno solo*: *Gateward's* case (5), *Blewett* v. *Tregonning* (6).

(PATTESON, J.: May not the words "for the more convenient use and enjoyment of his said messuage" be an informal way of limiting the claim, and so good on general demurrer?)

These words do not limit, any more than the allegation that the right is by reason of the occupation. This is a right appurtenant to the messuage: **Tyrringham's* case (7): and the limitation must be expressed; it is not enough simply to connect it with the messuage (8). If the defendant had traversed the right, the plaintiff would have insisted that he might prove his right for any quantity of water.

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(PATTESON, J.: In *Corbyson* v. *Pearson* (9) it was held that, after verdict, by the Statute of Jeofails, where a party justified

(1) Noy, 145
(2) March, 83, pl. 137.
(3) 1 Wms. Saund. 346 f.
(4) 8 R. R. 604 (7 East, 121).
(5) 6 Co. Rep. 59 b.
(6) 42 R. R. 463 (3 Ad. & El. 554).
(7) 4 Co. Rep. 36 b.
(8) See *Morse* and *Webb's* case, 13 Co. Rep. 65.
(9) Cro. Eliz. 458.

for a right of common for his beasts *levant* and *couchant*, and averred that he had put them in *utendo communia sua prædicta*, it should be intended that the beasts were such as might use the common.)

After verdict it would be intended that the proof had been given as to such only.

(PATTESON, J.: That would have been by common law; but the decision was that the intendment might be made by the Statutes of Jeofails (1).

COLERIDGE, J.: Can this be called a *profit à prendre* at all? Water is *publici juris*. In stat. 2 & 3 Will. IV. c. 71, s. 1, right of common or profit to be taken is distinguished from easement, watercourse, or "the use of any water," mentioned in sect. 2.)

Primâ facie the right to the water is in the owner of the soil: the plaintiff here claims, not the use of it in its passage, as an easement, but the right to abstract it from the soil. He, therefore, claims it as a *profit à prendre*, not as an easement.

(COLERIDGE, J.: You cannot bring an action to recover a pond: 2 Bla. Com. 18.)

Kelly, contrà:

The claim is sufficiently limited in the declaration; at any rate, there is no more than an informality, cured by pleading over. The right to water "for the more convenient use and enjoyment" of the *messuage can be only a right to so much water as would be required to enable the plaintiff to use and enjoy the messuage more conveniently. It must clearly be used upon the premises. And it may be remarked that the pond, if supplied by a spring, would be inexhaustible. The Court will put a reasonable construction on the language of the declaration. Could it be argued that a claim to use a highway for carriages, horses, and servants, was bad, because a party might put so many carriages, horses, and servants, on the highway, at one

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(1) See note (1) to *Stennel* v. *Hogg*, 1 Wms. Saund. 228 a.

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time, as to obstruct it? Besides, this is not, as assumed by the objection, a *profit à prendre*. It is a mere easement. Thus it was said, *arguendo*, in *Fitch* v. *Rawling* (1), that a custom to water cattle at a certain watering place was an easement (2), though this was an admission making against the general object of the argument. This was cited in *Blewett* v. *Tregonning* (3), and not disputed.

(*Wightman:* There the instance was adduced as shewing, *a fortiori*, that the right to take sand from another's soil was mere matter of easement; it would have shewn this if the *dictum* had been good law; yet the Court held the latter right to be a *profit à prendre;* and they decided that there could be no custom for inhabitants to take the sand *in alieno solo*.)

Such a right as that claimed here has often been the subject of actions.

LORD DENMAN, Ch. J.:

It is not consistent with ordinary language to call the taking of water a *profit à prendre*. But, assuming it to be so, I [*764] cannot see that *the declaration here necessarily claims more than enough for the supply of water for the culinary purposes of the house, and for cattle *levant* and *couchant* on the premises. There is, therefore, no objection available on general demurrer.

PATTESON, J.:

At all events, the declaration is not bad on general demurrer. Strictly speaking, the words "for the more convenient use and enjoyment of his said messuage and premises" may not be applicable to cattle: but the allegation is well enough on general demurrer.

(*Wightman* suggested that the limitation was not in the second count.)

(1) 3 R. R. 425 (2 H. Bl. 393, 395).

(2) *Pain* v. *Patrick*, 3 Mod. 294, is cited (but *quære* if to this point). The *dictum* there refers only to a watercourse. In *Goodday* v. *Michell*, Cro. Eliz. 441, a *way* to a common fountain is mentioned as an easement claimable for parishioners by custom.

(3) 42 R. R. 476 (3 Ad. & El. 571).

It is then necessary to decide the other question; and I am of opinion that this is not a *profit à prendre*, which must be something taken out of the soil. And, if there is any mode in which the declaration here can be supported, it is sufficient. Now it occurred to me, as an instance, that inhabitants of a parish might have a right to an easement of this sort, and that afterwards there might be an inclosure Act directing commissioners to set out the pond, so that an inhabitant might acquire a right against strangers, answering to the statements in this declaration.

WILLIAMS, J.:

I think the restriction in the first count is sufficient; and, as to the second, I agree that this does not appear to be a *profit à prendre*.

COLERIDGE, J.:

My judgment rests upon a ground which makes the difference between the two counts immaterial. I think the right claimed in each is a mere easement.

Judgment for the plaintiff.

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(5 Adol. & Ellis, 765—770; S. C. 1 N. & P. 193; 2 H. & W. 373; 6 L. J. (N. S.) M. C. 17.)

Indictment, alleging that a public highway within a parish is out of repair, and that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, and ought, to repair all public highways within it which otherwise would be repairable by the parish at large; that the parishioners never have repaired the said highway; and that, by reason of the premises, the township ought to repair, and the parish ought not to be charged. Replication, traversing the custom for the township to repair all public highways within it which would otherwise, &c.

Verdict for defendants.

Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not shew what party other than the defendants was liable to repair.

Judgment for the Crown *non obstante veredicto*, refused.

INDICTMENT for non-repair of a highway. The indictment described the portion of highway in question as situate in the

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parish of Eastrington, in the East Riding of Yorkshire, and alleged that the inhabitants of that parish ought to repair.

Plea, that within the parish aforesaid there now is, and from time whereof &c. there hath been, a certain township called the township of Eastrington, and that the part of the said highway alleged in the indictment to be out of repair is, and at the time of the taking of the inquisition was, situate within the said township: and that the inhabitants of the said township, from time whereof &c., have repaired and amended, and been used and accustomed &c., and during all the time aforesaid ought &c., "and still of right ought, to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large; and that the inhabitants of the said parish at large have not during all or any part of the time aforesaid repaired and amended, and have not been used or accustomed to repair or amend, and of right ought not to repair or amend the King's common highways within the said township, or any of them; and that by reason of
[*765] the *premises the inhabitants of the said township ought to have repaired and amended, and still ought to repair and amend the part of the said highway in the said indictment specified, and thereby alleged to be out of repair, when and so often as it hath been and shall be necessary, and that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same."

Replication, that the inhabitants of the said township, from time whereof &c., have not repaired &c., and have not been used and accustomed &c., and during all the time aforesaid ought not &c., and still of right ought not, "to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large, as in the said plea is above alleged." Issue was joined on this traverse.

On the trial before Alderson, B., at the York Spring Assizes, 1835, a verdict was found for the defendants; and in the ensuing Term *Starkie* obtained a rule to shew cause why judgment should not be entered for the Crown *non obstante veredicto*, or why judgment should not be arrested. The ground

of application was that the plea did not state the highway in question to be one which but for the alleged custom would be repairable by the parish at large, and did not shew who were the parties liable to repair.

Cresswell and *Alexander* now shewed cause:

The prosecutors cannot have judgment *non obstante veredicto*, unless the Court can see distinctly, on the whole record, that the verdict ought to have been for the Crown: note [*c*] to *Bennet* v. *Holbech* (1). The parishioners *here allege that they are by [*767] custom exempt from repairing all roads which, but for the custom, would be repairable by them; and the jury have found the custom: but the objection is, that this is not alleged to be a road which, but for the custom, would be repairable by the parish. If it were not such a road, the parish could not be liable, on the present verdict. The plea expressly denies the liability of the parish; the prosecutors say that it does not in terms state whether the township or a third party is liable; but, even if the replication could be taken to mean that, admitting the custom as alleged, a third party, and not the township, is liable, that, upon the present issue and finding, would not warrant a judgment *non obstante veredicto*. Nor is there any ground for arresting the judgment. The plea and indictment must be taken together. The prosecutors found their charge upon the common law liability of the parish to repair all roads within it: the defendants say, in effect, that the whole of such liability is, by immemorial usage, thrown upon the township, so far as that extends. A replication that A. B. was liable, *ratione tenuræ*, to repair the road in question, would have been bad; the defendants were not obliged (unless as mere matter of form) to exclude that state of things by averment. Suppose that, in a civil action, the plaintiff declared in covenant, as reversioner, stating that A. was seised in fee, and, being so seised, demised for a term of years to the defendant, who entered into the covenant declared upon; and that A. died seised, leaving the plaintiff his heir-at-law. If the defendant pleaded that A., by will duly executed, devised to C. all lands

(1) 2 Wms. Saund. 319 c. (5th ed.).

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of which he was seised in fee, not averring that the lands *in question were part of them, the declaration would supply that fact, and the plea would be a sufficient answer. So here the indictment supplies the fact that the roads in Eastrington township are such as the parish would be liable to repair but for the custom pleaded. And the plea here, after alleging the township to be in the parish of Eastrington, and the road in question to be in the township; and after setting forth the custom, alleges that, by reason of the premises, the township ought to repair. That averment here is an averment of fact, and fixes the road in question as one which, but for the custom, would be repairable by the parish. The form of plea given in note (10) to *Rex* v. *Stoughton* (1) contains no averment as to the road being repairable by the parish or any other district but for the custom pleaded; and, although the indictment in *Rex* v. *Ecclesfield* (2) did contain the statement said to be requisite here, Lord ELLENBOROUGH takes no notice of it when recapitulating the material parts of the plea in his judgment.

Starkie, with whom was *Wightman*, *contrà*:

At least the defendants cannot have judgment. Parishioners indicted for non-repair of a highway lying within their parish, cannot exonerate themselves merely on *non debent reparare*; and they must shew who is liable: *Rex* v. *St. Andrew's, Holborn* (3): the same rule may be collected from *Rex* v. *Yarton* (4).

(Lord DENMAN, Ch. J.: I do not think there is any doubt on that point; but *Mr. Cresswell* has given an ingenious answer to the objection, by arguing that the averment *wanting in the plea is supplied by the indictment.)

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The allegations of the indictment are those usual in every such case. The presumption is, *primâ facie*, against the parish. A prosecutor cannot be supposed to know that there is any other party indictable. He can only state that the road is a public

(1) 2 Wms. Saund. 159 c.
(2) 19 R. R. 335 (1 B. & Ald. 348).
(3) 1 Mod. 112.
(4) 1 Sid. 140; *S. C.*, as *Rex* v. *Yarenton*, 1 Keb. 277, 498, 514.

highway, is within the parish, and is out of repair. Those allegations cannot be construed into an admission that the road is one which the parishioners would be liable to repair but for a custom which they plead, the plea failing to shew of itself how any other party is liable. But, further, suppose there were within the parish a township containing three districts, in one of which the repairs were done *ratione tenuræ*, in another the district repaired, and in a third the whole township; and the parishioners, being indicted for the non-repair of a road within the township, pleaded as the defendants have in this case. According to the argument on the other side, they would be entitled to judgment, and yet the public could not know, by the result, who ought to be indicted in future. The parishioners, to discharge themselves, must find out the party liable.

(WILLIAMS, J.: And you argue that there is a general averment of liability in the township, but that the plea does not apply it to the particular road.)

Till some other party is shewn to be liable, the presumption must be against the parish, in favour of the public.

(LORD DENMAN, Ch. J.: The prosecutors apparently do not insist upon the prayer of judgment *non obstante veredicto*.

PATTESON, J.: That cannot be demanded; it is granted only when the merits are clear; in this case they are not so, if there is a third party who may be liable; and it is on that assumption only that the plea fails.)

LORD DENMAN, Ch. J.: [770]

As to the other part of the motion; I was struck at first with *Mr. Cresswell's* argument, but the reply to it is sufficient. The public, when they find a highway out of repair, cannot know who is the party liable, except as at common law. They proceed, in ignorance as to this point, against the nuisance as they find it. The parishioners, if they would discharge themselves, must point out the party who is liable.

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PATTESON, J.:

I am of the same opinion, though, if this had been an action and not an indictment, I should have said that the objection ought to be taken by special demurrer.

WILLIAMS, J. concurred.

COLERIDGE, J.:

I am of the same opinion. The parishioners here set up a special defence, that the township has been accustomed to repair such roads within it as would otherwise be repairable by the parish at large; but they state nothing which applies this to the road in question.

Rule absolute for arresting judgment.

1836. *Nov.* 24.

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REX *v.* THE INHABITANTS OF ABERGELE(1).

(5 Adol. & Ellis, 795—800; S. C. 1 N. & P. 235; 2 H. & W. 375; 7 L. J. (N. S.) M. C. 109.)

For obtaining a *certiorari* on behalf of a parish, to remove an order of Sessions, a notice to the justices, signed by the attorney for the parish, stating the intention of the parish to apply for the writ, is a sufficient notice by the "party or parties suing forth the same," within 13 Geo. II. c. 18, s. 5.

The recognisance, under 5 Geo. II. c. 19, s. 2, for prosecuting the appeal, must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties.

Where a *certiorari* had been allowed on an insufficient recognisance (it being given merely by two persons appearing on the recognisance to be inhabitants of the parish), this Court refused to quash the *certiorari*, but quashed the allowance, and enlarged the return to the writ, sending the writ back to the Sessions in order that it might be duly allowed, after the parties prosecuting the writ should have entered into a proper recognisance.

AN order for the removal of certain paupers from the parish of Abergele in Denbighshire was quashed by the Sessions, April, 1836, on appeal. Notice in writing was given to the chairman and justices, that the respondents intended applying for a *certiorari* to remove the order of Sessions. The notice was under the hand of the attorney employed for the parish. The *certiorari* was sued out, and was delivered to the justices at the

(1) See *R.* v. *Justices of Cambridgeshire*, 37 R. R. 579, and note there.—R. C.

October Sessions, 1836, together with a recognisance entered into by W. H., of &c., in the parish of Abergele, farmer, and A. W. of the town of Abergele, innkeeper, before a justice of the county, in 50*l.*, with condition that the inhabitants of Abergele should prosecute the said writ of *certiorari*, &c. In this Term a rule *nisi* was obtained for quashing the *certiorari*, on the grounds, that the notice of applying for the *certiorari* was not given by the "party or parties suing forth the same," according to stat. 13 Geo. II. c. 18, s. 5; and that the recognisance was irregular, being entered into by two inhabitants of the parish merely as inhabitants, and not by any person or persons in the name of the parish generally, whereas stat. 5 Geo. II. c. 19, s. 2, enacts "that no *certiorari* shall be allowed to remove any such judgment or order" (of justices) "unless the party or parties prosecuting such *certiorari*, before the allowance thereof, *shall enter into a recognisance with sufficient sureties," "in [*796] the sum of 50*l.*, with condition to prosecute the same at his or their own costs and charges with effect," &c., and to pay costs, &c. (1).

J. Jervis now shewed cause:

Notice, under the hand of the attorney for the respondents, of their intention to apply for a *certiorari* (2) was a notice by the parties within the meaning of the statute.

(1) It was also objected that the *certiorari* was not "moved or applied for within six calendar months next after" the making of the order of Sessions, pursuant to stat. 13 Geo. II. c. 18, s. 5. The order was made, April 7th; but the Sessions began on the 5th, and it was contended that the judgment must have relation to the first day. The agent for the respondents went to the chambers of the Lord Chief Justice, October 4th, to obtain a fiat for a *certiorari*. The Lord Chief Justice was out of town (as were the other Judges of this Court); but his Lordship's clerk promised the agent that he would send the necessary papers to the Lord Chief Justice in Derbyshire by that evening's post, and desired him to call again on the 8th, that being the first day on which it was probable the papers could be returned. The agent applied again on the 8th, and received the fiat, indorsed by the Lord Chief Justice; after which he immediately proceeded to obtain the *certiorari*. These facts were commented upon in argument; but the Court laid no stress upon the objection.

(2) The notice was described in these terms, in the affidavit on which the rule was granted, and no other account of it was given.

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(LORD DENMAN, Ch. J.: That is a reasonable construction.)

Rex v. *The Justices of Cambridgeshire* (1) shews that such a notice is sufficient, and not open to the objection taken in *Rex* v. *The Justices of Lancashire* (2).

(*Humfrey, contrà*, said that this point would not be insisted on.)

As to the recognisances, *Rex* v. *Boughey* (3) may be cited on the other side; but there the *certiorari* was applied for by individuals, who might themselves have been bound. A parish cannot be personally bound; and the respondents here have [*797] given two sureties, and that is the *practice in such cases.

(LORD DENMAN, Ch. J.: The objection to the recognizances in *Rex* v. *Boughey* (3) was not necessary to the decision, because the *certiorari* had been applied for too late.)

Humfrey, contrà:

The words "party or parties prosecuting" apply to a parish; the recognisance on its behalf might be entered into by the parish officers: and it would seem, by the language of PARKE, J. in *Rex* v. *The Justices of Cambridgeshire* (4), that all should enter into it. If two inhabitants, or one, could be said to represent the parish, still there is not a recognisance by the party and sureties. It appears from a manuscript note of *Rex* v. *Boughey* that one or two inhabitants may become bound on behalf of the parish; but that has not been done here. And whatever the practice may have been, effect ought to be given to the statute, according to its plain words.

(A note of *Rex* v. *Boughey* and others, by the late Mr. Dealtry, was here submitted to the Court, stating as follows: "There was an affidavit that, by the constant practice of the Crown Office, a party was not required to enter into recognisances to prosecute the *certiorari*; if he found two good sureties, it was always considered a compliance with the statute. And in the present case, but particularly in cases where a whole parish were

(1) 37 R. R. 579 (3 B. & Ad. 887).
(2) 4 B. & Ald. 289.
(3) 2 R. R. 381 (4 T. R. 281).
(4) 37 R. R. at p. 580 (3 B. & Ad. 889).

defendants, it was impossible that they could all enter into a recognisance. But the Court determined" "that the statute absolutely required a party removing to enter into the recognisance; and Lord KENYON said, in the case of a parish, one or two of the inhabitants might *enter into the recognisance on behalf of the rest, as on an indictment they plead in the name of the whole."

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The officers of the Crown Office now stated, in addition, that, since the decision in *Rex* v. *Boughey*, the recognisance in the case of a *certiorari* to remove orders at the instance of a parish had continued in the same form as before, except that it was altered from sureties by two inhabitants in 25*l.* each, to sureties by two inhabitants in a joint sum of 50*l.*)

LORD DENMAN, Ch. J.:

The Court is of opinion that recognisances ought to be given here on behalf of the parish, and two sureties also. But nothing limits the time for doing this; and we think the rule ought to be enlarged, in order that the proper recognisances may be entered into.

(*Humfrey* suggested that the time was limited by stat. 13 Geo. II. c. 18, s. 5.)

I do not think the words of that clause have the rigid sense contended for. The statute enacts that no *certiorari* shall be granted, unless moved or applied for within six calendar months after the making of the order. This was so applied for. Why may not there be an allowance now, if the first allowance is incorrect? It is doing no violence to the Act to say so. If the application for a *certiorari* were made when the six months were expiring, the allowance would necessarily be after the six months. And, by stat. 5 Geo. II. c. 19, s. 2, the recognisances are to be entered into "before the allowance" of the *certiorari*. That relates to allowance merely.

PATTESON, J.:

The allowance is by the persons to whom the *certiorari* is directed. Here the allowance is said to be irregular, on account

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of a defect in the recognisances. *Why should not it go back in order that proper recognisances may be entered into?

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Humfrey contended that, as the case now stood, the allowance being clearly irregular, the appellants were entitled to have the *certiorari* itself quashed.

J. Jervis:

There is no objection to the writ, though the proceedings for allowing it are defective. When those are amended, the *certiorari* will come into operation.

(PATTESON, J.: If a *certiorari* has been obtained within the six calendar months, but not used for a long time afterwards, it does not therefore become invalid.)

LORD DENMAN, Ch. J.:

The rule will be moulded so that the allowance may be quashed. When proper recognisances are entered into and another allowance obtained, the respondents will make what use of it they can.

PATTESON and WILLIAMS, JJ. concurred (1).

The rule was, that the allowance of the *certiorari* be quashed, and the recognisances discharged. And, "That the return to the said writ of *certiorari* be enlarged; and the said writ of *certiorari*, and the orders returned therewith, be sent back to the Sessions, in order that the said writ may be duly allowed, after the defendants shall have entered into a recognisance by one of them the said defendants, on behalf of himself and *the other inhabitants prosecuting the said writ of *certiorari*, with sufficient sureties, in the sum of 50*l.*, pursuant to the provisions of the statute in that case made and provided."

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(1) Coleridge, J. was in the Bail Court.

REX *v.* THE COMMISSIONERS OF THE NAVIGATION OF THE RIVERS THAMES AND ISIS.

1836. *Nov.* 23.

[804]

(5 Adol. & Ellis, 804—816; S. C. 6 L. J. (N. S.) K. B. 17.)

By Acts relating to a river navigation, commissioners were authorised to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream; and to make such horse-towing paths as they should think convenient for the navigation. If any person should think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction as they should think reasonable. And, if the party complaining should be dissatisfied with such order, &c., he might appeal to the Quarter Sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatever:

Held, that this Act gave jurisdiction to the Sessions to give satisfaction to a party complaining, although no legal injury had been suffered.

MANDAMUS. The inducement suggested that, by an Act, &c. (stat. 52 Geo. III. c. xlvii., local and personal, public), after reciting Acts passed in 11 Geo. III. *(c. 45), 15 Geo. III. [*805] (c. 11), 28 Geo. III. (c. 51), and 35 Geo. III. (c. 106), it was enacted (1) that all and every the powers, authorities, provisoes, restrictions, clauses, penalties, forfeitures, matters, and things contained in the recited Acts should continue in force for executing the works by the said former Acts, and by that Act, authorised and directed to be done (except such parts thereof as should be altered, &c., by that Act); and the commissioners appointed under the said Acts, or either of them, should have power and authority to execute so much of the said Acts as should remain in force, and also that Act: and that, in and by the said stat. 35 Geo. III. (c. 106), it was enacted (2) that, if any person should think himself aggrieved, damaged, or injured by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint thereof in writing to the said commissioners at any district or general meeting, &c., the said commissioners should hear and report

(1) Stat. 53 Geo. III. c. xlvii. s. 1. (2) Stat. 35 Geo. III. c. 106, s. 22.

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on such complaint to the next or some other subsequent general meeting, and should, at such next or subsequent general meeting, make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction to the party complaining as they should think reasonable; and, if the said party should be dissatisfied with such order, judgment, or determination, it should be lawful to appeal to the next General Quarter Sessions of the county in which the cause of complaint should arise, giving notice, &c., to the general clerk of the commissioners; and the said Court should entertain, and take cognizance of, such appeal, and make such order
[*806] and adjudication thereon *as to the justices should seem just, and award such costs, &c., which order and determination should be final and conclusive to all intents and purposes whatsoever.

That the Right Honourable George Lord Boston hath been for divers years last past, and now is, seised, possessed of, and entitled to, the fee simple and inheritance of an ancient towing path, situate in the several parishes of &c. in the county of Bucks, for the towage of barges, and of goods &c., contained therein, up and down the river Thames, for a great distance, to wit one mile and two furlongs, to wit (describing the termini, above and below Cookham Ferry); and that the said G. Lord B. hath been for divers years last past, and now is, seised, possessed of, and entitled to the sole and exclusive right and privilege of towing barges, &c., and goods, &c., to and from, &c. (mentioning the termini), taking, for the towing of such barges, &c., with horses kept by him, or by his authority for that purpose, certain reasonable tolls or payments.

And that the commissioners have made, under the authority
[*807] of the said above recited Acts (1), a certain *new cut or canal,

(1) Stat. 52 Geo. III. c. xlvii. s. 8, after repealing stat. 28 Geo. III. c. 51, s. 16, so far as it gives restricted powers to make cuts and erect locks, enacts, "That it shall be lawful for the said commissioners to erect any lock or locks, pound lock or pound locks, or other device for the improvement of the said navigation from the boundary of the jurisdiction of the city of London, near Staines in the county of Middlesex, to the town of Cricklade in the county of Wilts; and to make any cut and so many cuts as they shall deem necessary for the said navigation, or for the purpose of erecting or communicating with any lock or locks, pound lock or

from that part of the Thames which is opposite Cliefden bank, &c., and into the Thames again, a short distance below Cookham Ferry, by the making of which new cut or canal, all persons navigating barges, &c., up and down the river Thames are enabled to avoid that part of the said river along which the said towing path of G. Lord B. is situate, and to dispense with the use of the horses kept by, or by the authority of, G. Lord B. for the towing of such barges, &c., and to withhold the said tolls or payments, &c., for the use of such horses. That the commissioners have also made, under the authority of the said Acts, at or near the said new cut or canal, a certain pound lock, at which tolls and payments are, under the said Acts, demanded and taken by the commissioners, for the use of the said new cut by barges, &c., whether such barges, &c., shall or shall not have passed through the said new cut. And that the commissioners, by the making of the said new cut, have materially injured the old channel of the river *Thames, and made the navigation of that part thereof, along [*808] which the said towing path is situate, less easy and convenient; and that so, by the making of the said new cut or canal as aforesaid, and by the demanding and taking of the said tolls

pound locks on the same navigation: provided nevertheless, that no one cut shall" "be made so as to divert or stop up the present or usual channel of the said river, or to turn, divert, or alter the course of the stream or water passing through the same." Stat. 35 Geo. III. c. 105, s. 23, reciting that "it would greatly conduce to the benefit and advantage of the said navigation if a free, continued, uninterrupted, and public, horse towing path were made and established throughout and on the whole of the said navigation, so that barge masters or other persons might employ their own horses or cattle in the towing of barges, boats, and vessels, on the said navigation, either upward or downward, without interruption or impediment;" enacts that it shall "be lawful for the said commissioners to purchase and make any such horse towing paths, roads, and ways, for the haling of barges, boats, and vessels, or for passing from any public road to any horse towing path, as the said commissioners shall think convenient and necessary for the use of the said navigation," &c., with certain exceptions not material here; "the said commissioners paying and allowing unto all and every person or persons full recompence or satisfaction for all such losses or damages as he or they shall or may sustain or be put unto by reason of the taking of such lands or grounds for the making of a towing path, way, or road, for the use of the said navigation;" the damages, if not agreed upon between the parties, to be settled by a jury.

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as aforesaid, and by the injuring of the said channel as aforesaid, the commissioners have diverted the navigation from the towing path of the said G. Lord B., and rendered his said towing path, and his said sole and exclusive right and privilege of towing barges, &c., useless and unprofitable to him. And the said G. Lord B. has been aggrieved, damaged, and injured by the said work of the commissioners, and by the operation and effect thereof.

The inducement then suggested that the said G. Lord B. being so aggrieved, &c., did, in pursuance of stat. 35 Geo. III. (1), make complaint thereof in writing &c. to the commissioners at a general meeting held on 6th February, 1833, and demanded compensation; and thereupon the said commissioners, at a subsequent general meeting holden on 29th June, 1833, made an order, determination, and judgment on such complaint, which order, &c., was to the purport and effect following; to wit, "that the said commissioners could not accede to his Lordship's application:" that the said G. Lord B., being dissatisfied with such order, &c., appealed to the next practicable General Quarter Sessions for the county; which Court of Quarter Sessions, in pursuance of the last-mentioned Act, made an order and adjudication thereon, that the commissioners should forthwith, upon notice of that order, pay to the said G. Lord B., or to J. B., his solicitor, 1,000*l.* in full compensation for the [*809] injury sustained by him as aforesaid, and the further *sum of 200*l.* for costs of the said appeal; which sums of 1,000*l.* and 200*l.* ought thereupon to have been paid, &c. The inducement then suggested that Lord Boston had given notice to the commissioners, and their general clerk, of the order of Sessions, and had applied for payment; but that they had not paid, and still neglected and refused to pay.

The writ then commanded the commissioners to pay or cause to be paid to G. Lord B., or to J. B. his solicitor, the said two sums pursuant to such order, &c., or shew cause &c.

Return. That the cut or canal, in the writ described as having been made by order of the said commissioners, according to the provisions of the several statutes in the said writ recited,

(1) Stat. 35 Geo. III. c. 106, s. 22.

empowering them to make cuts or canals (1), pound locks, towing paths, and other works for improving and completing the navigation of the said rivers between the points mentioned, was opened on 30th of October, 1830; that it was not until 31st of January, 1833, that Lord B., of whom the commissioners had purchased some land towards making the said cut (2), applied to them for compensation in consequence of an alleged loss by the disuse of the said path: that the commissioners, believing that his Lordship had no claim to compensation under the recited Acts, did not think it necessary to hear any evidence on the subject of his complaint, or the amount of his alleged loss: that, they having notified to his Lordship, through *their general clerk, that the commissioners refused [*810] to accede to his application, Lord Boston, treating that refusal as if it were an order, determination, and judgment of the commissioners upon his claim, made it the ground of an appeal to the Quarter Sessions: and that, before the case was heard, the commissioners objected that the said refusal was not an order, determination, &c., against which an appeal lay under 35 Geo. III. c. 106, or any other of the recited Acts; but the Court overruled the objection. The return then certified that the said cut or canal enables persons navigating the Thames to avoid a dangerous curve or bend of the river, &c. (adding circumstances to shew that the navigation was benefited by the cut): that, by making the said cut, the commissioners have not done or caused any injury to the channel of the said river: that Lord B. is no otherwise entitled to the said path in the said writ mentioned than as owner of the land through which it passes, and to such part thereof only as passes through his land: that the commissioners have not, by the said cut, or by any other work, obstructed Lord B. in the use and enjoyment of the said path, or his wharfs, or other private property, nor have they placed any fence or other obstacle to navigation against the said towing-path, wharfs, or other

(1) See *ante*, p. 592, *n*. The powers recited in the return were given by different clauses of the several statutes, not affecting (except as above set forth) the points decided by the Court.

(2) The statutes empowered them to purchase for the purposes of the navigation, the value to be assessed by a jury, if necessary.

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property of the said Lord B.: that, by the effect or operation of the said cut, traders, and others, if they prefer it, are not prevented from navigating the old channel, or from proceeding to or from Lord B.'s wharfs, and that some barges still navigate the old channel; but that, even before the making of the said cut, when barges came down the stream so as not to require his horses, nothing was paid to Lord B. or his tenants [*811] in virtue of any alleged exclusive right of *towing barges: that the commissioners do not take toll for barges coming to or from the wharfs by the channel of the river: that the commissioners are not empowered by any of the recited statutes to make compensation for the disuse or abandonment of a towing path, or on account of traders, &c., being enabled by improvement in the navigation to dispense with the horses of any person claiming a supposed exclusive right of towing barges; and therefore, and for the reasons before stated, that the commissioners are not bound, nor by the said Acts or any of them authorised to pay, &c.

A *concilium* having been obtained, the case was argued in Trinity Term last (1), by *Sir John Campbell*, Attorney-General, against the return, and *Sir W. W. Follett* in support of it. The arguments on each side may be fully collected from the judgment of the COURT.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (November 23rd) delivered judgment as follows:

This case, of a *mandamus* to pay Lord Boston 1,000*l.*, as compensation for damage arising from the act of the commissioners, and 200*l.* costs, has been long pending, and has been more than once brought under the notice of the Court. On shewing cause against the rule, in Trinity Term, 1834 (2), it underwent

(1) May 28th, and June 1st, 1836, before Lord Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

(2) Cause was shewn on June 7th, 1834, before Lord Denman, Ch. J., Littledale, Taunton, and Williams, JJ., by *Sir James Scarlett* and *J. S. Taylor*; and *Sir John Campbell*, Attorney-General, and *Winthrop M. Praed*, were heard in support of the rule. Besides the points argued on the return, and noticed in the judgment, it was contended, in opposition to the rule, that, for the non-payment

much discussion, *which ended in the writ issuing: to that writ the commissioners have made a return, the sufficiency of which was argued in the last Term. After a great deal of deliberation and doubt, we have at length agreed on the judgment we ought to give. [*812]

The facts are these. One of the acts done by the commissioners was to cut off a bend in the river, and make a new channel straight across from one extremity of the bend to the other. A towing path belonging to Lord Boston, which went beside the ancient bend, was hereby rendered useless, and the channel of the river was supposed to be made less convenient for the purposes of navigation.

For the injury thus sustained, his Lordship applied for compensation to the commissioners, who refused to accede to his demand, and thought it unnecessary to hear any evidence on the subject. Lord Boston then appealed to the Quarter Sessions for Buckinghamshire, who, after a full hearing, set aside the commissioners' judgment, and awarded a compensation of 1,000*l.* for the said injury, and 200*l.* for his costs. The *mandamus* was to compel payment of these two sums by the commissioners.

The cause shewn by their return was that the damage described was not, within the Act of Parliament, a grievance; and that Lord Boston cannot be considered *a party aggrieved. [*813] Their argument was that a mere diversion of custom from the owner of a towing path who lets out his horses to be used there can be no more considered as an injury resulting from the act of the commissioners, than could the loss of guests brought upon the owner of an ancient public house by their making a new road cutting off a bend by which the house stood.

We were referred to authorities where a claim somewhat

of the money in obedience to the order of Sessions, the remedy (if any) was by indictment, not *mandamus*. On this point, the following authorities were cited: *Rex* v. *The Treasurer of the County of Surrey*, 1 Chitty, 650; *Rex* v. *The Severn and Wye Railway Company*, 21 R. R. 433 (2 B. & Ald. 646); *Rex* v. *The St. Katharine Dock Company*, 38 R. R. 260 (4 B. & Ad. 360). The Court said that an indictment would not give a sufficient remedy. See *Rex* v. *Jeyes*, 3 Ad. & El. 420, and the cases there cited.

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similar was held inadmissible (1). The answer is to be found in the very peculiar language of this Act of Parliament, which differs altogether from the numerous Acts of the same nature which were sent to us after the argument (2).

We might have found little difficulty in deciding that such damage could not give the sufferer the denomination of a party aggrieved. And, though the remedy is provided for the party who thinks himself aggrieved, and that question is sent to the Quarter Sessions, yet those words would probably have not been held extensive enough to prevent our judgment that such damage was no grievance. But the clause empowers every one who may think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, to apply for compensation to the commissioners, who are *to make such order, determination, and judgment thereon as to them shall seem just, and give such satisfaction to the party complaining as to them shall seem reasonable, and, on refusal by the commissioners, the party is to apply to the Sessions, who are required to entertain and take cognizance of such appeal, and to make such order and adjudication thereon as to the justices then present shall seem just, and award such costs to either party as they shall think just and reasonable: which order and determination shall be final and conclusive to all intents and purposes.

[*814]

Lord Boston then, thinking himself damaged and aggrieved by the operation and effect of a work made by the commissioners, asks them for compensation, and is refused. On his appeal to the Sessions, that Court is invested with cognizance of the cause, and enjoined to make such order and determination thereon as to the justices present seems just; a much wider power than

(1) On this point, the following authorities were cited: *Rex* v. *The Commissioners of the Nene Outfall*, 9 B. & C. 875; *Rex* v. *The London Dock Company*, p. 387, *ante*; *Rex* v. *The Directors of the Bristol Dock Company*, 11 R. R. 440 (12 East, 429).

(2) By the direction of the Court, copies of several local Acts were sent to the learned Judges, for the purpose of shewing that (as was contended) there was nothing peculiar in the language of the present Act. On this point, the General Turnpike Acts, 3 Geo. IV. c. 126, ss. 85, 145, and 4 Geo. IV. c. 95, s. 87, were also referred to.

merely to assess damages for some recognised injury. Can we say that they have done wrong in deciding that the damage has accrued by the operation and effect of works done by the commissioners? On the contrary, to assert that it has not, would have been a direct untruth in the ordinary sense of the words; and no other sense is attached to them by any clear legal authority (1).

Another objection to the *mandamus*, that the order of Sessions included two objects, for one of which the prosecutor was clearly entitled to no compensation, was not much pressed at the Bar, but has occupied the attention *of the Court. For if the 1,000*l.* [*815] were awarded, partly from the loss of profits from the towing path, and partly for obstructing the old channel, and the latter had certainly not been made out within the meaning of the clause, we were disposed to think that the judgment comprehending both could not have been sustained (2). But this objection also is cured by the extensive language of the Act.

The *mandamus* alleges the obstruction as one cause of complaint, and the loss of profits from the towing path as another; and recites that the Sessions gave their compensation for "the said injury:" that must be the two-fold injury. The return indeed denies that the channel was at all obstructed (3), and states that all who prefer that course may still pursue it. But the Sessions must be taken to have found the fact, when they gave compensation for it; and their order to do what to them seems just and reasonable is made final and conclusive. If the Sessions did not enquire into that point, the return might have so averred, and an issue of fact might have been raised. The fact of the commissioners asserting the channel not to have

(1) It was urged, in support of the *mandamus*, that the series of Acts relating to this navigation recognised the towing-paths as property; but, as the judgment of the Court did not turn upon this point, it is not considered necessary to state the clauses.

(2) As to a *mandamus* for purposes, which are partly legal and partly not, see *Rex* v. *The Church Trustees of St. Pancras*, 3 Ad. & El. 535.

(3) Some discussion arose, during the argument, whether the return fully negatived the fact that the navigation by the old channel was rendered less convenient; but Lord DENMAN, Ch. J. said that, for the purpose of the present argument, it might be assumed that there was such a denial.

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been obstructed is quite consistent with the fact of the Sessions having adjudged that it was.

Another objection of a technical kind was more relied on, that the jurisdiction of the Sessions did not attach, because the commissioners had come to no order, determination, *or judgment, from which an appeal would lie (1). On the facts above stated, which appear in the writ and are not denied in the return, we have not the least hesitation in saying that the refusal to accede to Lord Boston's application, or to hear any evidence in support of it, was a plain determination that he was not entitled to what he claimed, and consequently a proper subject of appeal.

This is one of a class of cases which has become exceedingly numerous, in which the Court has found itself constrained to give the words of a private Act an effect probably never contemplated by those who obtained the Act, and very probably not intended by the Legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense. The liabilities thus imposed on themselves by bodies of men are the conditions upon which the public empower them to perform works expected to be beneficial to both contracting parties. We are not at liberty to enquire whether the bargain is reasonable, but are bound to see it executed. Therefore we must award a peremptory writ of *mandamus*.

Peremptory mandamus awarded.

[A rule for payment of costs by the commissioners was subsequently argued and discharged.]

(1) It was contended against the *mandamus*, that it ought (supposing the case within the Act) to require the commissioners to make an order, determination, and judgment, or to hear and report. *Rex* v. *The Justices of Middlesex*, 16 East, 310, was cited.

1836.
Nov. 25.

[834]

DOE ON THE SEVERAL DEMISES OF JAMES CROSTHWAITE AND JOHN HUDLESTON *v.* WILLIAM DIXON AND JOHN WILSON (1).

(5 Adol. & Ellis, 834—840; S. C. 1 N. & P. 255; 2 H. & W. 364; 6 L. J. (N. S.) K. B. 61.)

One of two parceners aliened. The alienee and the other parcener agreed to make partition, and, an apportionment having been made, they and each of them, for the perfecting of such partition, conveyed to H., in fee, one portion of the premises, *habendum*, to the sole use of the alienee in fee, in full of his moiety, and the other portion in like manner to the sole use of the second parcener, in full of his moiety.

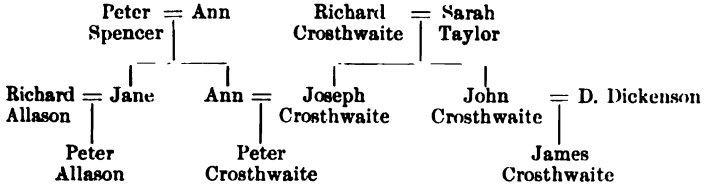
Held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs *ex parte maternâ*.

THIS ejectment, for closes of land situate in the parish of Brigham in Cumberland, came on to be tried before Lord Abinger, C. B. at the Summer Assizes for Cumberland, 1835, when a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

The lessor of the plaintiff, James Crosthwaite, claims the property as heir *ex parte paternâ* of Peter Crosthwaite deceased, and the defendants claim it as devisees of Peter Allason, who was heir-at-law, *ex parte maternâ*, of the same Peter Crosthwaite.

One Peter Spencer was formerly owner of an estate of which the property in question forms a part; and upon his death his estate descended to his two daughters, Jane the wife of Richard Allason, and Ann the wife of Joseph Crosthwaite, in coparcenary. Upon the death of Jane, her estate in the premises descended to the said Peter Allason her son and heir; and upon the death of Ann, her estate in the premises descended to the said Peter Crosthwaite her son and heir.

The following pedigree was agreed to be correct:



(1) By the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), s. 1 (which applies to successions after 1st January, 1834), "purchaser"

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In 1810, one John Nicholson purchased Peter Allason's share of the property; and the same was duly conveyed by Peter Allason to John Nicholson and his heirs by indentures of lease and release, dated respectively 15th and 16th of November, 1810, which, as well as those next mentioned, were to be referred to as part of the case.

By indentures of lease and release, dated 15th and 16th April, 1816, between John Nicholson of the first part, Peter Crosthwaite of the second part, and John Hudleston of the third part, after reciting that Nicholson and Crosthwaite were seised in fee of a messuage and tenement and closes (which were described), and that they, being desirous that the said tenement, lands, and hereditaments should be divided and partition thereof made between them, had appointed certain persons to allot and divide the same, and they had done so (as was particularly specified), and that Nicholson and Crosthwaite, being satisfied with such division and partition, had agreed to join in these indentures for the ratification thereof, it was witnessed that, to perfect such partition, and to the end that each of the said parties, their heirs and assigns, might hold and enjoy for ever thereafter in severalty and distinct from each other the hereditaments and premises set out and divided as aforesaid, and for certain considerations, which were stated, the said John Nicholson and Peter Crosthwaite, and each of them, did grant, bargain and sell, alien, release and confirm to the said John Hudleston, his heirs and assigns, all that &c. (describing certain of the premises before mentioned), and the reversion and reversions &c., and all the estate &c., *habendum* to the said J. H., his heirs and assigns, nevertheless to the only [*836] sole and proper use of the said John *Nicholson, his heirs and assigns, absolutely for ever, as and for, and in full of, the moiety, part, and share of the said John Nicholson, of and in the said messuage and tenement, land and hereditaments, &c., so divided and set out as aforesaid. Then followed a similar conveyance by Crosthwaite and Nicholson to Hudleston of the residue of the

means "the person who last acquired the land otherwise than by descent, or than by any escheat, *partition*, or inclosure, *by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent.*"—R. C.

premises, to the sole use of Crosthwaite, his heirs and assigns, as and for and in full of his moiety.

By the deed of partition, the premises sought to be recovered in this ejectment became the property of Peter Crosthwaite, who from that time became and was solely seised thereof in fee, and died so seised in 1819, intestate. On his death, Peter Allason entered into the premises in question, claiming to be entitled as heir *ex parte maternâ*, and continued possessed until the time of his death. The said Peter Allason died in 1831, having devised to the defendants his estate and interest in the premises now sought to be recovered. John Hudleston, the second lessor of the plaintiff, was the releasee to uses mentioned in the deed of partition.

The question for the Court was whether James Crosthwaite, being heir *ex parte paternâ* of Peter Crosthwaite, was, as such, entitled to all or any part of the premises in question, or whether the defendants, as devisees of Peter Allason, who was heir of Peter Crosthwaite *ex parte maternâ*, were entitled. If James Crosthwaite was entitled, the verdict was to stand for all or such proportion of the property as the Court might direct: if not, a nonsuit to be entered. The case was argued in this Term (1).

Wightman, for the plaintiff: [837]

When the premises were conveyed to Hudleston for the purpose of partition, the course of descent *ex parte maternâ* was broken, the general rule of inheritance attached, and consequently the portion allotted to Peter Crosthwaite descended to his heir *ex parte paternâ*; for, by the effect of the deed, Crosthwaite had become as a first purchaser. The difference between this case, where the estate vests in the taker as a first purchaser, and those in which the conveyance passes it merely to the old use, is shewn by Co. Litt. 13 a (2), 2 Roll. Abr. 780, tit. Uses (D), *Abbott* v. *Burton* (3), *Godbold* v. *Freestone* (4). If the conveyance to Hudleston did not of itself alter the character of the whole estate, as to the line in which it was transmissible,

(1) November 18th. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) See 14 Vin. Abr. 287, 288, Heir (W.), (W. 2).

(3) 2 Salk. 590; *S. C.* 1 Com. Rep. 160.

(4) 3 Lev. 406.

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at least the partition had that effect upon the portion which came to Peter Crosthwaite; for he was a first purchaser, at any rate to the extent of the share which had been Allason's.

W. H. Watson, contrà:

Under the deed of partition, Peter Crosthwaite took *ex parte materná*. The line of descent was not broken. The rules on this subject are entered into, and several authorities collected, in *Martin* d. *Tregonwell* v. *Strachan* (1), where it is said, "If a man seised as heir on the side of the mother made a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature [*838] of the lands, and shall descend to the heir *on the part of the mother." Unless the conveyance be of such a kind that a different estate is taken under it, the line of descent continues. Then, in the present case, did Peter Crosthwaite take a different estate in entirety or in moiety? The effect of a partition is merely to regulate the enjoyment; it does not alter the character of the estate: the tenant is in of the same estate as before. "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "But a coparcener, after partition, continues in the same privity of estate as before; for it does not convey, or make any alteration of the estate." "So, parceners shall be in from the common ancestor, as before:" Com. Dig. Parcener, (C 15), citing Savile, 113 (2). Partition by writ would clearly not have broken the line of descent; and partition by deed is only another mode of enforcing what the law would have compelled by writ. That partition does not alter the estate is proved by the cases in which it has been held not to operate in revocation of a will: *Luther* v. *Kidby* (3), *Risley* v. *Baltinglass* (4), *Swift* d. *Neale* v. *Roberts* (5), in all which cases the partition was by deed. *Luther* v. *Kidby* (3) is recognised as law by Lord KENYON in *Goodtitle* d. *Holford* v. *Otway* (in error) (6), and is explained, in the same

(1) 2 R. R. 552, *n.* (5 T. R. 107, *n.*); *S. C.* 2 Str. 1179, and in error, Willes, 444; 1 Wils. 66; 6 Brown's P. C. 319 (2nd edit.).

(2) *Thetford* v. *Thetford*.

(3) 8 Vin. Abr. 148, Devise (R. 6), pl. 30; *S. C.* 3 P. Wms. 169, note (B.).

(4) Sir T. Ray. 240.

(5) 3 Burr. 1490.

(6) 7 T. R. 399, 417.

case in the Court of Common Pleas (1), by BULLER, J., who says, "In the case of a partition, where no estate moves out of the party, I agree there is no revocation."

(*Wightman* here admitted *that, if the conveyance to Hudleston was merely to the use of the parties between whom partition was to be made, he could not contend that, by such a conveyance, the character of the estate was altered as to the course of descent.) [*839]

Then as to the moiety taken by Peter Crosthwaite on the partition; the portion allotted to him is not of a new estate: it is only a continued enjoyment, so far as the apportionment goes, of the old estate. Nicholson and he were tenants in common, the one holding by purchase, the other by descent. On the partition, Crosthwaite does not take anything by purchase; he is still in, by descent, of the property which he always had by descent.

Wightman, in reply:

Nicholson and Crosthwaite had an undivided possession of all the premises, occupying *per my et per tout;* Nicholson as purchaser, and Crosthwaite as heir. By the partition, Crosthwaite took an estate in one moiety, partly made up of his own interest in the moiety, and partly of that which Nicholson had in it by purchase from Allason. Then, at least as to half of the half, Crosthwaite became entitled as purchaser, and his estate would descend to the heir *ex parte paternâ.*

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the judgment of the COURT:

In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, *the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is whether by that deed the parcener [*840]

(1) 1 Bos. & P. 590—592. See further, as to the cases on this point, note (4) to *Duppa* v. *Mayo*, 1 Wms. Saund. 278 b.

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took anything as purchaser, so as to break the descent *ex parte materná*, and to let in the heir *ex parte paternâ* on the death of the parcener.

It is admitted that, if the deed of partition had been between the parceners themselves, the descent would not be broken: Com. Dig. Parceners (C 15). But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if anything was taken from him: but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty discharged from any right in the alienee, instead of an undivided moiety in common; but he had the same estate in the land as before.

The consequence is that a nonsuit must be entered.

Nonsuit to be entered.

1836. *Nov.* 25.

[841]

REX *v.* THE INHABITANTS OF MILVERTON.

(5 Adol. & Ellis, 841—855; S. C. 1 N. & P. 179; 2 H. & W. 435; 6 L. J. (N. S.) M. C. 73.)

An order of justices for stopping an unnecessary highway, under stat. 55 Geo. III. c. 68, s. 2 (1), is bad, if it stop up half the breadth of a highway, leaving the rest open; although the other half be not within their division.

Quære, whether the justices of the two divisions could, by orders made concurrently, stop both sides.

Justices cannot stop several highways by one order, except so far as they are authorised by stat. 5 & 6 Will. IV. c. 50, s. 86.

THIS was an indictment against the inhabitants of the parish of Milverton, Somersetshire, for non-repair of certain highways in that parish. The defendants pleaded Not guilty. On the trial at the Summer Assizes for Somersetshire, 1835, a special verdict was agreed to, the material parts of which were as follows.

The parts of the highway mentioned in the several counts of

(1) Repealed by the Highways Act, 1835 (5 & 6 Will. IV. c. 50), s. 1. But the decision is applicable to proceedings under the last-mentioned Act.—R. C.

the indictment were in the parish of Milverton, and were out of repair. The several parts of the said highway were called Blackgrove's Lane, which lane was part of a common highway from the village of Oak to the town of Milverton. All the ways mentioned in the indictment were comprised in the after-mentioned order. One portion of the highway, mentioned in the first and third counts of the indictment, was wholly in Milverton; another portion, mentioned in the second and third counts, was, as to half of its breadth, in the parish of Milverton, and, as to the other half of its breadth, in the parish of Oak, in Somersetshire. On February 25th, 1818, an order was duly made under the hands and seals of two justices of the county of Somerset, who therein stated that, at a Special Sessions holden at &c., in the parish of Milverton, "having *upon view found, and it appearing [*842] to" them, that a certain public highway in the parish of Milverton, called &c., (describing it) is useless and unnecessary; and also that a certain other public highway, commonly called Blackgrove's Lane, lying between &c., is useless and unnecessary, the entirety of which last-mentioned highway from H. common &c. to the northern corner of close C. &c., of the length &c., and breadth &c., is situated and being in the parish of Milverton aforesaid, and the southern side of the said highway to the middle thereof, from the said northern corner of close C. &c., to the north-eastern corner of the same close, of the length &c., and breadth &c., is situated and being in the parish of Milverton aforesaid, and the northern side thereof to the middle of the same highway, from the said northern corner &c. to the said north-eastern corner &c., is situated and being in the parish of Oak in the same county; and also that a certain other public highway, &c., is useless and unnecessary (describing another road, which, as to one part of it, was in Milverton, and, as to another, was divided like the preceding, between Milverton and another parish); they did thereby order "the said public highway hereinbefore first described and stated to be useless and unnecessary, and also the said public highway hereinbefore secondly described and stated to be useless and unnecessary, except so much and such part thereof as is in the said parish of Oak, in the county aforesaid, and likewise the said public

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highway hereinbefore thirdly described and stated to be useless and unnecessary" (with a like exception), "to be stopped up," and the land sold by the surveyors of Milverton to the proprietors of the adjoining lands, if willing to purchase for the full value; if not, to some *other person &c. for the full value; reserving to the owners and occupiers of adjoining lands and hereditaments free passage for persons, horses, carriages, &c., over the land and soil of the highways ordered to be stopped, to and from the same lands and hereditaments, according to their ancient usage thereof respectively.

[*843]

The verdict went on to state that the three highways directed to be stopped up were not joined to or connected with each other and did not lead into each other, but were altogether distinct, and at considerable distances from each other; that Blackgrove's Lane comprehends as well the parts of the said highway in the said parish of Oak, as those in Milverton; that such portion of the said highway as is stated in the order to be in the parish of Milverton is the same highway as is mentioned in the indictment; and that no order of justices has been made for stopping such parts of Blackgrove's Lane as are stated to be in the parish of Oak; that the said highway has never been divided and allotted under the provisions of 34 Geo. III. c. 64 (1); that the Special Sessions at which orders are made for stopping up roads in Oak are held at Taunton, and not at Milverton, and the parish of Oak is not within the division for which those justices acted, who signed the present order; that the parts of the said highway which were ordered to be stopped up have not been stopped up in fact, and that the three several highways have been and are in the same state as before the order, and the public has passed and repassed over them with carriages and horses without interruption in the same manner as before, but without any permission by the respective owners of the adjoining lands; that, since the date of the order, *no repairs have been done by the inhabitants of Milverton parish upon the highways so ordered to be stopped up; that the land and soil of the said highways have not been sold according to the directions, and subject to the

[*844]

(1) For the more effectually repairing of such parts of the highway of this kingdom as are to be repaired by two parishes."

reservations, contained in the said order, such land and soil being of no value to any person, as they could not be inclosed in consequence of the said reservations; that notices of the said order having been made were duly affixed and published &c.; and that the same was duly confirmed and enrolled, and not appealed against. The verdict was argued this Term (1).

Rogers, for the Crown:

The facts stated do not entitle the defendants to an acquittal. First, the order for stopping, which they rely upon, includes three distinct highways. * * *

Bere, contrà. * * * [849]

LORD DENMAN, Ch. J.: [852]

This case is very clear, upon the second objection to the order. Power is given to the justices to stop any highway which they find to be unnecessary. Stopping part of a way is not an exercise of that power. In the instance last put, where a road runs through different districts, but a part of it is wholly within one, though it might be very proper that the magistrates of the districts should communicate with each other, and concur in the order, their not having done so would be no decisive objection. But where, as in this case, an entire highway could not be stopped unless two sets of justices concurred, and there is no such concurrence, the statute is not carried into effect.

PATTESON, J.: [853]

The second section of stat. 55 Geo. III. c. 68, is sufficient to decide this point. The justices have not stopped up an unnecessary highway, bridle-way, or footway, as they are there empowered to do, but they have narrowed it. No such power is given to them. If the difficulty could have been removed by four justices meeting and making orders for stopping the two portions of the road, well and good; but that course has not been adopted. If that could not be done, no order could be made.

(1) November 19th and 21st.

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WILLIAMS, J.:

If that course was available, it would have been well that the justices had adopted it; if it was not, the case is not provided for by the Act.

COLERIDGE, J.:

Before the Act, 55 Geo. III. c. 68, this power of stopping unnecessary highways could not have been exercised. We must therefore look to the Act, to see what the justices can do. The difference between the power assumed here, and that given by the Act, is material. The inhabitants of a district might be willing that the whole of a road should be stopped, but not half its breadth. Parties charged with repairs might be satisfied to bear the burden for a whole road, but not for the half. Here, the inhabitants would no longer have an entire road, but would still remain liable to repairs. I should think that this was a *casus omissus* in the statute. As to the course which has been suggested, it might not be possible to get four justices to meet for the purpose: but it is not necessary to go into that discussion.

[854] *Bere* afterwards suggested that there was a highway mentioned in the order, and in the indictment, to which the objection now decided upon did not apply. The COURT therefore took time to consider on the first point.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

One among the numerous points on which we gave judgment for the Crown, being applicable to one only of the roads indicted, we have had to consider the other of them which was argued before us on both sides.

The prosecutor contended that the order for stopping up the road in question was invalid, because it stopped up also two other roads perfectly distinct from it: and we are of opinion that this objection must prevail.

The power of stopping roads is vested in the justices of the peace by 55 Geo. III. c. 68, s. 2, a power unknown to the

common law, and requiring to be exercised in strict conformity to the statute which creates it.

The clause enacts that it shall and may be lawful to stop roads by such ways and means in all respects, as are prescribed by the 13 Geo. III. c. 78, for widening or diverting highways. These are to be found in the sixteenth section, and in numbers xvi., xvii., and xviii., of the schedule annexed to the latter Act; and the form of the order for stopping up, which is No. xviii., clearly contemplates one highway only.

There is a marginal note to this form, which is not merely found in the printed Act, but in the Parliament roll. "If there are more highways than one to be stopped up, there should be a separate order for each." These words are a part of the Act of Parliament, and *must receive their full effect. Even if they were of less weight, the language of 55 Geo. III. c. 68, constantly referring to one order, one notice, one highway, would appear to the Court sufficient to limit the operation of any order to a single road. This is required both for convenience and fair dealing: it is also the proper construction of a statute which creates a new power, and expressly defines the manner in which it must be exercised. [*855]

Such was the view taken by Lord KENYON in *Davison* v. *Gill* (1), and by Lord TENTERDEN in *Rex* v. *The Justices of Kent* (2), to which, on a late occasion, we felt ourselves bound to adhere (3).

A simple rule is thus laid down for the guidance of magistrates, and the protection of the King's subjects: the former will not be perplexed with small distinctions, nor the latter deprived of their rights without full and clear notice.

Judgment for the Crown.

(1) 1 East, 64.
(2) 10 B. & C. 477.
(3) *Rex* v. *The Justices of Middlesex*, 5 Ad. & El. p. 626.

1836. *Nov.* 25.

[856]

LORD BOLTON *v.* TOMLIN AND OTHERS, EXECUTORS OF JOHN TOMLIN.

(5 Adol. & Ellis, 856—864; S. C. 1 N. & P. 247; 2 H. & W. 369; 6 L. J. (N. S.) K. B. 45.)

At a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from Lady Day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from Lady Day, and so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady Day, and paid rent:

Held (assuming the first transaction not to have been a demise), that there was a valid demise by parol under stat. 29 Car. II. c. 3, s. 2, when the tenant entered; that a demise rendered valid by that section might contain the same special stipulations as a regular lease; and that, on the trial of an action by the landlord against the tenant for breach of them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations.

ASSUMPSIT, on a farming agreement, and for rent. Plea, among others, *non assumpsit*. The defendants were executors of the lessee. The alleged breaches were of special conditions as to husbandry. On the trial before Parke, B. at the York Spring Assizes, 1835, the following evidence was given to shew a letting on the terms insisted upon. The plaintiff's steward said that, when any one applied to take one of the farms, he put into the party's hands a set of printed rules; and, if he were satisfied with the conditions, and with the farm and rent, the steward made a verbal agreement with him; a memorandum was afterwards added at the foot of the printed rules, containing the rent, quantity of land, and any special particulars; and, this having been read over in the presence of the new tenant and a witness, the steward considered the terms concluded upon. The plaintiff's solicitor stated that, in the present instance, the papers of rules and memorandums were produced to the tenants at a meeting, December, 1819, and the memorandums read to each tenant respectively, for the purpose of receiving their acknowledgment of holding on the terms stated. The testator's

[*857] father was then tenant of the premises in question, for a *term

ending on Lady Day, 1820. John Tomlin, the testator, having agreed with the steward to take the same premises, and having had the printed terms read over to him, attended the above meeting, where the rules were produced, and the memorandum of his taking read to him by the plaintiff's solicitor, and he was asked if he agreed to take the farm on those terms; to which he assented. The memorandum stated that W. S. (the steward), as agent of Lord Bolton, agreed to let, and J. T. (the testator) agreed to take, &c., stating the farm, the rent and times of payment, and that the term was for one year certain, and so from year to year, until due notice to quit, from Lady Day next subject to the printed terms. The memorandum purported to be "in the presence of me, L. T." (the plaintiff's solicitor), and was signed by him, but not by either of the parties or his agent for that purpose. The testator entered at Lady Day, 1820, and held and paid rent till 1821, when he died, and his executors, the now defendants, succeeded him. They paid the rent down to 1833; and on some occasions they asked to have deviations allowed (it was not stated in what particulars) from the terms of the holding. The paper containing the memorandum was produced at the trial, stamped with a lease stamp; but its reception as evidence was objected to, the defendants' counsel insisting that, for want of proper signature, it was not admissible as a lease, under sect. 1 of the Statute of Frauds; nor, for the same reason, was it admissible as an agreement under sect. 4, since the terms were not to be performed within one year from the making of such agreement. The learned Judge allowed the document to be read, being of opinion that it was only a qualification of a *demise, which demise was itself valid without writing under [*858] sect. 2 of the Statute of Frauds (1). He gave leave, however, to move to enter a nonsuit; and the plaintiff had a verdict. In the next Term, a rule *nisi* was obtained for entering a nonsuit.

Alexander and *Joseph Addison* shewed cause in this Term (2):

First, the evidence shewed a demise for a term not exceeding "three years from the making" of such demise, within stat. 29

(1) As to the use made of the document, see the judgment of the Court, p. 618, *post*.

(2) November 21st. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

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Car. II. c. 3, s. 2, and consequently not within the operation of sect. 1, which enacts that leases not in writing and signed by the parties making the same, or their agents, shall have the effect of leases at will only. It is contended that, as the term here was not to commence immediately, there was no actual demise within the protection of sect. 2, and that the document produced at the trial must be considered as an agreement within sect. 4, and therefore void, because not signed by the party to be charged. But *Ryley* v. *Hickes* (1) shews that the exception in sect. 2 is not confined to leases which commence from the time of making, but extends to others, provided the term granted by them does not exceed three years from the making. And DAMPIER, J. in *Inman* v. *Stamp* (2) admitted that the practice [*859] had been with the foregoing *case, though he himself inclined to the opinion that sect. 2 was confined to leases executed by possession. In a lease to commence at a future period, an *interesse termini* passes, and the lessee is tenant, for some purposes, from the time of the execution: note (1) to *Took* v. *Glascock* (3). It may be urged that the grant here was of a reversion merely, and therefore ought to have been by deed; but in 4 Bac. Abr. 847, Leases (N) (4), it is said that, "if one makes a lease to A. for ten years, and the same day makes a parol lease to B. for ten years of the same lands, this second lease is absolutely void;" but that, "if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years."

(COLERIDGE, J.: The parol lease there is supposed to commence immediately.)

Bracegirdle v. *Heald* (5), which may be cited, was the case of a contract for a year's service, to commence at the end of a month. The present contract is not an agreement for something to be done in future, but the conveyance of an immediate

(1) Bull. N. P. 177; *S. C.* 1 Stra. 651.

(2) 2 Selw. N. P. 844 (9th ed.); *S. C.* 18 R. R. 740 (1 Stark. 12). See *Edge* v. *Strafford*, 35 R. R. 746 (1 Cr. & J. 391; 1 Tyr. 295), cited 2 Selw. N. P. (as above). In the present argument the 8th edition was referred to.

(3) 1 Wms. Saund. 251.

(4) 7th ed.

(5) 19 R. R. 442 (1 B. & Ald. 722).

interest. Nor has the instrument any of the characters of an agreement. The memorandum indorsed upon the paper of terms is not an agreement for something to be done in future, nor part of such agreement; it is rather to be considered as a note of the bargain, taken by a third person, as in *Rex* v. *St. Martin's, Leicester* (1), and *Rex* v. *Wrangle* (2), by way of precaution, but not forming part of the transaction, nor necessary to render it valid. Although no part of the written instrument may have operated of itself as a demise, still, an entry and occupation in fact being *proved, this document might be made [*860] use of, under the circumstances, to shew upon what terms the parties held. The tenants had recognized the terms, and had even, in one instance, asked permission to deviate from them. It was for the defendants to shew that they held, not upon those terms, but on other and independent ones. Where a demise in writing has been considered void, as to the length of the term, by sect. 1 of the Statute of Frauds, the Court has nevertheless held that distinct stipulations in the same instrument might be looked to as shewing the conditions of the tenancy in other respects: *Doe* d. *Rigge* v. *Bell* (3), *Richardson* v. *Gifford* (4).

Cresswell and *Wightman, contrà:*

The instrument in question was an agreement "not to be performed within the space of one year from the making," within stat. 29 Car. II. c. 3, s. 4, and therefore void for want of signature. If *Rex* v. *St. Martin's, Leicester* (1) and *Rex* v. *Wrangle* (2) apply here, the rule must be absolute, because it is clear that the writings under discussion there could not have been used in evidence, but the instrument in the present case was so used. This, however, was, in fact, not a mere note to refresh the memory, but, as its language imports, an agreement for a future letting. By a lease to commence in future, an *interesse termini* is granted, but not a present estate in the land: if it were, such estate would merge, if the grantee, while entitled to it, took an estate for life in the same premises;

(1) 2 Ad. & El. 210; 4 N. & M. 202.
(2) 2 Ad. & El. 514; 4 N. & M. 375.
(3) 2 R. R. 642 (5 T. R. 471).
(4) 40 R. R. 253 (1 Ad. & El. 52).

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but the contrary was decided in *Doe* d. *Rawlings* v. *Walker* (1). A lease for not more than three *years from the making may be granted without writing, though to commence in future, and, when so granted, will be sufficient, if it be not sought to enforce by it any terms beyond those ordinary ones which are understood to result from the relation of landlord and tenant, and the custom of the country. But, if special terms are to be added, that must be by express agreement; and, if the agreement is one which, according to the contemplation of the parties when making it, will not be performed, that is completely performed (*Boydell* v. *Drummond* (2)), within a year, there must be a writing, properly signed, within sect. 4 of the Statute of Frauds. Now a demise, as in this case, to hold for one year certain, and so from year to year until notice to quit, is, according to all the authorities (from *Say* v. *Smith* (3) downwards), a demise for two years certain; and the terms of the present holding are, in many instances, special, and such as could be established only by express agreement. *Bracegirdle* v. *Heald* (4), therefore, is an applicable authority; and *Ryley* v. *Hickes* (5), supposing it to be law, which was questioned in *Inman* v. *Stamp* (6), does not apply, being a case on sect. 2 of the statute, whereas the present case falls under sect. 4. *Ryley* v. *Hickes* (5) only shews that a demise for less than three years may be made by parol upon such ordinary terms as are understood without special agreement. To hold that a demise containing special terms came within sect. 2, would let in all the frauds which the statute was intended to prevent. The conditions here are [*862] not a qualification of the demise, but the very terms of *it; and they are properly the subject of a special agreement within sect. 4.

(PATTESON, J.: Your argument tends to shew that, on a tenancy from year to year created without writing, there could not be a specific rent reserved, but that the demand must always be on a *quantum meruit*.)

(1) 29 R. R. 184 (5 B. & C. 111).
(2) 10 R. R. 450 (11 East, 142).
(3) Plowd. 273.
(4) 19 R. R. 442 (1 B. & Ald. 722).
(5) Bull. N. P. 177; *S. C.* 1 Stra. 651.
(6) 2 Selw. N. P. 844 (9th ed.).

If the tenant went in and paid rent for a time, the rent so paid would shew what ought to be paid subsequently. A difficulty like that now suggested might have been raised in *Bracegirdle* v. *Heald* (1). If the present transaction were held to be a demise protected by sect. 2 of stat. 29 Car. II. c. 3, special terms might always be annexed to the letting by means of some parol agreement, supposed to have taken place before the tenancy began.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT as follows:

This was a special action of assumpsit for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were that, in the month of December, 1819, the testator's father was tenant of the premises till the following Lady Day. The plaintiff's attorney, in the month of December, 1819, proposed to let the plaintiff's farms, at a meeting, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady Day; but no writing was signed. He did then enter, and continued tenant till his death; since which the defendants, his executors, have occupied and paid rent. At the foot of the printed paper of terms *was written a memorandum, [*863] not signed by either party, but by a clerk of the plaintiff's agent. This memorandum commenced in the following terms: "A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," &c., going on to state the farm, rent, and when payable, —for one year certain, and so from year to year until a due notice to quit, from Lady Day next. The plaintiff had a verdict, with liberty to the defendant to move for a nonsuit.

It is contended, on behalf of the plaintiff, that the testator became tenant at all events on his entry at Lady Day, 1820, if not before, and that the memorandum might properly be adverted to for the purpose of shewing the terms of the tenancy, although not to shew any agreement to become tenant. On the other hand, it is contended that this was an agreement not to be

(1) 19 R. R. 442 (1 B. & Ald. 772).

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performed within a year, and so required to be in writing by the fourth section of the Statute of Frauds; and that, although a tenancy from year to year may have been created, yet that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute.

Now, assuming that what passed in the month of December did not amount to a demise (see *Inman* v. *Stamp* (1), *Edge* v. *Strafford* (2)), and that, whilst it remained an executory agreement, the performance of it could not be enforced, yet it by no means follows that, when an actual demise by parol took place, and which was valid under the second section of the statute, and a tenancy was actually created by entry and payment of rent, the terms of that tenancy may not be proved [*864] by *parol. Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No authority is or can be cited, to shew that it may not; on the contrary, it has always been assumed that a parol lease, warranted by the second section, may be as special in its terms as a written one, and we are of opinion that the law is so.

But it is contended that, in this view of the case, the memorandum could only be used to refresh the memory of a witness; and perhaps in strictness that may be so. We cannot, however, find that it was used substantially in any other manner; certainly it was not treated as being in itself a binding instrument: and whether in fact it was read by the officer of the Court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. On these grounds we are of opinion that the verdict is right, and that this rule to enter a nonsuit must be discharged.

Rule discharged.

(1) 2 Selw. N. P. 844 (9th ed.); S. C. 18 R. R. 740 (1 Stark. 12).

(2) 35 R. R. 746 (1 Cr. & J. 391; 1 Tyr. 295).

IN THE EXCHEQUER CHAMBER.

1836.
Nov. 26.

[865]

(ERROR FROM THE KING'S BENCH.)

A. M. CAMPBELL, CLERK, J. KELLY, AND J. COCHRANE, *v.* MAUND (1).

(5 Adol. & Ellis, 865—884; 1 N. & P. 558; 2 H. & W. 457; 6 L. J. (N. S.) M. C. 145.)

The right to demand a poll is by law incident to the election of a parish officer by a show of hands.

At the election of a churchwarden of the parish of Paddington, in Middlesex (subsequently to stat. 58 Geo. III. c. 69), the show of hands was in favour of M. A poll was demanded by a rate-payer present, who required that it should be taken according to stat. 58 Geo. III. c. 69, s. 3 (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which H. and G. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, and did not vote. By stat. 58 Geo. III. c. 69, s. 8, nothing in that Act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By stat. 5 Geo. IV. c. cxxvi. the vestrymen of the parish of P. are to be elected by ballot, by plurality of votes, as under stat. 58 Geo. III. c. 69, s. 3; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; and overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either Act passed, and ever since, churchwardens were elected in P. by show of hands, no poll ever having been demanded.

1. Held, that (assuming stat. 58 Geo. III. c. 69, s. 3, to be inapplicable to the parish of P.) G. and H. were duly elected, the irregularity in the form of demanding the poll (if any) having been waived by the poll being in fact taken without objection from either party to there being a poll; and H. and G. having a majority on the poll according to either way of reckoning the votes.

2. Also, that stat. 58 Geo. III. c. 69, s. 3, was applicable to P.; for that the fact of no poll ever having been demanded did not show that the usage *de facto* in P. excluded a poll, and the elections were, at the time of passing stat. 5 Geo. IV. c. cxxvi., subject to stat. 58 Geo. III. c. 69, s. 3, in the event of a poll being demanded.

3. A poll may be demanded at an election of parish officers, after the chairman has declared the result of a show of hands.

ERROR from the Court of King's Bench, on a bill of exceptions. The defendant in error declared in trespass against the plaintiffs

(1) Followed in *R.* v. *Wimbledon Local Board* (1882) 8 Q. B. D. 459, 51 L. J. Q. B. 219. See, as to parish meetings under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2, and first schedule of that Act.—R. C

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in error, for that they, on 4th August, 1835, with force &c., assaulted him, he then being one of the churchwardens of the parish of Paddington, in the county of Middlesex, expelled him from the vestry room of the parish, and hindered and prevented him from being present at a certain general meeting of the [*866] vestry of *the said parish, holden at such vestry room on that day, pursuant to the provisions of the statute in such case &c., and at which meeting he the plaintiff, as one of the churchwardens of the said parish, was legally entitled to be present; and other wrongs &c.

Pleas, 1. Not guilty.

2. That before and at the time when &c., to wit 4th August, 1835, a certain general meeting of the vestry of the said parish, convened pursuant to the provisions of the statute in that case &c., was duly assembled and holden &c., in the vestry room in the parish, for the transaction of business touching the care and management of the overseers of the parish; but that, just before the time when &c., and whilst the vestry was duly assembled and sitting in the vestry room on parochial business as aforesaid, the plaintiff, without right or authority so to do, and he the plaintiff not being, before or at the said time when &c., one of the churchwardens of the said parish, as in the declaration mentioned, nor a vestryman of the said parish, unlawfully intruded himself, entered and came, into the said vestry room, and then and there made a noise, &c., and remained therein making such noise, without the leave or licence, and against the will of the said vestry so assembled as aforesaid, and thereby greatly disturbed the said vestry so assembled; and thereupon the said A. M. Campbell, then being the minister and perpetual curate and one of the vestrymen of the said parish, and the said J. Hill, then being one of the churchwardens and vestrymen of the said parish, and the said J. Cochrane, being one of the beadles and constables of and for the said parish, then and there requested the plaintiff to cease from making such noise and disturbance, [*867] and to go and *depart &c., which he then and there wholly refused to do, and then unlawfully continued such interruption, &c., whereupon the said A. M. Campbell, being such minister &c., and the said J. Hill, being such churchwarden &c., and the said

J. Cochrane, being such beadle &c., and as the servant of the said A. M. Campbell and J. Hill, and by their command, at the said time when &c., did gently lay their hands &c., in order to remove, and did then remove, the plaintiff, &c., as it was lawful &c. Replication, *de injuriâ*. *Similiter*.

The bill of exceptions stated as follows. The issues were tried before Lord Denman, Ch. J., at the Middlesex sittings after Michaelmas Term, 1835. Upon the trial, the plaintiff's counsel gave in evidence that the plaintiff, on 4th August, 1835, was forcibly turned out of the vestry-room of the parish of Paddington, where a general meeting of the parish, duly convened, was then assembled and holden by order of the defendants, the plaintiff claiming to be there present as having been duly elected churchwarden of the parish on the 21st of April, being the Easter Tuesday preceding. The defendant John Hill also claimed to have been duly elected churchwarden, and was a vestryman of the parish. The defendant A. M. Campbell was minister and perpetual curate, and one of the vestrymen of the parish, and chairman of the meeting. The defendant James Cochrane was one of the beadles and constables of the parish, and acted, in turning the plaintiff out of the room, in obedience to the directions of the other two defendants. The plaintiff gave further in evidence an Act, 5 Geo. IV. c. cxxvi. (1) *(the bill here referred to ss. 3 and 10 of that Act). The mode of electing churchwardens in the parish, both long before and after the passing the Act of

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(1) Stat. 5 Geo. IV. c. cxxvi. (local and personal public) is "for better governing and regulating the parish of Paddington," &c.

Sect. 3 enacts, that vestrymen (with the exception of certain *ex officio* vestrymen, including the minister and churchwardens, by sect. 6, and of others nominated by particular parties) shall be chosen by ballot, by the inhabitants and occupiers qualified as thereinafter mentioned; each of whom is to be entitled to the same number of votes as under stat. 58 Geo. III. c. 69, s. 3.

Sects. 8 and 9 provide for the election of future vestrymen, as in the original election.

Sect. 10 enacts, that the election of churchwardens "shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish."

Sect. 25 enacts, that the vestrymen shall "nominate the overseers of the poor for the said parish of Paddington, in such manner as the inhabitants of parishes in vestry assembled are in other cases empowered to nominate them," with a proviso as to the time.

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58 Geo. III. c. 69 (1), and long before, and at, and after the passing of the Act of 5 Geo. IV. c. cxxvi., had been and was by show of hands, no poll ever having been demanded. On the Easter Tuesday, 1835, the plaintiff below, Maund, and one Hobbs were proposed as churchwardens, as were also one Goodhind and the defendant below, Hill. The majority of the electors present at the said meeting, on a show of hands, was in favour of the plaintiff below and Hobbs, and was so declared to be by the chairman; whereupon a rate-payer present demanded *a poll, and required that the poll should be taken pursuant to stat. 58 Geo. III. c. 69. This mode of taking the poll, giving a plurality of votes to one person according to the amount of his rateable property in the parish, was objected to by an inhabitant present, who insisted that only one single vote should be allowed to each person. On the poll being so demanded, the chairman immediately granted a poll as demanded, in pursuance of the following notice, which had been previously circulated in the parish.

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"PADDINGTON, MIDDLESEX, 16th April, 1836.

"If a poll should be demanded for the election of churchwardens on Tuesday next, it will be opened at the National School-Room, Harrow Road, immediately after the meeting of the inhabitants and occupiers, and will continue open for the convenience of the rate-payers until six o'clock on Tuesday evening, and likewise from eight to six on the following day, &c.

"A. M. CAMPBELL, Minister.
"THOMAS FRANCE,
"JOHN GOODHIND, } Churchwardens."

(1) Stat. 58 Geo. III. c. 69, is "For the regulation of parish vestries," extending (ss. 9 and 10) to all parishes not in the city of London or in Southwark.

Sect. 3 enacts, that every rated inhabitant shall, in the vestry, have a number of votes in the proportion there assigned to the amount of property in which he is assessed.

Sect. 8 enacts, that nothing in the Act shall "extend to take away, lessen, prejudice or affect the powers of any vestry or meeting holden in any parish, township or place, by virtue of any special Act or Acts, of any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden."

The chairman withdrew, for the purpose of taking such poll, into the school-room, being at a small distance from the vestry-room, and within the parish, and more convenient for taking the poll. The poll was then and there taken according to the plurality of votes; and, upon the result of that poll, the defendant below, Hill, and Goodhind were declared duly elected, not only by a majority of votes as respecting property, but also by the plurality of single votes. The poll was kept open for two days; and all rate-payers within the parish, who had paid their taxes, were allowed to vote, whether they *had been present or not when the candidates were proposed, and the show of hands taken. During the taking of such poll, several of the parishioners protested against the mode in which such poll was taken; and, acting upon such protest, did not vote. All the four candidates were afterwards sworn in by the surrogate: and the plaintiff below, having come to the vestry-room on the 4th of August, claiming to be legally elected churchwarden by a majority on the show of hands, but not being a vestryman of the parish, came to the said meeting, and insisted on his right to attend the same as churchwarden, against the will of the said vestry. Whereupon, having been previously requested to withdraw by the defendants below, and refusing to do so, but continuing as aforesaid, he was turned out by the defendant below, Cochrane, the beadle, under the directions of the defendants below, Campbell and Hill, with instructions to use no unnecessary violence. The counsel for the defendants below insisted on their behalf that the said several matters, so produced and given in evidence, were sufficient to entitle the said defendants to an acquittal on both the issues, that the poll was duly taken under stat. 58 Geo. III. c. 69, that Hill was duly elected churchwarden, and that the plaintiff below was not duly elected churchwarden, and that the defendants below were justified, on the day when &c., in turning him out of the vestry-room, for the cause aforesaid; but the counsel for the plaintiff below insisted to the contrary: and the CHIEF JUSTICE did then and there declare and deliver his opinion in point of law to the jury, that, upon the evidence aforesaid, if believed, the said James Maund was duly elected churchwarden; that the 10th

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section of the *local Act 5 Geo. IV. c. cxxvi. took the parish of Paddington out of the operation of stat. 58 Geo. III. c. 69, as to the election of churchwardens by a plurality of votes in a single person by reason of rateable property in the parish: and that, a poll being demanded according to the provision of that statute, under the circumstances above stated, the chairman was not justified in holding it at all, and therefore the election must be determined by the show of hands, the majority of single votes upon the show of hands being allowed to be in favour of the plaintiff's election: and, with that direction, the CHIEF JUSTICE left the same to the jury. Whereupon the counsel for the defendants below excepted &c. The bill stated that a verdict was found for the plaintiff below.

Joinder in error.

The case was argued on Tuesday, November 1st, 1836, before Tindal, Ch. J., Lord Abinger, C. B., Park, J., Bolland, Alderson, and Gurney, Barons.

Sir F. Pollock, for the plaintiffs in error:

First, it was proper, under the circumstances, that a poll should be taken. Sir WILLIAM SCOTT, in *Anthony* v. *Segar* (1), said, as to the election of a churchwarden, "Where a poll is demanded, the election commences with it, as being the regular mode of popular elections; the show of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that, on a show of hands, the person has a majority, who on a poll is lost in a minority; and if parties could afterwards recur to the show of hands, there would be no

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certainty or *regularity in elections. I am of opinion therefore, that when a poll is demanded it is an abandonment of what has been done before; and that every thing anterior is not of the substance of the election, nor to be so received." Here the poll was demanded; the supposed election by show of hands is therefore a nullity. It will, however, be contended that, either by sect. 8 of Sturges Bourne's Act, stat. 58 Geo. III. c. 69, or under sect. 10 of 5 Geo. IV. c. cxxvi., or at common law, the ancient custom of taking by show of hands, in this parish, is to be

(1) 1 Hag. Ca. Cons. Court, 13.

adhered to; and, therefore, that the poll was not properly demanded, inasmuch as the demand was that a poll should be taken pursuant to stat. 58 Geo. III. c. 69, which, it will be argued, is inapplicable to the parish of Paddington. Now, supposing it, for argument's sake, to be inapplicable, the demand was nevertheless good, because the presiding officer was not prevented, by the terms of the demand, from holding it according to the legal method, whatever that was. This disposes of the case, independently of the question to be next discussed; because, if the poll was rightly demanded, then, inasmuch as Maund, at the poll, was in a minority, reckoning either by gross numbers, or by votes taken according to property under stat. 58 Geo. III. c. 69, he was not duly elected.

But, secondly, the proper method of taking the poll was under stat. 58 Geo. III. c. 69, s. 3. That applies to all parish vestries, except in London and Southwark. It is true that sect. 8 makes an exception in the case "of any ancient and special usage or custom." No such custom, however, is in evidence here. There is simply an absence of any demand of a poll; that is very different from a custom not to elect by poll, though demanded. A *similar answer applies to the argument which will be [*873] suggested from sect. 10 of stat. 5 Geo. IV. c. cxxvi. The usual manner of electing, since stat. 58 Geo. III. c. 69, must be understood to have been under the last named statute; for, although that statute had not actually been called into operation, inasmuch as no poll had been demanded, yet (in default of special custom, which has not been proved here) the poll, if taken, was liable to the statute; and therefore stat. 5 Geo. IV. c. cxxvi. found the parish subject to stat. 58 Geo. III. c. 69, and this latter Act is not repealed by sect. 10 of stat. 5 Geo. IV. c. cxxvi. The election of vestrymen is, by sect. 3 of the local Act, expressly directed to be made according to the provisions of stat. 58 Geo. III. c. 69, except that it is to be by ballot. And the object of sect. 10 of the local Act was merely to prevent the election of churchwardens from being subject to the changes which the Act introduced as to vestrymen. The fact that stat. 58 Geo. III. c. 69, had never been called into operation cannot affect the question.

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Although the plaintiffs in error contend that they are entitled to succeed, even if stat. 58 Geo. III. c. 69, do not apply to the parish of Paddington, it is the wish of both parties to obtain the judgment of the COURT on the question whether it does so apply.

Sir J. Campbell, Attorney-General, *contrà*:

The question is reduced to that of the applicability of stat. 58 Geo. III. c. 69. For, supposing that statute to be inapplicable, the only question, upon the show of hands being taken, was, whether it was in favour of Maund. Any person, who disputed that, might call for a poll to put an end to the doubt; that is all
[*874] which can be inferred from **Anthony* v. *Segar* (1); but the poll could be called for on that ground only. Here no such poll was demanded. In effect, the party making the demand did not dispute that the show of hands was in Maund's favour, nor require that question to be tried by the poll; but he insisted on applying stat. 58 Geo. III. c. 69.

(LORD ABINGER, C. B.: Do you say that a person not present at the show of hands could not afterwards vote on a poll being granted?)

In strictness he could not. The common law assumption seems to be, that all who have a right to vote are present when the show of hands is taken. A poll in many cases, as for instance on the question who is to be chairman (if indeed it can be taken at all on such a question), must be confined to parties present at the time when the question arises: and the law must be the same as to other questions.

(LORD ABINGER, C. B.: But there must often be a poll lasting for more days than one, as in the case of an election of a member of the House of Commons.)

That is the case of a county court, which the sheriff has a common law power to adjourn. In Prideaux on Churchwardens, p. 46 (ed. 10, by Tyrwhitt), it is said that, at a vestry meeting, "the present include the absent, and the major part of the present

(1) 1 Hag. Ca. Cons. Court, 13.

include all the rest. For those who absent themselves after such public notice given do it voluntarily, and therefore do thereby devolve their votes upon those who are present, and every act of the major part of the present in all such meetings is, in construction of law, the act of the whole parish" (1). Prideaux's book was stated to be one of authority in the Ecclesiastical Courts, by Sir JOHN NICHOLL, in *Wilson* v. *M'Math* (2). In *Rex v. *The Archdeacon of Chester* (3) the churchwardens gave notice of their intention to adjourn, if a poll should be demanded, in the original notice of meeting: and Lord DENMAN, Ch. J. said, "Those who summon a meeting of this kind must necessarily lay down some order for the proceedings." But that does not show that parties who have once, by meeting, the entire cognizance of a question submitted to them, are to be afterwards interfered with by others who were not at the meeting. [*875]

(LORD ABINGER, C. B.: The practice is against your position.)

The practice, if otherwise, is legal only when it takes place under Act of Parliament, or special custom. The presumption must be in favour of the common law practice. Here it appears that the majority of electors present were for Maund. Even if the common law admitted parties who were absent on the show of hands to vote at a poll, the special usage here would overrule that; and the enactment in sect. 10 of 5 Geo. IV. c. cxxvi. was perhaps introduced for the very purpose of protecting the usage in that respect.

(ALDERSON, B.: The contest here was between two and two, on the show of hands; that is not a good election, according to *Rex* v. *Player* (4).)

That may be correct, as to corporators; but the usual method of electing churchwardens is as here. It is, however, enough, in this case, that the custom in the particular parish has been followed.

Then, as to the question whether stat. 58 Geo. III. c. 69,

(1) And see Prideaux on Churchwardens, p. 70.
(2) 3 B. & Ald. 248. *n.* (*b*).
(3) 1 Ad. & El. 342.
(4) 21 R. R. 459 (2 B. & Ald. 707).

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be applicable to the parish of Paddington. Sect. 10 of stat. 5 Geo. IV. c. cxxvi. provides in express terms for preserving the custom, or *lex loci*. According to the argument on the other side, this section would have been *totally unnecessary: for it is contended that it left the elections to the existing law.

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(LORD ABINGER, C. B.: The object might be to prevent the churchwardens from being elected by the select vestry, as substitute for a general vestry.

Sir F. Pollock: By sect. 25 the overseers are to be chosen by the select vestry.)

That shows conclusively that, independently of express enactment, the churchwardens would have been elected according to the law prevailing before the statute. The object of sect. 10 is, therefore, to provide, not merely for maintaining the law as it stood before the Act, which was unnecessary, but for maintaining the method of election *de facto*, whether strictly legal or not. This is the construction which has been put on similar clauses, as in *Rex* v. *Birch* (1), *The Duke of Bedford* v. *Emmett* (2), *Rex* v. *The Churchwardens of St. James, Westminster* (3). It is argued that the custom of voting by single votes is not shown here, inasmuch as the plurality could take place only where a poll was taken, and a poll could be taken only where there was a demand, and the evidence merely negatives the demand. But, according to this course of argument, the evidence in support of the custom would be considered weaker, the more prevalent and notorious the custom was. That a poll was never demanded shows the strongest conceivable case of its not being usual.

Sir F. Pollock, in reply:

The objection to the putting up two names at once is, of itself, fatal to the defendant in error. It is said that parties not present at the show of hands ought not to be let in by the poll; *if so, the practice throughout the country is illegal. Besides, as there was here a notice of the intention to grant a poll, there was the less necessity for all the electors to attend. In *Rex* v.

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(1) 4 T. R. 608.
(2) 3 B. & Ald. 366.
(3) 5 Ad. & El. 391.

The Archdeacon of Chester (1) the party which had the minority on the poll had the majority on the show of hands as here: yet the result of the poll was held to be the true election. The doctrine laid down in Prideaux may be correct; those present may bind those absent: but the question still remains, whether it is not the parties present at the poll that bind the parish. The cases cited, to show that sect. 10 of stat. 5 Geo. IV. c. cxxvi. refers to the usage *de facto*, show merely that, where a particular practice is expressly referred to as the exemplar, that must be followed: here there is nothing analogous to such a provision, but only a clause leaving matters as they stood before. It is said that, on this construction, sect. 10 would be unnecessary: but many other objects might be suggested for it; for instance, it might be meant to defeat the canonical right of the minister to elect a churchwarden (2). But here there is no custom *de facto* against the plaintiffs in error: the custom is of election by a show of hands: to such a custom it is incidental that a poll, if demanded, should be granted. The fact that the incident is not recollected to have taken place, because never wanted, does not destroy the incident.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT. After having stated the pleadings, his Lordship proceeded as follows:

[878] The enquiry at the trial was reduced to this single question, whether Maund, the plaintiff below, had been duly elected churchwarden or not. The learned LORD CHIEF JUSTICE told the jury that [His Lordship here read the bill, so far as related to the ruling of the Lord Chief Justice, as *ante*, p. 623].

To this direction the defendant below excepted in point of law.

The bill of exceptions raises two points, each of which has been argued before us, viz., first, whether the election, which took place at a poll demanded and granted under the circumstances stated in the bill of exceptions, was a legal and valid election? and, secondly, whether the provisions of stat. 58 Geo. III. c. 69, apply to and govern the parish of Paddington?

(1) 1 Ad. & El. 342.

(2) As to which, see Prideaux's Directions to Churchwardens, pp. 54, 55, and notes, ed. 10.

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And, upon the first question, we are all of opinion that the election, which took place at the poll demanded and granted in the manner and under the circumstances stated, was a legal and valid election.

We agree to the proposition contended for on the part of the defendant in error, that, whatever was the particular mode of electing churchwardens for the parish of Paddington at the time of passing the local Act, the same mode is still preserved and remains unaltered in the parish, by virtue of the 10th section of that Act. For the provision in that section, that elections of churchwardens "shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish," appears to us to intend the usual and customary mode of election *de facto* observed there, whatever it might be, and without any reference to its origin or conformity with the general law.

[879] But we are, at the same time, of opinion that the mode of electing churchwardens in the parish of Paddington set out in the bill of exceptions is not inconsistent with, nor does it by any means exclude, the right of the parishioners of Paddington to have recourse to a poll in the election of churchwardens for that parish.

All that is stated to have been proved to the jury is, that the mode of electing churchwardens in the parish of Paddington had been by a show of hands, no poll ever having been demanded. There is no evidence before them of any poll having been ever demanded and refused, or of any custom or usage, in negative words, to exclude the granting of a poll when properly demanded.

The question, therefore, becomes this: whether the right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it?

And we think such right is, in point of law, a necessary incident, or consequence, to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll, where the population of the parish is large, appears to be

the only mode of ascertaining, with precision, the numbers of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all; for, in the case of populous parishes, no vestry-room can be large enough to contain the whole body. Still further, where the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of *the community can express their opinion [*880] with freedom and security. But, in addition to these general grounds, we think the authority of Lord STOWELL'S judgment, in the case (1) referred to in the course of the argument, is intitled to the greatest consideration on a matter of this nature. [His Lordship then read the passage cited, *ante*, p. 624.]

The right to demand a poll being therefore, as it appears to us, by the common law, an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms, viz., that no such right exists in the particular parish. And we are clear that there is no such finding as the parish of Paddington, or facts stated which could warrant such a finding, but that the case strongly resembles that of *Doe* d. *Edmunds* v. *Llewellin* (2), where it was held, by the Court of Exchequer, that the finding in a special verdict, that there did not appear upon the Court rolls any entry of a surrender to the use of a will, was no finding of a custom that lands within the manor could not be surrendered to the use of a will.

But it is objected that the demand of the poll was in the present case a nullity, on two grounds; first, because it was not made until after the show of hands was declared by the chairman to be in favour of the plaintiff, and of the candidate joined with him; and, secondly, because the demand required that the poll should be taken pursuant to the statute 58 Geo. III. c. 69.

We think it an answer to the first objection, that, in *the [*881]

(1) *Anthony* v. *Seyar*, 1 Hag. Ca. Cons. Court, 13.

(2) 2 C. M. & R. 503; 5 Tyr. 899.

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nature of the thing, the demand of a poll never is, nor can reasonably be expected to be, made until the necessity for such demand arises; that is, until one of the contending parties is dissatisfied with the decision of the chairman upon the show of hands, from which it is in the nature of an appeal. And, as to the second objection, it might be sufficient to observe that there is no evidence, in this bill of exceptions, that any one of the parishioners in vestry objected to the demand of the poll on that ground. If the granting of the poll had been objected to on that ground, and refused, the question might by possibility have arisen, whether the annexing to the demand of a poll the requisition of a particular mode of conducting it did or did not afford a justifiable excuse for the refusal to allow the poll. But, in this case, neither of the parties objected that a poll should in fact be taken. And, as, in point of fact, upon the present occasion, a poll was granted, and actually taken between the contending parties, we hold there has been a complete waiver of any irregularity in point of form in the mode of demanding the poll, even if any such irregularity had existed; which, however, we think was not the case.

But it is lastly, and indeed principally, objected that the poll was improperly taken, the electors having been allowed to have a plurality of votes according to the amount of their property as provided by the statute 58 Geo. III. c. 69, and not having been each restrained to the exercise of a single vote: whereas the parish of Paddington, as it is contended on the part of the plaintiff below, is excepted out of the operation of that Act by the tenth section of the local Act 5 Geo. IV. c. cxxvi., so that [*882] no elector can have more than a single vote in *the election of a churchwarden. But, as the evidence before the jury was that the defendant Hill, and the candidate joined with him, who were declared duly elected at the poll, were not only elected by a majority of votes with reference to property, but also by the plurality of single votes, it becomes a matter of indifference to the parties to this suit, whether the legal right of voting in the parish of Paddington is governed by the statute 58 Geo. III. c. 69, or not; for upon neither supposition has the plaintiff below been elected to the office of churchwarden.

As, however, both the parties have been heard on this question before us, and have expressed their desire that we should deliver our opinion upon it, and as we ourselves think the expression of our unanimous opinion may have the effect of preventing any future litigation on this subject, we have thought it right to enter upon the discussion of the second question, that is, whether the mode of election by the statute 58 Geo. III. c. 69, does or does not extend to the parish of Paddington?

This question depends for its answer on the proper construction to be put upon the eighth section of the general Act, and the tenth section of the local Act.

The eighth section of the general Act provides [His Lordship here read the section: see p. 622, *n.*, *ante*].

Now there is no special usage or custom, as to the mode of electing churchwardens in the parish of Paddington, found upon the bill of exceptions, where they are to be elected in vestry. The churchwardens, at the time of passing that Act, were chosen by a show of hands. So were the elective churchwardens, generally speaking, throughout most of the parishes in England. It is the general mode of election of churchwardens throughout *the realm. But it is found that no poll had ever been demanded [*883] in the parish. The same may be said of very many, perhaps by far the greater part, of the parishes in England, in which the parishioners have never demanded a poll because they have been satisfied by the show of hands. If the custom within the parish of Paddington had by negative words excluded a poll, it would then indeed have been a special usage or custom which would have taken that parish out of the operation of the statute; for it is obvious that an election by show of hands alone is necessarily inconsistent with the allowance of a plurality of votes in any one person. But, if the usage or custom within Paddington, as set out in the bill of exceptions, should be held sufficient to exclude a parish from the operation of stat. 58 Geo. III. c. 69, on the ground of its being "special," the statute would have comprehended a very small proportion indeed of the numerous parishes in England.

If then stat. 58 Geo. III. c. 69, taken by itself, includes

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within its operation the parish of Paddington, is there any clause in the local Act which can exempt the parish from its operation? The only clause which can be contended to have that construction is the tenth. [His Lordship here read sect. 10 of stat. 5 Geo. IV. c. cxxvi. See p. 621, note, *ante*.]

This clause, as we have before observed, was intended to leave the parish of Paddington precisely in the same condition as it was at the time of passing that Act. Now what was the condition of the parish as to its mode of electing churchwardens at that time? We answer, by show of hands, if no poll is demanded, and, if demanded, then by a poll taken according [*884] to law. Now by law, at *that time, a poll must be taken by plurality of votes as provided by stat. 58 Geo. III. c. 69, where the parish falls within the operation of that statute. And the mere fact that the votes have never been actually taken in that mode since the passing of the statute is no more a proof that the statute does not apply, than the fact of the non-demand of a poll proves that such poll was not demandable of right.

Upon the whole of this second question, we think that the mode of electing churchwardens in the parish of Paddington, before the passing of stat. 58 Geo. III. c. 69, was by a show of hands, with a power of going to a poll, in which case the majority of single votes decided the election. That stat. 58 Geo. III. c. 69, gave each voter a plurality of votes at the poll, when demanded and held, according to the quantity of his estate; and that, such being the rightful mode of election at the time of passing the local Act, it was continued and preserved to the parish by the tenth section.

We think, therefore, that, upon the present record, a judgment of *venire de novo* must be awarded.

Judgment of venire de novo.

REX *v.* THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF EDLASTON.

1836.
Nov. 5.

[20]

(1 Nevile & Perry, 20—21; S. C. W. W. & D. 163; 2 H. & W. 429.)

1. A *mandamus* will issue to compel one of the churchwardens and one of the overseers to concur in making a rate for the relief of the poor, where they refuse to consent unless the rate expressly stated that certain inclosures are within a particular district of the parish.

2. The rule for a *mandamus*, to concur in making a rate for the relief of the poor, is absolute in the first instance.

GREAVES applied for a *mandamus* to compel the defendants to make a rate for the relief of the poor of the parish of Edlaston, upon an affidavit made by Thomas Gadsby, one of the overseers of the parish, which stated the following circumstances: Edlaston is a parish maintaining its poor, and is not for that purpose divided into townships. There are two churchwardens and two overseers annually appointed, and from the 10th of August last a rate has been necessary for the relief of the poor. There are two districts in the parish, the one called Edlaston, the other Wyaston, which repair their highways separately. Shaw, one of the churchwardens, and Gadsby, the overseer, who reside in Wyaston, prepared a rate in the usual form, making no distinction between such persons as occupied lands in Wyaston and such as occupied in Edlaston, and requested the other churchwarden and the other overseer, who both reside in Edlaston, to concur in the rate. Both of them refused either to concur in that, or in the making of any other rate, unless the rate expressly stated on the face of it, that certain inclosures, one of which was in the occupation of *Gadsby, were situate in Edlaston. The [*21] churchwarden and the overseer, who reside in Edlaston, are tenants of Mr. Harrison, who claims the inclosures in question as encroachments on the waste of the manor of Edlaston, of which he is the lord, and they refused to concur in the rate, by his express directions.

Greaves, in support of the application:

The parish officers who are resident in Edlaston have no right to make use of their office to compel an admission by the officers resident in Wyaston against their interest. If Gadsby were to consent to a rate in the form required, it would be an admission

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that the land he occupies is in Edlaston. Such a rate would be a direct admission by the officers in Wyaston against their interest with regard to the highway rate.

LORD DENMAN, Ch. J. intimated that the rule should be granted.

Greaves then suggested that the rule ought to be absolute in the first instance, and that there was a case (1) moved by *Ludlow*, Serjt. in the Bail Court, in which it was held, that the rule was absolute in the first instance, on the ground that the poor were not to be left to starve, whilst the rule was pending, and if the parties who resisted the rule had any good cause to show, it might be returned to the *mandamus*.

Rule absolute in the first instance (2).

1837. *Jan.* 31.

[572]

REX *v.* GADSBY AND OTHERS, OVERSEERS AND CHURCH-WARDENS OF EDLASTON.

(1 Nevile & Perry, 572—574.)

1. A writ of *mandamus* to the overseers and churchwardens of a parish to make a poor's rate, may be issued out on the prosecution of one of the overseers, where it appeared by affidavit that the other overseer had refused to concur in making the rate.

2. Where a writ of *mandamus* was obtained on an affidavit stating that a rate was necessary for the relief of the poor, and the *mandamus* recited that no rate had been made for the necessary relief of the poor, and that the overseers had refused to make a rate: Held, that the writ contained upon the face of it sufficient to give the Court jurisdiction.

THE writ issued in this case (3) recited, that "whereas we have been informed that there is no legal rate or assessment made by you the said overseers and churchwardens of the said parish, upon the inhabitants and occupiers of lands, houses, and other things rateable within the said parish, for and towards the *necessary* relief, support, and maintenance of the poor of the said parish, according to the form of the statute in such case made and provided: but that you the said overseers and churchwardens, not regarding your duties in this respect, have

(1) Not reported.

(2) The *mandamus* would be directed to all the parish officers, although applied for by two of them: see *Anon.*, 2 Chitty, 254.

(3) *Ante*, p. 635 (1 N. & P. 20).

absolutely neglected and refused, and still do neglect and refuse to make any such rate, &c. &c." The only affidavit used in applying for the writ was made by Gadsby, one of the overseers (1). In Michaelmas Term last, *Whitehurst* had obtained a rule, upon reading the writ and the said affidavit, calling upon the prosecutor thereof to show cause why the writ should not be superseded, as it had been obtained by one of the overseers to whom it was directed, or quashed, as insufficient upon the face of it.

Greaves now showed cause:

The writ may issue on *the application of one overseer or churchwarden, and in that case must be directed to all: *Anonymous* (2). This writ is in the usual form, and was drawn up at the Crown Office. A similar one issued in *Rex* v. *St. Mary's, Leicester* (3). [He was then stopped by the COURT.] [*573]

Whitehurst, contrà:

I. The *Anonymous* case cited was decided fourteen years before the late Act (4) regulating the costs of proceedings by *mandamus*, and which must prevent, for the future, any one suing out the writ against himself. * * *

II. The writ does not show that there was any necessity for a poor's rate. * * *

LORD DENMAN, Ch. J.:

As the word "necessary" is in the writ, that appears to us to be sufficient; for the terms of the writ being reconcileable with the assertion in the affidavit of Gadsby (5), that a rate was required for the relief *of the poor of the parish, it calls for the interference of this Court. As to the other point that has been raised, the late Act has made no alteration as to the parties who may obtain the writ, but only with regard to the costs on such applications. [*574]

WILLIAMS and COLERIDGE, JJ. concurred.

Rule discharged.

(1) *Ante*, p. 635.
(2) 2 Chitty, 254.
(3) Not reported.
(4) 1 Will. IV. c. 21, s. 6. Repealed, S. L. R. Act, 1891.
(5) *Ante*, p. 635.

1837.
May 5.

[756]

REX *v.* THE RECORDER OF POOLE.

(1 Neville & Perry, 756—760; S. C. W. W. & D. 497.)

A notice of appeal against a borough rate under the Municipal Corporation Act (5 & 6 Will. IV. c. 76) (1), must state a grievance, or facts from which a grievance must be necessarily inferred.

A notice in the following form was held insufficient: "I, F. T., being a burgess of the borough of P., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next General Quarter Sessions of the peace to be holden, &c., against a borough rate, at a meeting of the council of the said borough, held on &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c."

MR. TURNER, of Poole, thinking himself aggrieved by a borough rate, made by the mayor and council of that borough, gave the following notice of appeal to the parties to whom it was directed:

"I, Francis Turner, being a burgess of the borough of Poole, and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal, and shall appeal, at the next General Quarter Sessions of the peace to be holden in and for the said borough, on the 10th of April next, against a borough rate, at a meeting of the council of the said borough, held on Monday and Tuesday, the 2nd and 3rd of January last, ordered and resolved to be raised for payment of the expenses to be

[*757]

incurred in carrying into effect *the provisions of the Municipal Act. Dated this 23rd day of March, 1837.

"(Signed) FRANCIS TURNER.

"To THOMAS ARNOLD, Esq., town clerk of the said borough; THOMAS ARNOLD, clerk of the peace of said borough; BENJAMIN INSKIP, high constable of said borough; and ROBERT HENNING PARR, Esq."

The appeal was entered with the clerk of the peace, at the last April Sessions, but the Recorder, being of opinion that the above notice was insufficient, refused to hear the appeal. Application was then made on behalf of Mr. Turner, to enter and respite the appeal until the ensuing Sessions, but that also the Recorder refused to permit. On a former day in this Term,

(1) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5. But see sect. 144 (9). —R. C.

REX v. THE RECORDER OF POOLE.

Bingham had obtained a rule *nisi* for a *mandamus* to the Recorder to enter continuances and hear the appeal, against which cause was now shown by

Sir W. W. Follett, and *Barstow* (1):

The question in this case turns upon the form of the notice. By the 92nd section of the Municipal Corporation Act, (5 & 6 Will. IV. c. 76), the town council are authorized to order a borough rate, in the nature of a county rate; and it enacts, that if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the Recorder, at the next Quarter Sessions for the borough, and such Recorder shall have power to hear and determine the same, and to award relief in the premises, as in the case of appeal against a county rate. It is doubtful whether the applicant has any right to appeal at all, because the Recorder is only authorized to give relief as in the case of an appeal against a county rate; the statutes relating to county rates are the 55 Geo. III. c. 51, and the 57 Geo. III. c. 94, and they only give an appeal to churchwardens and overseers. By the Municipal Corporation Act there is no assessment on individuals. But the principal objection is, that the notice *does not either state in terms that the party is aggrieved, nor [*758] state circumstances from which it can be inferred that he is aggrieved. There are three classes of decisions on this subject, those relating to the diverting and stopping up a highway, to overseers' accounts, and to county rates. *Rex* v. *The Justices of Essex* (2), and *Rex* v. *The Justices of the West Riding of Yorkshire* (3), which relate to the diverting and stopping up a road, establish that the party must either state in his notice that he was aggrieved, or circumstances from which it may be inferred he was. *Rex* v. *The Justices of Somersetshire* (4), which relates to an appeal against overseers' accounts, is consistent with *Rex.* v. *The Justices of the West Riding of Yorkshire* (3). The statute relating to an appeal against

(1) Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(2) 29 R. R. 283 (5 B. & C. 431; 7 Dowl. & Ry. 658).

(3) 31 R. R. 278 (7 B. & C. 678, 1 Man. & Ry. 547).

(4) 31 R. R. 280, *n.* (7 B. & C. 681, *n.*).

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overseers' accounts, gave a right of appeal to a person having a material objection to the accounts, and the notice did state a material objection. Then as to the cases on the county rate, which are *Rex* v. *The Justices of Westmorland* (1), and *Rex* v. *Blackawton* (2). In both those cases the notice stated a grievance. What the Legislature mean when they confine the right of appeal to the party aggrieved is, that there must be some matter which is a grievance to the individual intending to appeal. The notice merely states that the appellant is a burgess, and has been called upon to pay the borough rate. Both those circumstances may be true, and yet it does not necessarily follow that the party, individually, was aggrieved. The stopping up a highway may be considered a grievance to all the King's subjects, yet it has been held that it is not sufficient to state that a highway has been stopped, but that the appellant must show some grievance to himself, or state in express terms he is aggrieved.

[*759] Then it is said the Recorder ought to have allowed the *appeal to have been entered and respited, but there is no power for that purpose given by the Municipal Corporation Act. The former cases, on the subject of the entry and respite of an appeal, have turned on other Acts of Parliament. The 9 Geo. I. c. 92, s. 8, authorizes, in express terms, the adjournment of an appeal against an order of removal. The Municipal Act contains no such words, and it may have been the intention of the Legislature that an appeal against a borough rate should not be adjourned, but should be decided in the first instance. However that may be, there could be no adjournment until the Court was in the possession of the appeal, which was not the case here. In *Rex* v. *Justices of Westmorland* (1), where BAYLEY, J. expressed an opinion that the Sessions ought either to have heard or adjourned the appeal, the Court was in possession of the appeal. Here, the appeal was not in Court.

(PATTESON, J.: In *Rex* v. *The Inhabitants of Kimbolton* (3) we held, that the Sessions have jurisdiction to respite an appeal, when it is properly lodged.)

(1) 10 B. & C. 226. (2) 10 B. & C. 792. (3) 1 N. & P. 606.

Sir J. Campbell, A.-G. and *Bingham, contrà* :

The words of the Act are, that any party may appeal who *thinks* himself aggrieved. Does not the notice in this case intimate that Mr. Turner thinks himself aggrieved? It states that he is a burgess, that a rate has been made, and that he has been called upon to pay that rate. No form of notice is prescribed by the Act, nor does it require that any ground of appeal should be set out in the notice. Surely the statement by the party that he ought not to be called upon to pay, is equivalent to saying that he thinks himself aggrieved. *Rex* v. *The Inhabitants of Essex* (1), and *Rex* v. *The Justices of the West Riding of Yorkshire* (2), turn on the Highway Act, and the statutes relating to the diversion of highways gave the right of appeal only to the person *actually injured or aggrieved. [*760] In those two cases, there was nothing in the notice to show that the party appealing was not a mere stranger. As to the cases of *Rex* v. *The Justices of Westmorland* (3), and *Rex* v. *Blackawton* (4), the words of the Act, upon which those cases were decided, differ from the words of the present Act.

The Recorder was bound to receive the appeal: *Rex* v. *The Justices of Wilts* (5), *Rex* v. *The Justices of Westmorland* (3). He might undoubtedly have used his discretion as to the adjournment. In the present case, however, he did not use any discretion. He refused to receive the appeal.

Cur. adv. vult.

LORD DENMAN, Ch. J., on June the 6th, delivered the judgment of the COURT, as follows:

We have given a good deal of attention to this case, and were unable for some time to arrive at the same conclusion. We are, however, at length all agreed, that the meaning laid down by Lord TENTERDEN and BAYLEY, J., in the cases cited, is that which ought to be applied. We therefore think that as the notice of appeal does not state any grievance or grounds from

(1) 29 R. R. 283 (5 B. & C. 431; 7 D. & R. 658).
(2) 31 R. R. 278 (7 B. & C. 678; 1 M. & R. 547).
(3) 10 B. & C. 226.
(4) 10 B. & C. 792.
(5) 8 B. & C. 380; 2 Man. & Ry. 401.

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which a grievance may be necessarily inferred, the rule must be refused. I confess it is with some hesitation on my part, but still I must say it is very easy for a party who is aggrieved by a rate, and who wishes to appeal, to state the grounds of complaint in his notice.

Rule discharged.

IN THE COURT OF COMMON PLEAS.

1837. *Nov.* 7.

[17]

PLANCHÈ *v.* BRAHAM (1).

(4 Bing. N. C. 17—20; S. C. 5 Scott, 242; 3 Hodges, 288; 1 Jur. 823; 7 L. J. (N. S.) C. P. 25; S. C. at Nisi Prius, 8 Car. & P. 68.)

What is a representation of part of a dramatic production, so as to subject the person representing it to a penalty under 3 & 4 Will. IV. c. 15 (2), is a question for the jury.

A jury having found that singing two or three songs of plaintiff's libretto to an opera, was a representation of part of plaintiff's production, the Court refused to grant a new trial.

THE plaintiff had drawn up the libretto or English words for the music of Weber's celebrated opera of "Oberon, or the Enchanted Horn."

In this shape, the opera was performed at Covent Garden Theatre, where the defendant sustained the principal character.

The defendant afterwards caused another libretto to be written by another artist, for the same music, and then performed the opera, with the new words, and a new title, at his own theatre, where he again sustained the principal character. The new

[*18] words were distributed *among the performers for the purpose of being learnt, and were sold in the defendant's theatre.

But the defendant himself still made use of the plaintiff's words as the vehicle for two or three of the most striking airs, and in particular for one commencing with the words

"Ocean! thou mighty monster!"

whereupon the plaintiff brought this action against him under the statute 3 & 4 Will. IV. c. 15, for representing at a place of

(1) Explained, and principle adopted in *Chatterton* v. *Cave* (H. L. 1878) 3 App. Cas. 483, 47 L. J. Q. B. 545. —R. C.

(2) See now also the Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17).—R. C.

dramatic entertainment, a part of a dramatic piece of which the plaintiff was the author, without his consent. By sect. 1 of the above statute, it is enacted, "that the author of any dramatic piece shall have as his property the sole liberty of representing it, or causing it to be represented, at any place of dramatic entertainment." And, by sect. 2, "That if any person shall during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s*., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit (1), by such author or other proprietor."

TINDAL, Ch. J. left it to the jury to say whether, under the foregoing circumstances, there had been a representation *of a [*19] part of the plaintiff's production; and the jury having found a verdict for the 40*s*. penalty,

Wilde, Serjt. moved to set it aside, on the ground that they should have been directed that this was no representation of any part of the plaintiff's production. The insertion or omission of a few lines here and there, or even of two or three songs, was immaterial to the development of the drama, and therefore such lines could not form the subject of a representation within the meaning of the Act. Had the defendant adopted the plaintiff's language for some of the leading incidents or dialogues of the opera, that might have been a representation of a part of the plaintiff's production: but the music of the piece was the

(1) A "full and reasonable indemnity" is now substituted: 5 & 6 Vict. c. 97, s. 2. *Reeve* v. *Gibson* [1891] 1 Q. B. 652, C. A.

PLANCHÈ v. BRAHAM.

main object of attraction; the words were a mere vehicle for the music; the story was common property; the accidental adoption of a few lines not essential to the drama, was of no benefit to the defendant; no injury to the plaintiff; nor a representation of any thing at all.

TINDAL, Ch. J.:

I think that the question now brought before us must in all cases be determined by a jury. By the recent statute a party is prohibited from representing, without the consent of the author, any dramatic production or any part thereof, at any place of dramatic entertainment. It is difficult to say what is or is not a representation of part of a dramatic production: the subject *patitur majus et minus:* and it must be left to a jury to determine the fact. In effect it was left to the jury here; and they found by their verdict that there had been a representation of part of the plaintiff's production. The positive enactment that every offender shall be liable to an amount not less than 40*s.*, or to the full amount of the benefit derived or loss sustained, shows that damage to the plaintiff is not the test [*20] of the defendant's *liability, but that 40*s.* is to be paid even if there be no actual damage. The jury having found a verdict for 40*s.*, I think we should defeat the intention of the Legislature if we granted a rule to set it aside.

VAUGHAN, J.:

We should be interfering with the province of the jury, if we did not leave it to them to say whether this was representation of a part of the plaintiff's production.

BOSANQUET, J.:

It seems to me that there has been an infraction of the statute. At all events, as the question was properly left to the jury, and they have found a verdict for only 40*s.*, we cannot interfere.

COLTMAN, J.:

I think this was a question for the jury, and that it having in effect been left to them, we cannot interfere.

Rule refused.

STONE *v.* PHILLIPPS.

1837.
Nov. 10.

[37]

(4 Bing. N. C. 37—41; S. C. 5 Scott, 275; 3 Hodges, 302; 7 L. J. (N. S.) C. P. 54; 6 Dowl. P. C. 247.)

Four actions between distinct parties, and all matters in difference, were referred to an arbitrator. Among the matters in difference was a fifth action, relating to a part of the premises in dispute, of which fifth action the award took no notice, notwithstanding it had been mentioned to the arbitrator:

Held, that this omission rendered the award bad *in toto*.

By an order of Nisi Prius, at the last Oxford Assizes, made by consent of the parties, their counsel and attornies, the jury found a verdict for the plaintiff, in the four following causes; viz. *John Stone* v. *William Phillipps*, *John Stone* v. *George Phillipps* and others, *Doe* d. *Richard Stone* v. *Elizabeth Stone* and others, and *Richard Stone* v. *Robert Stone*, subject to the award of an arbitrator appointed "to settle these causes, and all matters in difference between the said parties, with liberty to all other parties interested to come in within a month."

The arbitrator, a barrister, by his award directed how the verdict should be entered up, in each of the four causes; and after deciding upon various matters in difference between the parties, concluded by ordering that all persons who had become parties to the reference, should, upon being required, and at the cost of the party requiring it, execute a general release of all actions and demands touching any matter which was the subject of any of the actions above referred, or any claim or dispute concerning any title to any of the premises in question.

Cooper obtained a rule *nisi* to set aside this award for want of finality in various particulars, and, among others, on an affidavit, which stated that, besides the actions above enumerated, there was an action of ejectment, for part of the premises in question, on the demise of Richard Stone, against Robert Stone, which was not taken to trial, on account of some informality in the proceedings; that that action was still pending, and was one *of the matters in difference, but that the arbitrator, notwithstanding he had notice of that action, had omitted to dispose of it in his award.

[*38]

STONE v. PHILLIPPS.

Keating, who showed cause, contended as to this point, that even if the award were bad in part, the Court would sustain it as to the remainder: there were different parties in each of the actions; and as to three of them, the award could not be impeached. He cited *Manser* v. *Heaver* (1), where an arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant: he then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might, on giving notice to the defendant, bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceeding were taken by the plaintiff, within two months after the work was done, the award then made should be final: and he enlarged the time for making his further and final award, if requested, for six months. It was held, that the latter part of that award was bad, as it assumed to reserve a power over future differences, but that it might be rejected; and that the former part was final, and might stand. And in *Thorpe* v. *Cole* (2), where a parishioner and overseers having referred to arbitrators the validity of a parish rate, the expenses of preparing the agreement to refer, and the costs of the arbitration, PARKE, B. said, that though the reference of the rate was not binding on the overseers, that the submission and award were still valid as to the other matters in difference.

[39]

Cooper, in support of the rule:

Where an award is bad as to a matter which is separable in its nature, as where the arbitrator exceeds his authority, the award may be good for the residue, of which several instances are given in Com. Dig. tit. Arbitrament, E. 8, E. 19. But where the defective matter is an essential part of the subject referred, it is a condition precedent to the validity of the award, that the arbitrator shall settle the whole: *Randall* v. *Randall* (3), *In re*

(1) 37 R. R. 426 (3 B. & Ad. 295).
(2) 41 R. R. 733 (2 C. M. & R. 377).
(3) 8 R. R. 601 (7 East, 81).

Robson and another and *Railston* (1). The cases of *Pope* v. *Brett* (2), and *Turner* v. *Turner* (3) were decided on this principle. In the present case, the condition of the submission is, that the arbitrator shall make his award by a certain day concerning the premises, that is to say, concerning the four causes and all matters in difference, which matters included the action of ejectment against Robert Stone: this condition has not been fulfilled.

And although it be true that all the causes were not originally dependent on each other, and that the matter left undecided by the arbitrator might have no effect on the result of either of the four actions specified in the submission, still the condition of the submission must be observed. A party who is interested in four causes, may feel sure of a verdict in three of them, and doubtful as to the fourth; and the desire to obtain a settlement of that may be his consideration for his consenting to a reference at all. If therefore the arbitrator omits to settle any one, the consideration for the reference has failed, and the award is bad; and so with respect to any other matter of difference, whether the subject of an action or not. That a submission by several persons, of all matters in difference between them imports a submission of all matters that any one may have against the others jointly or severally, appears *by the case of *Turner* v. *Turner*; in which all matters in difference between the parties in a Chancery suit having been referred, the award was held bad, because, although the arbitrator had decided all matters in difference between the plaintiffs and defendants, he had not decided matters in difference between the co-defendants. [*40]

TINDAL, Ch. J.:

I think we cannot hold this a good award. When I look to the authorities as to the power of severing matters in difference, I find that *Manser* v. *Heaver* does not apply. There, the arbitrator, after awarding that certain works should be done by one of the parties, enlarged the time for ultimate decision, to afford an opportunity of a further reference as to the sufficiency

(1) 35 R. R. 426 (1 B. & Ad. 723).
(2) 2 Saund. 293.
(3) 3 Russ. 494.

STONE v. PHILLIPPS.

of the work when it should have been done: and all the Court says is, that "the clause, as to making a further and final award, must be considered as having reference only to prospective differences: so much, then, of the award as relates to these may be rejected as surplusage, and the rest retained." Here, four actions were referred to the arbitrator, and all matters in difference. Part of the matters in difference was an ejectment on which there is no award; and I cannot say that the award is good, when the condition of the submission is that the arbitrator shall award on the premises referred to him. It seems to be like the case of *Auriol* v. *Smith* (1), where the Court of Chancery held, "that an award might be good in part, and bad in part, where the submission was clearly capable of being separated; but not where all the matters were within the submission, and the award was upon the face of it entire."

BOSANQUET, J.:

I am of the same opinion, but come to the decision with very great reluctance.

[41] COLTMAN, J.:

There are cases where an award may be good in part, and bad in part: but that is where the matter objected to is severable, and not part of the consideration for submission: as in *Doe* d. *Williams* v. *Richardson* (2), where the defect was only as to the direction for mutual releases: or *Aitcheson* v. *Cargey* (3), where the arbitrator exceeded his authority by directing the mode in which the matters ordered by the award were to be done. But where matters within the submission and part of the premises referred, have been unnoticed in the award, it cannot be sustained.

VAUGHAN, J. was absent. *Rule absolute.*

(1) Turn. & Russ. 121.
(2) 21 R. R. 513 (8 Taunt. 697).
(3) 26 R. R. 305 (2 Bing. 199).

OWEN *v.* KNIGHT.

1837.
Nov. 13.

(4 Bing. N. C. 54—58; S. C. 5 Scott, 307; 3 Hodges, 245; 7 L. J. (N. S.) C. P. 27; 6 Dowl. P. C. 245.)

[54]

Plaintiff being possessed of the lease of a messuage by assignment, delivered it to F. with authority to raise money on the security of the deed. Defendant, who had advanced money, which was not repaid, having refused to deliver up the deed, plaintiff sued him in trover: Held, that defendant might give these facts in evidence under a plea that the plaintiff was not possessed of the deed as his own property at the time of the action, and that the plaintiff was not entitled to recover.

THE plaintiff declared in trover that he was possessed, as of his own property, of a certain indenture bearing date the 7th of November, 1830, between R. Sadler, of the one part, and S. Feary of the other, by which Sadler demised to Feary a certain messuage therein described, and complained of the defendant having converted this deed to his own use.

The defendant pleaded, first, Not guilty; and, secondly,

That the plaintiff was not, at the time when, &c., possessed, as of his own property, of the indenture, in the declaration mentioned:

Upon which pleas issue was joined:

Thirdly, that Feary being the owner of the indenture, on the 3rd of August, 1833, assigned and delivered the same, and the term thereby granted, to the plaintiff, by way of mortgage, as a security for money which had been lent by the plaintiff to Feary; that on the 23rd of May, 1836, before the said time, when, &c. the plaintiff redelivered the indenture to Feary for the purpose of raising money thereon by assignment or deposit thereof, so that Feary might thereby be enabled to pay a bill of exchange for 113*l.* 6*s.* 2*d.* theretofore drawn by the plaintiff, and accepted by Feary; that Feary, with the plaintiff's consent, appeared to be the owner of the indenture, and, on the 23rd of May, 1836, by deed assigned it to the defendant, as a security for the repayment by Feary of 150*l.* then advanced, on the faith of the deposit and assignment, by the defendant to Feary; that the defendant received the indenture without notice of the claim of the plaintiff, and that the money advanced by him to Feary was still *unpaid; wherefore he refused to deliver the indenture to the plaintiff.

[*55]

OWEN v. KNIGHT.

Replication: that the plaintiff did not redeliver the indenture to Feary, in manner and form as in the last plea was alleged.

At the trial before Vaughan, J., it appeared that the defendant, in answer to a formal demand on the part of the plaintiff, refused to give up the deed, and Feary, who was called as a witness, proved the statement contained in the third plea.

The learned Judge told the jury, that if Feary were believed, their verdict ought to be for the defendant.

A verdict having been found for the defendant accordingly,

Talfourd, Serjt. moved for a new trial, on the ground that notwithstanding the establishment of the third plea, the jury should have been directed to find a verdict for the plaintiff on the first and second.

The third plea, by admitting the assignment to the plaintiff, admitted the plaintiff's property in the messuage which was demised by the deed in question. If the messuage was the plaintiff's, the right to the possession of the deed which conveyed it was his also: *Philips* v. *Robinson* (1), *Bailey* v. *Fermor* (2). The second plea therefore, which alleged that he was not possessed of the deed, ought to have been found in his favour; and the property in the deed could not be contested under the plea of not guilty, which put in issue the fact of conversion only: *Stancliffe* v. *Hardwicke* (3), *Frankum* v. *Lord Falmouth* (4).

A rule *nisi* having been granted,

Bompas, Serjt. and *Godson* showed cause:

[*56] They cited various authorities to show, that in trover *the plea of not guilty puts in issue the property of the plaintiff, as well as the conversion by the defendant; but upon this point the Court abstained from pronouncing any opinion.

On the second plea, they contended that the defendant was entitled to retain his verdict; for admitting the property in the deed to be in the plaintiff, he was not possessed of it, or entitled to the possession of it, at the time of the action; and to maintain trover, he must show a right to the possession, as well as the property.

(1) 29 R. R. 518 (4 Bing. 106).
(2) 23 R. R. 666 (9 Price, 262).
(3) 2 C. M. & R. 1; 3 Dowl. 762.
(4) 4 Dowl. 65.

But after having authorised Feary to assign the deed to the defendant as a security for money advanced, he could have no claim to the possession till that money was repaid.

Talfourd and *R. V. Richards*, in support of the rule, contended that the defendant having refused absolutely to deliver the lease, and not conditionally till payment of the sum due to him, had been guilty of a wrongful conversion within the terms of the first issue; and that the plaintiff being possessed of the house to which the deed related, was, in point of law, possessed of the deed as of his own property under the terms of the second issue.

TINDAL, Ch. J.:

It is unnecessary for us to give any opinion as to what was matter of proof under the first issue, because the question here turns on the second issue only. This is an action of trover for the conversion of a lease, and the declaration, according to the usual form pursued in actions of trover, alleges that the plaintiff was lawfully possessed of the deed as of his own property.

The defendant joins issue on that precise proposition: the question therefore is, whether on that issue so raised, the facts proved will give the verdict to the plaintiff or *to the defendant. [*57] The action of trover only lies where the plaintiff has the right to possession, as well as a legal property in the subject of the suit. That was established by the case of *Gordon* v. *Harper* (1), which decided that, where goods, leased as furniture with a house, had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff pending the lease, because, to maintain such an action, he must have the right of possession as well as the right of property at the time.

The plaintiff here was originally entitled to the possession, and had a legal property in the deed in question; but it was afterwards delivered to the defendant, with the plaintiff's assent, to raise money for the discharge of a bill, on which he and Feary were both liable.

The parties therefore stand in this position, that the plaintiff is entitled to the property in this deed, but entitled to the

(1) 4 R. R. 369 (7 T. R. 9).

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possession only when the money advanced by the defendant has been repaid. The defendant is entitled to hold possession till he has been repaid. On the second issue, the verdict for the defendant cannot be impeached.

VAUGHAN, J.:

The deed is in the defendant's hands, with the plaintiff's assent, upon an advance of money by the defendant; and the plaintiff is not entitled to the possession, till the money has been repaid. The defendant had a right to set up his lien, and that shows that the plaintiff is not entitled to possession. The cases of *White* v. *Gainer* (1), and *Boardman* v. *Sill* (2), show that the defendant does not waive his lien, because he omits to mention it.

BOSANQUET, J.:

I agree that the defendant is entitled to retain the verdict on
[*58] the second issue. There is an *express traverse of the plaintiff's possession, and the facts show that the deed was deposited with the defendant by the authority of the plaintiff, on a condition which has not been observed.

COLTMAN, J.:

I think that under the second issue, the right to possession is raised as distinct from the right to property; and that the verdict for the defendant, on that point, ought not to be disturbed.

Rule discharged.

1837. *Nov.* 17.

[92]

GREEN *v.* CHAPMAN AND ANOTHER.

(4 Bing. N. C. 92—95; S. C. 5 Scott, 340.)

It is not within the limits of fair comment to print of an exhibitor of flowers, in observations touching the exhibition, "The name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase."

LIBEL. The declaration stated, that before the committing of the grievances by the defendants as hereinafter mentioned, the

(1) 2 Bing. 23. (2) 1 Camp. 410, *n.*

plaintiff was a grower, seller, and exhibitor of flowers: that a certain society, commonly called or known by the name of the Metropolitan Society of Florists and Amateurs, had held a public meeting at a certain house called the "Bakers' Arms," for the exhibition of flowers, and for the adjudication of certain prizes proposed to be given to the showers of flowers at such meetings, on which occasion one of the said prizes of a certain value, to wit, of the value of 15*s*., was adjudged by the said society to be given to the plaintiff, for certain flowers then and there exhibited by him; and that the defendants falsely and and maliciously published, in a certain periodical work called or known by the *name of the "Horticultural Journal, Florist Register, and Royal Ladies' Magazine," of and concerning the plaintiff, and of and concerning him as such grower and seller of flowers, and of and concerning the said prize so adjudged to the plaintiff, by the society hereinbefore mentioned, and of and concerning the said society, and the prizes so distributed by the same society, and of and concerning the plaintiff as a member of such last-mentioned society, and exhibitor of flowers, at the meeting thereof, the following libel: "SIR, you will recollect a mean shabby fellow, named Green, making a great noise about a fifteen shilling prize, and using gross language because he did not receive it directly. The name of Green is to be rendered famous, I believe, in all sorts of dirty work. The tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges more honest than usual: and Riley, Dunn and he, (meaning the plaintiff), being little kings of growers among the 'Bakers' Arms' squad, have formed a new society in which none who can show against them will be allowed to compete. This is the way in which floriculture is to be supported in the East. Societies ought to obtain the list of members of this new club of amateurs, and carefully exclude from their ranks the knaves who promote, and the fools who join, such a despicable gang. Yours, &c."—"If Green be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice: if he be not the same man, all we have to say is, that it is a pity two such beggarly souls could not be

[*93]

GREEN v. CHAPMAN.

crammed into the same carcase. Dunn and Riley ought to have known better."

The defendants pleaded, that after the adjudging of the prize in the declaration mentioned to the plaintiff, to wit, in September last, an annual show of dahlias for prizes took place in the [*94] eastern part of the *metropolis, where the exhibitors were confined to amateurs growing within three miles of the spot; and on that occasion the plaintiff was an exhibitor, and an unsuccessful candidate as such exhibitor for prizes; and that after such exhibition, and in consequence of the result thereof, the plaintiff and one Riley and one Dunn, being members of the said society held at the "Bakers' Arms," as in the declaration mentioned, did form a new society for the exhibition of flowers, under certain rules and regulations, which afforded greater facilities to the plaintiff, and the said Riley and Dunn, towards obtaining prizes, than had existed for the plaintiff under the rules and regulations of the said society which had exhibited in September last: whereupon the defendants did publish, and cause and procure to be published in the said periodical work in the declaration mentioned, the matter in the said declaration mentioned, in the form of an article, of and concerning the premises aforesaid, comprising the matter following, including the matter in the declaration mentioned, and intended to be read in connection with the said matter. (Here followed a series of other observations on the plaintiff, much in the same style and to the same effect as those set forth in the declaration.)

Demurrer and joinder.

W. H. Watson appeared in support of the demurrer, but the COURT called on

Barstow, who was for the defendants, to support the plea:

If the Court recognizes the distinction taken in *Thorley* v. *Lord Kerry* (1), between oral and written vituperation, it must be [*95] admitted that these censures, unless justified, *may form the subject of an action. But according to the principle established by *Carr* v. *Hood* (2), a man who exhibits himself publicly is

(1) 13 R. R. 626 (4 Taunt. 355). (2) 10 R. R. 701, *n.* (1 Camp. 355, *n.*).

a fair mark for the shafts of criticism, and an action does not lie for observations confined to the occasion on which he has courted public notice. The whole of the alleged libel is relevant to the plaintiff's floricultural exhibition.

(TINDAL, Ch. J.: "The name of Green is to be rendered famous in all sorts of dirty work?")

Taking that passage with the context, it means dirty work in the exhibition of flowers.

(TINDAL, Ch. J.: "If he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase?")

That is also said of him in his character of public exhibitor.

(TINDAL, Ch. J.: The ground of attack seems to be that he withdrew himself from the "Bakers' Arms" squad, to a private society.)

By any exhibition the plaintiff lays himself open to criticism, and ought not to complain if its verdict be not always couched in the language of compliment. But

The COURT at once determined that this did not fall within the privilege extended to fair criticism by the case of *Carr* v. *Hood*, and gave

Judgment for the plaintiff.

VINE *v.* SAUNDERS AND WIFE.

1837. *Nov.* 17.

[96]

(4 Bing. N. C. 96—102; S. C. 5 Scott, 359; 3 Hodges, 291; 2 Jur. 136; 7 L. J. (N. S.) C. P. 30; 6 Dowl. P. C. 233.)

Husband and wife may be jointly sued in trespass for their joint act.

THE declaration alleged, that the defendants, on the 19th of October, 1836, with force and arms, &c., assaulted the plaintiff, and then caused the plaintiff to be arrested and taken into custody upon a false charge of felony, then made by the defendants against the plaintiff; and then forcibly compelled the plaintiff to get out of the bed in which she was lying, and then

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indecently and indelicately forced and compelled her to go from and out of a certain bedroom, parcel of a certain dwelling house, situate &c., in certain night clothes, in which she was then dressed, in the presence of divers, to wit, two men, down the stairs of the said dwelling house, into another room, parcel of the said dwelling house, and then indecently and indelicately kept and detained the plaintiff in custody in the last mentioned room, in the presence of the said men, in the said night clothes without decent apparel, for a long space of time, to wit, twenty minutes then next following: and also then, during the night time, forced and compelled the plaintiff to go from and out of the said dwelling house into and along divers public highways, to a certain other dwelling-house, and then imprisoned the plaintiff, and kept and detained her in prison without any reasonable or probable cause whatsoever, in the last mentioned dwelling house, for a long space of time, to wit, for six hours then next following, and during the night time, contrary to the laws and customs of this realm, and against the will of the plaintiff; whereby the plaintiff was during that time deprived of her necessary sleep and rest, and suffered great alarm and inconvenience and
[*97] distress of mind, and was also thereby then *greatly exposed and injured in her credit and circumstances; and other wrongs to the plaintiff then did, against the peace of our Lord the King, and to the damage of the plaintiff of 200*l.*

General demurrer and joinder.

Petersdorff in support of the demurrer:

The declaration is ill; for it alleges a joint act of trespass, and trespass does not lie against husband and wife for their joint act; the husband is solely responsible. It is true that some of the earlier authorities look the other way; but they are cases in which the objection not having been taken till after verdict, the Court might assume it to have been proved that the trespass was committed by the wife, and that the husband was joined for conformity only; as in *Drury* v. *Dennis* (1), *Draper* v. *Falkes* (2), *Tampian* v. *Newsam* (3), *Rogers* v. *Goddard* (4), *White*

(1) Yelv. 106.
(2) *Id.* 165.
(3) *Id.* 210.
(4) 2 Show. 255.

v. *Eldridge* and wife (1). So, in *Keyworth* v. *Hill* and wife (2), in order to support the verdict, the Court assumed that the conversion might have been by the wife's destroying the goods in question. That, indeed, was an action of trover; for this purpose, however, the difference between trespass and trover is not material. But Com. Dig. Baron and Feme, Y, is an express authority, that though an action of tort will lie against husband and wife for the separate act of the wife after coverture, the action must be against the husband alone, upon their joint contract or joint conversion: the reason is, that the wife is not responsible for the act of her husband, nor for her own act done by his authority: and if an action lay against them jointly, she might be rendered responsible in damages for the act of her husband; as if, after the trial of an action against both, he were to die between verdict and *judgment. It is clear they cannot [*98] join in an action for an assault on both: *Dunwell* v. *Marshall* (3), *Newton* v. *Hatter* (4), *Hockett* v. *Stiddolph* (5), *Milner* v. *Milnes* (6); because the wife has no interest in any damages recovered by the husband, for an injury done to him. And according to the same principle, she ought not to be liable to damages for an act done by him. In *Fawcet* v. *Beavres* (7), an action was brought against husband and wife for retaining and keeping the servant of the plaintiff; but the reporter observes, that no notice was taken that a *feme covert* cannot make a retainer or contract, and in Bac. Abr. Baron and Feme, L, the case is cited with a query.

Addison, contrà:

The cases relied on for the defendant were chiefly cases of trover, in which the conversion was laid to the use of husband and wife. Now, in trover, the conversion is the gist of the action; and, as the wife could not acquire property jointly with the husband, she could not be responsible for a joint conversion. But *Berry* v. *Nevys* (8), which decides that the conversion must be laid to the use of the husband, admits that both may be

(1) 1 Ld. Ray. 443.
(2) 3 B. & Ald. 685.
(3) 2 Lev. 20.
(4) 2 Ld. Ray. 1208.
(5) 2 Mod. 66.
(6) 3 T. R. 627.
(7) 2 Lev. 63.
(8) Cro. Jac. 661.

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charged with a battery jointly, for which Com. Dig. Pleader, 2 A. 2, is also an authority. So, where the conversion arises out of an act of destruction, they may be charged with a joint conversion: *Keyworth* v. *Hill*. But in trespass, where the conversion is not the gist of the action, and the question of property does not arise, the husband and wife may be sued jointly for their joint act. This is expressly laid down by BAYLEY, J., in *Keyworth* v. *Hill;* and is to be inferred from *Watson* v. *Thorpe* (1), where in trespass against husband and wife for a [*99] battery, though the Court thought a separate plea *by the wife of *son assault demesne* was ill, it was never objected that the action did not lie against both. But *Smalley* v. *Kerfoot* (2) is an express authority; for there, in trespass against husband and wife for entering the plaintiff's house, taking his goods, and converting them to the use of the defendant, after judgment by default, on which there could be no presumption as to evidence, it was held that the action lay. With respect to the objection that the wife, if sued, might be liable to damages for an act done by her husband,—as the damages would survive to her in an action in which they sued jointly, it could not be a subject of complaint that the liability should survive where they were jointly sued.

Petersdorff, in reply:

The authority of Com. Dig. Baron and Feme, Y. is in conflict with his authority in Pleader 2 A. 2. In *Berry* v. *Nevys* the question was raised after verdict: in *Watson* v. *Thorpe* it was not necessary to take the objection: *Smalley* v. *Kerfoot* (3) is expressly said in the report in Strange to have been after verdict; and the *dictum* of BAYLEY, J. in *Keyworth* v. *Hill* was extrajudicial.

TINDAL, Ch. J.:

I think this action is maintainable against the husband and wife jointly; no direct authority has been cited to show that it is not; and, as far as we have any authorities to guide

(1) Cro. Jac. 239.
(2) 2 Andr. 242.
(3) 2 Str. 1094.

us, those referred to on the part of the plaintiff lead to the opposite conclusion. The first is that of *Watson* v. *Thorpe*. There, an action was brought against husband and wife for a joint battery; the wife pleaded *son assault demesne;* and the husband, that he was acting in aid of his wife when she was attacked. Both issues being found for the plaintiff, and entire damages given, it was alleged, in arrest of judgment, *that [*100] the trial was ill, as the wife could not plead by herself; and the damages being entirely assessed all was ill: and the Court being of that opinion, awarded that the parties should replead. If the ground of their decision had been that the action was not maintainable against the husband and wife jointly, they would not have ordered a repleader.

The next case is *Berry* v. *Nevys*, where in trover against husband and wife, the error assigned was that the conversion was laid to the use of both; and it was admitted at once that they might have been charged jointly for a joint battery: but it was held they could not be charged with a joint conversion, because "an action lies not against baron and feme for converting goods to their uses: for it is the conversion of the baron only, and they are only to his use."

The third case is *Smalley* v. *Kerfoot*, which was an action of trespass against baron and feme for entering the plaintiff's house, and taking his goods, and converting them to their own use. And after verdict for the plaintiff, and general damages, it was moved in arrest of judgment, that the feme could not convert to her own use; and Salk. 114 was cited, where in trover it was held ill. But upon consideration the CHIEF JUSTICE delivered the resolution of the Court, "that this being trespass it was well enough; for the conversion here is not the gist of the action, as it is in trover, this action being maintainable for entering the house and taking the goods: and we must take it the damages were given only for that."

This is a direct authority that trespass, *vi et armis*, lies against husband and wife jointly; and I cannot agree that it is got over by the observation that, according to the report in Strange it was after verdict, seeing that another reporter puts it expressly as a judgment by default. However, the two reports

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are not necessarily *inconsistent; for Strange may be speaking of a verdict upon a writ of inquiry after judgment by default.

Then comes the authority of Mr. Justice BAYLEY in *Keyworth* v. *Hill*, where in trover against husband and wife, for a bond and promissory notes, upon an objection, in arrest of judgment, that the conversion could not be to the use of both, the Court said they would assume that the conversion had been effected by a destruction of the instruments: that is, that where the injury is not of such a nature as must necessarily have been done by the husband alone, the wife may properly be joined; a distinction expressly taken in Com. Dig. Pleader, 2 A. 2. But BAYLEY, J. also said, that it was quite clear that in trespass the husband and wife might have been joined.

Our judgment therefore must be for the plaintiff.

VAUGHAN, J.:

No direct authority has been cited in favour of the defendants; and *Keyworth* v. *Hill* is an *à fortiori* case in favour of the plaintiff; for that was an action for the conversion of goods; and BAYLEY, J. says that it is quite clear that in trespass the husband and wife might have been joined; but a case of trover is stronger than a case of personal assault. Then, the decision in Andrews is expressly in point.

BOSANQUET, J.:

I think this demurrer must be overruled. No distinct authority has been adduced for the defendants; but there are some strong cases in favour of the plaintiff. In *Watson* v. *Thorpe*, which, like this, was an action of assault and battery, against husband and wife, the Court held that the wife could not plead separately *son assault demesne*; but they awarded a repleader, which they would not have done if the action did not lie. In *Berry* v. *Nevys*, where it was objected in trover, [*102] that the conversion could not be laid to the *use of husband and wife, it was admitted in argument, that for battery and false imprisonment, an action would lie against them jointly. Again, in *Smalley* v. *Kerfoot*, the Court expressly held that such an action was maintainable. It is stated in Andrews, that this

was a judgment by default; and the verdict mentioned by Strange might have been a verdict on a writ of inquiry. Then in *Keyworth* v. *Hill*, which was an action of trover, with the conversion laid to the use of husband and wife, the Court said they would presume the conversion was effected by a destruction of the property; which is an admission, that if the action had been for such destruction, it would have lain against husband and wife if they had been both concerned. It is not necessary on the present occasion, to decide what would be the liability of the wife as to damages, in case she should survive her husband; but it is going a long way, to say that she ought to be exempt after having been jointly concerned in the injury.

COLTMAN, J.:

The counsel for the defendants has not made out any ground for exempting the wife from damages, where she has been jointly concerned in committing the injury; nor has he cited any direct authority, to show that an action will not lie against them jointly for such an injury. On the contrary, there are two express authorities the other way; *Watson* v. *Thorpe* and *Smalley* v. *Kerfoot:* consequently there must be

Judgment for the plaintiff.

DALLMAN *v.* KING (1).

1837. *Nov.* 18.

(4 Bing. N. C. 105—113; S. C. 5 Scott, 382; 3 Hodges, 283; 7 L. J. (N. S.) C. P. 6.)

[105]

Agreement that lessee should spend 200*l.* in repairs, to be inspected and approved of by lessor, and to be done in a substantial manner; lessee to be allowed to retain the sum out of the first year's rent of the premises: Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent.

CASE for an excessive distress.

At the trial, it appeared that the plaintiff had taken the premises of the defendant, the trustee of a charity, by agreement bearing date the 29th of August, 1835, at the clear yearly rent of 250*l.*, payable quarterly, at the four usual days of payment in the year, the first payment to become due and

(1) *Stadhard* v. *Lee* (1863) 3 B. & S. 364, 371.

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payable on the 25th of December then next ensuing. The agreement then was as follows: "And the said Thomas Dallman doth hereby promise and agree to spend out of his own proper monies, within one year from the date hereof, the sum of 200*l.* at the least, in erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room, one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation; such erection and alterations or repairs to be inspected and approved of by the said William King, and to be done in a substantial manner. And it is agreed that the said Thomas Dallman shall be allowed the sum of 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises. And the said Thomas Dallman doth hereby further promise and agree to pay to the said W. King, or to the trustees, for the time being, of the said charity, the said yearly rent of 250*l.* at the times and in manner aforesaid."

In September, 1836, a year's rent being in arrear, and the plaintiff offering to pay only 50*l.*, the defendant, allowing 115*l.* 17*s.* for work done by the plaintiff, made a distress for 134*l.* 3*s.*

[106] The work for which the plaintiff was to be allowed 200*l.*, had not been approved of by the defendant; but the jury finding that it had been done in a substantial manner, gave a verdict for the plaintiff.

Talfourd, Serjt., pursuant to leave reserved, obtained a rule *nisi* to set the verdict aside, and enter a nonsuit instead, on the ground that the defendant's approval of the manner in which the work done by the plaintiff had been performed, was a condition precedent to the plaintiff's deducting the amount from his rent. He relied on *Morgan* v. *Birnie* (1), where the defendant was to pay for building, upon receiving an architect's certificate that the work was done to his satisfaction: and the architect having checked the builder's charges, and sent them to the defendant, it was held, that that did not amount to such a

(1) 35 R. R. 653 (9 Bing. 672).

certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered: and TINDAL, Ch. J. was of opinion, that the production of a certificate from the architect, was a condition precedent to the bringing that action.

Wilde, Serjt. and *Bayley* showed cause:

The defendant's approval is not a condition precedent to the plaintiff's right to repay himself out of the rent. It does not go to the whole consideration; it is stipulated for by a clause distinct from that under which the plaintiff is authorised to repay himself; and if it were a condition precedent, the defendant by capriciously withholding his approval, might render the clause for repayment altogether nugatory. The intention of the parties was, that the plaintiff should repay himself if the work *were substantially done, and that if it were not, the [*107] defendant should have his cross action: but the jury having found that it was substantially done, there is no pretence for the defendant's withholding his approval. In *Morgan* v. *Birnie* the work was to be done to the satisfaction of an architect, and the money was not to be paid till a certain time running from the date of the architect's certificate: till that certificate was obtained, therefore, there was no means of ascertaining when the plaintiff should be paid. But in *Hotham* v. *East India Company* (1) it was held, that a covenant in a charter-party "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage should be found and made to appear on the ship's arrival on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," was not a condition precedent to the plaintiff's right of recovering for short tonnage, but was a matter of defence, to be taken advantage of by the defendants; and that the not averring the performance was no ground for arresting the judgment: also, that if the defendants prevented the performance of a condition precedent, by their neglect and default, it was equal to performance by the plaintiffs. However, it is a sufficient answer

(1) 1 R. R. 333 (1 T. R. 638).

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to this application, that the stipulation for the defendant's approval does not go to the whole of the consideration for the agreement. Thus, in *Fothergill* v. *Walton* (1), the omission to take on board six pipes of brandy on the voyage out, according to covenant, was held to be no bar to an action for the freight of the entire voyage; in *Storer* v. *Gordon* (2), the failure by the plaintiff to perform an undertaking to deliver an outward cargo, was held no bar to an action against the defendant for failing to provide a homeward cargo; and in *Ritchie* v. *Atkinson* (3), the failure to receive and deliver a complete cargo, according to

[*108] agreement, did *not preclude the plaintiff from recovering *pro ratâ* for a short cargo. The same point was determined in *George* v. *Jackson* (4), and the principle was recognised in the decision of *Miller* v. *Burn* (5), where the plaintiff recovered for building a house, though he had not done it in two months, according to his agreement. See also *Starers* v. *Curling* (6).

Talfourd, in support of the rule, relied on *Morgan* v. *Birnie*: observing, that the architect whose approval in that case was held to be a condition precedent, was appointed by the defendant; and contending, that, in effect, there was no difference between an approval of the works by the defendant, or an approval by an architect appointed by him. The defendant, as trustee for a charitable institution, was bound to see that the work was duly performed: and the plaintiff was to deduct only for such erections as had been approved of by the defendant.

TINDAL, Ch. J.:

The first question is, whether the approval by the defendant of the repairs which were to be done by the plaintiff, was a condition precedent to his deducting the amount from the rent to be paid to the defendant. Now, in point of form, it seems to me that this is not necessarily a condition precedent. It is not in form a condition precedent, unless some words at the end can be deemed to have such import in law. The words used

(1) 20 R. R. 567 (8 Taunt. 576).
(2) 15 R. R. 499 (3 M. & S. 308).
(3) 10 R. R. 307 (10 East, 295).
(4) K. B. Michaelmas, 1813. MSS. of Bayley, J.
(5) *Ibid.*
(6) 43 R. R. 682 (3 Bing. N. C. 355).

are, that Thomas Dallman shall lay out 200*l.* in certain erections and alterations, "such erections and alterations or repairs to be inspected and approved of by the said W. King, and to be done in a substantial manner." This is a separate clause from, "it is agreed that the said Thomas Dallman shall be allowed *the [*109] sum of 200*l.* towards such erections and alterations, or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." Unless, therefore, the word "such" includes both the quality of the repairs, and the right of the lessor to decide on their sufficiency by his approval, this is not a condition precedent; it does not go to the whole of the consideration; for if the tenant had done all but the minutest fraction, the argument for the defendant would still hold, that the refusal of his approval would disentitle the plaintiff to make any deduction, although it is apparent that such could never have been the intention of the parties.

But admitting this clause of the agreement to constitute a condition precedent, the next question is, whether the condition has been substantially performed. The stipulation consists of two parts: first, that the work should be done in a substantial manner; secondly, that it should be done to the satisfaction of the lessor. The gist of the agreement is, that the work should be done in a substantial manner; the approval of the lessor was added, for the purpose of enabling him to ascertain that the work had been done. It never could have been intended that he should be allowed capriciously to withhold his approval; that would have been a condition which would go to the destruction of the thing granted, and if so, according to the well known rule, the thing granted would pass discharged of the condition. The jury find that 200*l.* has been laid out, according to the terms of the agreement; that is, in substance and effect, according to the intention of the parties. Under such circumstances, it would be giving greater effect to the clause for the lessor's approval, than could ever have been intended by the parties, if we held that no deduction should be made for the repairs till such approval had been formally signified. The case is clearly distinguished from *Morgan* v. *Birnie*; the great object of the defendant in that case, was, not to be liable for the expense of *additions and alterations [*110]

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in the execution of a building contract, without the certificate of a third person, a surveyor, who is expressly called the arbitrator between the parties. The certificate of the arbitrator was there a clear condition precedent to the liability of the defendant: it is doubtful whether there is any condition precedent here, but if there is, it has been substantially performed.

VAUGHAN, J.:

I am of the same opinion. In modern times the doctrine of conditions precedent has been considerably relaxed, and there is no disposition in the Courts to consider stipulations in that light, unless the terms of the contract clearly require it. Looking at the intention of these parties, as it is to be collected from the instrument before us, I cannot put the construction on the word "such" which the defendant requires. The plaintiff is to lay out 200*l.* in "erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room, one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation." And there the sentence stops, after showing the precise objects of the contemplated expenditure. Therefore, by *such* repairs, I conceive the parties meant repairs of the description specified. The sentences which specify the repairs, and stipulate for the landlord's approval, are entirely distinct, and admit of the construction that this is not a condition precedent. If we were to hold that it was, the defendant might capriciously deprive the plaintiff of any remedy. I think it is not a condition precedent, and the defendant by giving credit for 115*l.*, may be said himself to have put that construction on the agreement.

If, however, it could be considered as a condition precedent, it has, at all events, been substantially complied with.

[111] BOSANQUET, J.:

The case depends on the construction which is to be put on the agreement between the parties; the Court cannot take into its consideration that the defendant was not contracting for his own benefit. It appears that the plaintiff having entered on the premises as tenant, agreed to lay out 200*l.* in a certain way,

viz., "in erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room, one pair story, into two or more rooms, or in such other repairs as might be necessary to make the same fit for habitation;" and the jury find that this undertaking has been performed: the instrument then goes on, "such erections and alterations or repairs to be inspected or approved of by the said William King, and to be done in a substantial manner." If this sentence had commenced with, "It is further agreed, that the defendant shall be at liberty to inspect and approve," &c., it could hardly have been considered otherwise than as a separate and independent agreement; and, as it stands, the sentence does not necessarily import a condition precedent. Then we come to the clause, "that the said William Dallman shall be allowed the sum of, 200*l.* towards such erections and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." What are *such* erections and repairs? Such as are done for the improvement of the house. It is contended that they must mean such as have been approved of by the defendant: that construction, however, would set up a condition precedent, repugnant to the main object of the agreement, and therefore void. The question in *Morgan* v. *Birnie* was altogether different; there, the defendant was to pay for building, upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to the defendant; it was held, that that *did not amount to such a [*112] certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered: and TINDAL, Ch. J. said he was of opinion that the production of a certificate from the architect was a condition precedent to the bringing that action. The surveyor, it is true, was the surveyor of the defendant, but he had been approved of as an arbitrator between both parties; and it was distinctly stipulated that no money should be paid till his certificate had been obtained. That is altogether different from the present case, in which I think there is nothing to prevent the plaintiff from deducting the sum which the jury find he has substantially expended.

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COLTMAN, J.:

The question is, whether the approval of the defendant was a condition precedent to the plaintiff's deducting from the rent the 200*l.* he had substantially expended. It might be some inconvenience to the defendant that this should be held not a condition precedent, because he might be called on to allow sums not fairly expended; though for that he would have a remedy, by suing for breach of the plaintiff's undertaking: but it would be more inconvenient to the plaintiff, after he had laid out the whole or the greater part of the money, for us to hold the defendant's approval a condition precedent to his being reimbursed. We should not hold it a condition precedent, without the strongest reasons for doing so. I think it is not a condition precedent. The case is clearly distinguishable from *Morgan* v. *Birnie*, and turns on the construction to be put on the words "such erections, alterations, or repairs to be inspected and approved of by the said William King, and to be done in a substantial manner." If we were to adopt the defendant's construction, he might capriciously [*113] withhold *his approval, and deprive the plaintiff of the money due. But the agreement is in effect a contract that the repairs should be substantially done; and that the defendant should have the means of ascertaining the fact. The jury having found that the repairs *were* substantially done, this rule must be

Discharged.

1837. *Nov.* 25.

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BULNOIS *v.* MACKENZIE.

(4 Bing. N. C. 127—134; S. C. 5 Scott, 419; 3 Hodges, 251; 7 L. J. (N. S.) C. P. 33; 6 Dowl. P. C. 215; 2 Carp. P. C. 406; Webs. P. C. 260.)

In actions for infringing a patent, the notices of objection delivered by defendant under 5 & 6 Will. IV. c. 83, s. 5 (1), are not conclusive at his peril; but the Court, or a Judge, under their general jurisdiction, as well as under the statute, may order a further and fuller notice.

THIS was an action on the case for infringing a patent for an improved cabriolet invented by Moses Poole, and by him assigned to the plaintiff.

By the statute 5 & 6 Will. IV. c. 83, s. 5 (1) it is enacted,

(1) See now sect. 29 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).—R. C.

"that in any action brought against any person for infringing any letters patent, the defendant, in pleading thereto, shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made on behalf of *such defendant or plaintiff respectively at such trial, unless [*128] he prove the objections stated in such notice; provided always, that it shall and may be lawful for any Judge at Chambers, on summons served by such defendant or plaintiff, or such plaintiff or defendant respectively to show cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms, as to such Judge shall seem fit."

The defendant pleaded several pleas, and delivered with them a notice of the following objections to the patent: first, that the alleged invention was not, at the time of granting the patent, new; secondly, that Poole was not the first and true inventor; thirdly, that Poole was not, at the time of granting the patent, in the possession of the alleged invention; fourthly, that at the time of granting the patent, the alleged invention had been used by others; fifthly, that the supposed improvements were not a new invention as to the public use thereof; sixthly, that the specification was imperfect in not ascertaining the nature of the invention, and not showing the application of the alleged improved construction. These objections were a mere echo of the pleas.

On the 14th of June last, PARK, J. after hearing counsel on both sides at Chambers, upon a summons for further and better objections, ordered the defendant's attorney to deliver a further and better account in writing of the objections intended to be relied on. Whereupon

The defendant added to his fourth objection, that the alleged invention had been used by James Hargrave Mann in England, and by divers other persons in other parts of the kingdom: altered the fifth, into an objection that the specification did not describe the nature of the *invention; that every matter or [*129] principle stated in it was already known to the public, and open

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to public use; and that it contained no new combination: and the sixth, into an objection that vehicles with two wheels, drawn by one horse, and entered behind, were in public use before the granting of the letters patent; and that the specification did not set out, with any certainty, what Poole claimed as his invention.

The plaintiff then took out a summons, calling on the defendant to furnish the name, description, and place of abode of the persons referred to in the fourth objection, and further and better objections in lieu of the fourth, fifth, and sixth, or to be precluded from calling witnesses in support of the fourth.

VAUGHAN, J., after hearing counsel on both sides, on the 22nd of June made an order to that effect. The defendant then added to the first objection, that the details of the alleged invention (specifying them), as well as the alleged invention, were not new; and in place of the fourth, fifth, and sixth objections, substituted a minute detail of defects in the specification, concluding the whole with a statement of the address and description of James Hargrave Mann. Early in the present Term

Sir F. Pollock obtained a rule to rescind the two orders of the 14th and 22nd of June, and for the defendant to be at liberty, on the trial of the cause, to rely on the objections originally delivered with the pleas. He contended that, under the late statute, the defendant must deliver in a particular of objections at his own peril, and that the Judges had no authority to interfere under their general jurisdiction.

Wilde, Serjt. and *Hoggins*, who showed cause, insisted that
[*130] even if the late statute did not confer any authority *in this matter, the Court had a right to interfere by virtue of their general jurisdiction in regulating the proceedings in a cause: as, in ordering particulars of a plaintiff's demand; further particulars; the production and inspection of documents, and the like; for which orders there was no authority by statute. In *Blakey* v. *Porter* (1), they ordered a copy of an assignment of a lease, to enable the plaintiff to commence an action of covenant. And, in general, where a party can obtain an

(1) 1 Taunt. 386.

inspection of documents in equity, this Court will compel it in the progress of a cause. Under the statutes of set-off, the defendant may be said to act at his peril, and no express jurisdiction is given to the Court; and yet it is the constant practice to order amended particulars of set-off. But the proviso, in s. 5 of the late Patent Act, seems to point expressly to a discretion in the Court.

Here, the first notice of objections was altogether illusory and vague, and gave no more information than the plea. The plaintiff was at all events entitled to know the names and addresses of the other persons besides Mann, who were alleged to have used the plaintiff's invention; otherwise, if the evidence as to Mann were answered, the plaintiff might still be taken by surprise as to the others who were not named.

Sir F. Pollock and *R. V. Richards*, in support of the rule, argued, that to enforce these orders would be an unfair exposure of, and interference with, the defendant's evidence: that the jurisdiction of the Court in controlling the proceedings in a cause appeared by the Year Books to have commenced in the reign of Henry VII., when pleadings were *ore tenus*: the Court then compelled a defendant to produce a document; but that was *a usurpation which the Court would not now be disposed to [*131] extend; otherwise, it might become impossible to draw a line. The Court might be called on to order particulars of every plea that was pleaded; the time, place, and manner of *son assault demesne*, and the details of the trading, debt, and act of bankruptcy, which the plaintiff's assignees must prove upon being required to do so. The defendant being precluded from giving evidence of any objection of which he has not given notice, the sufficiency of the notice will be determined at the trial. And as to the names and addresses of the other persons mentioned in the notice, the defendant may be able to prove that several persons have been seen using it, with whose names he is unacquainted. In *Crofts* v. *Peach* (1), in an action for the infringement of a patent, the Court held, that the plaintiff could not be compelled to produce a specimen of the patent

(1) 2 Hodges, 110.

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articles to enable the defendant to prepare his defence to the action. If these orders be enforced, it will rest with a Judge at Chambers, and not with the defendant, to say on what evidence he shall go to trial: he proceeds on notices given by the Judge, and not on those for which the statute has made him responsible. The analogy of set-off has no application, for a set-off is a species of cross action, of which the party is bound to furnish all the particulars; and this is the first time that an order like the present has been made.

TINDAL, Ch. J.:

This is an application to set aside two orders of a Judge at Chambers; one, for further and better objections in answer to an action for infringement of a patent; that has been complied with, and therefore there is no occasion for setting it aside; the
[*132] other, for the address of James Mann and other *persons, who are alleged by the defendant to have used the invention before the plaintiff. To a certain extent, that order has also been complied with, for the address of James Mann has been furnished: to that extent, therefore, it is unnecessary to rescind it; and the only question is, whether it should be rescinded as to the name and address of the other persons. I accede to the proposition that the Court has the right to model these proceedings under its general jurisdiction; and I protest against the word "usurpation" which has been employed on the part of the defendant. It is admitted by the learned counsel that this jurisdiction was exercised in the reign of Henry the Seventh; it has constantly been acted on ever since; and it is most beneficial to the parties, who would otherwise be driven to a court of equity. But looking at the words of the statute 5 & 6 Will. IV. c. 83, s. 5, I think it falls clearly within the same construction as the statutes of set-off. I cannot see any objection to the Court's looking at notices delivered by the defendant, and determining whether or not they are sufficient. At the same time there is a generality in the words of the section, which leaves it open to doubt, whether under the words "notice of objection" we can require the defendant to furnish the names of those who are alleged to have used the plaintiff's invention.

We shall therefore rescind so much of the second order, as requires the defendant to furnish the names and addresses of those other persons. The consequence will be, that the Judge at Nisi Prius will admit or reject evidence as to those persons, according as he may deem them to fall within the terms of th notice or not; and then, one of the parties will tender a bill of exceptions. I regret that the defendant declines to preclude this inconvenience by complying now with the Judge's order.

VAUGHAN, J.: [133]

It is true that the order is new in specie; but before the recent Act and the new rules of pleading, the question was not likely to arise; because the defendant might give in evidence whatever he pleased, under the general issue. I think the construction I put on the Act was correct. It meant to afford the plaintiff more specific information than was given by the defendant's plea; and, therefore, I think the present notice insufficient; for if the defendant fails as to the alleged user by James Mann, he has only to resort to the others, as to whom the plaintiff must now be taken by surprise.

BOSANQUET, J.:

I entertain no doubt as to the power of the Court to decide on the sufficiency of these notices of objection. I do not consider it to have been created by the late Act of Parliament, but the fifth section of the Act engrafts itself on the practice already existing. The practice as to notice of set-off is exactly analogous. The defendant originally gave merely the heads of his set-off, which afforded the plaintiff little information; the Courts therefore required him to furnish such particulars as should enable the plaintiff to understand what was to be proved at the trial; not, indeed, to lay open his case, or the evidence by which it was to be supported, but give a reasonable account of the nature of the transaction. I have no doubt, therefore, of the power of a Judge to order a further notice of objections: but I think the order goes too far in requiring the names of all the others, who are alleged to have used the invention. *Andrews* v. *Bond* (1) is

(1) 8 Price, 213, 538.

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in point. There, the plaintiff had been nonsuited, on the ground that a notice of set-off had given sufficient information of the sum intended to be set-off against the demand, and that the [*134] *defendant was not precluded by his particular of set-off, from entering into a proof of a counter demand not stated there; that nonsuit was afterwards set aside, and the Court, considering that he *was* precluded, granted a new trial.

COLTMAN, J.:

As far as the jurisdiction of the Court is concerned, I think this question must be decided on the same principle as questions under the statute of set-off. The recent statute, no doubt, requires a pretty full notice to restrain the generality of a defence: but, perhaps, it would be throwing too great a difficulty on the defendant to require him to disclose the name and address of all persons who are alleged to have been seen using the plaintiff's invention. To that extent, therefore, I think the Judge's order should be rescinded.

Rule absolute accordingly.

1837. *Nov.* 25.

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GOULD AND OTHERS *v.* OLIVER (1).

(4 Bing. N. C. 134—143; S. C. 5 Scott, 445; 3 Hodges, 307; 7 L. J. (N. S.) C. P. 68.)

The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship owner for a loss by jettison.

THE second count of the declaration stated, that whereas the plaintiffs, before and at the time of the happening of the damages and losses in that count mentioned, were the owners and proprietors of certain merchandize and chattels, to wit, twenty-six pieces of timber, then being in and on board a certain ship or vessel of the defendant, and laden and placed on the deck thereof, to be carried and conveyed therein for freight payable to the defendant in that behalf, on a certain voyage whereon the said ship was then proceeding, to wit, from Quebec to London; and

(1) The sequel (1840) is reported in 2 Man. & Gr. 208, and will be dealt with in the corresponding volume of the Revised Reports.—R. C.

whereas, *before and at the time of the loading of the said last-mentioned pieces of timber, in and on board the said ship or vessel, there had been, and was, a certain ancient and laudable custom used and approved of, touching and concerning the loading of timber in and on board ships or vessels trading between Quebec and London, and employed in carrying timber from Quebec to London aforesaid, that is to say, that the owners of such ships or vessels have had, and have been used and accustomed to have, and of right have had, and still of right ought to have for themselves and their servants, the liberty and privilege of loading and placing on the deck of such ships or vessels, a reasonable part of such timber, as they from time to time respectively are employed to bring from Quebec to London; and whereas also the said ship or vessel, in that count first mentioned, at the time of the happening of the damages and losses in that count mentioned, was a ship or vessel trading between Quebec and London, and employed in carrying timber from Quebec to London aforesaid; and the said twenty-six pieces of timber, so laden and placed on the deck of the said ship or vessel, were then a reasonable part in that behalf of the timber which the defendant was then employed to carry in that voyage by the said ship or vessel from Quebec to London; and the said twenty-six pieces of timber were laden by the defendant on the deck of the said ship or vessel, in pursuance of and according to the said custom; and whereas also, whilst the said ship or vessel was sailing and proceeding on her said voyage with the said chattels and merchandize on board, to wit, on, &c., by storms, winds, and tempestuous weather, in order to preserve the said ship or vessel, it then became expedient and necessary to throw and cast overboard the said chattels and merchandize, being the property of the plaintiffs of great value, to wit, of the value of 100*l.*; and the same were *then accordingly cast and thrown overboard, and became, and were wholly lost to the plaintiffs; and the said ship or vessel was, by means of the premises, then saved and preserved, and afterwards, to wit, on, &c., arrived safely, to wit, at London aforesaid; of all which last-mentioned premises, the defendant afterwards, to wit, on, &c., had notice; and then, in consideration of the last-mentioned premises,

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promised to pay the plaintiffs so much money as the defendant, as owner of the said ship, and interested in the said freight, was liable to contribute to the said losses and damages in a general average, on request; the plaintiffs averred, that the defendant, as such owner of the said ship, and so interested in the said freight, was liable to pay and contribute to the said losses and damages, in a general average, a large sum of money, to wit, the sum of 20*l.*: whereof the defendant afterwards, to wit, on, &c., had notice: yet the defendant disregarded her said promise, and had not paid the last-mentioned sum of money, or any part thereof.

Plea: that though true it was, that before and at the time of the loading of the said pieces of timber in and on board the said ship or vessel, there had been and was the said custom, in the second count mentioned, yet there had not been, and was not any custom that any contribution and general average should be paid upon the loss or damage of timber so laden and placed, as in the said count mentioned, and cast and thrown overboard as in that count mentioned; and that, the defendant was ready to verify, &c.

Demurrer: that it was admitted in and by the last-mentioned plea, that such custom existed in fact as was stated in the second count of the declaration; and that the matter sought to be put in issue by the said plea was a conclusion of law necessarily resulting from such custom in fact; and also that no apt, [*137] sufficient, or material *traverse of fact could be taken upon the matter alleged in the said last-mentioned plea.

Joinder.

The case was argued in Trinity Term by

Wilde, Serjt., for the plaintiffs:

The plea is ill, and the plaintiffs are entitled to contribution. By the rule of the Rhodian law, if goods are thrown overboard in order to lighten a ship, the loss incurred for the benefit of all shall be made good by the contribution of all: Abbott on Shipping, part 3, chap. 8, s. 2, p. 355; *Price* v. *Noble* (1): and there is nothing to exempt this defendant from the operation of the general rule. For this is not a question between the different

(1) 13 R. R. 566 (4 Taunt. 123).

shippers of goods, nor between assured and underwriter; but between the shipper, and the owner of the ship: and though, in general, the owners of other goods, and insurers, are exempted from contribution in respect of the jettison of goods laden on deck, because such a mode of lading obstructs the management of the ship: French Ordinance, liv. 3, tit. 8, art. 13; *Backhouse* v. *Ripley* (1); Abbott on Shipping, part 3, chap. 8, s. 13, p. 368; yet those parties are not exonerated where there is a custom for loading on the deck: *Da Costa* v. *Edmunds* (2): nor is the owner ever exonerated; because if the goods were placed there without the consent of the shipper, the shipowner shall not take advantage of his own wrong; and if they were placed there by the consent of the shipper, it must have been at the request and for the convenience of the shipowner, who ought not thereby to escape from his general liability. The responsibilities of underwriters depend on the contract in the policy of insurance, while the claim for general average rests on a general rule of law: *Simonds* v. **White* (3), *Price* v. *Noble*; and in the [138] French Ordinance, b. 2, tit. 1, art. 12, fo. 397, a case is referred to where there being a known usage upon the voyage in question to load goods upon the deck, the under-deck cargo of flour was held bound to contribute to the jettison of the upper-deck cargo. Where the goods are improperly placed on the deck, the owners of other goods are not liable: but the owner of the ship is never exonerated from contribution; because he, or his servant the captain, might have prevented the improper stowage: Code Napoleon (Commerce), art. 421, Laws Ancient and Modern, of the Sea, 323, 325: but here it is expressly averred in the declaration, that the goods were properly stowed, according to the custom of the trade.

Stephen, Serjt., for the defendant:

If this action proceeds on the custom, the count is insufficient. The custom is not alleged to have existed from time immemorial; and even if that should be deemed unnecessary in a custom of trade, at all events, the usage should have been distinctly set

(1) Park on Ins. 26.
(2) 16 R. R. 763 (4 Camp. 142).
(3) 26 R. R. 560 (2 B. & C. 805).

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forth; for time and usage are the two pillars of custom: 1 Leon. 242; Bro. Abr. Custom, fo. 251, pl. 51; Co. Litt. 110 b, 113 b. All customs, too, are local; a qualification which the count has has not attached to the custom in question. If it existed, it impliedly became a part of the defendant's contract, which should have been set forth accordingly, as it was in *Birkley* v. *Presgrave* (1).

The main question, however, is, whether, where it is usual to stow goods on deck, contribution may be claimed in respect of the jettison of such goods. Now the general rule is, that contribution cannot be claimed in respect of goods laden on deck. And to that rule there is no exception; for though it is true [*139] that by another *rule the master is allowed to load goods on the deck where such is the usage of the particular voyage, Abbott on Shipping, p. 363, yet there is no authority for saying that he is therefore liable to general average. *Da Costa* v. *Edmunds* was an action against an underwriter, and the claim turned on the construction to be put on the contract, not on the general law. The master or owner may be liable for the injury in an action on the case for improperly stowing, but not for a general average. By the Ordinance of Louis XIV., art. 12, s. 16, no master shall lay any goods on his ship's deck without consent of the owners, on pain of being answerable for all damages; and by art. 13, s. 33, no contribution shall be demanded for payment of such goods as shall be on deck, leaving the owner his recourse against the master. To the same effect is Code Napoleon (Commerce), 421, Emerigon, cap. 12, s. 42, Pardessus, Cours de Loi, 3 vol., art. 795, p. 192. If the master has the consent of the owner to put his goods there, he is free from all responsibility. All these authorities speak of the master, and not of the shipowner. The authority of Emerigon is decisive, and overrules the case in the French Ordinance, of the cargo of flour; and in Phillipps on Insurance, 323, a case appears to have been decided in the American Courts, in which it was held that where there was a custom to that effect, goods might be carried on deck without the owners' consent, and without any claim against the other shippers or the shipowner

(1) 6 R. R. 256 (1 East, 220).

for contribution. Common peril is the principle of the law of general average; but goods below deck are not in equal peril with goods above; and it is a *non sequitur* to say that because goods *may* be loaded on deck, therefore they are entitled to contribution for jettison.

Wilde, in reply:

Whether there be an exception as to goods laden on deck, or not, an action against the *owner of the ship, who is responsible for the correct loading, falls within the general principle of the Rhodian law, whatever may be the case with underwriters or shippers of other goods; it was not necessary therefore to state the custom in the declaration; but all the earlier books which mention the law have laid it down without the exception. The body of Sea Laws, p. 91, art. 9, 22, 25, 38, 43. The laws of Oleron, in the same book, p. 132, art. 8, 9, 32. Valin, third book, tit. 8, art. 13; second book, tit. 1, art. 12. Wisbuy, art. 20, 21, 38, 40, 43. Consolato del Mare, c. 94. Emerigon, vol. 1, c. 12, s. 1, 2. No doubt the rule is subject to the implied qualification that the goods be properly laden, as they were here, being laden according to the custom; but if they were improperly laden, it is not open to the shipowner to take the objection, and discharge himself by his own wrong: and though an action might lie against the master for improperly lading, the shipper may have a concurrent remedy by suing for contribution. [*140]

The proposition laid down by the American writer Phillipps is stated much too broadly, and is not borne out by the decision to which he refers. There is no decision on the general question, as assumed on behalf of the defendant.

Cur. adv. vult.

TINDAL, Ch. J.:

The question upon this record arises upon the second count of the declaration, in which the plaintiffs declare for contribution against the defendant, the shipowner, in respect of certain timber of the plaintiffs, which was laden on the deck of the defendant's vessel, to be carried on a voyage from Quebec to London, for freight to be paid to the defendant; and the plaintiffs

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state in this count a certain ancient and laudable custom, touching the loading of timber on *board ships engaged in the said voyage, by which custom the shipowners have the liberty and privilege of loading, on the decks of their ships or vessels, a reasonable part of the timber which they are employed to carry on such voyage. And the count then alleges that the timber in question was a reasonable part of the timber which the defendant was employed to carry upon that voyage, "and was laden on the deck of the ship, in pursuance of and according to such custom." The defendant pleads to this count, that there is not any custom that any contribution and general average should be paid on the loss or damage of timber placed on deck and cast overboard; to which plea the plaintiff demurs.

It has been urged in argument by the defendant, that the custom stated in the second count has been pleaded without sufficient certainty or formality; but as this objection does not arise upon a special demurrer to the declaration itself, we think no objection in point of form can now be taken; and that the allegation in substance and effect amounts to a statement of a usage and practice of loading ships generally observed upon the voyage in which the vessel was engaged; and consequently, that it must have been known to both the contracting parties, the shipowner and the owner of the timber, who must be taken to have entered into this contract with reference to it.

The question, therefore, before us is, not whether generally the owner of goods laden on deck which are thrown overboard for the preservation of the ship and the rest of the cargo, is entitled to contribution against the owners of the ship and of the residue of the cargo; but whether in this special and particular case, where the shipowner has laden the goods on deck under a privilege reserved to him by the general usage and practice of the voyage, the owner of the goods may claim contribution from such shipowner.

[142] And upon the best consideration we can give to this question, referring at the same time to the foreign authorities, and to the few decisions which have taken place in our own Courts, we think the plaintiff entitled in this case to contribution against the shipowner.

The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard for the preservation of the ship and cargo, shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception, by the foreign writers, "that goods laden on the deck and cast into the sea, shall not receive contribution; saving to the owner of the goods his recourse against the master or shipowner." Consol. del Mare, 183. Ordinance, liv. 3, tit. 8, art. 13. Emerigon, ch. 12, s. 42. Code de Commerce, art. 421. Now, where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point. Valin, tit. du Capitaine, art. 12, Consol. del Mar. cap. 183. And the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion. Unless, therefore, the owner of the timber in this case, has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss in consequence of his timber having been thrown overboard for the benefit of all; an inference directly at variance with the general rule above laid down, and, indeed, contrary to the authority of the foreign writers. For Valin lays it down, that the rule of article thirteen does not apply in respect of boats and other small vessels going from port to port, "where the usage is to *load merchandizes on the deck." The latter words [*143] of which text writer give the reason for throwing such a case out of the exception into the general rule for contribution, at least so far as the ship is concerned.

As to the authorities in the English Courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our Courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that for goods so laden, the underwriters are not responsible: *Ross* v. *Thwaite*, Park on

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Insurance, 26; *Backhouse* v. *Ripley*, *ib.* But in the case of *Da Costa* v. *Edmunds* (1), it was left to the jury to say, whether there was a usage to carry on deck goods of the description of those thrown overboard; and the jury having found such usage the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties; but it appears to fall within the same principle of decision.

We think, therefore, the judgment on the second count must be for the plaintiffs.

Judgment for plaintiffs.

1837. *Nov.* 25.

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(4 Bing. N. C. 148—161; S. C. 5 Scott, 453; 3 Hodges, 277.)

By the 7th custom of the manor of P. the lord is to have for a heriot, on every descent, the best quicke cattle for every yard and half yard of land: by the 17th, if any tenant shall let his land, and at his decease the lord not answered the best beast for his heriot, which did commonly manure the premises, the person to whom the land ought to come shall pay to the lord, within six weeks after the death of the tenant, 3*l.* for every yard land, and 40*s.* for every half yard, instead of a heriot: Held, that where the tenant died after having let his land, the lord was entitled only to the pecuniary payment in lieu of the heriot.

THIS was an action of trover brought by the plaintiff against the defendant, to recover damages for the conversion of a horse, alleged in the declaration to be the property of the plaintiff, and to have been converted by the defendant to his own use.

[*149] The defendant pleaded that the plaintiff was not *possessed of the said horse as of his own property; on which plea issue was joined.

By consent of the parties, the following case was submitted for the opinion of the Court.

The manor of Painswick, in the county of Gloucester, is an ancient manor, the lords of which have, from time immemorial, enjoyed the right of taking certain fines and heriots from the tenants of the manor, according to the custom of the manor as hereinafter set forth, and the customary and copyhold messuages, lands, tenements, and hereditaments, parcel of the said manor, have been, from time immemorial, used and accustomed to be

(1) 16 R. R. 763 (4 Camp. 142).

granted and demised by copy of court roll of the said manor, for estates of inheritance in fee simple, by the words *sibi* and *suis*, at the will of the lord, according to the custom of the manor.

In the twenty-eighth year of the reign of Queen Elizabeth, some difficulties having arisen between the then lord of the said manor and his tenants, touching the customs of the manor, those customs were declared and explained, in and by a certain decree in a Chancery suit. The customs set out in that decree, were afterwards ratified and confirmed by an Act of Parliament, passed for that purpose, in the 21st of James I.

The 6th, 7th, 16th, and 17th of these customs are as follows:

6. "The tenants by their custome, tyme out of mynde used, may geve and sell their customary lands att their will and pleasure, making a surrender of the same, either in open Court to the hands of the steward for the tyme being, or else out of the Court, into the hands of the Reeve of that yere, or his deputie, in the psence of two customarie tenants of the same mannor, and the same surrender must be psented att the next Court, or else the surrender to be void, and upon every surrender so made and psented in Court, the lord is to have an *herriott, [*150] if the land be herriottable, that is to saye, for every yard and halfe yard of land, which the tenants hold, to geve or paye the best quicke cattle; and in default of such cattle, the best household stuffe or goods of what kinde soever." 7. "That upon every discent of anie customary lands of inheritance, the lord is to have one year's rent for his fine, and herriott in manner aforesaid, yf the land be herriottable." 16. "By the custome, every yarde or halfe yarde of lande, holden by coppie after the custome and manner is herriottable, and the heriot to be paid att the death of the tennte, that dyeth seised thereof, or upon the surrender of his possession when the reversion was surrendered before." 17. "Yf any customary tenante shall lett or sett his yarde or halfe yarde of lande, which is herryottable, and att his decease the lord not answered the best beast for his herryott, which did commonly manure the said pmisses by the space of one yeare next before his decease, or the full value thereof, that then, such pson to whome the same yarde or halfe yarde by the custome ought to come, shall pay to the lord

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or his officers, within six weeks next after the death of such tenant, three pounds for every yarde lande, and forty shillings for every halfe yard, insteade of an herriott; and in case defalte be made thereof, then yt shall be lawfull for the lord by his officers, to take one whole yeares proffitts of such yarde or halfe yard to his owne use and behoofe insteade of the said herryott."

By the 13th custom, tenants are allowed to demise their lands without license from the lord.

In the month of February, 1804, the plaintiff purchased the said manor of Painswick, and then became, and thence hitherto has been, and still is, the lord of the said manor, and seised in his demesne as of fee thereof.

On the 21st of July, 1823, Sir Berkeley William Guise, Bart., [*151] was admitted tenant to a half yard land heriotable, *parcel of the customary tenements of the said manor, called the Quarr, lying in the tything of Spoonbed, within the said manor, and held at the yearly rent of 1*l.* 7*s.* 4*d.*, and a heriot, according to the custom of the manor, on descent and alienation, when it should happen; and the said Sir B. W. Guise then became, and was, and continued until the time of his decease hereinafter mentioned, seised of the said last-mentioned tenement in his demesne as of fee, at the will of the lord, according to the custom of the manor. Sir B. W. Guise afterwards, in or about the year 1830, demised the last-mentioned tenements from year to year, to John Bailey, to hold the same as such tenant thereof under the said Sir B. W. Guise, and J. Bailey became such tenant; and his tenancy under Sir B. W. Guise continued until the decease of the latter, who died on the 23rd of July, 1834, having before then made his last will and testament in writing, and thereby appointed the defendant his executor, who, upon the death of Sir B. W. Guise, took upon himself the burthen of the execution of the will, the said J. Bailey remaining and continuing in the occupation of the said tenement from the death of Sir B. W. Guise, until the Michaelmas thereafter. The copyhold tenement descended to the heir-at-law of Sir B. W. Guise.

Upon the death of Sir B. W. Guise, the plaintiff claimed the best quick beast of the said Sir B. W. Guise, at the time of his death, as a heriot due on the descent of the said copyhold

tenement; and in prosecution of such claim, and within the space of ten days after the death of Sir B. W. Guise, the plaintiff seized a certain horse, of the value of 50*l.*, being the horse in the declaration mentioned, being the best quick beast of Sir B. W. Guise at the time of his death, such horse not having commonly manured the said premises by the space of one year next before his decease; and by such *seizure became possessed thereof; [*152] whereupon the defendant so being such executor as aforesaid, and claiming the said horse as part of the personal estate of Sir B. W. Guise, deceased, retook the said horse from the plaintiff, and converted the same to his own use. The defendant after the seizure of the said horse by the plaintiff, and within six weeks next after the death of Sir B. W. Guise, tendered to the plaintiff the sum of 2*l.* for the said half yard land instead of an heriot, but the plaintiff refused to accept the same.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action: if the Court should be of opinion that the plaintiff was so entitled, judgment was to be entered for the plaintiff, by confession, for 50*l.* damages; but, if the Court should be of opinion that the plaintiff was not entitled to recover, then judgment of *nolle prosequi* was to be entered for the defendant.

R. V. Richards, for the plaintiff:

The plaintiff, as lord of the manor of Painswick, is entitled to claim the horse in question, under the general law, and under the sixth and seventh customs of the manor of Painswick. Under the general law the heriot accrues to the lord at the moment of the tenant's death. The title to it is not deferred till the time of the lord's election, but has relation to the period of the death; and the lord can take no chattel but that which belonged to the tenant: 2 Scriven on Copyholds, 463, 3rd edit.; *Parton* v. *Mason* (1). So that in this case, where the tenant had demised the land, if he had died without possessing a beast, the lord could have had no heriot. But the right which attached on the death of the tenant having become complete by *seizure, it is for [*153] the tenant to show how that right has been devested. He will

(1) 2 Dyer, 199 b.

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contend that, under the seventeenth custom, the lord is entitled to 40*s.* for every half yard of land in lieu of a heriot, where the tenant, as here, has demised. But that is only where the lord is "not answered the best beast which did commonly manure the premises." Here, the lord has been answered the best beast: his right accrued on the death of the tenant; (customs 6 and 7;) it was completed by seizure ten days afterwards; and he was not confined by those customs to seize on the land itself. The meaning of the seventeenth custom was to give an option to the landlord: if it were otherwise, the tenant, by demising a minute fraction of his land, might defraud the lord of a valuable beast upon payment of 40*s.* or 60*s.* But the lord's right is settled by the sixth and seventh customs, and there is nothing in the seventeenth incompatible with it. The seventeenth custom does not, in any manner, exonerate the personal estate of the deceased tenant from the primary liability to satisfy the lord of his heriot; but provides for the protection of the lord in cases where the customary tenant has let his land, which he is allowed to do by the thirteenth custom, or where the tenant dies without a beast, or the lord is unable to seize it.

Stephen, Serjt. for the defendant:

The defendant having, pursuant to the fourteenth custom, tendered 2*l.* within six weeks after the death of the tenant, in respect of the land which had been demised by the tenant, is thereby discharged from any claim for a heriot: and, at all events, the plaintiff had no right to seize the beast in question, because it had not commonly manured the land for a twelvemonth, as required by the seventeenth custom.

[*154] The sixth and seventh customs apply to the case *where the tenant is in occupation of the land: the sixteenth and seventeenth raise an exception in the case where the land has been underlet. Under the sixth and seventh sections the lord may seize the heriot: it does not lie in render: *Garland* v. *Jekyll* (1); but the language of the seventeenth entitles him to a pecuniary compensation where he is not answered the best beast; language which seems to give to the tenant the alternative of answering

(1) 27 R. R. 630 (2 Bing. 273, 294).

by render of the beast, or payment of the substituted fine. The custom was intended by the arbitrators as a commutation for the heriot, to avoid disputes where the tenant did not occupy: a half yard land is about ten acres, and 2*l.* or 3*l.* were about the average value of a good beast at the time of the award.

All customs are to be taken strictly against the lord. Year Book, 5 Hen. VII. 41: "Nota per Keble and Vavaser que un custom sera pris strict, car il ad été adjudge que l'où un custom fuit que un enfante à l'age de 15 ans puit faire feoffment uncore un release fait per lui al tiel age est void." And in *Arthur* v. *Bokenham* (1), the Court said, "All customs which are against the common law of England ought to be taken strictly, nay, very strictly, even stricter than any Act of Parliament that alters the common law. It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing; for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage. And, therefore, you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom."

So odious are heriots that equity will not interfere: 2 Eq. Cas. Abr. 279. However, the seventeenth custom, here, gives a boon to the lord; for he may seize the beast of the occupier, though the tenant dies without one, and the land is made answerable for the value. 2*l.* and 3*l.* seem to have been the ordinary commutation for a beast, in the time of Charles II. and James II.: Vin. Abr. Heriot D.; *Hangon* v. *Carve* (2). But the tenant is entitled to the alternative given by the seventeenth custom. And there is no novelty in it, for the Year Book, 1 Edw. IV. pl. 14, contains the qualification of the beast manuring the land. It is found also in lib. Assizarum. Ann. 27, pl. 24; Fitz. Abr. Heriot, pl. 6; *Parton* v. *Mason* (3). [155]

(1) 11 Mod. 160.
(2) 1 Sid. 437.
(3) 2 Dyer, 199 b.

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The case of underletting being expressly provided for by custom 17, the lord is limited by it; and that custom coming subsequently to custom 6, must be taken to control it. *Paget* v. *Foley* (1) was decided on this principle. The 3 & 4 Will. IV. c. 27, s. 42, enacts that no arrears of rent shall be recovered by distress, action, or suit, but within six years next after it shall become due: but 3 & 4 Will. IV. c. 42, s. 3, enacts that all actions of debt for rent upon an indenture of demise, and all actions of covenant or debt upon bond or other specialty, shall be brought within twenty years after the cause of action.

(TINDAL, Ch. J.: If this is a general enactment, the subsequent declaration, that an action of covenant may be commenced during a longer period, is virtually an exception out of the former. We are to reconcile the two enactments if it be possible; but if it be not, the affirmative and negative cannot coexist, and the action of covenant must be taken as an exception.

[*156] PARK, J.: When I find the Legislature *using, in the second statute, language incompatible with the first, if the first is to be taken as involving a case of this kind, I must give effect to the latter.

BOSANQUET, J. thought the case included in the first Act. However (he observed), on this point, it is unnecessary to give any opinion; for if such be the true interpretation of the first Act, it is quite inconsistent with the second; and, in such case, the latter enactment must prevail.)

These customs having been confirmed by statute must be construed as a statute; and it is laid down in Hardr. 344, that "a statute ought, upon the whole, to be so construed, that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." In *Altham's* case, Lord Coke says, *Maledicta expositio est quæ corrumpit textum.*

R. V. Richards, in reply:

The lord's right vested, in other words it was answered, by the seizure, and nothing has occurred to divest it. If the

(1) 42 R. R. 698 (2 Bing. N. C. 679).

defendant's argument be correct, the lord is in a worse position where the tenant lets his land without leave than where he has no such indulgence. The lord cannot seize the beast of the occupier, or of a stranger; and according to that argument, if the tenant had no beast manuring the land, the lord receives only 60*s.* in lieu. Suppose only a part of the premises let; is the lord to lose the best beast and put up with the 60*s.*? Or suppose the beast manured the land for a part only of the year? These difficulties can only be met by conceding to the lord the option of asserting his right under customs 6 and 7: 2 Wms. Saund. 168 a.

Cur. adv. vult.

TINDAL, Ch. J.:

The question raised by this special case is, whether the plaintiff, as lord of the manor of *Painswick, was justified [157] in seizing the horse which is the subject-matter of this action, as a customary heriot due upon the death of the late Sir Berkeley William Guise, a customary tenant of the said manor. And the answer to this question appears to us to depend, not so much upon any discussion of the general law relating to heriots, as upon the proper construction to be put upon the customs of this particular manor. The customs are set forth in the decree of the Court of Chancery which forms part of this case, and which were afterwards confirmed by a private Act of Parliament passed in the twenty-first year of King James I.

Such of the customs of the manor as claim our particular attention, are the customs contained in the sixth, seventh, sixteenth, and seventeenth articles of the indenture set forth in the decree. It appears by articles 6 and 7, that a heriot is due by custom to the lord upon every surrender, and every descent, of all customary tenements of the manor that are heriotable; and that such heriot is "the best quick cattle; and in default of such cattle, the best household stuffe or goods, of what kinde soever, of the late tenant." And it appears further from article 16, that all half yard lands within the manor holden by copy (of which description is the tenement in question) are heriotable.

So far therefore as depends on these two customs, the case is

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free from all doubt. If no other custom had been set forth in the decree, the right of the lord of the manor to seize the horse, as the best quick cattle of the late customary tenant upon his death, would have been inevitable; and the plaintiff, the lord of the manor, would have been entitled to judgment in this action.

[*158]

But the difficulty arises from the custom set out in the seventeenth article, by which it is provided, that if *any customary tenant shall let or set his half yard land which is heriotable, and at his decease the lord not answered the best beast for his heriot which did commonly manure the said premises by the space of one year next before his decease, or the full value thereof, then such person to whom the same yard or half yard by the custom ought to come shall pay to the lord or his officers, within six weeks next after the death of such tenant, 3*l.* for every yard land, and 40*s.* for every half yard, instead of heriot; and in case of default, the lord may enter and take one year's profits.

Now on the part of the lord it is contended, that notwithstanding the case may fall within the seventeenth custom, by reason of the half yard land being let or set at the time of the tenant's death, the lord has still the right to the best beast of the tenant under the sixth and seventh customs: that the seventeenth custom only applies where the lord "has not been answered the best beast," that is, has not seized the best beast under the general customs: and that the seventeenth custom gives him a cumulative remedy against the new tenant, or the land itself, in case the old tenant died without being possessed of a beast, or the lord was unable to seize it. On the other hand, the tenant insists that the seventeenth custom applies to and governs the case of a half yard land which is let and set at the time of the tenant's death, and that the lord, in such case, can only take the heriot given by that custom, or the substitute thereof provided by the same custom, and cannot resort to the heriot given him by the general custom. And we think we do less violence to the language of the customs by holding the interpretation contended for on the part of the tenant to be the right construction; namely, that where the half yard land is

let or set, the lord cannot seize the best beast or best household stuffe or goods *of the late tenant, but must have recourse to the heriot or the substitute thereof described and provided for by the seventeenth custom. [*159]

In the first place, it is difficult to hold the seventeenth custom as giving a cumulative remedy to the sixth, when it provides for and relates to only one of the cases governed by the general custom. For whilst the general custom gives the lord a heriot both upon surrender and descent, the seventeenth custom applies itself to the case of descent only. Again, whilst the general custom gives as a heriot "the best quick cattle, and in default of such cattle, the best household stuffe or goods," the seventeenth custom is altogether silent as to the alternative, and gives only the best beast. And as to the argument on the part of the plaintiff, that by the very terms of the seventeenth custom it is conditional only, namely, the lord not answered the best beast for his heriot, we agree that if the condition had stopped here, the conclusion contended for by the lord would have been irresistible; but it continues thus, "the lord not answered the best beast for his heryott which did commonly manure the said premises by the space of one year next before his decease, or the full value thereof." So that the custom is so far from letting in the ordinary heriot due upon a descent, that it gives a heriot substantially different in kind and description in every case falling within it: the one, giving the best quick cattle or best household stuff or goods of the customary tenant; the other, giving the best beast which ordinarily manured the land for the year next before the tenant's death (whose soever it might be), or the value thereof. We think, therefore, we can give force to the two customs in no other manner than by holding the one to apply to the case where the customary tenant dies in occupation of his heriotable tenement, and the other to the case of the death of the *tenant of a half yard of land which is let or set at the time of his death. [*160]

In the course of the argument many difficulties have been put by the plaintiff's counsel as to the possibility of enforcing the seventeenth custom; such as the legality of a custom to seize the best beast of the occupier, or of a stranger; the difficulty of

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applying the custom, if the premises have been manured only part of a year, and the like: but it is to be observed, that the custom provides an election which is free from all difficulty, viz. the value of the beast; and as the payment is to be made by the tenant, the election is with him. And still further, in case the payment of this heriot altogether fails, the custom provides a resource which is altogether free from exception, viz. the payment of 40*s.* instead of a heriot, and in default thereof, one whole year's profit of the land.

It is to be observed that by this construction the lord gains in many cases an immediate advantage; for he has the certainty of a heriot, or of a substitute for a heriot, which at the time was probably thought an equivalent in value, in every case of the death of a tenant of a half yard land which is let and set: and again, the customary tenant is bound to make good the payment in lieu of the heriot. Whereas, under the general custom, he has only the best quick cattle or best household stuff of the customary tenant, which may be worth less; or the tenant may die without possessing any. It appears, therefore, a more just as well as sound construction not to throw into the lord's scale the benefit of both customs. And we are the more inclined to this construction, because upon general principles the custom of heriots is not a custom to be extended in favour of the lord; and in this particular case the confirming of the customs was the result of a bargain or agreement between the lord and the
[*161] tenants, *in which, according to the language of the arbitrators to whom the differences were referred, "the tenants have given for buying their peace a very ample and liberal satisfaction to their landlord, not inferior, in our opinions, to the true worth of any benefits they shall or may receive by this order."

We therefore think, for the reasons above given, a *nolle prosequi* must be entered.

Judgment for defendant.

HARTSHORNE *v.* WATSON.

1838.
Jan. 17.

(4 Bing. N. C. 178—183; S. C. 5 Scott, 506; 1 Arn. 15; 2 Jur. 155; 7 L. J. (N. S.) C. P. 138; 6 Dowl. P. C. 404.)

[178]

An action of covenant lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor under such re-entry is to have the premises again, "as if the indenture had never been made."

THE declaration stated, that on the 1st of April, 1812, by a certain indenture then made between the plaintiff of the one part, and one Alexander Christie of the other part, the plaintiff demised unto the said A. Christie a certain shop, rooms, and premises, with the appurtenances thereto belonging; to have and to hold the said shop, rooms, and premises thereby demised, with the appurtenances, unto the said A. Christie, his executors, administrators, and assigns, from the 25th of March then last past, for the term of twenty-six years; yielding and paying yearly and every year during the said term unto the plaintiff, his executors, administrators, and assigns, the net yearly rent of 100*l.*, on the usual days of payment of rent in the year, that is to say, the 24th of June, the 29th of September, the 25th of December, and the 25th of March in each and every year, by even and equal portions; the first payment thereof to be made on the 24th of June then next ensuing, clear of all extra and additional taxes which might be laid or imposed upon the said thereby demised premises in consequence of any addition or improvements which the said A. Christie, his executors, administrators, or assigns might make to the same: by virtue of which demise the said A. Christie afterwards, to wit, on, &c., entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, &c., to him thereof granted: that after the making of the indenture, and during the term thereby granted, to wit, on the 24th of August, 1826, all the estate, &c. of the *said [*179]
A. Christie, of and in the said demised premises, with the appurtenances, by assignment thereof then made, legally came to and vested in the defendant, who then entered into and upon the said demised premises, with the appurtenances, and became and was possessed thereof for the residue of the said term, and

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continued so possessed thereof until and upon a certain other day, to wit, the 25th of March, 1830: that after the making of the indenture, and during the said term thereby granted, and after the defendant became such assignee as aforesaid, and while the defendant was possessed of the said demised premises, with the appurtenances, to wit, on the 25th of March, 1830, a large sum of money, to wit, the sum of 150*l.* of the rent aforesaid for the space of one year and two quarters of the said term then elapsed,—the whole of such period having elapsed after the defendant had become and was such assignee as aforesaid, and while she was so possessed of the said demised premises,—became, and was, and still is, in arrear and unpaid to the plaintiff.

The defendant, pleaded, fourthly, that in and by the said supposed indenture, it was provided that if the said rent should be behind and unpaid for the space of fourteen days next after any of the days of payment, or if the said A. Christie, his executors, administrators, or assigns should neglect or fail in or be guilty of a breach or non-performance of any of the covenants, clauses, conditions, and agreements in the indenture contained on the part of the said A. Christie, his executors, administrators, and assigns, to be performed and kept, from thenceforth it should and might be lawful to and for the plaintiff, his executors, administrators, and assigns, into and upon any part of the said demised premises, in the name of the whole, to re-enter, and the same to have again, as if the said indenture had never been made: that during the term in and by the *said indenture granted, to wit, on the 29th of March, 1830, default was made in the payment of the rent reserved, that is to say, for the said arrears which the plaintiff sought to recover in this action, to wit, the said sum of 150*l.* in the declaration mentioned; and the said A. Christie, his executors, administrators, and assigns therein neglected and failed in and were guilty of a breach or non-performance of the covenants, clauses, conditions, and agreements in the indenture contained on the part of the said A. Christie, his executors, administrators, and assigns, to be performed and kept, to wit, in the non-payment of the said rent for the term of the said arrears in the declaration mentioned; whereupon the plaintiff, by reason thereof, after the said 150*l.* of the rent

[*180]

aforesaid, for the space aforesaid had been and was in arrear, and fourteen days after the day of payment thereof, to wit, on the 1st of June, 1830, and before the commencement of this suit, into and upon all and every part of the said demised premises re-entered, and the same had again as if the said lease had never been made, whereby the said rent reserved and arrears thereof, and the said indenture, whereby the same was reserved and granted, became and were extinguished, merged, and released.

Fifthly, That the said supposed causes of action in the declaration mentioned did not, nor did either or any part thereof, accrue within six years next before the commencement of this suit.

Replication, as to the fourth plea (except so far as the same related to the non-payment of 25*l.* of the rent aforesaid for the space of one quarter of a year of the said term, to wit, the last quarter thereof mentioned in the declaration), that the plaintiff did not by reason of the non-payment of the said rent in the declaration mentioned, or any part thereof (except the non-payment of the said rent for the last-mentioned quarter), into or *upon all or any part of the said demised premises re-enter, or [*181] the same have again as if the said lease had never been made, in manner and form as the defendant had above in the said fourth plea alleged; and that, the plaintiff prayed might be enquired of by the country.

And as far as the said fourth plea related to the non-payment of the said sum of 25*l.* of the rent aforesaid, for the said space of one quarter of a year of the said term, to wit, the said last quarter thereof mentioned in the declaration, that the same was not sufficient in law.

Then, as to the fifth plea, so far as the same related to the non-payment of the sum of 25*l.* of the rent aforesaid, for one quarter of a year of the said term, to wit, the last quarter thereof mentioned in the declaration, that the cause of action in the declaration mentioned did accrue to the plaintiff within six years next before the commencement of this suit; and that, the plaintiff prayed might be enquired of by the country.

And so far as the same fifth plea related to all the causes of action in the declaration mentioned, except the non-payment of

HARTS-HORNE v. WATSON.

the said last-mentioned sum of 25*l.*, that the said fifth plea was not sufficient in law.

Upon which allegations of fact and law issue was joined.

Peacock, in support of the demurrer:

Three questions arise in this case. First, whether re-entry for breach of covenant is a bar to an action of covenant for rent accrued before the re-entry; secondly, whether the lapse of six years is a bar to an action of covenant for rent arrear; and thirdly, whether a plaintiff may traverse a portion of a plea and demur to the rest. And first, according to *Pennant's* case (1) (first resolution), an action of debt for rent lies as well after as [*182] before *re-entry, on the contract between the lessor and lessee: if so, the law must be the same as to covenant. But the plea is also bad, as alleging the re-entry for several quarters' rent; the lessor could only re-enter for the last quarter: re-entering for that, he affirmed the validity of the lease as to the preceding quarters: *Doe* d. *Wheedon* v. *Paul* (2). It is bad also for not showing that the re-entry was preceded by demand of the rent; if that formality was not observed, the re-entry was merely a trespass, and the lease not at an end.

Hoggins, for the defendant, abandoned the second point (on which *Peacock* had cited *Paget* v. *Foley* (3)), and the third, (on which he had referred to *Vivian* v. *Jenkins* (4) and *Cousins* v. *Paddon* (5)); but contended that, under the language of this deed, the plaintiff having upon re-entry resumed the property "as if the said indenture had never been made," it must be considered as if it had no existence, and consequently could not sustain the lessor's suit. *Pennant's* case was an action of debt which turned on privity of contract: here, the defendant, an assignee, was sued in covenant upon an alleged privity of estate; but the estate having been determined by the re-entry, the right to sue fell with it. A proviso for re-entry must be construed strictly; and if the reversioner takes advantage of it, he must take all the consequences. It is a sufficient penalty for the

(1) 3 Co. Rep. 64 a.
(2) 33 R. R. 708 (3 Car. & P. 613).
(3) 42 R. R. 698 (2 Bing. N. C. 679).
(4) 3 Nev. & Man. 14.
(5) 2 C. M. & R. 457.

assignee to lose his estate, and the lessor cannot be materially prejudiced, since he may re-enter on the default of a single quarter.

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TINDAL, Ch. J.:

The proper construction of this condition is, that from the time of re-entry, the lessor shall have the land as if the indenture had not been made: *for the period previous to re-entry the lessee or assignee had it subject to the indenture. It would be a singular construction to hold that to an action for rent on an instrument under seal, the lessee or assignee may plead, not payment, but that the lessor entered for non-payment; in other words, may deprive the lessor of his rent because he declines to submit to any further loss: the argument would apply equally to covenant for repairs, or other services to be rendered by the lessee, and is so unreasonable that it cannot be upheld.

[*183]

Judgment for plaintiff.

BLISS *v.* HALL (1).

1838. *Jan.* 17.

(4 Bing. N. C. 183—187; S. C. 5 Scott, 500; 1 Arn. 19; 2 Jur. 110; 7 L. J. (N. S.) C. P. 122; 6 Dowl. P. C. 442.)

[183]

To an action of nuisance for carrying on the business of a tallow chandler, in a messuage adjoining the messuage of the plaintiff, it is no plea that the defendant was possessed of his messuage, and the business was carried on, before the plaintiff became possessed of and occupied the adjoining messuage.

THE declaration stated that the defendant wrongfully and injuriously exercised and carried on in and upon the messuages of the defendant, being contiguous and near to the messuage of the plaintiff, the trade or business of a candle-maker or manufacturer of candles; and did then and there, to wit, on, &c., in and upon the said messuages of the defendant, wrongfully and injuriously melt and prepare, and caused to be melted and prepared for the making and manufacturing of candles, divers large quantities of grease and tallow; and did then and there, to wit, on, &c., in and upon the said messuages of the defendant, wrongfully and injuriously make and manufacture, and cause and procure to be made and manufactured divers large quantities of candles: by means of which several premises, divers noisome,

(1) *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642.

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noxious, and offensive vapours, fumes, smells, and stenches, on the several days and times aforesaid arose, issued, and proceeded
[*184] from *the said messuages of the defendant, and spread and diffused themselves over and upon and into and through and about the said messuage of the plaintiff; and the air in, over, through, and about the same was thereby then greatly filled and impregnated with the same noisome, noxious, and offensive vapours, fumes, smells, and stenches, and was then rendered and from thence hitherto had been, and still is, greatly corrupted, offensive, disgusting, unwholesome, and uncomfortable.

Plea, that the defendant was possessed of his said messuages for a long space of time, to wit, for the space of three years next before the plaintiff became possessed of his said messuage in the declaration mentioned, and before the plaintiff occupied, inhabited, and dwelt in the same; and that before and at the time when the defendant first became and was possessed of his said messuages, the said furnaces and stoves in the introductory part of this plea mentioned had been and then were erected, set up, and placed in and upon the same: that the defendant always, to wit, from the time at which he became so possessed of his said messuages, until and at and after the plaintiff so became possessed of his said messuage as in the declaration mentioned, and thence hitherto, had used, exercised, and carried on the said trade and business of a candle-maker, and had occasioned—the phenomena described in the declaration, (enumerating them as above)—in the same manner and form, and degree, and to the same extent, and at the same hours, and times, and seasons, as at the said time when &c., in the declaration and in the introductory part of this plea mentioned; and the same during all that time, and at the said time when &c., were and still are requisite and necessary to enable the defendant to carry on his said trade and business, in and upon his said premises, in the same manner
[*185] and form, and to the *same extent, as the defendant carried on the same at the time when the plaintiff came to his said premises in the declaration mentioned, near and adjoining to the premises and business of the defendant, so carried on as aforesaid: that the defendant lawfully enjoyed his said premises, manufactory, and business, before the plaintiff came to, occupied, or was possessed of his said premises in the declaration mentioned, in

the same condition, extent, manner, and form, as he enjoyed and possessed the same at the said time when &c., in the declaration mentioned, and of right ought still lawfully to enjoy the same without interruption or suit of the plaintiff; and that, the defendant was ready to verify.

Demurrer and joinder.

Butt, in support of the demurrer, cited *Elliottson* v. *Feetham* (1) as an authority, that it is no defence to an action for a nuisance to plead that the defendant was possessed of certain premises, and created and carried on the nuisance before the plaintiff came to occupy the adjoining premises.

Hoggins, contrà:

The defendant's business is lawful: Com. Dig. Action on the case for a nuisance. "An action upon the case lies for a nuisance to the habitation or estate of another; as, if a man erect anything offensive so near the house of another, that it becomes useless thereby, as a swine-stye, or a tallow furnace. But if he be a chandler, *quære*."

But even if it be a nuisance, a party who comes to it is not entitled to complain. It was his own election to approach so near.

(TINDAL, Ch. J.: Obstructing a watercourse is a nuisance: could the wrongdoer say in answer to a complainant, "I stopped the water before *you came below?") [*186]

The complainant there would object in respect of the estate of his predecessor, who might have had an immemorial right to the water; here, for aught that appears to the contrary, the defendant was the first occupier in the district. There must be some places in which such a business may be carried on; and when it is set up before other houses are built, those who erect them must do so subject to the rights of the first occupier to carry on a lawful business.

TINDAL, Ch. J.:

In this case the declaration alleges that the defendant injuriously carried on, in messuages contiguous to the messuage of the plaintiff, the trade and business of a candle maker, by

(1) 42 R. R. 557 (2 Bing. N. C. 134).

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which noxious vapours and smells proceeded from the messuage of the defendant and diffused themselves over the messuage of the plaintiff; and all that the defendant says in answer, is, that he carried on the business for three years before the plaintiff became possessed of the messuage he inhabits. That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is, a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment.

PARK, J.:

In *Elliottson* v. *Feetham* the COURT said that the defendant should at least have alleged a holding of twenty years' duration: here he does not go beyond three.

VAUGHAN, J.:

The smells and noises of which the plaintiff complains are not hallowed by prescription, and under this plea the defendant cannot justify their continuance.

[187] BOSANQUET, J.:

I am of the same opinion. The defendant has, *primâ facie*, a right to enjoy his property in a way not injurious to his neighbour; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance.

Judgment for the plaintiff.

1838. *Jan.* 22.

[229]

HICKS *v.* THE DUKE OF BEAUFORT (1).

(4 Bing. N. C. 229—233; S. C. 5 Scott, 598; 1 Arn. 55; 2 Jur. 255; 7 L. J. (N. S.) C. P. 131.)

The drawer of a bill being applied to for payment, said, "If the acceptor does not pay, I must, but exhaust all your influence with the acceptor first:" the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor: Held, that this admission was not to be taken as conclusive evidence of defendant's having received or waived notice of dishonour of the bill.

THIS was an action on a bill of exchange, drawn by the defendant and accepted by Lord Foley, payable in December, 1831.

(1) See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50(2)(*b*).—R. C.

The plea was, that the defendant had received no notice of the dishonour of the bill; upon which issue was joined.

At the trial, a witness stated that he called on the defendant on the subject of the bill, in May, 1832, when the defendant said it was hard upon him, as he had only drawn the bill for accommodation; that if Lord Foley did not pay, *he* must; but he desired the witness would exhaust all his influence with Lord Foley first. The witness having then applied to Lord Foley in vain, the defendant proposed to raise a sum of money by an annuity on the life of the defendant and Lord Foley; but the treaty was broken off, and the present action followed.

The learned Judge left it to the jury to determine, upon this evidence, whether or not the defendant had received notice of the dishonour of the bill; and, the jury having found for the defendant,

Wilde, Serjt. obtained a rule *nisi* for a new trial, on the ground of alleged mis-direction, and on affidavits of surprise.

He contended that, if the witness were believed (and the credit due to him was not left to the jury), the legal effect of the defendant's admission of his liability was, that he must be deemed to have received notice of the dishonour of the bill; and that, therefore, the jury should have been directed, that, if the witness were believed, *the notice must be considered as [*230
proved or waived. In *Lundie* v. *Robertson* (1), where an indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but, as the debt was justly due, he would pay it, Lord ELLENBOROUGH said, "when a man, against whom there is a demand, promises to pay it, for the necessary facilitating of business in transactions between man and man everything must be presumed against him. It was, therefore, to be presumed *primâ facie*, from the promise so made, that the bill had been presented for payment in due time, and dishonoured, and that due notice had been given of it to the defendant. But, taking the subsequent conversation as connected with the former, the

(1) 7 East, 231.

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only limitation of it would be, that the defendant stated that he had not had regular notice of the dishonour; but even that objection was waived in the same breath, for the defendant said that, as the debt was justly due, he would pay it. Then it stands on the first conversation, as an absolute promise to pay the bill; thereby admitting (for I do not put it on the ground of a waiver of any objection to the non-presentation of the bill in due time as existing in fact,) that there did not exist any objection to his payment of the bill, but that everything had been rightly done. That supersedes the necessity of the ordinary proof."

Talfourd, Serjt. and *Petersdorff* showed cause:

There is no rule of law under which any form of expression is to be held conclusive proof of a fact. It is for the jury to consider what effect ought to be given to the expression. In [*231] *Lundie* v. *Robertson* there was an *express promise to pay, upon which, as in *Potter* v. *Raynorth* (1), the Court mainly relied. *Fletcher* v. *Froggart* (2), *Gunson* v. *Metz* (3), and *Wood* v. *Brown* (4), exemplify the same principle. In *Pickin* v. *Graham* (5), the words "I suppose there will be no alternative but my taking up the bill, and if you will bring it on Tuesday I will pay the money," were held not sufficient to support an inference of notice. In order to dispense with proof of notice there must be an unconditional promise to pay: acknowledgment of liability is not sufficient: *Borradaile* v. *Lowe* (6), *Standage* v. *Creighton* (7), *Cuming* v. *French* (8).

As to waiver, the question cannot arise on an issue addressed exclusively to the point of notice.

Wilde and *Bagley*, in support of the rule, relied on *Lundie* v. *Robertson*:

The declaration of the defendant, that if Lord Foley did not pay, *he* must, was, in effect, a promise to pay; and that he

(1) 13 East, 417.
(2) 2 Car. & P. 569.
(3) 1 B. & C. 193.
(4) 1 Stark. 217.
(5) 38 R. R. 738 (1 Cr. & M. 725; 3 Tyr. 923).
(6) 4 Taunt. 93.
(7) 5 Car. & P. 406.
(8) 2 Camp. 106, *n.*

treated it as such himself appeared from his subsequent attempt to raise the money by annuity. Whether or not the defendant made the declarations ascribed to him by the witness, was, indeed, a question for the jury; but the effect of those declarations ought to have been determined by the Judge, as the effect of certain acts, upon the question whether or not a party is executor *de son tort*: *Padget* v. *Priest* (1).

TINDAL, Ch. J.:

The issue joined on this record is, that the defendant had due notice of the dishonour of the bill on which the plaintiff sues; and the question is, *whether, in commenting on the [*232] evidence in support of that issue, the learned Judge mis-directed the jury. I am of opinion that there was no mis-direction. The cases go to this point only; that if, after the dishonour of a bill, the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received notice of the dishonour; because men are not prone to make admissions against themselves; and, therefore, when the drawer promises to pay, it is to be presumed he does so because he knows the acceptor has refused. *Lundie* v. *Robertson* goes no further than that. There the defendant said "that he had not had regular notice, but, as the debt was justly due, he would pay it:" and the jury having presumed from those expressions that he must have received notice of the dishonour, the Court refused to interfere. There is no such distinct promise in the present case. At the interview with the defendant, in May, 1832, nearly six months after the bill became due, there was nothing like a promise to pay, but merely a request that the applicant would exhaust all his influence with Lord Foley first, as the defendant had drawn the bill merely for accommodation. There was nothing in this which amounted to an unconditional promise. It was evidence from which the jury might consider whether they could or could not infer that the defendant had received notice of the dishonour; and, if they had found for the plaintiff, the Court would not have set aside the verdict. But it was entirely a question for the jury; and the learned Judge did

(1) 1 R. R. 440 (2 T. R. 97).

HICKS v. THE DUKE OF BEAUFORT.

right in not withdrawing from them the effect of the evidence. Upon this ground, therefore, we cannot grant the rule; but, on the affidavits of surprise, there may be a new trial on payment of costs.

PARK, J.:

I think there was no mis-direction; but, on the affidavits, there may be a new trial.

[233]

VAUGHAN, J.:

It is putting it too broadly to say that this admission must be taken as conclusive that the defendant had received notice of the dishonour. It afforded a presumption, but there were circumstances from which the presumption might be rebutted; and, upon the specific issue, whether the defendant had received notice or not, it was for the jury to say what weight the evidence ought to have.

BOSANQUET, J.:

If the jury had found for the plaintiff I should not have been disposed to disturb the verdict; but I think there has been no mis-direction. The issue was on the notice: the evidence was presumptive only, open to be rebutted by circumstances; and it was for the jury to say what weight was to be ascribed to it. If the learned Judge had left only the question whether the witness was entitled to credit, and had withdrawn the question as to notice, the defendant might have tendered a bill of exceptions.

Upon the affidavits there may be grounds for having the case reconsidered, but there is no reason for granting a new trial on the score of mis-direction.

Rule absolute on payment of costs.

1838. *Jan.* 24.

[243]

BECKHAM *v.* KNIGHT AND DRAKE.

(4 Bing. N. C. 243—253; S. C. 5 Scott, 619; 7 L. J. (N. S.) C. P. 93.)

THIS was a case in which the Court of Common Pleas held that a dormant partner was not liable upon an agreement made with and signed by the ostensible partners. The case was

subsequently brought into the Exchequer Chamber, where all the Judges were agreed that the decision of the Court of Common Pleas upon the substantial question was wrong, though they considered that the judgment, which overruled a demurrer to a plea, might be supported on a technical point of pleading. In a subsequent action (*Beckham* v. *Drake*) brought in the Court of Exchequer, the Judges, recollecting what passed in the Exchequer Chamber, disregarded the decision of the Common Pleas, which has consequently been uniformly regarded as substantially overruled. The case of *Beckham* v. *Drake* ((1841) 9 Meeson & Welsby) will be reported in due course.—R. C.]

MOULE, PUBLIC OFFICER OF THE NORTH WILTS BANKING COMPANY, *v.* BROWN (1).

1838. *Jan.* 25.

[266]

(4 Bing. N. C. 266—269; S. C. 5 Scott, 694; 1 Arn. 79; 2 Jur. 277; 7 L. J. (N. S.) C. P. 111.)

A cheque drawn by F. on a banker at Bath, was cashed for defendant by a branch of the N. W. bank at Malmesbury, on Tuesday, March 28th. The same day it was forwarded to the principal N. W. bank at Melksham, twelve miles from Bath; on Friday, the 31st, it was presented at Bath and dishonoured: Held, that the presentment was not in time to give the N. W. bank any claim against defendant.

THE plaintiff declared on a banker's cheque for 27*l.*, drawn by Frederick Fry, the 28th of March, 1837, on Moger & Co., bankers at Bath; payable to bearer; delivered by Fry to the defendant; and by the defendant transferred to the North Wilts Banking Company.

Averment, that Moger & Co. did not pay the cheque, although it was duly presented to them for payment, whereof the defendant then had notice.

The second and fourth pleas alleged that the cheque was not duly presented to Moger & Co. for payment.

At the trial, before Patteson, J., last Wiltshire Assizes, it appeared that the chief office of the North Wilts Banking Company was at Melksham, and that they had a branch office at Malmesbury, about eighteen miles from Melksham, which is distant from Bath about twelve miles.

(1) See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 74.—R. C.

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On Tuesday, the 28th of March, the defendant having received the cheque from Fry in payment for goods, obtained cash for it at the Malmesbury office of the North Wilts Bank, though he was not a customer of the bank. By that office the cheque was on the same day remitted to the head office at Melksham.

[*267] From the head office at Melksham it was dispatched *on Thursday, the 30th, by a private hand, and was not presented to Moger & Co. at Bath till Friday, the 31st of March, when it was dishonoured, Fry having no effects in the hands of Moger & Co.

The defendant, who lived seven miles from Malmesbury, received notice of the dishonour of the cheque, on Saturday, the 1st of April.

It was the course of the North Wilts Banking Company, except in cases of doubt, to transmit to the chief office at Melksham cheques cashed at the branch offices.

The mail goes every night from Melksham to Bath, and Fry's cheque arrived at Melksham in time to have been sent to Bath by the mail of Tuesday night, March 28th.

PATTESON, J. told the jury that the cheque ought to have been sent to Bath on Wednesday, the 29th of March, and that the defendant was entitled to a verdict on the 2nd and 4th pleas. The jury found for the plaintiff; but by consent leave was reserved to move to enter a verdict for the defendant on the 2nd and 4th pleas.

Bompas, Serjt., having obtained a rule *nisi* accordingly,

Barstow showed cause:

The defendant being no customer of the North Wilts Bank, but having obtained cash upon Fry's cheque, as a matter of accommodation, must be taken to have transferred the cheque subject to the practice of that particular bank. It was the practice of that bank to transmit cheques from the branch offices to Melksham. Having received this cheque at a branch office on Tuesday, they were not bound by law to transmit it to Melksham before Wednesday; and when the cheque was at Melksham it would have been sufficient, according to all the cases, to have forwarded it to Bath by the next day's (Thursday's) post. If

that course, which the defendants were entitled to pursue, had *been adopted, the cheque would not have reached Bath before Friday, the day on which it was actually presented. But there is no inflexible rule that a cheque shall, at all events, be presented on the next day. It is a question for the jury whether, under all the circumstances of the particular case, the cheque has been presented with reasonable diligence. In *Rickford* v. *Ridge* (1) Lord ELLENBOROUGH said, "It is always to be considered, whether, under the circumstances of the case, the cheque has been presented with reasonable diligence. This is what the law-merchant requires. The rule that the moment a cheque is received by the post it should invariably be sent out for payment, would be most inconvenient and unreasonable." [*268]

(PARK, J.: In *Boddington* v. *Schlencker* (2), it was ruled that a cheque should be presented the day after it is received.)

That was the case of a London cheque. The case of a cheque on a country bank is very different, and public convenience requires a different rule. But the jury have decided in effect that this cheque was presented within a reasonable time; and that was a question of fact for them to determine.

(VAUGHAN, J.: When the jury have found within what time a cheque has been presented, it is a question of law whether that was a reasonable time: *Tindal* v. *Brown* (3).)

The plaintiffs have taken no more than the reasonable time for proceeding in the regular course of business.

TINDAL, Ch. J.:

The result of the cases, from *Rickford* v. *Ridge* to *Boddington* v. *Schlencker*, is, that the party receiving a cheque has till the following day to present it, where there are the ordinary means of doing so. Here, the plaintiffs resided in a post town, and if they *had transmitted the cheque to Bath by the next's day's post, it would have been presented on Thursday. If there [*269]

(1) 2 Camp. 537, 539.
(2) 38 R. R. 360 (4 B. & Ad. 752).
(3) 1 R. R. 171 (1 T. R. 167).

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was any sufficient reason for not pursuing that course, it lies on them to show it; but I think upon this state of facts they have been guilty of *laches*.

PARK, J.:

The cases are uniform that the presentment of the cheque should not be delayed beyond the next day.

VAUGHAN, J.:

That rule was laid down in *Rickford* v. *Ridge*, where Lord ELLENBOROUGH said, "the rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable that cheques received in the course of one day should be presented the next."

If any other rule were adopted, it would be difficult, if not impossible, to draw the line.

BOSANQUET, J. concurred.

Rule absolute.

1838. *Jan.* 26.

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YATES *v.* WHYTE AND OTHERS (1).

(4 Bing. N. C. 272—285; S. C. 5 Scott, 640; 7 L. J. (N. S.) C. P. 116.)

Plaintiff sued defendants for damaging his ship by collision: Held, that defendants were not entitled to deduct from the amount of damages to be paid by them, a sum of money paid to plaintiff by insurers in respect of the damage.

THIS was an action on the case, brought to recover damages sustained by the plaintiff by reason of the defendants' vessel, the *Gazelle*, having run foul of the plaintiff's vessel, the *Sesostris*, by and through the carelessness, negligence, misdirection, and mismanagement of the defendants, whereby the plaintiff's ship sustained damage, and was obliged to put into Portsmouth to repair.

The plaintiff sought to recover 293*l.* 14*s.*, the amount of the repairs, and also damages, on account of the detention of the *Sesostris* at Portsmouth.

(1) Approved and followed in *Dickenson* v. *Jardine* (1868) L. R. 3 C. P. 639, 37 L. J. C. P. 321; *Simpson* v. *Thomson* (H. L. Sc. 1877) 3 App. Cas. 279. And see cases cited in note to *Clark* v. *Hundred of Blything*, 26 R. R. 334.—R. C.

At the trial before Tindal, J. in 1836, the jury, as to the repairs, found a verdict for the plaintiff, but negatived his claim to damages for the detention. It was agreed that the amount of damages for repairs should be referred: and, accordingly, by an order of Nisi Prius, the same was referred to the award of a London merchant, who was empowered to ascertain the same; (the plaintiff undertaking to make no claim for damages arising from the detention of his vessel at Portsmouth;) and for the amount of damages so to be ascertained, the verdict was to stand. And it was further ordered, that if the arbitrator should make any allowance or deduction to the defendants, from the expenses incurred by the plaintiff, in effecting the said repairs, by reason or in consequence of any payment having been made to the plaintiff by any underwriter or insurance company, the arbitrator should state the fact of his having done so upon the face of his award for the opinion of the Court as to the propriety thereof

The arbitrator having taken upon himself the burthen *of the [*273] arbitration, the following admission was entered into by the attorneys of the respective parties: "that the work done, and materials supplied, and the items of expense mentioned in the statement of general and particular average, amounting to 293*l.* 14*s.*, were necessarily done, supplied, and incurred, to repair the damage sustained by the plaintiff's ship *Sesostris*, by the collision of the schooner *Gazelle*, as in the pleadings mentioned, save and except the several sums of 5*l.* 5*s.* and 3*l.* 12*s.* mentioned in such statement under the head 'Owners;' that the plaintiff, after the commencement of this action, received from the underwriters, under a policy of insurance upon the plaintiff's ship *Sesostris* for the voyage in question, valued therein at 5,000*l.*, on and in respect of the said damage, 172*l.* 4*s.* 11*d.*, being the particular average on the said ship, according to the said statement, after the deduction thereon made of 71*l.* 3*s.* 1*d.*, as is usual, for new materials employed in the repairs of the said ship instead of those destroyed or injured by the said collision; that the plaintiff also received from the consignors or consignees of the said cargo the further sum of 45*l.* 1*s.* in respect of the said damage, being the general average payable by the said consignors or consignees in respect of their goods on board

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the said ship; that this action was brought by the orders and instructions of the plaintiff;" that the plaintiff paid the said sum of 5*l.* 5*s.* for towing the said ship *Sesostris* on the 10th of January, 1834, from Portsmouth harbour to Spithead after the repairs were completed; and the said sum of 3*l.* 12*s.* for part of the pilotage and other charges mentioned in the particulars thereto annexed, and not allowed in the said statement.

In December, 1836, the arbitrator made his award, the material part of which was as follows:

[274] "First, having enquired into the damages so referred to me, and excluding any claim for any damages arising from the detention of the plaintiff's vessel at Portsmouth (no claim for such damages having been made by the plaintiff), I have ascertained, and do hereby ascertain, the same at 1*s.*; and I award, order, and determine that the amount of damages upon the verdict already entered up for the plaintiff be reduced to the said sum of 1*s.* And I further award and determine that, in so ascertaining the damages, I have made an allowance to the defendants of the sum of 172*l.* 4*s.* 11*d.* from the expenses incurred by the plaintiff in effecting the repairs of his vessel, the *Sesostris*, in the pleadings mentioned, by reason of the said last sum having been paid to the plaintiff for the said repairs by the underwriters, under a policy of insurance effected by the plaintiff upon the said vessel, the *Sesostris*. And I find that the said sum of 172*l.* 4*s.* 11*d.* was paid by the said underwriters to the plaintiff after the commencement of this action, and before the plea of the defendants was pleaded. And in case the Court of Common Pleas shall be of opinion that I have improperly allowed to the defendants the sum of 172*l.* 4*s.* 11*d.*, then I do hereby fix and ascertain the damages sustained by the plaintiff, and so referred to me as aforesaid, at the said sum of 172*l.* 4*s.* 11*d.*; and I do award and determine that the damages upon the verdict so entered up as aforesaid be reduced to the said sum of 172*l.* 4*s.* 11*d.*"

The arbitrator also found that the plaintiff paid the sum of 258*l.* 15*s.* as the premium for the said insurance; and that the only loss which accrued on the voyage was the loss occasioned by the collision aforesaid:

That this action was commenced and carried on by the orders

and instructions of the plaintiff, and for *his own use and benefit, and was not commenced or carried on by the authority or instructions of the underwriters. YATES v. WHYTE. [*275]

No other evidence than that above stated was laid before the arbitrator.

The question for the opinion of the Court was, whether the allowance made by the arbitrator to the defendants, by reason of the payment made to the plaintiff by the underwriters, was a proper allowance.

Wilde, Serjt., for the plaintiff. * * *

Sir W. Follett, for the defendants. * * * [278]

Wilde, in reply. * * * [282]

TINDAL, Ch. J.:

I think this case is decided in principle by that of *Mason* v. *Sainsbury* (1). There, a party whose property had been burnt by a mob was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 Geo. I. for the benefit of the insurers. The only distinction between that case and the present, is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with the insurers is no bar to a claim for damages against the wrong-doer. Lord MANSFIELD says, "Though the office paid without suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the hundred under this Act? Who is first liable? If the hundred be *first liable, still it makes no difference. If [*283] the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an *indemnity*. We every day see the insured put in the place of the insurer. In abandonment it is so; and the insurer uses the name of the insured. It is an extremely clear case. The

(1) Marshall on Insurance; 3 Doug. 60.

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Act puts the hundred in the place of the trespassers; and on principles of policy, I am satisfied it is to be considered, as if the insurers had not paid a farthing." That the insurers may recover in the name of the assured after he has been satisfied, appears from *Randal* v. *Cockran* (1), where it was held that they had the plainest equity to institute such a suit. Such therefore is the situation of the underwriters here, that this case has received its answer from it. If the plaintiff cannot recover, the wrong-doer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the plaintiff.

PARK, J.:

I am of the same opinion. This point has been decided ever since the time of Lord HARDWICKE; so much so that it has been laid down in text-writers, that where the assured, who has been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal* v. *Cockran* it was said they had the clearest equity to use the name of the assured, in order to reimburse themselves, and in *Mason* v. *Sainsbury* the Judges were all unanimous: they held indeed that the insurers could not sue in their own names; but they confirmed the general doctrine, that the wrong-doer should be ultimately liable, notwithstanding a payment by the insurers.

VAUGHAN, J.:

No case has been cited which establishes the point contended for on behalf of the defendants, *while *Randal* v. *Cockran*, and *Mason* v. *Sainsbury*, are in point for the plaintiff. [*284]

In *Mason* v. *Sainsbury* it was argued as here, that the plaintiff, having received his indemnity from the insurers, could not recover a second time against the hundred; but Lord MANSFIELD said, "Who is first liable? If the hundred be first liable, still it makes no difference: if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an indemnity. We every day see the insured

(1) Park Ins.; 1 Ves. Sen. 98.

put in the place of the insurer." And in *Clark* v. *The Hundred of Blything* (1), the authority of *Mason* v. *Sainsbury* was expressly recognised by Lord TENTERDEN.

BOSANQUET, J.:

I am of the same opinion, and consider the case as decided by *Mason* v. *Sainsbury* in 1782. It is true that in *Clark* v. *The Hundred of Blything* (1), Lord TENTERDEN made observations on the object of the statute of 1 Geo. I.; but there was nothing in those observations to impeach the case of *Mason* v. *Sainsbury*, where BULLER, J. said, "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, strictly taken, is a wager; liberally, it is an indemnity: but on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted, that the hundred is put in the place of the trespassers. How could the trespassers have availed themselves of this satisfaction, made by the office? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle *is, that the insurer and insured are as one person; and in that [*285] light, the paying before, or after, can make no difference." There, the action was brought for the benefit of the underwriters; here, the plaintiff sues on his own account. But I think that makes no difference; for he has the legal right to the damages, and if the underwriters have an equitable right they will establish it in another Court.

Judgment for plaintiff.

(1) 26 R. R. 334 (2 B. & C. 254).

1838.
Jan. 31.

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GATLIFFE *v.* BOURNE AND OTHERS (1).

(4 Bing. N. C. 314—332; S. C. 5 Scott, 667; 7 L. J. (N. S.) C. P. 172.)

A carrier by sea, under a bill of lading of goods "to be delivered in the like good order, &c., at the port of, &c., unto Mr. ——, or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss.

THE first count of the declaration stated, that the plaintiff, on the 22nd of August, 1836, at the defendants' request, caused to be delivered to the defendants divers goods and merchandise, to be taken care of, and safely and securely carried and conveyed by the defendants, in and by a certain steam-vessel of the defendants, called the *City of Londonderry*, from certain parts beyond the seas, to wit, from Belfast, to Dublin, and there, to wit, at Dublin aforesaid, to be reshipped into a certain other steam-vessel of the defendants, called the *William Fawcett*, and to be by the defendants carried and conveyed in and by the said last-mentioned steam-vessel from Dublin aforesaid to London, and there, to wit, at the port of London aforesaid, to be delivered in the like good order and condition (all and every the dangers and accidents of the seas, steam navigation of what nature and kind soever, *excepted), unto the plaintiff or his assigns, on paying for the said goods certain freight and charges, with primage and average accustomed; and, thereupon, in consideration of the premises, and of the said freight and reward, the defendants then promised the plaintiff to take care of, and safely and securely carry, and convey, and deliver the said goods and merchandise as aforesaid, all and every the dangers and accidents of the seas, and steam navigation of what nature or kind soever, excepted: But, although the defendants then took, accepted, and received the said goods and merchandise of and from the plaintiff for the purpose aforesaid, and although the said steam-vessel called the *William Fawcett* afterwards, to wit, on, &c., safely arrived at London aforesaid, with the said goods and merchandise on board thereof, and although none of the

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(1) Compare *Chapman* v. *Great Western Ry. Co.* (1880) 5 Q. B. D. 278, 49 L. J. Q. B. 420.—R. C.

said dangers and accidents so excepted as aforesaid prevented the safe carriage and delivery of the said goods and merchandise, or of any part thereof; and although a reasonable time for the delivering the said goods and merchandise had long since and before the commencement of this suit elapsed; and although the plaintiff was always ready and willing to pay the defendants the said freight and charges as aforesaid, with such primage and average as aforesaid, of all which said several premises the defendants, to wit, on, &c. had notice, and were then requested by the plaintiff to deliver to him the said goods and merchandise; and although the defendants, in part performance of their said promise, delivered to the plaintiff, at London aforesaid, a part of the said goods, to wit, one box of linen; yet the defendants did not, nor would, at any time deliver the residue of the said goods and merchandise, or any part thereof, to the plaintiff, but had hitherto wholly neglected so to do: and the defendants so carelessly, negligently, and improperly conducted *themselves [*316] with respect to the residue of the said goods and merchandise, whilst they were in their custody for the purposes aforesaid, that, for want of due care in the defendants and their servants in that behalf, the said residue of the said goods and merchandise, afterwards, to wit, on, &c., became and was wholly lost to the plaintiff; and, by reason of the premises, the plaintiff wholly lost and was deprived of divers great gains and profits to a large amount, to wit, 200*l.*, which otherwise would have arisen and accrued to him by the sale of the said residue of the said goods and merchandise. * * *

The defendants, in their third plea to the first count of the declaration, pleaded, that the said steam-vessel therein mentioned was and is a vessel used and employed by them for the conveyance of goods and merchandise for freight from parts beyond the seas, to wit, from the port of Dublin to the port of London; and that the said goods and merchandise in that count mentioned were shipped and received on board the said steam-vessel at Dublin, upon and under the terms and conditions expressed and contained in a certain bill of lading, whereby it was expressed that the said goods and merchandise were to be *delivered at the said port of London, in the like good order and [*317]

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condition in which they were so shipped, (all and every the dangers and accidents of the seas, steam navigation of what nature or kind soever, excepted,) unto the plaintiff or his assigns, on paying for the said goods freight and charges, as mentioned in the margin thereof, with primage and average accustomed. That after the arrival of the said steam-vessel at London aforesaid, with the said goods and merchandise on board thereof, as in the first count mentioned, to wit, on, &c., the defendants caused the said goods and merchandise (except the part thereof in that count mentioned to have been delivered to the plaintiff) to be unshipped therefrom, and safely and securely landed and deposited in such like good order and condition as aforesaid, in and upon a certain wharf, called Fenning's Wharf, at the said port of London, there to remain until the same could be delivered to the plaintiff or his assigns, according to the tenor and effect of the said bill of lading, the said wharf, before that time and then, being a place at which goods conveyed in steam-vessels from the port of Dublin to the port of London were, on their arrival at the last-mentioned port, used and accustomed to be landed and deposited for the use of the consignees thereof, and a place fit and proper for such purposes. That afterwards, and whilst the said goods and merchandise (except as aforesaid) remained and were deposited upon the said wharf for the purposes aforesaid, and before a reasonable time for the delivery thereof, according to the tenor and effect of the said bill of lading had elapsed, to wit, on, &c., the same goods and merchandise (except as aforesaid) were, together with divers other goods and merchandise, then being upon the said wharf for the like purposes, wholly consumed and destroyed by a fire which then happened and broke out by accident, by means whereof, and from no other cause, and without *any carelessness, negligence, or improper conduct, or want of due care in the defendants, or their servants, in that behalf, the defendants were hindered and prevented from delivering the said goods and merchandise, except as aforesaid, to the plaintiff; and that, the defendants were ready to verify.

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Fourthly, as to the said first count, that after the said steam-vessel had safely arrived in the port of London, with the goods

and merchandise on board thereof, as in that count mentioned, to wit, on, &c., the defendants were there ready and willing to deliver the same to the plaintiff or his assigns, according to their said promise; but neither the plaintiff or his assigns was or were there ready to receive the same; whereupon the defendants caused the said goods and merchandise (except the part thereof in the first count mentioned to have been delivered to the plaintiff) to be unshipped, and safely and securely landed and deposited, in the same good order and condition in which they were delivered to the defendants, in and upon a certain wharf called Fenning's Wharf, within and at the said port of London, there to remain until the plaintiff or his assigns should come and receive the same, or until the same could be conveyed and delivered to the plaintiff or his assigns, the said wharf, before that time and then, being a place at which goods conveyed in steam-vessels from the port of Dublin to the port of London were, on their arrival at the last-mentioned port, used and accustomed to be landed and deposited, and a place fit, proper, and convenient, for that purpose. That afterwards, and whilst the goods and merchandise, except as aforesaid, remained and were deposited upon the said wharf for the purposes aforesaid, and before the plaintiff or his assigns came or sent for the same, and before the defendants were requested to deliver the same to the plaintiff or his assigns, or a reasonable time for conveying *them from the said wharf to the plaintiff or his assigns had [*319] elapsed, and before the same could be removed therefrom, to wit, on, &c., the said goods and merchandise, and every part thereof, except as aforesaid, were and was, together with divers other goods then being upon the said wharf for the like purposes, casually consumed and destroyed by a fire which then and there happened, and broke out by accident, and without any negligence, improper conduct, or want of due care in the defendants or their servants; and by means thereof, and from no other cause, the defendants were hindered and prevented from delivering the said goods and merchandise, except as aforesaid, to the plaintiff or his assigns; and that, the defendants were ready to verify.

[After argument the COURT took time for consideration.]

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TINDAL, Ch. J.:

The questions upon this record arise upon two pleas to the first, and one to the second, count of the declaration.

The first count is framed in assumpsit upon a contract by the defendant, safely and securely to carry and convey, by a certain steam-vessel, certain goods of the plaintiff from Belfast to Dublin, and from thence to the port of London, "and to deliver the same at the port of London, to the plaintiff or his assigns;" the breach assigned in the declaration being, that the defendants so carelessly and negligently conducted themselves about the carrying and conveying of the goods, that they became wholly lost to the plaintiff. The defendants, in their third plea to this count, allege, that, after the arrival of the steam-vessel in London, they caused the goods to be unshipped and deposited in a certain wharf called Fenning's Wharf, at the port of London, there to remain until they could be delivered to the plaintiff, the said wharf being a place where goods conveyed in steam-vessels from Dublin to the port of London were accustomed to be deposited [*329] for the use of the consignees *thereof, and a fit and proper place for such purposes. And the defendants, in their fourth plea to the same count, allege that after the arrival of the steam vessel in the port of London, the defendants were ready and willing to deliver the goods to the plaintiff or his assigns, but neither the plaintiff or his assigns were ready to receive the same, whereupon the defendants caused them to be unshipped, and safely landed and deposited on a certain wharf called Fenning's Wharf, (as in the former plea,) each of the said pleas concluding with the statement of the destruction of the goods by a fire, which broke out by accident, and without any negligence on their part, after the goods had been so deposited at Fenning's Wharf. To each of these pleas the plaintiff has demurred specially; but as we think the pleas bad in substance, it becomes unnecessary to give any opinion on the objections which have been assigned as causes of special demurrer, in point of form.

The defendants, in each of the pleas, profess to substitute a delivery at Fenning's Wharf, in the port of London, for and in the place of a delivery "at the port of London to the plaintiff or

his assigns," as required by the terms of the bill of lading; and call upon us to say by our judgment, that such delivery under the circumstances stated in each plea is a good delivery in point of law under the bill of lading. But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance *with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places: the time of the arrival and departure of the vessel; the state of the tide and wind; interruptions from accidental causes; and all the other circumstances which belong to each particular port or place of delivery. [*330]

The delivery, therefore, of these goods not being alleged in the pleas to have been made according to the custom or practice of the port of London, we cannot take notice that it is sanctioned by such practice; and the delivery must therefore stand or fall upon the allegations contained in each plea.

Now, as to the first of these special pleas, it contains no other allegations therein, than that, after the arrival of the steam vessel, the defendants caused the goods to be unshipped therefrom, and securely landed and deposited in and upon Fenning's Wharf, until they could be delivered to the plaintiff; the wharf being one at which goods brought in steam vessels from Dublin to London were used to be landed and deposited for the use of consignees, and a place fit for the purpose. But at what interval after the arrival of the steam vessel they caused the goods to be landed and deposited does not appear. Whether a reasonable time was allowed to elapse after the ship's arrival in the port of London, in order to give time to the plaintiff to claim and receive his goods from alongside the vessel, the plea is altogether silent. It is even quite consistent with the allegations in this plea, that

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the plaintiff demanded the delivery of his goods before they were landed, and that the defendants refused or neglected to permit him to receive them. And we hold this plea bad, if for no other reason, at all events for this, that it leaves the matter in uncertainty [*331] *whether the plaintiff was not compelled against his will to receive his goods from a wharf where there is no allegation that such is the usual practice observed in the port of delivery.

The next special plea contains, indeed, the additional averment that, after the steam vessel had arrived in the port of London, the defendants were ready and willing to deliver the goods to the plaintiff or his assigns, but that they were not there ready to receive them, whereupon the defendants landed the goods at the wharf before described. But this allegation is open to the very same objection as was taken to the former plea, namely, that it does not appear that the plaintiff had a reasonable time or opportunity for receiving his goods from the vessel's side. The statement in this plea is compatible with the supposition, that the steam vessel arrived in the port at midnight, and proceeded in full speed to the wharf, and there immediately deposited the goods; facts, which whatever might be the readiness or willingness of the defendants to deliver, would make it impracticable for the plaintiff to receive them, if he had been there, and unreasonable to expect either the plaintiff or the assignee of the bill of lading to be there; and if such a mode of delivery is to be held good, it can only be by reference to the usage and custom of the port of London, as to which the plea is altogether silent. We therefore think neither of these pleas affords an answer to the first count of the declaration. * * *

Judgment for the plaintiff on these pleas.

IN THE EXCHEQUER CHAMBER.

1841. *Dec.* 9.

BOURNE AND OTHERS *v.* GATLIFFE, IN ERROR.

(3 Man. & Gr. 643—690.)

[3 Man. & Gr. 643]

[THE record being brought by writ of error to this Court and argued, before Lord Denman, Ch. J., Parke, B., Alderson, B.,

Patteson, J., Williams, J., Gurney, B., and Rolfe, B., the judgment of the COURT was (so far as relates to the demurrers to the two pleas) delivered, as follows, by]

LORD DENMAN, Ch. J.: [686]

The Court has to decide in this case, whether the Court of Common Pleas were right in giving judgment for the plaintiff (below) on the demurrers to two pleas to the first count of the declaration, and to one to the second, and also whether the exceptions to the opinion of the LORD CHIEF JUSTICE on the trial of the issues ought to be allowed. We think our judgment should be in favour of the plaintiff below, who is the defendant in error, except as to the demurrer to the plea to the second count (1).

The declaration is in assumpsit. The first count states the delivery to the defendants (below) of certain goods to be carried by them in a steam-vessel from Dublin to London, and there delivered (all and every the dangers and accidents of the seas, steam navigation, &c. excepted), to the plaintiff (below) or his assigns; and the breach assigned is, the non-delivery in London. The second count is on a promise—in consideration of the previous delivery to be carried to London for freight, and of the employment of the defendants by the plaintiff for other reward, —to take care of the goods at the wharf where they should be landed from the steam-boat, and to carry the same from the wharf to the plaintiff's place of business, and to deliver the same in a reasonable time; and the non-delivery is alleged as a breach.

To the first count is a plea, that the goods were put on board under a bill of lading, by which they were made deliverable to the plaintiff (below) or his assigns on payment of freight; that after the arrival of the goods, the defendants (below) caused them to be deposited on Fenning's Wharf, there to remain until they could be delivered to the plaintiff (below), that wharf being a place at which goods conveyed by steam-vessels from Dublin

(1) The second count was laid upon a special contract, as to the construction and effect of which the Court of Error differed in opinion from the Court of first instance. The question as to this, as well as to the exceptions, became only a question of costs.—R. C.

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to London, were used and accustomed to be landed and deposited for the consignees thereof, and a place fit and proper for that purpose; and that afterwards, and before a reasonable *time for the delivery thereof, according to the bill of lading, the goods were destroyed by an accidental fire. Another plea (the fourth) stated that, after the arrival of the ship and goods, the defendants were ready and willing to deliver to the plaintiff or his assigns; but neither the plaintiff or his assigns were then ready to receive the same, and that the goods were thereupon deposited on Fenning's Wharf (with the same averment of the place being usual, fit, and proper), and that they were destroyed there by an accidental fire before the defendants had been requested to deliver the same, or a reasonable time had elapsed for that purpose. * * *

We are all of opinion that the two pleas to the first count are bad in substance; because they do not state either a delivery to the consignee or his assigns, or that a delivery to Fenning's Wharf was a delivery to them, according to the usage of the port of London with respect to goods on such a voyage; and if, as the goods were deliverable to the plaintiff or his assigns, the defendants were not bound to deliver until they had notice that the plaintiff or some assignee would receive, or until the party

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entitled should come to receive them, *still the defendants were bound to keep the goods on board (or on the wharf at their own risk), for a reasonable time, to enable the consignee or his assigns to come and fetch them, and they continued liable until such reasonable time had elapsed. The defendants could not at once discharge themselves from all responsibility under the bill of lading by immediately landing the goods, and that without any notice to the consignee. But both those pleas are defective in substance, in not averring that a reasonable time for the plaintiff to come and receive the goods had elapsed when the goods were landed, or when they were destroyed; nor is any notice to the consignee stated; nor, though it is pleaded that the defendants were ready and willing to deliver, is it alleged that notice of that readiness was given to the plaintiff. It is quite consistent with the averments in these pleas, that the moment the steam vessel arrived, the goods were landed before the

consignees had notice of the arrival, or any opportunity of receiving the goods from the ship's side. For these reasons we concur entirely with the judgment of the Court of Common Pleas, on the demurrer to the pleas to the first count. * * *

The judgment is affirmed [with the exception of the ruling of the Court below upon a demurrer to the count upon a special contract.]

Judgment accordingly.

IN THE HOUSE OF LORDS.

BOURNE *v.* GATLIFF.

1844. *June* 7, 10.

(11 Clark & Finnelly, 45—84; S. C. 8 Scott, N. R. 604; 7 Man. & Gr. 850.

[11 Cl. & F. 45]

UPON this judgment the defendants (now the plaintiffs in error) brought a writ of error to this House, and assigned errors [*inter alia*] to the following effect: "That the declaration and the matters therein contained are not, nor is any part thereof, sufficient for the said S. Gatliff to have or maintain his aforesaid action." * * *

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Mr. Kelly and *Mr. J. W. Smith*, for the plaintiffs in error: [53]

The plaintiff below says that the defendants were bound, by the terms of this bill of lading, to deliver the goods to him wherever he might be, or to wait a reasonable time in the river till he sent for them. The first question may be taken to be, whether the master of a foreign ship, for such this vessel must be considered, can, on arriving in the port of London, land the goods in a convenient and customary place, and then be relieved from responsibility on their account? Here the bill of lading does not specify a place of delivery, nor a time of delivery, nor the person to whom the delivery must be made. The second question is, whether, under a bill of lading in the ordinary form, evidence is admissible of former transactions between the same parties, that is, of former conveyance of goods by the same vessel to the same consignees, so as to give a meaning to the terms of the bill of lading? These are the main *questions in [*54]
the case itself; but there is another matter arising on the form

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of these proceedings, and on which the plaintiffs in error say that the judgment ought to be reversed. * * * [It is submitted that] the whole judgment is erroneous, and ought to be reversed.

(LORD CAMPBELL: Then do you mean to contend that the master may land the goods instantly, and sail away with the next tide?)

That is the point contended for. Where he has received the goods on a general bill of lading, as in this case, he is not bound to give any notice to the consignee, who is himself bound to be watching for their arrival. This is a bill of lading which applies to all cases of goods sent to this country. The bill of lading never specifies the residence of the consignee; sometimes it makes the goods deliverable to the shipper or his assigns. In all cases whatever they are made deliverable to "assigns," and it frequently happens that they pass through several hands before the arrival of the ship. It may be that the person possessed of the bill of lading, not only is not known to the master, but he may be resident at Liverpool, or elsewhere at a distance. It is consequently the duty of the consignee, or his agent, to seek out the vessel and demand the goods. The mode of proceeding easily enables him to do this; the usages of trade in this particular matter are most perfectly understood.

(LORD CAMPBELL: You must go the length of alleging that the instant the master arrives, he may, without notice to the consignee, land the goods. Where is the authority for that proposition?)

[*56] There ought *rather to be a demand for an authority to show that he cannot do so.

(LORD BROUGHAM: The fourth plea does not state that the goods were landed at a place where the consignee could have got them whenever he pleased.)

That is implied in law. The plea describes the place as a usual and accustomed, and fit and convenient place at which to land

goods. There is no necessity for notice of the master's intention to land them.

(THE LORD CHANCELLOR: Suppose the ship arrives in the middle of the night?)

That makes no difference. *Harman* v. *Clarke* (1) shows that the consignee must watch the arrival of the vessel, and is not entitled to notice from the master. It is plain that ships coming to the river cannot remain in it; the river would be choked up.

(THE LORD CHANCELLOR: You must maintain that the master may unload instantly, and put the goods on a wharf, without any notice to the owner, or without any delay on his part.

LORD BROUGHAM: And that you may thus throw on him the charge of wharfage, which, on receiving reasonable notice, he would be prepared to avoid.)

The captain only subjected himself to wharfage by landing the goods; the owners of them could obtain them on paying the freight, primage, and average, according to the bill of lading. It will be impracticable to make the master wait till the goods are demanded at the ship's side. It has been held that the consignee must watch the arrival of the ship; a decision totally opposed to what is now supposed to be the duty of the master: *Hyde* v. *The Trent and Mersey Navigation Company* (2). An undertaking to carry goods from a place to Manchester, was held there to make the carriers liable for a fire which happened while the goods were in the *course of transit to Manchester. The [*57]
case is not in point, but the observations of Lord KENYON are. His Lordship said (3): "The owners of ships bring goods from foreign countries to merchants in London; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf." It

(1) 16 R. R. 768 (4 Camp. 159).
(2) 2 R. R. 620 (5 T. R. 389).
(3) 2 R. R. at p. 624 (5 T. R. 395).

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is clear that he contemplated the immediate delivery of the goods at the wharf; he did not think of the master waiting a reasonable time in the river for the goods to be demanded. The point was put still more emphatically by Mr. Justice BULLER, who said (1): "When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." In no case will be found anything of the duty of the master to wait for a reasonable time; such a duty would be incompatible with business. Some goods will be on the top, some at the bottom of the vessel: if the master must wait a reasonable time, how can he deliver the goods at the bottom of the vessel, while he is waiting a reasonable time for the owner of the goods which have been stowed at the top? A rule that he must wait, would fetter commerce to a most inconvenient degree. Suppose *there were fifty consignees, all or the greater part might be put to inconvenience by waiting the supposed reasonable time for the owner of one parcel of goods. The master has a right to land the goods at once, and the owner ought to be ready on the arrival of the vessel to receive them, and so protect himself against the charge of wharfage. Mr. Justice GROSE, in the same case, observes (2): "The case of foreign goods brought to this country depends on the custom of the trade, of which persons engaged in it are supposed to be cognizant. By the general custom, the liability of carriers is at an end when the goods are landed at the usual wharf."

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(THE LORD CHANCELLOR: If this is a custom, you should have averred the custom.

LORD CAMPBELL: Your pleas to the first count do not show a performance, nor an excuse for non-performance.

LORD BROUGHAM: Nor, except in the fourth plea, a readiness to deliver; but there you have not alleged a reasonable time.)

(1) 2 R. R. at p. 626 (5 T. R. 397). (2) 2 R. R. at p. 629 (5 T. R. 400).

That is so; but there need not be an averment of reasonable time.

(LORD CAMPBELL: The case of *Harman* v. *Clarke* (1) does not support your argument. There is, in fact, no authority for it.)

There ought to be an authority shown for the other rule.

(THE LORD CHANCELLOR: This is a contract to deliver. The owner of the goods is at London, and could conveniently receive notice; or if at Liverpool or any other distant place, would have an agent here, to whom notice could be given. Can the master be discharged by immediately landing the cargo without notice?)

He can. In the case of foreign ships, by delivery at a wharf in London the master is discharged (2). That being so, the other party must interpose an authority to show that *there must be a delay. That was a lawful delivery. Fenning's Wharf was expressly proved at the trial to be a fit, and usual, and convenient place for the landing of goods. There is another passage upon this point, in Abbott (2): "If the consignee sends a lighter to fetch the goods, it seems that the master of the ship is obliged, by the custom of the river Thames, to watch them in the lighter until the lighter is fully laden; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it. But it has been much contested, whether the master is by the usage, bound to take care of the lighter after it is fully laden, until the time when it can properly be removed from the ship to the wharf." That passage shows that the consignee must be ready. If the consignee does not wait the arrival of the ship, the master may proceed at once to land the goods, and to discharge himself from his liability on the bill of lading, under the provisions of which he is only liable for the carriage of the goods from port to port. [*59]

(THE LORD CHANCELLOR: The captain took the goods on board for delivery in the port of London; he had no right to change the

(1) 16 R. R. 768 (4 Camp. 159). (2) Abbott on Shipping, 261; 4th edit.

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risk till they were delivered. No answer is given to that part of the case, which, therefore, resolves itself into a question of costs.)

* * * * *

[The questions upon the exceptions taken at the trial and as to the demurrer to the second count alleging a special contract were then argued and disposed of. And by the formal order of the House, the judgment of the Court of Exchequer Chamber,
[84] so far as relates to certain costs, was altered, and it was] further ordered and adjudged, that in all other respects the said judgment be affirmed.—Lords' Journals, 11th June, 1844.

1838. *Jan.* 31.

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DOE D. JOHN SIMPSON AND ANOTHER *v.* THOMAS SIMPSON AND OTHERS.

(4 Bing. N. C. 333—348; S. C. 5 Scott, 770; 7 L. J. (N. S.) C. P. 155.)

[AFFIRMED in error, s.n. *Doe* d. *Blesard* v. *Simpson*, 3 Man. & Gr. 929. Will be reported in the corresponding volume of the Revised Reports.]

1838. *April* 20.

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HALL *v.* SWIFT (1).

(4 Bing. N. C. 381—384; S. C. 6 Scott, 167; 1 Arn. 157; 7 L. J. (N. S.) C. P. 209.)

A right to a water-course is not destroyed by the owner's altering the course of the stream; and the owner may establish his claim notwithstanding an interruption within twenty years of his action brought to enforce the right.

THE declaration stated, that the plaintiff, before and at the time of the committing of the grievances by the defendant hereinafter mentioned, was, and from thence hitherto had been, and still is seised in his demesne as of fee, of and in certain lands and premises, with the appurtenances, situate in the county of Stafford; and by reason thereof long before and at
[*382] the time of the *committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed, and still

(1) Cited in the judgment of the Court of Common Pleas in *Harvey* v. *Walters* (1873) L. R. 8 C. P. 162, 166, 42 L. J. C. P. 105, 108; and in the judgment of the Court of Appeal in *Hollins* v. *Verney* (1884) 13 Q. B. Div. 304, 310, 53 L. J. Q. B. 430, 434.—R. C.

of right ought to have and enjoy the benefit and advantage of the water of a certain stream or water-course, which, during all that time, of right ought to have run and flowed, and still of right to run and flow unto and into the said lands and premises of the plaintiff, for the supplying the same with water; and for the irrigating and watering of the said lands and premises; and for the benefit and improvement of the soil thereof; and for the use of the plaintiff in his trade and business of a currier, and otherwise; and of the cattle of the plaintiff depasturing in the said lands and premises: and then alleged, that the defendant had wrongfully obstructed and diverted the stream above the plaintiff's premises, to the great injury of the plaintiff.

The defendant pleaded, first, Not guilty; and secondly, a traverse of the plaintiff's right.

The obstruction and diversion complained of were proved at the trial: but it appeared that, after those grievances had been committed by the defendant, the plaintiff had to some extent altered the course of the stream, at a spot above his own lands.

It was proved that, at a period much earlier than twenty years before the commencement of this action, the stream had flowed through the plaintiff's lands; but that there had been some interruption about twenty-two years before the action; and it was not till within nineteen years that the stream had again flowed constantly in its former course.

A verdict having been found for the plaintiff,

Maule moved to set it aside, on the ground; first, that, the course of the stream having been altered by the plaintiff, it was not the same stream which, in the language of the declaration, "long before, and at the *time of the grievances committed by [*383] the defendant, of right ought to have run and flowed, and still of right, ought to run and flow unto and into the lands and premises of the plaintiff, for supplying the same with water, and irrigating and improving the soil;" but a new water-course, with a new direction given to it by the plaintiff, and in respect of which, as he could have acquired no prescriptive rights, he had failed to establish in proof the allegations of the declaration.

Secondly, that the interruption which occurred previously to

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the period of twenty years before the action, having continued to a time within that period, there was no evidence sufficient to establish the plaintiff's claim.

TINDAL, Ch. J.:

I think that these objections to the verdict ought not to prevail. The declaration states a general right in the plaintiff to the use of water, which long before, and at the time of the grievances committed by the defendant, ought to have run and flowed, and still ought to run and flow unto and into the lands of the plaintiff; it appears, that the water in question flowed into the plaintiff's lands from the defendant's; but that some alteration had been made in the course of the stream, at a spot above the plaintiff's premises; and it is said that that is an answer to the right set up in the declaration. If so, any alteration, however slight, would destroy the right, however long established. No authority has been cited in support of such a proposition; and I think it cannot be maintained.

The second objection is, that though the stream was proved to have flowed to the plaintiff's premises more than twenty years ago, yet as there was some interruption before the twenty years began to run, and the stream did not flow again in its former course till within nineteen years, there is a want [*384] of sufficient *evidence to support the plaintiff's claim. But it would be very dangerous to hold, that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment.

Rule refused.

1838. *April* 24.

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EX PARTE HOLDSWORTH.

(4 Bing. N. C. 386—387; S. C. 6 Scott, 170; 1 Arn. 189; 7 L. J. (N. S.) C. P. 225.)

The Court ordered an attorney, who held a deed as trustee, to deliver the draft of it to the cestui que trust, who had paid for the deed and draft.

BOMPAS, Serjt. moved for a rule to set aside a Judge's order, by which Mr. Callow, an attorney, was required "to

deliver up to Mr. Holdsworth the draft of Mr. Holdsworth's marriage settlement, the charges for which had been paid to Mr. Callow by the said Mr. Holdsworth."

It appeared that Mr. Callow had prepared the draft and the settlement, but that he and a Mr. Goode were trustees for the lady whom Mr. Holdsworth married, and *as such trustees [*387] claimed to retain the draft as well as the deed.

Bompas contended that the deed belonged to the legal owners of the property settled in trust: *Harrington* v. *Price* (1), *Lightfoot* v. *Keane* (2), *Lord* v. *Wardle* (3); and that the draft belonged to the owners of the deed. In *Ex parte Horsfall* (4) it was held, that an attorney, upon receiving the amount of his bill, was bound to deliver up to his client, not only original deeds, &c., belonging to him, but also the drafts and copies: but the party who paid for the draft was there the owner of the deed.

TINDAL, Ch. J.:

If this had been an application by Mr. Holdsworth to obtain the deed itself, there can be no doubt what would have been the result. But the question is, whether á cestui que trust has not a right to inspect and have a copy of the trust-deed. Instead of applying for and incurring the additional expense of a copy, he says here, I have paid for a draft, let me have that instead; the trustees insist that the draft shall remain with the deed. If there had been anything to show that the draft contained matter not included in the deed, and not proper to be disclosed to the cestui que trust, there might have been ground for opposing the delivery; but as there is no suggestion of that sort, and what the cestui que trust requires is no more than a copy, the Judge's order must be enforced.

Rule to set aside the order refused.

(1) 37 R. R. 374 (3 B. & Ad. 170).
(2) 1 M. & W. 745.
(3) 43 R. R. 761 (3 Bing. N. C. 680).
(4) 31 R. R. 266 (7 B. & C. 528).

1838.
April 26.

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HEATH *v.* ELLIOTT.

(4 Bing. N. C. 388—392; S. C. 6 Scott, 172; 1 Arn. 170; 7 L. J. (N. S.) C. P. 210.)

Common pur cause de vicinage cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs.

REPLEVIN for sheep taken on Houghton Down.

Avowry, that the Duke of Norfolk being seised in fee of the *locus in quo*, demised it to the defendant as tenant from year to year, and that the sheep were distrained *damage feasant*.

Plea, that the said place called Houghton Down lay contiguous and next adjoining to a certain common or down in the parish of Bury, called Bury Hill Down, containing divers, to wit 500 acres of land, and had never been separated or divided from Bury Hill Down, by any inclosure, hedge, or fence whatsoever, sufficient to prevent cattle feeding on Bury Hill Down, from erring or escaping therefrom into the said common or down, called Houghton Down; and that the said cattle, from time immemorial, put on the said common or down called Bury Hill Down, to feed on the grass there growing, and to use the common of pasture upon the said last-mentioned common or down, from time immemorial, had gone, escaped, and rambled, and had been used and accustomed to go, escape, and ramble therefrom, into the said common or down called Houghton Down, and to intermix there and feed with the cattle, from time to time feeding on the grass growing on the said last-mentioned common or down; and in like manner the cattle, from time immemorial, duly put into the said common or down called Houghton Down, to feed on the grass then there growing, and to use the common of pasture upon the common or down called Houghton Down, from time immemorial, had gone, escaped,
[*389] and rambled, and had been used and accustomed to go, *escape, and ramble therefrom, into the said common or down called Bury Hill Down, and to intermix there and feed with the cattle, from time to time feeding on the grass growing on the said last-mentioned common or down: that the plaintiff, before and at the said time when &c., was, and still is the occupier of a

certain messuage, and of divers, to wit fifty acres of land, with the appurtenances, situate and being in the parish of Bury aforesaid; and that the plaintiff and all others, occupiers for the time being of the said messuage and land then of the plaintiff, with the appurtenances, for the full period of thirty years next before the commencement of this suit, and the said time, when &c., without interruption, and of right, had had, and been used and accustomed to have, and the plaintiff still, without interruption and of right, ought to have for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, common of pasture upon the said common or down called Bury Hill Down, for all his sheep, *levant* and *couchant* in and upon the said land of the plaintiff, with the appurtenances, every year, and at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining: that the plaintiff being such occupier as aforesaid, just before the said time when &c., put the said sheep in the declaration mentioned, in and upon the said open common or down called Bury Hill Down, being the plaintiff's commonable cattle, *levant* and *couchant* in and upon the said land of the plaintiff, to use the said common of pasture of the plaintiff, and to feed on the grass there growing: that the said sheep, so being in the said common called Bury Hill Down, for the purpose aforesaid, and the said common or down called Houghton Down, in which &c., so being and lying contiguous thereto, and not separated or divided *therefrom by any inclosure, hedge or fence whatsoever, the [*390] said cattle of the plaintiff afterwards, and just before the said time, when &c., of their own accord, and without the knowledge and consent of the plaintiff, went, escaped, and rambled from and out of the said common or down called Bury Hill Down, into the said common or down called Houghton Down, and intermixed and fed with the cattle then there feeding on the grass, and remained and continued in the common or down called Houghton Down, on the occasion aforesaid, without the knowledge of the plaintiff, and then necessarily and unavoidably a little trod down and depastured the grass and herbage then and there growing, and necessarily and unavoidably did

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the damage there to the defendant, as in the said avowry mentioned.

The replication traversed the prescription for cattle to ramble from the common or down called Bury Hill Down, to the common or down called Houghton Down, and from Houghton Down to Bury Hill Down.

At the trial before Littledale, J., Sussex Summer Assizes, 1837, it appeared that Bury Hill Down and Houghton Down formed one continuous open space, the boundary between them being marked only by stones set up at certain distances: that occupiers of land in the parish of Bury, and among them the plaintiff, had rights of common over Bury Hill Down: that Houghton Down belonged to the Duke of Norfolk, and was occupied by his tenants: that the sheep placed upon each of the downs used from time to time to stray into the other, and were frequently driven back to their original pasture by the shepherds on either side.

The defendant relied chiefly on this circumstance as tending to negative the plaintiff's claim. But LITTLEDALE, J. considered it inconclusive, as *common pur cause de vicinage* is only an excuse for a trespass: Co. Litt. 22 a; the verdict, therefore, [*391] was taken for the defendant, *with leave for the plaintiff to move to set it aside, and enter, instead, a verdict for the plaintiff.

In Michaelmas Term,

Platt obtained a rule *nisi* accordingly, on the ground that till the two downs had been separated by a fence, the defendant had no right to distrain the plaintiff's sheep: *Wells* v. *Pearcy* (1).

Thesiger, who showed cause, admitted that this might be so, if Houghton Down were, like Bury Hill Down, a place over which the tenants of the manor in which it lay had rights of common of pasture; but it was the exclusive property of the Duke of Norfolk, subject to no such rights; and there could be no *common pur cause de vicinage* without reciprocality.

(1) 1 Bing. N. C. 556.

Platt and *Channell*, in support of the rule:

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In the replication as well as the plea, Houghton Down is styled a certain common or down.

(TINDAL, Ch. J.: That is only a word of description: you do not allege in the plea that tenants of the manor had a right of common over Houghton Down.)

The only question on the pleadings is, the custom for cattle on both sides to stray and intermix; no right of common, strictly speaking, is put in issue; in order to avail himself of the defence now set up, the defendant, instead of traversing the custom to stray and intermix, should have replied that Houghton Down was his private property.

TINDAL, Ch. J.:

On this issue the attention of the parties was sufficiently called to the uses of the pasture between the one down and the other; and the jury having found for the defendant, upon evidence that *Houghton Down belonged to his landlord, and [*392] that the plaintiff's sheep had frequently been driven back, I think the verdict is right.

Rule discharged.

MATSON AND OTHERS *v.* COOK.

1838. *April* 26.

(4 Bing. N. C. 392—393; S. C. 6 Scott, 179; 1 Arn. 172.)

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Overseers, who inclosed parcel of a waste, under 59 Geo. III. c. 12, and 1 & 2 Will. IV. c. 42, were held to have sufficient possession to maintain trespass against an inhabitant of the parish who destroyed their fence without establishing any right of common, notwithstanding they failed to show the consent of the lord of the manor to their inclosure.

THE plaintiffs, overseers and churchwardens of the parish of Battersea inclosed a portion of the waste or common within the manor, called Latchmore, for the purpose of employing the poor, pursuant to 59 Geo. III. c. 12, and 1 & 2 Will. IV. c. 42.

They erected a fence; let out in allotments some portions of the land inclosed, and cultivated the rest.

The defendant, an inhabitant of Battersea, but neither lord of the manor, nor copyholder, having pulled down the fence in

MATSON v. COOK.

question in assertion of an alleged right over the waste, the plaintiffs sued him in trespass.

The defendant pleaded; first, Not guilty; secondly, that the land was not the property of the plaintiffs; and, thirdly, that he had a right of common of pasture from May till September, for one cow, as to his messuage and land appertaining.

Issue was joined on the two first pleas. The third was traversed; and the defendant failed to establish it at the trial; but the plaintiffs' evidence of the consent of the lord of the manor (as required by 1 & 2 Will. IV. c. 42, s. 2) being imperfect, it was objected, that they did not appear to have any property in the land in question, or any right to inclose it: the learned Judge who presided however, left the question to the jury; and a verdict having been found for the plaintiffs,

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Platt obtained a rule *nisi* to set it aside, on the ground that the jury should have been directed to find for the defendant on the second plea. The statute giving authority to the overseers, ought to be construed with the strictness applied to a power: *Rex* v. *Austrey* (1); and unless the consent required by the statute was clearly established, the plaintiffs had no interest sufficient to maintain an action.

Thesiger, who showed cause, relied on the mere possession of the plaintiffs, the defendant, upon failing to establish his third plea, appearing to be a wrongdoer.

Platt:

The plaintiffs took possession as overseers; and if the mere fact of their inclosing the land is to be evidence of rightful possession, it can never be ascertained whether or not they have proceeded in conformity with the statute.

TINDAL, Ch. J.:

The plaintiffs inclose, cultivate, and allot portions of the land; neither the lord of the manor nor the copyholders interfere; the defendant is a stranger; and, as against him, the plaintiffs are entitled to maintain this action on their mere possession.

Rule discharged.

(1) 1 Stark. Evid. 322, *n.* (*a*).

MALINS *v.* FREEMAN (1).

1838.
April 27.

(4 Bing. N. C. 395—400; S. C. 6 Scott, 187; 7 L. J. (N. S.) C. P. 212.)

[395]

A purchaser cannot rescind his own contract at an auction, on the ground that he has refused to pay the auction duty pursuant to the conditions of sale, notwithstanding the statute 17 Geo. III. c. 50 (2), enacts that, in case of such refusal, the bidding shall be null and void to all intents and purposes.

THE declaration stated, that plaintiff, on the 8th of May, 1834, caused to be put up for sale, by public auction, a certain plot of land and premises, situate in the parish of Woodford in the county of Essex, subject to the following, amongst other conditions of sale: that the purchaser should pay down immediately a deposit of 20*l.* per cent., in part of the purchase-money, together with a moiety of the excise duty of seven pence in the pound, and sign an agreement for payment of the remainder of the purchase-money, with the amount of the timber, fixtures, &c., on or before the 31st of August, 1834: that the purchaser should have a conveyance of the said premises, at his own expense, properly executed by the vendor, upon payment of the remainder of the purchase-money, as aforesaid; when he should be entitled to possession of the said premises: that if the purchaser should neglect or fail to comply with the said conditions, the deposit-money should be forfeited; the vendor should be at liberty to resell the said premises by public or private sale, and the deficiency, if any, by such sale, together with all charges attending the same, should be made good by the defaulter at the then present sale, and be recoverable as and for liquidated damages, and without the necessity of a conveyance being first tendered to such defaulter. That the defendant upon such putting up the said premises for sale as aforesaid then was the highest bidder, and was then declared to be, and then became and was the purchaser of the said premises, at and for a certain sum of money, to wit the *sum of 1,400*l.*, subject to the same conditions: and in consideration of the premises, and that the plaintiff had then promised the defendant to perform the said conditions on the said plaintiff's part and behalf as such vendor,

[*396]

(1) Cited in judgment in *Davenport v. Reg.* (1877) 3 App. Cas. 115, 129, 47 L. J. P. C. 8, 16.—R. C.

(2) Repealed by 33 & 34 Vict. c. 99.

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the defendant then promised the said plaintiff to perform the conditions on his, the defendant's part as such purchaser as aforesaid.

The defendant pleaded, fourthly, that it was a condition of the said contract of sale in the said first count mentioned, that a moiety of the excise duty or pound-rate granted by the Act of Parliament in such case made and provided, should be paid by the purchaser over and above the price bidden at such sale by auction; that the said moiety of the excise duty or pound-rate was not, nor was any part thereof paid by him at the time of the sale (although payment thereof was then demanded by the auctioneer of the defendant), or at any time since, but the same remained wholly due and unpaid on his the defendant's part; contrary to the statute in such case made and provided; whereby and by force of the said statute, the said bidding and sale became, and was, and still is, wholly void; and that, the defendant was ready to verify, &c.

Demurrer and joinder.

R. V. Richards was to have argued in support of the demurrer, but the COURT called on

W. H. Watson to support the plea:

He relied on the stat. 17 Geo. III. c. 50, s. 8, which provides, "That nothing herein contained shall extend or be construed to restrain any seller by auction, or person acting as auctioneer, at any sales by way of auction, from making it a condition of sale that the pound-rate granted by this Act, or any certain [*397] portion thereof, shall *be paid by the purchaser over and above the price bidden at such sale by auction; and in such case, the person so acting as auctioneer is hereby authorised and required to demand payment of the said duty from such purchaser or purchasers, or such portion thereof as shall be expressed in such condition or agreement; and upon neglect or refusal to pay the same, such bidding shall be null and void to all intents and purposes:" and contended, that, in favour of the revenue, the statute should be construed strictly.

In Sugden's Vendors and Purchasers, p. 44, 9th edit., note,

it is said, "Although the duty is, by the Acts, imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction: and, in such case, the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition; and, upon neglect or refusal to pay the same, such bidding is declared by the Act to be null and void to all intents and purposes."

In *Phillips* v. *Bistolli* (1), where a purchaser returned at an auction an article before he had paid any portion of the price, alleging that he had made a mistake in his bidding, it was held to be a question of fact for a jury, whether the purchase had been complete or not. But here, upon non-payment of the stipulated amount of excise duty, the bidding was void in law, and could not be acted on by the plaintiff or the defendant. That stipulation qualified the bidding, and the contract itself; and distinguished it from cases where a contract is made void by matter arising subsequently,—as a lease, upon non-performance of covenants; in which case, it might *be admitted that the party who [*398] breaks his covenant cannot take advantage of the nullity of the lease: *Doe* d. *Bryan* v. *Bancks* (2). It might also be conceded, that the words "null and void," in a statute may mean "voidable," unless there be something else to confine their operation. But here, for the protection of the revenue, the more strict interpretation must be adopted.

TINDAL, Ch. J.:

I think this statute may receive a construction which shall ensure the full benefit intended to Government, without destroying the contract between these parties.

If we hold the contract to be void at the option of the seller, it will effect all that the statute requires. It is like the case in 3 Co. Rep. 59 b, "On the statute of 1 Eliz., which provides that all grants, leases, &c., made by Bishops in other manner than is mentioned in the Act, shall be utterly void, and of no effect, to all intents and purposes; notwithstanding these precise words,

(1) 26 R. R. 433 (2 B. & C. 511). (2) 23 R. R. 318 (4 B. & Ald. 401).

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it was adjudged in the Common Pleas, in a *quare impedit* between Sale and the Bishop of Coventry and Litchfield, that the grant of the next avoidance of an advowson, which is not warranted by the said Act, is not void as to the grantor himself, but as to the successor; for so was the intent of the Act to provide for the successor, and not for the party himself. So, and on the same reason, it was resolved in the Common Pleas, *per totam Curiam*, Pasch. 39 Eliz., between Hunt and Singleton, for a house in Foster Lane, in London, whereof the inheritance was in the Dean and Chapter of St. Paul's, that if the Dean and Chapter make a lease not warranted by the stats. 13 and 14 Eliz., in which case it is provided by the said Acts, that such lease shall be absolutely void and of no effect, to all intents and purposes; [*399] *in this case of a corporation aggregate of many persons, which never dies, it was greatly doubted, if the lease should not be utterly void presently according to the express letter of the Act; but it was at last resolved, forasmuch as the Act was made for the benefit of the successors, that the lease should not be void till after the death of the Dean, who was party to the lease." And I cannot distinguish the present case from *Doe* d. *Bryan* v. *Bancks* (1), where a lease of coal mines reserved a royalty rent on every ton of coals raised, and contained a proviso, that the lease should be void, to all intents and purposes, if the tenant should cease working at any time for two years. After the working had ceased more than two years, the lessor received rent: it was held, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work, commencing two years before the day of demise in the ejectment.

In like manner, this contract was to be void only at the option of the vendor: it seems to me that the statute is capable of bearing that construction, the only one which in law and justice it ought to have.

PARK, J. and BOSANQUET, J. concurred.

(1) 23 R. R. 318 (4 B. & Ald. 401).

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It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose. By the stat. 14 Eliz. c. 8, recoveries suffered by tenants for life or in remainder, are to be clearly and utterly void and of none effect; and yet it has been held, that a recovery by tenant for life, *vouching the remainder-man in tail, who vouches the common vouchee, to the use to the tenant in tail and his heirs, will bar the reversion in fee; the object of the statute being to protect the remainder-man against the tenant for life. [*400]

The object of the provision here, is to protect the revenue; and that will be sufficiently accomplished by holding the contract to be void at the option of the vendor.

Judgment for the plaintiff.

HOULDITCH AND ANOTHER *v.* CAUTY (1).

1838. *April* 30

[411]

(4 Bing. N. C. 411—419; S. C. 6 Scott, 209; 1 Arn. 162; 7 L. J. (N. S.) C. P. 217.)

Notice by holder to indorser, of the dishonour of a bill by acceptor, in these terms: "Messrs. H. are surprised to hear that Mrs. G.'s bill was returned to the holder unpaid," followed by a visit from the indorser to the holder on the same day, in which he expressed his regret, and promised that he would write to the other parties, by whom or by himself the bill should be paid: Held, sufficient to render him liable.

THIS was an action on a bill of exchange for 850*l.*, drawn on the 28th of March, 1832, by Ann Gib, on, and accepted by W. H. Rainsford, payable three months after date; by Gib indorsed to William Crokatt, and by Crokatt to the defendants: averment of due presentment to Rainsford for payment, and of refusal by him, whereof the defendant had due notice.

Pleas: first, that the bill was not duly presented to Rainsford; secondly, that the defendant had not due notice of the dishonour; thirdly, that in consideration that divers persons, creditors of Crokatt, had accepted from Crokatt 2*s.* 6*d.* in the pound on their respective debts in satisfaction and discharge of their debts, the plaintiffs received the like amount in discharge and satisfaction

(1) See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (7).—R. C.

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of this bill, without the knowledge or consent of the defendant, and thereby released the defendant from all liability.

Issue was joined on the first and second pleas, and *de injuriâ* was replied to the third.

At the trial, the presentment to Rainsford and the dishonour of the bill by him were duly proved.

Notice was given to the defendant by the following letter: "Messrs. Houlditch are surprised that Mr. Cauty has not taken up Chaplin's bill according to his promise: are also surprised to hear that Mrs. Gib's bill was returned to the holder unpaid."

The defendant called on the plaintiffs, the holders of the bill, the same evening on which he received this letter; expressed his regret and surprise that the bill had not been paid; but promised [*412] to write immediately *to Edinburgh to the other parties to the bill, and that it should be paid either by them or by himself.

By a Scotch deed of the 14th of June, 1834, the plaintiffs in consideration of 116*l.* 13*s.* 5*d.* paid to the plaintiffs by D. R. Souter constituted Souter their assignee to the sum of 850*l.* due under the bill of exchange drawn by Mrs. Gib, but so far only as the bill could form the ground of a claim of debt at their instance against William Crokatt, reserving right of recourse against the acceptor, drawer, and indorsees of the bill.

The deed contained no release of Crokatt; or statement that the 116*l.* 13*s.* 5*d.* was received in discharge and satisfaction of the bill.

Souter was trustee for certain creditors of William Crokatt, in Scotland; who executed to him similar deeds in respect of their several debts, upon receiving from him 2*s.* 6*d.* in the pound.

It was objected, on the part of the plaintiffs, that this deed did not sustain the third plea: and on the part of the defendant, that he had received no sufficient notice of the dishonour of the bill; for which he relied on *Solarte* v. *Palmer* (1), and *Boulton* v. *Welsh* (2), where a letter stating that "the promissory note for 200*l.* drawn by H. H., dated 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid, I therefore give you notice thereof, and request you will let me have the amount thereof forthwith,"

(1) 7 Bing. 530; 1 Bing. N. C. 194. (2) 3 Bing. N. C. 688.

was held not a sufficient notice of dishonour. A verdict having been found for the plaintiffs,

Thesiger obtained a rule *nisi* to set it aside on the above objection to the notice of dishonour, and on the ground of a surprise on the defendant, by which he had *failed to establish [*413] in evidence the deed executed by the plaintiffs to Souter.

Wilde, Serjt., *Kelly*, and *Petersdorff*, showed cause:

In *Boulton* v. *Welsh* the COURT expressed great reluctance to extend the principle of *Solarte* v. *Palmer*, a case which has occasioned much inconvenience in the mercantile world. If *Boulton* v. *Welsh* be adhered to, no merchant will be able to give notice of the dishonour of a bill without consulting an attorney, for the expression "returned unpaid" has always signified among merchants, dishonoured on presentment; and therefore an action for slander would lie for saying of a merchant that his bills were returned unpaid. No precise form of notice is prescribed by the old authorities; the principle is, that the holder must show he does not mean to give credit to the acceptor. But in *Hedger* v. *Steavenson* (1), a notice of the dishonour of a promissory note in the words following: "SIR, I am desired by Mr. H. to give you notice that a promissory note, dated August the 10th, 1835, made by S. T. for 99*l.* 18*s.* payable to your order two months after date thereof, became due yesterday, and has been returned unpaid; I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post," was held sufficient; and in *Grugeon* v. *Smith* (2), tried at Liverpool, before Patteson, J., the notice of dishonour was, "Your bill, due this day, has been returned with charges, to which we request your immediate attention;" which the learned Judge held to be sufficient. A motion was afterwards made in the King's Bench for a new trial, on the ground that the notice was insufficient, but the Court refused the rule. The notice in *Woodthorpe* v. *Lawes* (3), which was also *held sufficient, shows the meaning attached by mercantile [*414]

(1) 2 M. & W. 799.
(2) Cited in *Hedger* v. *Steavenson*, 2 M. & W. 802.
(3) 2 M. & W. 109.

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people to the expression "returned unpaid." However, in the present case, the notice must be coupled with the promise made by the defendant on the evening of the day he received the notice, and it has always been held that a promise to pay operates as an admission that due notice of dishonour has been received: *Hicks* v. *Duke of Beaufort* (1). Then, the deed put in evidence to support the second plea was not a release of Crokatt, but a mere power to Souter to sue in the name of the plaintiffs.

Humfrey, in support of the rule:

In *Hedger* v. *Stevenson* and *Grugeon* v. *Smith* there is a demand of charges for noting, from which dishonour must necessarily be implied: those cases, therefore, are distinguishable from *Boulton* v. *Welsh*, which cannot be distinguished from the present. As to the defendant's conversation on the day he received the plaintiff's letter, it does not amount to an absolute and unconditional promise to pay, and from nothing short of such a promise can the receipt of due notice of dishonour be inferred. In *Pickin* v. *Graham* (2), the words, "I suppose there will be no alternative but my taking up the bill, and if you will bring it on Tuesday, I will pay the money," were held not sufficient to support an inference of notice: *Borradaile* v. *Lowe* (3), *Standage* v. *Creighton* (4), *Cuming* v. *French* (5), *Baker* v. *Birch* (6). Here, the defendant's promise was, in effect, only a promise to pay in case the parties at Edinburgh did not.

At all events the defendant was entitled to a new trial on the third plea, for the deed put in evidence was in effect a discharge of Crokatt, and thereby a release of the defendant.

[415] TINDAL, Ch. J.:

This was an action on a bill of exchange for 850*l*., indorsed by the defendant Cauty, and dishonoured by the acceptor.

The answer given by the pleas to the demand on the bill is, first, that it was not presented when due; secondly, that the defendant did not receive due notice of the dishonour of the bill;

(1) P. 700, *ante* (4 Bing. N. C. 229).
(2) 38 R. R. 738 (1 Cr. & M. 725; 3 Tyr. 923).
(3) 4 Taunt. 93.
(4) 5 Car. & P. 406.
(5) 2 Camp. 106, *n*.
(6) 13 R. R. 767 (3 Camp. 107).

thirdly, that the plaintiffs received from a prior indorser 2*s.* 6*d.* in the pound on the account of their debt without the knowledge or consent of the defendant, and so released him from this demand.

The due presentment of the bill was established in proof, and a verdict was given against the defendant on these three issues. The question is, whether that verdict is proper on the second and third issue, or whether there should be a new trial.

With respect to the sufficiency of the notice of dishonour, on the authority of the two cases of *Hedger* v. *Steavenson*, and *Grugeon* v. *Smith*, we have been urged to say that if the judgment of this Court in *Boulton* v. *Welsh* be not erroneous, at least the case is distinguishable from the present. I see no reason for saying that the judgment in *Boulton* v. *Welsh* is not law: it has, indeed, gone the full length of *Solarte* v. *Palmer*, but it has not exceeded that case: however, we are not called on either by the case of *Hedger* v. *Steavenson*, or that of *Grugeon* v. *Smith*, to alter our decision in *Boulton* v. *Welsh*, because in *Hedger* v. *Steavenson* and *Grugeon* v. *Smith* the charges for noting were circumstances which did not exist in *Boulton* v. *Welsh*, and which showed by necessary inference that the bill had been dishonoured. Nevertheless, if it were necessary, I should be ready to reconsider the decision in *Boulton* v. *Welsh*, provided I were not called upon to alter the principle laid down. But, in the present case, coupling the notice sent in the plaintiffs' letter with the conversation which ensued between them and the defendant the same *day, there is no ground for saying that the defendant did not [*416] receive sufficient notice of the dishonour of the bill. In their letter of July 2nd, 1832, the plaintiffs say they are surprised to hear that Mrs. Gib's bill was returned to the holder unpaid: stopping there, the notice is very like that in *Boulton* v. *Welsh*; but the same day the defendant calls on the holders at their counting-house, expresses his regret and surprise that the bill has not been paid, and promises to write immediately to the other parties in Edinburgh, and that the bill should be paid either by them or by himself. If at that time he had expressed a word of dissatisfaction at what had occurred in Edinburgh, it would have led to an explanation of the whole, and the plaintiffs

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might have furnished any further notice which the circumstances might render advisable. If we were not to hold this notice sufficient, we should be allowing a defendant to succeed on a formal objection, after lulling the plaintiff into security by apparent acquiescence; but the jury found that the notice was sufficient, and we are not disposed to disturb their verdict.

As to the supposed release, if the instrument on which the defendant relies did amount to a release, we should perhaps be induced to grant a new trial on the ground of surprise: but, upon looking at the deed, we find that it will not admit of any such construction as the defendant puts upon it. The deed is a transfer by the plaintiffs to Souter of a right to sue Crokatt as to the 850*l.* bill at their instance. The language of the deed shows that the plaintiffs' right of action was not released, but that Souter was put in their place to enforce it in their name.

PARK, J.:

I think that this case, as far as any question arises as to the sufficiency of the notice of dishonour, may be decided on the [*417] parol evidence in the cause. I *abstain, therefore, from saying any thing about the decision in *Boulton* v. *Welsh* (1). The defendant, the same day on which he had received the written notice, calls on the plaintiffs, expresses his regret that the bill has not been paid, but promises to write to the parties in Edinburgh, and that the bill shall be paid either by them or by himself. That brings the case within the class of decisions in which it has been held that a promise to pay releases the holder from proof of notice of dishonour. *Pickin* v. *Graham* (2), and *Baker* v. *Birch* (3), are relied on for the defendant, to show that the promise should be more express: but in neither of those cases was the dishonour of the bill known at the time of the promise. In *Pickin* v. *Graham* a bill was drawn in Yorkshire and accepted, payable in London. During its currency, the affairs of the acceptor became embarrassed to the knowledge of the last indorser, who, being in Yorkshire on the day the bill became due, told the person who indorsed it to him that it would

(1) 3 Bing. N. C. 688.
(2) 38 R. R. 738 (1 Cr. & M. 725: 3 Tyr. 923).
(3) 13 R. R. 767 (3 Camp. 107).

probably not be paid: it was dishonoured in London on that day; but, before notice of that fact could arrive, the agent to the drawers called on the last indorser at Rotherham in Yorkshire, and, in the course of conversation about the bill being likely to come back, said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday I will pay the money:" the bill was not returned by the holder to the last indorser until ten days after this conversation, and the drawers did not receive notice of dishonour in due time: it was held that the terms of the promise made to the indorser by the agent to the drawers not being unconditional, and having been made at a time when no *laches* could have been committed in *giving due notice of dishonour, did not waive the necessity of [*418] giving that notice: and VAUGHAN, B. said, "What passed in this case seems to me to amount only to this, that, in a conversation about the expected dishonour of the bill, the agent of the drawers, supposing that they had no alternative but to pay, used the expressions relied on, in contemplation of a regular notice of dishonour about to be received. His words import a fear of being compelled to pay if the bill came back in due course, and that, as it would probably do so, there would then be no other course to be adopted but to pay it. That, in my opinion, does not amount to an absolute promise to pay the amount." In *Baker* v. *Birch* the promise was given a few days before the presentment: but in order to give validity to the promise, the default of the acceptor must be known at the time it is made: *Blesard* v. *Hirst* (1). That, therefore, brings the present case within the principle of *Lundie* v. *Robertson* (2), where an indorsee, three months after the bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but as the debt was justly due he would pay it; it was held, that the first conversation, being an absolute promise to pay the bill, was *primâ facie* an admission that the bill had been presented to the acceptor for payment in due time, and had been dishonoured, and that due notice had been given of it to the indorsee.

(1) 5 Burr. 2670. (2) 7 East, 231.

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Upon the other point, I am of opinion that the instrument produced does not support the plea: the effect of it is no more than this, to assign to Souter, who does not appear to be a trustee for any of the parties, the chance of recovering against Crokatt.

[419] COLTMAN, J.:

I think that the notice of dishonour in this case was sufficient. It may be that the letter taken by itself would not suffice: but when the parties meet the same day, and the defendant promises to pay the bill if the acceptor fails to do so, it would be hard to allow him to object to the notice after having thus lulled the holder into security. The cases of *Pickin* v. *Graham* and *Baker* v. *Birch* are distinguishable, because in them it could not be known at the time of the promise, whether or not the holder would be entitled to call on the drawer. So in *Borradaile* v. *Lowe*, a letter written by the indorser of a bill, who had been applied to for payment, after several days *laches*, telling the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered the defendant as unsafe, to return the bill to Trevor & Co. (who were prior indorsers on the bill, and also bankers at the defendant's place of residence), was held not to be such a waiver of *laches*, and promise to pay, but that the defendant, on discovering that in law he was discharged, might refuse payment. Here, the dishonour had occurred at the time of the defendant's promise, which, taken in connection with the plaintiff's letter, affords sufficient evidence of due notice of dishonour. The jury have found it sufficient, and they are the proper judges of the effect of the conversation.

Rule discharged (1).

(1) There was another count on a bill for 100*l*., upon which the Court were about to grant a new trial, on the ground that a witness had been improperly kept out of the way; but the plaintiff abandoned the claim.

PLACE AND ANOTHER *v.* DELEGAL.

1838.
May 3.

(4 Bing. N. C. 426—433; S. C. 6 Scott, 249; 1 Arn. 185; 7 L. J. (N. S.) C. P. 227.)

[426]

E., as attorney for plaintiffs, executors of M., having sold an estate, to a share of the proceeds of which W. was entitled as legatee of M., and defendant claiming W.'s share of such proceeds under an agreement with W., plaintiffs paid the amount to defendant, on receiving from him a guaranty, addressed to E., and also to plaintiffs, as executors of M., to indemnify them and each of them against any action by W.:

Held, that plaintiffs might sue on this guaranty without joining E.

THE first count of the declaration stated that before and at the time of the making of the promise of the defendant hereinafter next mentioned, the plaintiffs were executors of the last will and testament of one John Miers; and an estate called Black Bank had been and was sold under the directions of the plaintiffs as such executors; and before and at the time of the payment by the plaintiffs to the defendant hereinafter next mentioned, the plaintiffs, to wit, as executors as aforesaid, held in their hands certain monies as the produce of such sale. That, upon the death of the said J. Miers, one William Miers claimed to be entitled to a certain share of and in the said estate and the proceeds thereof, when sold; and the said W. Miers became a bankrupt, and a certain commission of bankruptcy, founded on the statutes relating to bankrupts then in force, had been and was awarded against him after the death of the said J. Miers, and before the making of the defendant's promise hereinafter next mentioned, to wit, on the 23rd of April, 1829; and thereupon, before the making of the defendant's promise hereinafter next mentioned, to wit, on the 20th of May, 1829, certain persons, to wit, James Chart and Alfred Newman, were appointed and became assignees of the estate and effects of the said W. Miers, under the commission. That before and at the time of the making of the defendant's promise hereinafter next mentioned, the said J. Chart and A. Newman, as such assignees, claimed to be entitled to, and required the plaintiffs to pay to them a certain sum, to wit, the sum of 32*l.* 6*s.* 6*d.*, being in the hands of the plaintiffs as such executors, in respect of the said W. *Miers' said [*427]
share of and in the produce of the said estate. That before and at the time of the making of the defendant's promise hereinafter

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next mentioned, certain transactions and dealings had taken place between the said W. Miers and the defendant; and the defendant also claimed to be, and represented to the plaintiffs that he was entitled to receive the said sum of 32*l.* 6*s.* 6*d.* of and from the plaintiffs, and then requested the plaintiffs to pay him, the defendant, the said sum of 32*l.* 6*s.* 6*d.* And thereupon, heretofore, to wit, on the 26th of December, 1834, in consideration of the premises, and that the plaintiffs, at the request of the defendant, had paid to him the said sum of 32*l.* 6*s.* 6*d.*, in respect of the share of W. Miers or his assignees in the produce of the said estate called Black Bank, the defendant then undertook and promised the plaintiffs to indemnify the plaintiffs and save them harmless from and against any claim that might be made against them, in consequence of their having so paid the defendant the said sum of 32*l.* 6*s.* 6*d.*, whether by the said W. Miers or any other person claiming through him. That thereupon afterwards, to wit, on the 11th of February, 1835, by reason of the premises, and in consequence of the plaintiffs having so paid to the defendant the said sum of 32*l.* 6*s.* 6*d.*, the said J. Chart and A. Newman, as assignees of the estate and effects of W. Miers as such bankrupt, according to the statutes in force concerning bankrupts, and claiming through him, did implead the plaintiffs in an action on promises for the recovery of, amongst other monies, the said sum of 32*l.* 6*s.* 6*d.*; and such proceedings were thereupon had in that action, that the said J. Chart and A. Newman as assignees, afterwards, to wit, in Trinity Term, 1835, by the consideration and judgment of the Court of, &c., recovered in the same action against the plaintiffs a large sum, to wit, the sum of
[*428] 32*l.* 6*s.* 6*d.*, and also the costs of the said J. Chart and *A. Newman as assignees in that behalf, amounting together to a large sum, that is to say, 89*l.* for their damages, which they, as assignees, had sustained as well by reason of the premises, as for their costs and charges by them about their suit in that behalf expended; whereof the plaintiffs were convicted, as by the record and the proceedings thereof remaining in the said Court fully appeared; by means of which said several premises they, the plaintiffs, afterwards, to wit, on the 29th of July, 1835, were called upon and forced and obliged to pay, and did then

necessarily pay and satisfy to J. Chart and A. Newman, as such assignees, the said sum of money so recovered, to wit, the said sum of 32*l.* 6*s.* 6*d.*, and the said costs, amounting together to the said sum of 89*l.*; and thereby also the plaintiffs were obliged to pay, and did then pay to J. Chart and A. Newman, as such assignees, other monies, to wit, the amount of 40*l.* for other their costs by them incurred in the said action; of all which premises the defendant afterwards, to wit, on &c., had notice; yet the defendant did not nor would, although often requested by plaintiffs so to do, pay the plaintiffs or either of them the said sums of 89*l.* and 40*l.* or either of them, or any part thereof, and thereby or otherwise indemnify or save harmless the plaintiffs, according to the defendant's said promise; and by reason of the premises the plaintiffs were damnified to the amount of said sums of 89*l.* and 40*l.* contrary to the defendant's promise.

The agreement on which the plaintiffs declared was as follows:

"Mr. John Evans, and also Messrs. Place and Meabry, as the executors of the will of the late Mr. John Miers:

"In consideration of your having paid to me the sum of 32*l.* 6*s.* 6*d.*, in respect of the share of Mr. Wm. Miers, or of his assignees, in the produce of the estate called *Black Bank, I [*429] hereby undertake to indemnify and save you, and each of you, harmless from any claim that may be made against you in consequence of your having so paid me the said sum of money, whether by the said Wm. Miers, or any person claiming through him. December 26, 1834.—C. DELEGAL."

The facts stated in the declaration were proved at the trial. It also appeared that the sale of Black Bank estate was effected by John Evans as attorney for the plaintiffs, and that the proceeds of the sale were paid over by him to the plaintiffs after the execution of the defendant's agreement.

After the plaintiffs had paid the defendant the 32*l.* 6*s.* 6*d.*, the assignees of Miers sued the plaintiffs for that sum, and joined another demand in the same action. The defendant Delegal had notice of this action; counsel's opinion was taken upon it, with his assent: and thereupon the action was defended. A verdict was obtained for the assignees, and the costs of the action, together with the 32*l.* 6*s.* 6*d.*, amounted to 91*l.* 8*s.* 6*d.*

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The plaintiffs then commenced the present action on the above agreement, and having obtained a verdict, on the count setting it forth, for 91*l.* 8*s.* 6*d.*,

Talfourd, Serjt. moved to set the verdict aside, on the ground that Evans and the plaintiffs had a joint interest in the guaranty, and therefore should all have joined in the suit: *Graham* v. *Robertson* (1), *Brand* v. *Boulcott* (2), 1 Wms. Saund. 154, n. 1; or that their interest was joint and several, and therefore the suit should have been carried on by one alone, or by all three of the persons guaranteed. He also moved to reduce the damages, on the ground that, as the assignees' action against
[*430] the plaintiffs was for two demands, and the defendant's *guaranty extended to only one of them, the defendant ought to pay such portion only of the costs of that action as applied to the demand he had guaranteed.

A rule *nisi* having been granted,

Channell showed cause:

The action is well brought in the name of the two plaintiffs; for, though three persons are named in the guaranty, the interest is in two parties only: the one, Evans; the other, the plaintiffs as executors; and that interest is several in the two parties. This is manifest from the circumstances under which the guaranty was given. The assignees might have sued Evans for the 32*l.* 6*s.* 6*d.*, part of the proceeds of the Black Bank estate, before he paid it over to the plaintiffs; or they might have sued the plaintiffs as executors after it came to their hands; but they never could have included all the three in the same action; and, as it was doubtful whom they would sue, the guaranty was framed on the one hand to save Evans harmless, in case he should be sued; on the other, to save the plaintiffs as executors, in case they should be sued. Each of those two parties, therefore, had a several interest; and the case resembles that of *Withers* v. *Bircham* (3), where, by deed, reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the

(1) 2 T. R. 282.
(2) 3 Bos. & P. 235.
(3) 27 R. R. 350 (3 B. & C. 254).

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survivor, it was witnessed that C. covenanted with A. and B. and their executors to pay the annuities or either of them when the grantors should make default in payment. A. died; it was held that the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C. In *James* v. *Emery* (1), where one of two covenantees had no interest, but was a trustee for the other, it was held that as such trustee he ought to *join in the suit; here, if Evans had any interest, it was on his own account, and not as trustee. But he had no interest after paying the money over. In *Graham* v. *Robertson*, those who sued had not, collectively, an interest separate from those whom they omitted to join in the action.

[*431]

As to the reduction of damages in the way of apportioning costs, as the assignees' action was resisted at the instance of the defendant, he is liable for the event. For aught that appears, the other demand might have been yielded to if he had not interfered.

Talfourd:

It may be, that after Evans had paid over the money received from the sale, he had no interest in this guaranty: but the question is, what was the interest of the parties when the guaranty was executed; and as they were then all liable to an action by the assignees of William Miers, they had, at that time, a joint interest in being indemnified; so that the case is not distinguishable from *Graham* v. *Robertson*. There, the plaintiffs, together with others, being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which were paid solely by the plaintiffs: it was held that an action could not be brought by the plaintiffs alone for their share of the restitution-money and costs, because it was either a partnership transaction, when the other parties ought to be joined,—or not, when separate actions should be brought by each of the persons paying.

(1) 19 R. R. 503 (8 Taunt. 245).

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TINDAL, Ch. J.:

The question whether the three persons named in this guaranty ought to have joined as plaintiffs in the action against the defendant, depends on the situation in which each of them stood with respect to the transaction out of which the guaranty arose. [*432] *And, when we look at the relation between the parties, it is perfectly clear that the two plaintiffs had an interest separate from that of Evans.

Evans was the attorney of the plaintiffs, who were executors of John Miers: by their directions he sold an estate which had belonged to the testator; a share of the proceeds of which sale, 32*l.* 6*s.* 6*d.*, was claimed by William Miers. Evans, therefore, was the attorney, and the plaintiffs were his principals; but it might be uncertain whom the assignees of Miers would sue. If Evans had the money at the time the demand was made, the assignees might have sued him alone: if the plaintiffs had received it from Evans, the assignees might sue them without Evans. The contract, therefore, was so prepared as to guarantee either Evans or the plaintiffs, as the case might require. They are the two parties to be indemnified, and they have no joint interest. Looking, therefore, at the whole transaction, and the interest of each of the two parties, Evans as the attorney, and the plaintiffs as the principals, no action could have been brought by the assignees to charge all three; and the plaintiffs, having a separate interest, have properly brought this action without joining Evans.

PARK, J.:

I am of the same opinion. In *Graham* v. *Robertson* there was a joint interest in all the owners of the ship to obtain the amount of restitution-money paid by them on account of the defendants: it was held, therefore, that all should have joined in suing for it. In the present case, the guaranty is addressed to John Evans, and also to Place and Meabry as executors of Miers; clearly implying that Evans is one party, and the executors another. I think, therefore, the action is properly brought.

BOSANQUET, J.:

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Evans was not jointly interested with the executors of Miers; his interest was of one description; *theirs of another and a distinct description: I think they have properly sued without Evans. [*433]

COLTMAN, J.:

I do not agree in the argument that we should look only at what the interest was at the time of the guaranty; we must also consider who is entitled to recover damages, and there is no ground for saying that Evans has sustained any damage.

As to the claim for deducting a portion of the costs in the action of Chart against the plaintiffs, if the defendant objected to the resisting that action, he should have given the plaintiffs notice to pay the 32*l.* 6*s.* 6*d.*

Rule discharged.

PAWLE *v.* GUNN.

1838. *May 7.*

(4 Bing. N. C. 445—449; S. C. 6 Scott, 286; 1 Arn. 200; 7 L. J. (N. S.) C. P. 206.) [445]

Plaintiff having, at defendant's request, entered into a contract for the purchase of Spanish bonds to be delivered at a future day, and having afterwards paid the price: Held, that defendant could not, in answer to an action for the money paid to his use, object that the contract was not in writing as required by the Statute of Frauds, s. 17 (1).

ASSUMPSIT for money paid to the use of the defendant.

Pleas: first, *non assumpsit;* secondly, that the money was paid voluntarily by the plaintiff, and without the consent of the defendant, in pursuance of a contract entered into for the purchase of Spanish bonds, of which the vendor was not in possession at the time of the contract, and which contract the plaintiff was not authorised to complete.

The plaintiff replied that the contract was entered into in the name of the defendant, and with his authority, and traversed the allegation that the payment had been made voluntarily.

At the trial before Tindal, Ch. J. it was proved, by admissions of the defendant and otherwise, that the contract for the purchase of these bonds at a future day had been entered into by the plaintiff with one Hitchcock, under orders given by the defendant;

(1) See now the Sale of Goods Act, 1893, s. 4, and definition of "Goods" in s. 62.—R. C.

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that the price had been paid or accounted for to Hitchcock on the day fixed for the delivery of the bonds; and that the defendant had promised to repay the plaintiff if he would withdraw the present action. On some points the evidence was conflicting, but it appeared clearly that the contract had not been signed by the party to be charged, or his agent. A verdict having been found for the plaintiff,

Currie moved to set it aside, on the ground, that assuming the second plea not to have been established in proof, the defendant was entitled to the verdict on the general issue:

[446] This was a contract for the sale of goods within the meaning of the 17th section of the Statute of Frauds, and there having been no delivery of the goods, or part payment at the time of the contract, the bargain could not be proved for want of a note in writing. If so, the money alleged to have been paid to the defendant's use was paid voluntarily by the plaintiff, and a promise on the part of the defendant to repay it could not be implied. The plaintiff should have declared for an indemnity on the special agreement between him and the defendant: *Spencer* v. *Parry* (1).

That foreign bonds are goods within the 17th section of the Statute of Frauds appears from *Pickering* v. *Appleby* (2), and *Crall* v. *Dodson* (3). They pass by delivery like other chattels; trover would lie for them; the words *bona et catalla*, jointly or separately, denote personal property of every kind as distinguished from real; and under a writ of *diem clausit extremum*, debts whether by specialty or simple contract are seized into the King's hands as chattels of the deceased: *Bullock* v. *Dodds* (4).

A rule *nisi* having been granted, [and argued:]

[448] TINDAL, Ch. J., after stating the pleadings:

On the issue joined on the second plea the defendant was bound to make out that the plaintiff paid this money voluntarily, and without the consent of the defendant. There was not a tittle of evidence to establish that such was the fact; on the contrary, it was proved that the defendant promised to pay

(1) 3 Ad. & El. 331.
(2) 1 Comyn, 353.
(3) Select Cases in Chancery, 41.
(4) 20 R. R. 420 (2 B. & Ald. 258).

the amount if the defendant would withdraw his action; and therefore we come to the question raised on the general issue. I agree, that in order to maintain an action for money paid to the defendant's use, the plaintiff must prove either that the money was paid by compulsion of law for the benefit of the defendant, or at his express request; and in order to show payment by compulsion of law, he must show such a contract as the law will enforce. But it is unnecessary to decide whether or not the contract between the plaintiff and Hitchcock was of that description, because this money was paid on what amounts of necessity to a request on the part of the defendant; and when the employer has assented, as here, to a payment by his agent, no case has gone the length of saying he may repudiate such payment.

If a person were to request another to pay money to a charity, —a payment which could not be enforced by *law, could it be [*449] contended that an action would not lie against him for money paid? I am clearly of opinion, that on this ground the rule must be discharged.

PARK, J.:

The request by the defendant for the plaintiff to enter into the contract having been proved, and the defendant's subsequent promise to repay him being established, this is clearly a case in which the plaintiff was entitled to sue the defendant for money paid to his use.

BOSANQUET, J. concurred.

COLTMAN, J.:

Spencer v. *Parry* only decided, that where the law does not compel a plaintiff to pay money for a defendant, a promise by the defendant to repay him will not be implied; but it never decided, that after an express authority to enter into a contract, the party giving the authority can refuse to reimburse his agent. Here, the order to enter into the contract and the subsequent promise to pay the amount having been clearly established in evidence, the rule for a new trial must be

Discharged.

1838.
May 7.

[449]

WOOF *v.* HOOPER.

(4 Bing. N. C. 449—450; S. C. 6 Scott, 281; 1 Arn. 199; 6 Dowl. P. C. 617.)

Where a cause is referred to an arbitrator, to certify for whom, and for what amount, if any, the verdict shall be entered, he is not confined to a general verdict, but may enter it on the several issues, according to the evidence before him.

To an action of assumpsit, the defendant pleaded the general issue, payment, and a set off.

[*450] By an order of Nisi Prius the cause was referred to *an arbitrator, who was to certify for whom, and for what amount, if any, the verdict should be entered.

No evidence was offered on the pleas of payment or set off, but the plaintiff having failed to establish the claim set up in the declaration, the arbitrator directed a general verdict to be entered for the defendant.

Talfourd, Serjt., obtained a rule *nisi* to amend the certificate of the arbitrator, by directing a verdict to be entered for the defendant on the general issue, and for the plaintiff on the two other issues.

R. V. Richards, who showed cause, contended that the Court had no authority to do this:

The order of Nisi Prius only authorized the arbitrator to enter up a verdict generally for the plaintiff or defendant. If it had been intended that he should have power to enter the verdict on the several issues, the order should have been more explicit.

Talfourd:

The true intention of the order is, a finding on each of the issues. That is the meaning of referring the cause. If it were otherwise, the finding on the whole record would be inconsistent, as the defendant could not be entitled to a verdict on the general issue, which denies the claim, and on the plea of payment which admits it.

TINDAL, Ch. J.:

In good sense, and I see no reason why not in law also, our decision must be with the party who makes this application.

The whole cause is referred, with power to the arbitrator to enter a verdict. I think that is *secundum subjectam materiem*, and that, as the arbitrator is put in the place of the jury, he may find the verdict in the same way as the jury had power to find it.

Rule absolute.

MANTZ *v.* GORING (1).

1838. *May 7.*

[451]

(4 Bing. N. C. 451—453; S. C. nom. *Young* v. *Mantz*, 6 Scott, 277; 1 Arn. 198.)

In an action for breach of a covenant to keep a house in repair, though the defendant may show generally in what state the premises were at the commencement of the term, and whether they were new or old, it is not competent to him to show it in matters of detail.

THIS was an action for breach of a covenant to keep certain premises demised to the defendant in 1830, in tenantable repair, reasonable wear and tear excepted.

Plea. Performance.

The premises consisted of a house, cottage, barn, and brick wall surrounding the curtilage.

The witnesses for the plaintiff proved that the buildings were old, and that it would cost 155*l.* to put them in tenantable repair.

The defendant proposed to ask one of his own witnesses whether some of the defects did not exist previously to 1830; and in particular, whether the brick wall was standing at that time.

COLTMAN, J., who presided at the trial, held that the defendant might show generally in what state of repair the premises were at the commencement of the term, but that it was not competent to him to go into matters of detail; and the evidence was rejected.

A verdict having been found for the plaintiff, damages 55*l.*,

Byles obtained a rule *nisi* to set it aside, on the ground that this evidence had been improperly excluded.

Bazett, who showed cause, relied on *Stanley* v. *Towgood* (2), where it was held that a covenant to keep and leave a house in

(1) See the same principle applied in *Payne* v. *Haine* (1847) 16 M. & W. 541, 16 L. J. Ex. 130, and in *Proudfoot* v. *Hart* (1890) 25 Q. B. Div. 42, 59 L. J. Q. B. 389.—R. C.

(2) 43 R. R. 569 (3 Bing. N. C. 4).

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repair, was satisfied by keeping it in substantial repair according to the nature of the building; and that, with a view to determine the relative sufficiency of the repair, the jury might enquire whether the house was new or old; but the CHIEF JUSTICE said, that the state of repair at the time of the demise, is not to be taken into consideration.

[452] The COURT then called on

Byles, and *Hindmarsh* with him, to support the rule:

They referred to *Gutteridge* v. *Mungood* (1), where a lessee having covenanted to keep old premises in repair, it was held, that he was not liable for such dilapidations as resulted from the operation of time and the elements; and TINDAL, Ch. J. said, "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord."

The defendant therefore, had a right to show what defects were owing to time or the elements, and what to the neglect of the tenant, and he could not do that without going into the details of the state of repair at the time of the demise. If the plaintiff's witness had been examined in chief as to the general state of repair at that time, the defendant might have cross examined him as to the details, in order to test the accuracy of his testimony; and unless he could examine his own witness in like manner, he might be compelled to substitute new premises for old ones, instead of being confined to the repairs of that which had decayed during the tenancy.

TINDAL, Ch. J.:

I see no reason for disturbing this verdict. The objection is, that the defendant was not allowed to put the question, "Did

(1) 1 Moo. & Rob. 334.

not some of the defects complained of, exist prior to 1830?" But the learned Judge allowed the defendant to go into evidence *of the general state of repairs at that time: I think that was sufficient, and that, in effect, the defendant had all that he asked for. The covenant is to keep the premises in good and tenantable repair, reasonable wear and tear excepted. Every one knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises: for it is established by *Stanley* v. *Towgood* and other cases that the same nicety of repair is not exacted for an old building as for a new one. It is clear, however, that justice has been done here according to that principle, for it was proved that it would have cost 155*l.* to put these premises in complete repair, and the jury threw off the 100*l.*, probably because they were old.

The rest of the Court concurring, the rule was

Discharged.

DYKES *v.* BLAKE.

1838. *May* 10. [463]

(4 Bing. N. C. 463—477; S. C. 6 Scott, 320; 1 Arn. 209; 7 L. J. (N. S.) C. P. 282.)

By particulars of sale, Lot 13 was described as building ground, and the adjoining Lot 12 as a villa, subject to liberty for the purchaser of Lot 1 to come on the premises to repair drains, &c. as reserved in Lot 7. The reservation in Lot 7 referred to a lease, which gave the occupier of that and several adjoining lots composing a row of houses, a carriage way in common, in front of the lots, and a footway at the back, and also a footway over Lot 13. The particulars contained plans, which disclosed the carriage way in front, and the footway at the back of the houses, but not the footway over Lot 13. But they stated that the lease of Lot 7 might be seen at the vendor's office, and would be produced at the sale. Plaintiff having purchased Lots 12 and 13 by one contract in ignorance of the footway over Lot 13: Held, that the misdescription was such as to entitle him to rescind the contract as to both.

THIS action was brought to recover the sum of 633*l.* 0*s.* 5*d.*, being the amount of deposit and auction duty paid by the plaintiff to the defendant, who was an auctioneer, on the purchase of two lots, Nos. 12 and 13, forming part of several lots of property at Camberwell, put up for sale at Garraway's Coffee

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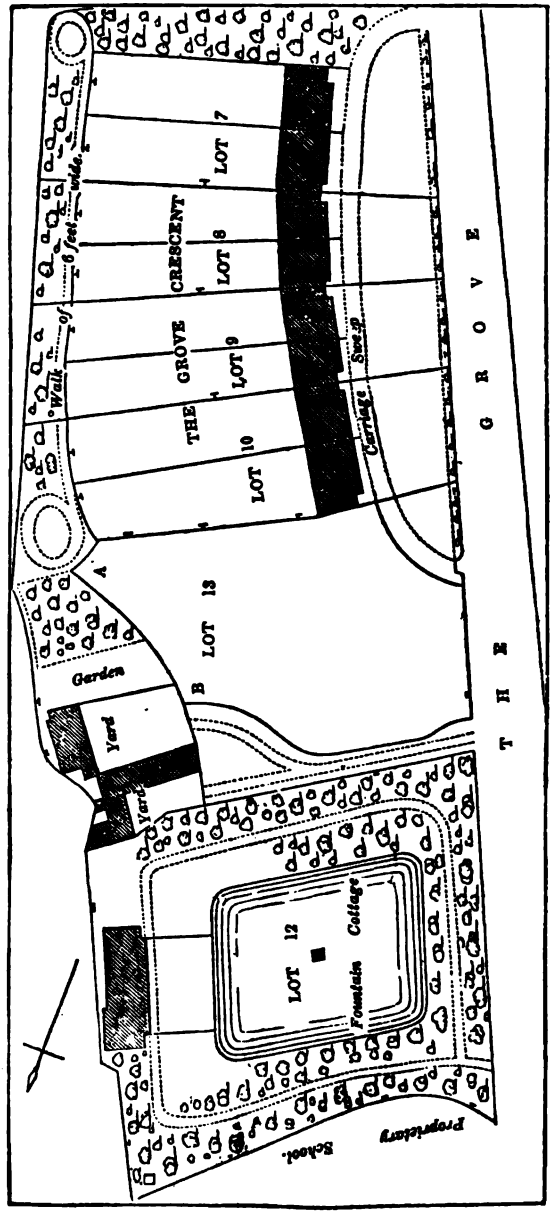
House, in London, *on the 20th of May, 1836, and delineated in the particulars of sale, as on the following plan:



[465] At the trial before Tindal, Ch. J., London sittings after Hilary

Term, 1837, a verdict was found for the plaintiff, subject to the opinion of this Court, who were to draw such inferences from the facts stated in the following case, as a jury might have done.

Previously to the time of the sale, printed particulars with conditions of sale had been issued to the public. The particulars thus issued contained the following description of the said Lots 12 and 13: "Lot 12. The celebrated Fountain Cottage (describing it) let to I. M. Gerothwohl, Esq., upon an agreement for a lease for nine years, from Midsummer, 1833. The covenants in the agreement will be read at the time of sale. The purchaser of this lot will be entitled to a right of carriage and footway, 13 feet in width, over Lot 13, on the northern boundary thereof, as shown upon the plan; bearing and paying one moiety of the expense of keeping the road in repair. This lot is supplied with water from Lot 1, without any rent or payment for the same; and the purchaser will be entitled to have water supplied as heretofore from Lot 1 until Midsummer, 1842, but not afterwards; and the lot is sold subject to liberty for the purchaser of Lot 1 to come upon the premises at all reasonable times to repair the main laid from the reservoir in Lot 1 and the drain and sewer in the same premises, in like manner as reserved in Lot 7."

"Lot 13. A first-rate building plot of freehold ground, land tax redeemed, called the Crescent Field, lying between Lots 10 and 12, enclosed from the grove by an ornamental iron fence, to which it has a frontage of 86 feet, besides another frontage of about 90 feet to the Crescent sweep, as shown upon the plan. Unquestionably as fine a situation for building as any in Camberwell: together with the stable-yard and planted ground in the rear, including two small tenements. The entire site *of this [*466] lot comprehends about one acre, be the same more or less. This lot will include the ground forming part of the Crescent sweep comprised within the boundary of Lot 13 by the line running east and west upon the plan, subject for ever hereafter to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the Crescent houses, and subject to a similar reservation for the purchaser of Lot 1 in respect of the main from the reservoir and the drain and sewer, as is made out of Lot 12."

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The reservation in the description of Lot 7, referred to in the description of Lot 12, was in the following words: "This lot is to be supplied with water as specified in the description of Lot 1, and will include that portion of the ground next the grove, which lies in front of this lot as shown in the plan by the line drawn from east to west; and also that portion of the planted ground on the east side of the gardens of the Crescent houses, which lies in the rear of this lot, as also shown on the plan by the line drawn from west to east, with the benefit for ever hereafter of the same rights of way and passage, and other rights and easements over the residue of the said ground next the grove, and the said planted ground in the rear, as are now enjoyed under the existing leases of the Crescent houses, and on the same terms and conditions; subject nevertheless to corresponding rights and easements in favour of the other Crescent houses; and to liberty for the purchaser of Lot 1 to come upon the said planted ground at all reasonable times to repair the main laid from the reservoir of Lot 1 and the drain running through the same ground, as shown upon the plan expressly referring to the sewers, drains, and water courses, produced at this sale, making good any
[*467] damage that may be sustained *thereby. And the conveyance to the purchaser is to ascertain all proper reservations, covenants, and agreements, for the above purposes."

The particulars of Lot 7 described the two houses comprised in that lot, as let on lease for twenty-one years from Midsummer, 1826; the lease to be seen at Mr. Gregson's offices, and to be produced at the sale. The particulars of Lot 8 stated the reservation as in Lot 7, "and as shown in the plan." The particulars of Lots 9 and 10 referred to the plans in the same words.

The particulars issued contained both a plan of the lots, and a plan of the drains and sewers referred to throughout the particulars.

The plaintiff attended and bid at the sale: Lot 12 was knocked down to him for the sum of 1,300*l.*, and Lot 13 for the sum of 1,650*l.*, making together the sum of 2,950*l.*; and a single contract of purchase for both lots was signed at the foot of one of the printed particulars.

The tenants of all the eight houses forming what are called the Crescent houses, and delineated and described in the plan annexed as Lots 10, 9, 8, and 7, had a right of way across Lot 13 to the extent mentioned in the passage printed in italics, in the following clause, which was inserted in the leases of all those houses: "Also full and free liberty of ingress, egress, and regress, to and for the person or persons for the time being, occupying the said messuage, or tenement, and premises, and his and their servants, workmen, and others in his or their company, or without, and to, and for carriages and horses to him or them belonging, or by him or them retained or used, at all times during the continuance of this demise, in, through, over, or upon the road made and leading to, and being in front of the said messuages or tenements, from the gate placed next the Grove at the north-west end of such road to the gate *placed [*468] at the south-west end thereof: and also full and free liberty of way and passage to and for such person or persons for the time being occupying the said messuage, or tenement, and premises, and his and their respective families (not being servants), and friends, in, along, and over the walk of six feet wide, made and now being in the rear and lying to the east of the ground inclosed by wire fences as the garden ground or ground to be occupied with such several houses; the same walk having been provided and set out as a promenade or walk for the use of the inhabitants of all the said houses, and their respective families (not being servants), and extending from the north-east corner of the wall inclosing the garden ground of the messuage or tenement hereby demised or intended so to be, to the south-east corner of the fence which incloses the garden ground in the rear of the southernmost of the said eight houses: *and also full and free liberty to and for such person or persons, for the time being, occupying the said messuage, or tenement, and premises, and his wife, children, and friends, in their or one of their company, to pass and repass on the path commencing at the end of the said walk and leading to the stable-yard near thereto; and also full and free liberty to and for the servants of such person or persons so for the time being occupying the said messuage, or tenement, and premises, to pass and repass from the grove or*

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stable-yard, with gravel, earth, dung, or compost, to be placed or used in the said garden, in hand or wheelbarrows, but not otherwise, along and over the said way and path already made and leading from the Grove to the said garden ground of the said messuage or tenement intended to be hereby demised."

The leases of the eight houses in the Crescent were for the following terms: No. 1 for seventy years from Midsummer, 1818, determinable by the tenant at the end of twenty-one years; [*469] Nos. 2, 3, and 4 for seventy-one *years from Michaelmas, 1817; Nos. 5 and 6 to yearly tenants; No. 7 for twenty-one years from Midsummer, 1826, determinable at the end of fourteen years; and No. 8 for twenty-one years from Midsummer, 1835, determinable by the tenant at the end of 3, 7, or 14 years.

The houses all face the grove. There is a carriage drive or sweep forming with the garden or plantation in front a semi-ellipse, and this drive leads from the Grove to the eight several houses.

There is a garden at the back of each of the eight houses. At the eastern extremity of these gardens there is a gravel walk running from south to north, which is the walk of six feet wide mentioned in the leases. This gravel walk, together with the rest of the ground running from south to north at the back of the gardens and extending northward to the field forming part of Lot 13, forms the promenade mentioned in the leases, and is common to all the eight houses forming the Crescent.

The right of way upon which the questions in this case arose, is exercised in respect of each of the eight houses, by going out of the gardens at the back of the houses and along the grave walk or promenade, and thence along the way or path described in the leases as already made, and which still exists across the field which forms part of Lot 13, into the road delineated in the plan as running along the northern side of Lot 13, and so along that road either to the stable yard, which also forms part of Lot 13, or to the Grove.

The said way or path runs across the said field at the eastern end of that field nearly parallel to the boundary of the said stable-yard, which is at the eastern end of the said lot. There is a garden gate opening from the promenade into the pathway

at the letter A in the plan; and a hand-gate opening from the pathway at the letter B in the plan, into the said road on the northern side of Lot 13.

The letters A and B, the termini of the path in question, were [470] not on the plans annexed to the particulars issued as aforesaid; and there was not any delineation of that path on the said plans.

The portion of Lot 13, over which the pathway extends, was, at the time of the sale, a grass-field.

At the time of the sale, the tenant of the house, which was the first house in the Crescent next to Lot 13, and which was one of the houses in Lot 10, was also in the occupation of Lot 13 as tenant from year to year; and the nearest access from the garden at the back of his house, and from the gardens of the other Crescent houses to the field, was through the iron gate marked A.

The 9th condition of sale was, "That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the present sale, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken as the case may require."

Notice was given by the plaintiff before the action was brought, that he would not complete the contract, on the ground that the same was void on account of the said right of way; and a demand was made upon the defendant for the deposit and auction duty, with interest, which was refused by the defendant.

The case was argued in Hilary Term by

Wilde, Serjt. for the plaintiff. * * *

Wightman, for the defendant. * * * [473]

Wilde, in reply. * * * [474]

Cur. adv. vult.

TINDAL, Ch. J.:

The question is, whether the plaintiff is at liberty, under the circumstances stated in the special case, to hold the contract of purchase into which he entered to be altogether void, and to recover back the money paid to the auctioneer as money had and received to his use. And this will depend on the determination of two questions: first, whether the description of the premises

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in the printed particulars and plans exhibited at the time of the sale, upon the faith of which the plaintiff made his purchase, was such that a prudent and vigilant man would enter into the contract without discovering the existence of the right of way over the land comprised in Lot 13; and secondly, whether such right of way being found to exist, renders the purchase altogether useless for the purposes for which it was made, or only brings it under the head of mis-description, so as to form the subject of compensation or equivalent under the ninth condition of sale. And upon the first of these two questions we are of opinion that looking at the printed particulars of sale, and the plans which accompany them, and which are referred to by the particulars, there is no sufficient disclosure of the existence of the right of

[*475] way to enable a bidder at *the sale, by the exertion of ordinary vigilance and sagacity, to discover that such way exists.

Looking at the description of Lot 13, given in the particulars themselves, it states that the lot will include the ground forming part of the Crescent sweep coloured red upon the plan, "subject for ever hereafter to the same rights of way and passage over the same, as are now enjoyed under the existing leases of the Crescent houses." Now, in the first place, it is left in very great uncertainty whether the rights of way and passage there spoken of, are to be exercised only over the sweep before the Crescent houses, or whether they are meant to extend over other and more distant parts of the close. Admitting, however, the latter to be the proper, though it certainly is not the most obvious construction, a reference to the other part of the particulars, so far from throwing any light upon the existence of the way now claimed, would tend to mislead the bidder at the auction. He would naturally refer for information to the description of the Crescent houses themselves, for the use of which the way is reserved. But the description of Lot 7, so far from pointing at the way in question, mentions only the reservation of a right of way and passage over a different part of the premises, viz., such rights of way over the ground "next the Grove, and the planted ground in the rear, as are now enjoyed under the existing leases of the Crescent houses;" and in all the subsequent lots, 8, 9, and 10, the particulars expressly state that these lots are sold with

similar rights and privileges, and subject to similar reservations as Lot 7, "and as shown in the respective plans." Now upon referring to the plan, which is thus appealed to in the particulars, there is no trace whatever of any right of way over Lot 13, for the use of the Crescent houses, except the carriage sweep. There is indeed a way over the close for the use of Lot 12, clearly *marked upon the plan, the presence of which would add strength [*476] to the conclusion that none other was intended to be reserved.

The only question therefore is, whether the exception in the description of Lot 13 of the rights and easements now enjoyed under the existing leases of the Crescent houses, coupled with the notice in the description of Lot 7, that the lease and agreement might be seen at the attorney's offices and would be produced at the sale, imposed an obligation on the bidder to refer to the lease itself; and we think, under the circumstances, it did not. Whatever might have been the case, if the particulars had been confined to matter of description only, we think that as there is a direct reference and appeal to the plan, and the plan, whilst it discloses one way, altogether omits any trace of the way now claimed, the bidder at the auction could not be bound in the exercise of ordinary prudence and vigilance to look further; that the inspection of the plan would lull all suspicion to sleep, and that it was calculated, not simply to give no information, but actually to mislead. Particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction; and they would only become a snare to the purchaser, if after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to. We therefore think upon the great head of enquiry, the existence of this right of way was not sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and that the contract is not binding on the plaintiff.

The second point is, does the mis-description become matter of compensation and equivalent only? The 13th lot is stated in the particulars to be "a first-rate building plot of freehold ground;" it is then described as having *a frontage of 86 feet to [*477] the Grove, and 90 feet to the Crescent sweep. The purchaser

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therefore might fairly conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purpose of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased. And although it has been argued that the objection can apply at most to Lot 13, and that the purchaser of Lot 12 can have no right to rescind that purchase by reason of the mis-description in the Lot 13, we answer, that in this case the seller has been contented to treat the two purchases as one contract, by entering into one agreement for the sale of both at once at the aggregate price; and secondly, that the purchaser of Lot 12, upon the facts of this case, may be reasonably understood to have purchased Lot 12 in order that he might, by unity of seisin, extinguish the right of way over Lot 13, which before belonged to Lot 12, and thereby render Lot 13 more valuable as building ground; an object and purpose which is entirely defeated by the existence of the right of way above mentioned.

We therefore think the mis-description, however unintentional, has been such as to justify the plaintiff in saying, that the lots which the seller is ready to convey are not the lots which he purchased, and consequently that he may recover back with interest, the sums paid to the auctioneer.

Judgment for the plaintiff.

IN THE HOUSE OF LORDS.

1838.
May 22.

[574]

WILLIAM MILLER, ESQUIRE, AND JOHN MALONE, APPELLANTS; AND THE VERY REV. EDMOND DALRYMPLE HESKETH KNOX, RESPONDENT (1).

(IN THE CAUSE OF THE SAID VERY REV. EDMOND DALRYMPLE HESKETH KNOX, PLAINTIFF; AND JOHN GAVAN AND OTHERS, DEFENDANTS.)

(4 Bing. N. C. 574—632; S. C. 6 Scott, 1.)

The persons named in a writ of rebellion, and charged with the execution of it, have a right, at their discretion, to require the assistance of any of the liege subjects of the Crown to assist in the execution of the writ:

And that, upon reasonable apprehension of resistance, no resistance having taken place:

And, as against persons appointed and acting as constables in Ireland, under 3 Geo. IV. c. 103 (2):

Notwithstanding regulations made under that Act prohibit such constables from interfering in the execution of any writ, decree, or civil order, or in driving for rent, tithes, or taxes, unless called out by a magistrate, or the high or sub-sheriff in person:

And a stranger to the proceedings in the cause, called upon to assist in the execution of the writ, and declining to do so, is liable to an attachment for contempt: LITTLEDALE, J. and BOSANQUET, J., *dissentientibus* as to the attachment.

THIS was an appeal against an order of his Majesty's Court of Exchequer in Ireland, made on Monday, the 1st of February, 1836, whereby the said Court disallowed the cause shown by the appellant John Malone, and made the conditional order of the 11th of January then last, absolute, and ordered that an attachment should be awarded against him for his contempt, stated in the affidavit of Robert Dudley, in refusing to aid and assist said Robert Dudley, one of the commissioners named in the Commission of Rebellion, in the above-named cause; and that an attachment should also be awarded against the appellant William Miller for his contempt, stated in the affidavit of said Robert Dudley; the attachments thereby awarded not to issue, and each party to abide his own costs of the motion.

(1) Cited by Sir P. O'BRIEN, Ch. J. in *Att.-Gen.* v. *Kissane* (1893) 32 L. R. Ir. 220, 235.—R. C.

(2) Repealed by the Constabulary (Ireland) Act, 1836 (6 & 7 Will. IV. c. 13), s. 1. But see s. 15 of this Act.—R. C.

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[575] From the affidavit above mentioned, and others, it appeared that, on or about the 6th of March, 1835, a bill was filed in his Majesty's Court of Exchequer in Ireland by the above-named respondent, as rector and vicar of the parish of Eglish, in the diocese of Killaloe and county of Tipperary, claiming to be entitled to composition in lieu of the rectorial and vicarial tithes of the said parish, against the above-named defendants, as occupiers of lands, and liable to the payment of composition in lieu of tithes, in respect of the same; and the said bill prayed that an account might be taken, under the decree of the Court, of all sums due to the above-named respondent, as such rector and vicar, for or on account of such tithe composition, which accrued due on the 1st of November, 1834, and payable out of the lands within the said parish by the above-named defendants, as occupiers, or having such interest therein as to make them liable; and that they might be respectively decreed to pay such sums as should appear on the taking of the account to be due, and might be decreed to pay the costs.

On the 18th of April, 1835, the above named defendant John Gavan, and several other defendants, put in their appearance by attorney.

The appellant William Miller was at the times above mentioned, and is now, by virtue of the appointment of the Lord-Lieutenant of Ireland, the general superintendent and inspector, for the province of Munster, of the chief and other constables appointed under the provisions of the Act of Parliament passed in the third year of the reign of his late Majesty George IV., intituled "An Act for the appointment of constables; to secure the effectual performance of the duties of their office; and for the appointment of magistrates in Ireland in certain cases;" and he was directed to reside in the province of Munster, and to

[*576] take under his superintendence *the police appointed under the said Act in the counties of Cork, Kerry, Limerick, Tipperary, and Waterford. The appellant John Malone was and is a chief constable, by virtue of a like appointment under the provisions of the said Act. Various rules, orders, and regulations, were made and approved by the Lord-Lieutenant of Ireland, for the conduct and proceeding of the chief and other constables

appointed under the said Act, and were promulgated before and in the year 1833, and the conduct of the said chief and other constables has been regulated accordingly. Among these rules is the following: "The men will on no account interfere in the execution of any writ, decree, or civil order, or in driving for rent, tithes, or taxes, unless called out by a magistrate or the high or sub-sheriff in person; and they will then only consider it their duty to protect those persons in the execution of their office, excepting in the execution of any process directed to them for levying the amount of any recognisance forfeited to his Majesty, his heirs and successors, or of any fines imposed on jurors, witnesses, parties, or persons at any assizes, or commission of *oyer* and *terminer*, or gaol delivery, or session of the peace, in the county in and for which such constables shall be appointed, pursuant to the Act 3 Geo. IV. c. 103, s. 7. Constables are not to be employed in revenue duty unless when specially ordered."

Circulars were also issued, by order of the Lord-Lieutenant, for the guidance of the police establishment, on or about the 26th of October, 14th of November, and 7th of December, 1835, and communicated to the appellants at those times.

Before and on the 23rd of December, 1835, the appellant John Malone was stationed at Borrisokane, in the county of Tipperary, and had under his superintendence the barony of Lower Ormond, and was under *the command of the appellant William Miller, [*577] who was stationed at Cork, upwards of eighty miles distant. On the said 23rd of December, Robert Dudley, of Borrisokane, delivered to him at that place a copy of a writ of rebellion, purporting to be issued out of his Majesty's Court of Exchequer in Ireland, and to be directed to Robert Dudley and three others, dated the 4th of December, in the fourth year of the reign of his Majesty, and returnable on Saturday the 9th of January, then next. At the same time he delivered to the appellant Malone a notice in writing, by which the said Robert Dudley required him, pursuant to the tenor of the said writ, to accompany the said Robert Dudley, and be aiding and assisting in the execution thereof; or, in default of his so doing, an application would be made to the Court of Exchequer for an attachment against him for his contempt.

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Upon delivering the said copy and notice, the said Robert Dudley asked the said Malone to accompany him with the police to the parish of Eglish, to assist him in executing the said writ: to which Malone replied, that he could not go upon the said duty, but would apply to the inspector-general for instructions; he could do nothing without an order from the proper authorities; and, observing that the writ named only King's county, informed Dudley that he had no connexion with that county. On the 3rd of January, 1836, Dudley came to Malone, and acquainted him that he had taken John Gavan, and proposed removing him to Dublin on the following day; and he required Malone to give his aid, and that of some of the police under his command, in escorting him (Dudley) and the prisoner part of the way to Roscrea: Malone declined to do this, but told him that if any person should attempt to molest him in the execution of the said writ, in the town of Borrisokane, he (Malone) would prevent him [*578] from being *ill-treated; but, with respect to the said Gavan, it was impossible for him (Malone) to lend him any assistance in escorting him to Roscrea; and assigned for a reason (as the fact was) that he was under three several recognizances to appear at the Sessions at Nenagh, and prosecute, at the said Sessions, five persons for riots and assaults; and also, that he had no opportunity of consulting with the inspector-general as to giving an escort.

In refusing his aid in the manner above stated, the appellant Malone acted in conformity to a communication received by him from the appellant Miller, to whom he had transmitted the said copy of the writ and notice, and which communication the appellant Miller made to him in pursuance of instructions from the Irish Government, to the effect that the chief constable might decline compliance with the said notice.

On the 13th of January, 1836, both appellants were served with an order of the said Court of Exchequer, purporting to be dated the 11th of that month, and to be made at the instance of the said respondent, upon the affidavit of the said Robert Dudley, for an attachment against the said Malone for his contempt, in refusing to aid the said Robert Dudley, unless cause should be shown to the contrary; and that the appellant William Miller

should answer the matters of the said affidavit. The appellants accordingly filed affidavits, disclosing the matters above stated, and showed cause against the said order on the 29th and 30th days of January, 1836; and the said Court, on the 1st of February, were pleased to make the order of that date as above stated.

Upon an appeal from this order to the House of Lords, the case was argued by the *Attorney* and *Solicitor-General* for the appellants, and by *Jackson*, Serjt. and *Pemberton* for the respondent; and the opinion of the Judges was requested on the following five questions:

[579]

1. Have the persons named in the writ, and charged with the execution of it, a right, at their discretion, to require the assistance of any of the liege subjects of the Crown to aid and assist in the execution of the writ?

2. Have such persons such a right upon reasonable apprehension of resistance to the execution of the writ, no actual resistance having taken place?

3. Have such persons such a right as against persons appointed and acting as constables, in Ireland, under the Act 3 Geo. IV. c. 103?

4. Have such persons such a right as against persons so appointed and acting under 3 Geo. IV. c. 103, there having been a regulation made in the manner pointed out by that Act in the words following? The men will on no account interfere in the execution of any writ, decree, or civil order, or in driving for rent, tithe, or taxes, unless called out by a magistrate or the high or sub-sheriff in person, and they will then only consider it their duty to protect those persons in the execution of their office; excepting in the execution of any process directed to them for levying the amount of any recognizance forfeited to his Majesty, his heirs and successors, or of any fines imposed on any jurors, witnesses, parties, or persons at any assizes or commission of *oyer* and *terminer*, or gaol delivery, or session of the peace, in the county in and for which such constable shall be appointed pursuant to the Act 3 Geo. IV. c. 103, s. 7:—constables are not to be employed in revenue duty unless when specially ordered.

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5. Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and declining so to do, can the Court, out of which such writ issued, commit such person as guilty of a contempt of such Court?

[580] Upon the last question there was a difference of opinion, as appears in the sequel; but on the four first, the unanimous opinion of the Judges was now delivered by

TINDAL, Ch. J.:

In answer to the first question proposed by your Lordships to her Majesty's Judges, we are all of opinion, that the persons named as commissioners in the writ of rebellion, and charged with the execution thereof, have not the right, arbitrarily, and under every state of circumstances, to require the assistance of the liege subjects of the Crown; but we are, at the same time also of opinion, that when circumstances render assistance necessary for the due execution of their commission, they have the right, by law, to require assistance from the liege subjects of the Crown, to such an extent as is necessary to insure the execution of the writ; due regard being had in each case to the condition of life, description, and ability, of the persons called upon to render assistance, the numbers required to assist, and the extent of the service required from them. And we think this follows as a necessary consequence, from the consideration of the process itself, and from the close and direct analogy which subsists between the duty of sheriffs in the execution of process directed to them by the superior Courts of Westminster Hall, and that of the officers named in the writ of rebellion.

The commission of rebellion is a process directed to commissioners, nominated indeed by the plaintiff in the suit, but appointed by the Court, under the authority of the broad seal of the Court: so that whoever they may be by name, or of whatever description or situation in life, they are, in the eye of the law, the commissioners of the Court itself. And that they are so considered, appears from the reason which is assigned by Chief Baron GILBERT, for directing this process to

commissioners under the broad seal, and not to the sheriff; *viz. "because the sheriff cannot be supposed to execute all such process in person, and it may be inconvenient to trust so great a power with the deputies of the sheriff's nomination; and therefore the Court appoints its own commissioners, who are intrusted to do everything very carefully, and are answerable to the Court for their miscarriages" (1). [*581]

The commission, therefore, confers upon the persons named in it, authorities and powers as large in degree, and, with respect to their local extent, larger than those with which sheriffs are invested under ordinary writs of execution. In the first place, the commissioners are commanded by the writ, "to omit not by reason of any liberty, but to enter the same, and the said persons, wherever they shall be found within the kingdom of Ireland, as rebels and contemners of the laws to attach, or cause them to be attached, so that they may have their bodies before the Chancellor, &c., on a certain day." Whether, therefore, it be in the nature of criminal process, as it seems to be,—for it is laid down as undoubted law, that the commissioners may break open the doors of a house in order to apprehend the party, and the writ may be executed on a Sunday, which it is allowed the sheriff cannot do under an ordinary *capias ad satisfaciendum* (2),—or whether it be civil process only, it confers upon the commissioners authority and power, at the very least as large as sheriffs derive from writs of the superior Courts. But the authority of the commissioners is not limited, as is the authority of the sheriff in an ordinary writ of execution, to the boundary of one particular county: it extends over all the counties of the kingdom. In whatever part of the kingdom the party who has been proclaimed a rebel can be found, *the commissioners are commanded, and have authority, to apprehend him, and to bring him into Court on the day appointed. [*582]

It is further to be observed, that the commission contains within it the clause of assistance, which is not to be found in a writ of execution; viz. "We also command all other our officers ministerial, and other liege subjects whatsoever, that

(1) Gilbert. For. Roman. cap. 5. 353; Crompt. Auth. des Courtes, fo. 47.
(2) See Dalton, Office of Sheriffs,

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in the execution of the premises they be aiding and assisting as it behoveth them, on the peril incumbent." The sheriff, indeed, has no occasion for such a mandate in every writ, inasmuch as he receives a patent of assistance under the Great Seal, with his patent of office, directed to "all archbishops, bishops, dukes, earls, barons, knights, freemen, and all others of the county; who are thereby required to be present, aiding and assisting him in all that pertains to his office." See the form in Dalton's Office of Sheriff, cap. 1. And indeed the sheriff would seem to have this power at common law: 2nd Inst. 194. But the reason for the insertion of such a mandate in the commission of rebellion is, that the commissioners are not known as regular officers of the law, and may therefore require such an authority to place them upon the same footing with sheriffs—the ordinary officers of the Courts. The commissioners are therefore, by the insertion of this mandate of assistance, placed at least upon an equal footing with the sheriff, and may be considered as having the same power under the writ as if it had been directed to the sheriff, to whom, according to the authority of Lord Chief Baron COMYNS, the writ may be directed by the Court, instead of the commissioners named by the party: Comyns' Digest, Chancery, D. 5.

Taking, therefore, the commissioners, when acting in execution of this process, to be, in effect, sheriffs in each and every [*583] county of the kingdom, the question *becomes this, what authority has the sheriff as to the *posse comitatûs* in the execution of a writ? for by a direct analogy the commissioners must possess at least the same. Now, according to the authority of the books, he is armed with the power of the county, because "Quando aliquid mandatur, m ndatur et omne per quod pervenitur ad illud," as was observed by the COURT in *Foljambe's* case (1). And Dalton lays it down more at large, that "the sheriff, or his under-sheriff, or bailiff, &c., may (nay ought, if need be) to take the power of the county (*scilicet*, what number of persons they shall think good,) to aid him or them to execute in every behalf the King's process or writ; be it by a writ of execution, replevin, *capias*, &c., or any other writ, it being the

(1) 5 Co. Rep. 115 b.

King's commandment. And such as shall not assist the sheriff, &c. therein, being required, shall pay a fine to the King": Dalton's Sheriff, 354. And further, by the same authority, p. 355, it appears "that when the sheriff may take the *posse comitatûs* he may make proclamation commanding all persons (meet) to come and go with him and to aid him;" and again, "in such cases they are not appointed in any number, but it is referred to the discretion of the sheriffs, &c. what number they will have to attend upon them, and how, and in what manner they shall be armed, weaponed, or otherwise furnished."

One of the earliest authorities on this subject is in the Year Book, 3 Hen. VII. 1, where it was held that an indictment would not lie against a bailiff for taking 300 men in arms to execute a replevin, nor against those who accompanied him; "for every one is bound to assist the sheriff, and to maintain him in his office in the execution of writs; (for it is the commandment of the King); and the bailiff has the same authority as his master; and every one is bound to aid them in their *business; and that, [*584] by the common law and common reason, notwithstanding the Statute of West. 1 and West. 2; and also every man is sworn to be aiding the sheriff in his business; and if they do not do it at the request of the sheriff, they shall make fine: as if he require them to take felons, and they refuse, so shall they in that case." And when it was argued by the King's serjeants that the sheriff had no right to take so many men with him, but a reasonable company, it was answered (which must mean by the Court) "that he might be in great peril and jeopardy of his life, and for this reason he shall take with him as many as he pleases at his own discretion." And when it was argued that the Statute of West. 2, c. 39, says that, "*post querimoniam factam*, he shall take the power of the county and not before," it was holden that he may by the common law.

This ancient case forms the principal groundwork upon which the law on this subject has been laid down by text writers and others, though with some difference of language: see 2 Inst. 693; 3 Inst. 16; Dalton's Office of Sheriff, c. 95; Bro. Abr. Fine pur Contempts, 37, Trespass, 266; Vin. Abr. Sheriff; and Comyns' Digest, tit. Viscount. Upon the ground, therefore, that

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under these authorities the sheriff is armed with such power in the execution of writs directed to him, we think the commissioners have the power to call on such persons as are of proper age, and able and fit to travel, to assist them in the execution of the commission within the county in which they may be, exercising a sound discretion, whether, upon the particular occasion, such aid is necessary, and what numbers the particular occasion may require; and that all persons answering such description, having a reasonable and timely summons and notice for that purpose from such public officers, are bound to attend to it, and punishable for a wilful disobedience thereof.

[585] In answer to the second question proposed to us, we are all of opinion that the commissioners have a right to the assistance of the liege subjects in the execution of the commission, upon a reasonable apprehension of resistance, although no actual resistance has taken place; or in other words, that it is not essential to the exercise of this power, that a breach of the peace should have been actually committed, or an attempt to execute the process be first made by the officers, and resistance ensue, before they are entitled to call for assistance. There might, indeed, have been some ground for such contention, if the sheriff's authority to call for aid had depended upon the Statutes of West. 1 and 2; but as it has been expressly ruled that such statute is in affirmance of the common law, it is alike consonant to law and reason that previous resistance should not be considered necessary as a foundation for the exercise of the power. And, therefore, if there be a show of intended resistance; if it be clear, from the surrounding circumstances, to a reasonable man, that force and numbers will be used to oppose the execution of the process, either by rescuing or protecting the defendant; and that such assistance is absolutely necessary to put down such intended resistance, we conceive this is, from the nature of the thing, such resistance as is pointed at and intended by the text writers above referred to. To hold otherwise, would be to expose the life of the officers to imminent peril; and the object of the writ might be defeated by the removal of the defendant. And indeed, in many of the instances put by Dalton, in his ninety-fifth chapter, in which

the sheriff is stated to have authority to call out the *posse comitatûs*, actual resistance cannot, from the nature of the case, be supposed to have taken place previously to his calling for aid; but the object of such summoning of assistance is manifestly to prevent resistance by showing that it would be hopeless.

In answer to the question, thirdly, above proposed to us, we [586] are all of opinion that the commissioners appointed by the writ have the right to require the assistance of persons appointed, and acting as constables in Ireland, under the statute 3 Geo. IV. c. 103.

The persons so appointed cannot be less liable, by reason of such their appointment, than other liege subjects; and, besides this view of the question, they may perhaps be considered as falling within the description contained in the writ of ministerial officers of the King; in which point of view they would be the first class of persons to whom application should be made. And, indeed, looking to their usual employment, and their freedom from the ordinary occupations of life, they are, of all others, the very persons to whom the commissioners might most reasonably apply in the first instance for assistance.

In answer to the fourth question proposed by your Lordships, we agree in thinking that the commissioners have the right to require the assistance of persons appointed as constables under 3 Geo. IV. c. 103, notwithstanding the regulation particularly set forth in the said question has been made in the manner pointed out by that statute.

Because we think it was neither the effect nor the intention of that statute to enable any order to be made which should diminish or abridge the common law duties of a constable, or take away any responsibility where it has attached by the common law. There is nothing in the Act which points to such an alteration in the liability of a constable: it was an Act passed, as appears by the preamble, to establish a new and more effective system for the appointment and regulation of constables throughout Ireland. The twelfth section authorises the inspectors appointed under it, with the consent and approbation of the Lord-Lieutenant, to frame rules, orders, and regulations, "for the conduct *and proceedings of the constables," from time to [*587]

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time. To direct the constables in the due and orderly performance of their duty; to point out to them the manner in which it would be best performed; not to alter the limits and extent of their duty, was the intention of the Legislature. And the direction given in sect. 6, which applies, if any does, to this case, does not in any manner militate against this construction; for it says no more than the law would have itself said, in directing them not voluntarily to mix themselves up with the execution of civil process. But if the duty of aiding the sheriff in the *posse comitatûs*, or the duty of aiding the commissioners in the execution of a writ of rebellion, is cast upon them as liege subjects not less than as constables, there is nothing in that order which can have the effect of absolving them, nor is any authority given by the statute to absolve them from the performance of such their common law duty.

WILLIAMS, J.:

My Lords, the fifth question proposed by your Lordships, to which alone it is necessary that I should address myself, is, "whether, supposing a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, be regularly called upon to render such assistance, and decline to do so, the Court out of which such writ issued, can commit such person as guilty of a contempt of such Court;" or, in other words, whether a writ of attachment may issue against such person: and I understand the question to be confined to the authority and competence of the Court, and to that only.

Now that the superior Courts of Record, especially, have been in the habit of issuing such process, is past a doubt. "The issuing of attachments by the supreme Courts of Westminster Hall for contempts out of Court," (as is observed by Lord Chief Justice WILMOT in his prepared, but not delivered judgment, [*588] in the case of *Rex* *v. *Almon* (1),) "stands upon the same immemorial usage as supports the whole fabric of the common law. It is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever."

(1) Wilmot's Opinions, 254.

Again, I shall not waste your Lordships' time, by discussing whether the Court of Exchequer in Ireland stands upon the same footing as those before alluded to. This was not disputed in argument at the Bar.

Lastly, I shall assume that the writ of rebellion was process lawfully issuing in the King's name by the authority of the Court; because, although much observation and criticism were employed upon the nature and quality of the writ, that was not denied.

The question, therefore, resolves itself into this point, whether, in the case supposed, an attachment can legally issue; or whether indictment be not the appropriate and only remedy. And, in considering this point in the absence of any precise authority, we are driven (as in so many instances must be the case), to analogy; and therein to ascertain whether this process has been resorted to on occasions not distinguishable from the present; because this ancient principle, as in the language of a late CHIEF JUSTICE, I have described it to be, has not been a barren theory, but has been frequently and variously resorted to.

In Viner's Abridgment, title Contempt A., it is defined or described to be "a disobedience to the Court, or an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required, by the process, order, or decree of the Court."

Hawkins, in book 2, chapter 22, of attachment observes, that "it is properly grantable in cases of contempt, *against which, [*589] for the most part, all Courts of Record generally, but more especially those of Westminster Hall, and above all, the Court of King's Bench, may proceed in a summary manner according to their discretion." Now, I would by no means intimate an opinion that the learned writer, by the latter general expression meant to assert that the power of the Courts is perfectly arbitrary and indefinite; but I do think he must be understood as describing their power not to be precisely limited or fixed, but that it may be extended to new cases as they arise, provided they be within the principle of those in which the power has been decided to exist. The subject is pursued with much

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minuteness in the book I have referred to, though it is truly remarked, "that all the particular instances of contempts, it would be endless to enumerate."

With one class, however, and that not a small one, I shall not trouble your Lordships. I allude to attachments against sheriffs, gaolers, attorneys, and others, as to whom a distinction may be drawn; that inasmuch as they are to be considered ministers or servants of the Court, they may especially be subjected to an immediate and summary control. But after examining cases of that description, Hawkins comes to consider "where persons" (generally) "are punishable in this manner for contempt of the King's writs;" and, upon this point, there is the following passage: "It seems that it may reasonably be argued, that all such writs being in the King's name, and imposing some lawful command or prohibition from him, which every subject is in duty bound to obey, every disobedience of them, being a contempt of the King's authority, is in strictness punishable in the manner above mentioned, if the Court in its discretion" (discretion again) "shall think fit so to proceed. Yet it doth not seem to be usual for the Court to proceed in this manner for
[*590] a bare nonfeasance *in not performing the command of the first writ in any case whatsoever." I have, of course, given the passage entire: the distinction, however, contained in the last clause does not seem to respect the power of the Court so much as the ordinary course and practice; whereas I consider my present concern to be with what the Courts can in strictness do, and not what it may be usual or expedient, and so forth, for them to do. And even understanding the latter clause in the sense above attributed to it, I think it will presently appear to be not quite consistent with the author's usual accuracy.

I shall now advert to some of the cases in which this process has issued. In an *Anonymous* case (1), an attachment was granted at once against a party upon whom a rule of Court was served; upon which occasion he uttered some vulgar expressions concerning it. I am aware that an attempt may be made to explain this case as coming under the acknowledged head of contempt—"speaking contemptuous words of the Court;" which being

(1) 1 Salk. 84.

considered to be an impeachment of, and an attack upon its authority, is supposed to require immediate interposition and correction. And supposing this to be the true solution of the principle upon which the attachment was granted, it must be admitted that the case has less bearing upon the present than if the real ground for holding it to be a contempt was the disobedience of the order or the rule of Court. But, however that may be, that there are cases in abundance which rest absolutely and exclusively upon the latter principle, will be seen presently. In this case, however, which is constantly referred to, and its legality, I believe, never questioned, the attachment was awarded against the party, unheard, as I have before noticed. In a very recent case, *Gobby* v. *Dewes* (1), the Court of Common Pleas granted an attachment in the first instance *against certain [*591] persons concerned in a rescue, although the return stated that the rescue had been out of the custody of a bailiff, and not of the sheriff himself—the application being founded solely upon that return.

What weighs with me, however, most strongly, is the long continued and undoubted practice of issuing attachments for disobedience of writs of *subpœnâ*, whether coming from the Crown Office or taken out, as it is of course, in a civil suit. And yet it is undeniable that, in the latter instance, it is merely a private remedy resorted to by a private party to enforce or resist a claim wholly unconnected with any public concern or interest whatsoever. And, moreover, this summary interference might appear, and has actually been urged to be the less requisite, and therefore the more objectionable, because there is another remedy by express statutory provision for the party aggrieved by the non-compliance with the exigency of the writ. But this notwithstanding, against persons not officers or ministers of the Courts, —mere private parties,—attachments have been awarded in more instances than it would be possible to enumerate, and from which I must make a selection.

In the case of *Wyatt* v. *Wingford* (2), an attachment was moved for against a witness for not attending at the Assizes to give evidence in pursuance to a *subpœnâ* : cause was shown,

(1) 38 R. R. 410 (10 Bing. 112). (2) 2 Ld. Ray. 1528.

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and it was urged that the party had his remedy (before adverted to) by action on the statute 5 Eliz. c. 9, s. 12; and further that such applications had been refused. But the Court, adverting to the statutory remedy, decided "that it was a good foundation for an attachment, the disobedience of the process being a contempt of the Court:" and the rule was made absolute. In [*592] *Hammond* v. *Stewart* (1), **Smalt* v. *Whitmill* (2), and *Chapman* v. *Pointon* (3), though questions arose upon the time of serving the writ, and the amount of compensation tendered to bring the party into contempt, the principle itself was not doubted. In *Pearson* v. *Iles* (4), Lord MANSFIELD alludes to an attachment as a prevalent and preferable remedy to that by action. For the purpose of showing that the practice is not obsolete—not to weary your Lordships with what may be deemed unnecessary citations,—I shall content myself with referring (amongst the more modern cases) to *Barrow* v. *Humphreys* (5), to *Dixon* v. *Lee* (6), and, lastly, to *Rex* v. *Fenn* (7), to which, for the best reason, I attach no weight, except for the purpose of showing, as the fact undoubtedly was, that no allusion was made to the remedy by attachment not being applicable. That was taken completely for granted.

It remains to consider the nature and quality of the process upon which the question arises: that it is such, and issuing under the authority of a superior court of record has not, as I have already observed, been denied: that it is (to place the matter no higher) not inferior in dignity, importance, and exigency, to the private writ of *subpœnâ*, must, I presume, also be admitted: That the persons named in it are otherwise without authority, is true; but by being so named, that the power and authority of the Court are deputed to them, is true also. All the King's subjects are commanded "to be aiding and assisting in the execution of the writ;" and a demand of such assistance was made upon an occasion, and for a purpose which, so far as the present question is concerned, I think we must consider as

(1) 1 Str. 510.
(2) 2 Str. 1054.
(3) *Ib.* 1150.
(4) Doug. 556.
(5) 3 B. & Ald. 598.
(6) 40 R. R. 667 (1 C. M. & R. 645; 3 Dowl. P. C. 259).
(7) 3 Dowl. P. C. 546.

justifying it. That there was a refusal to comply with that demand, must also, for the present purpose be assumed; and that refusal is not to be received in the *light of an excuse, by the individual, to escape from trouble and inconvenience to which he was liable; but the complaint is, that the object of the Court, so far as he was concerned, was interrupted,—in a word, when the authority under which that demand was made is considered, its process was disobeyed. Nor do I think it material that it might have happened, or actually did happen, that by other means the writ was executed; any more than to an application for an attachment for disobeying a *subpœnâ*, it would be an answer for the party to say, that the plaintiff or defendant might successfully have proceeded to trial without his testimony.

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Upon the whole, confining myself throughout to the power of the Court, I feel bound to answer the question in the affirmative.

PATTESON, J.:

With respect to the first four questions proposed by your Lordships in this case, I will with your Lordships' permission, take leave to refer to the unanimous opinion of the Judges, delivered by my LORD CHIEF JUSTICE.

The fifth question runs in these words: "Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and declining so to do; can the Court out of which such writ issued commit such person as guilty of a contempt of such Court?" I humbly answer in the affirmative.

A contempt of Court is thus described in the Practical Register in Chancery, pages 133 and 134: "A contempt is a disobedience to the Court, or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or *decree of the Court. Sometimes it arises by one or more; their opposing or disturbing the execution or service of the process of the Court, or using force to the party that serves it; sometimes by using words importing scorn, reproach or diminution of the Court, its

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process, orders, officers, or ministers, upon executing or serving such process or orders. It is also a contempt to abuse the process of the Court by wilfully doing any wrong in executing it; or making use of it as a handle to do wrong; or to do any thing under colour or pretence of process of the Court without such process or authority." And the punishment is added. "For any direct and positive contempt, a party may not only be taken into custody, but committed to the Fleet during the pleasure of the Court. But for a bare contempt in not doing somewhat, then only till he obey and perform: for a contempt in doing somewhat against the order of the Court, is accounted much greater than omitting to do somewhat commanded, seeing the one is wilful, the other not always so; and besides, what is only not done may be done; but what is once done cannot be undone, though its effects may often be made to cease, or reparation may be made."

I cite these passages, because they appear to me to afford a complete answer to one objection which was urged at your Lordship's bar, namely, that process of contempt cannot be issued for a bare nonfeasance. That it may be so issued is here expressly stated; and in conformity therewith, it is the uniform practice to proceed by process of contempt against witnesses for not attending in pursuance of a writ of *subpœnâ*; against parties for non-performance of awards; for not appearing, or not putting in answers; and numberless other bare non-feasances. And although several cases were cited in support of this objection, yet in none of them is any doubt thrown upon the

[*595] power and authority of the *Court; but they turn upon the question, whether the Court, under the particular circumstances of each case, will, in their discretion, exercise such power and authority. I cannot, therefore, entertain any doubt, but that process of contempt may be issued against any person who has barely omitted to do what he is commanded or required to do by the process of the Court. It follows, that in order to fix a person under the circumstances stated in your Lordships' question, as guilty of a contempt of Court, it will be sufficient to show that he is commanded or required by the process of the Court to render that assistance in its execution which he has declined to do.

Now, as the person supposed is a stranger to the proceedings in the cause, and is not one of the persons to whom the writ, or rather commission of rebellion, is addressed by name, (which the very form of the question implies), he is not in the predicament in which persons usually are in respect to whose conduct questions of contempt have arisen; that is, he is not personally and directly called upon, in the first instance, by the process of the Court, to do any act. The process does not, upon the face of it, necessarily convey to him any command or requisition. It does, however, contain a clause commanding all the Queen's liege subjects whatsoever to be aiding and assisting in the execution of the premises, as it behoveth them, upon the peril incumbent. The person supposed in your Lordships' question, is one of those liege subjects, none of whom are particularly named in the process; the question assumes that it behoved him to render assistance, and that he was regularly called upon to do so: the conclusion necessarily follows, in my mind, that he is commanded and required by the process to render that assistance, just as much as if his name were actually inserted in it; and his refusal to do so is as much a contempt of the Court *as if he had been one of the commissioners, and had [*596] neglected to execute the process.

I have come to this conclusion, upon a conviction that the power which the Court exercises of punishing by process of contempt, those who, being bound to obey, nevertheless disobey its process, orders, or decrees, is inherent in the Court by the common law of the land, for the support of its authority and dignity, and does not depend upon any statute.

I am aware that it has been argued that the mode of proceeding by attachment took its rise from the Statute of Westminster 2, c. 39; that as that statute speaks only of assisters, aiders, consenters, commanders, and favourers, who are to be attached by a writ judicial, no other persons can be so attached in respect of any thing done or omitted in execution of process directed to the sheriff; and that the same law applies to process of rebellion directed to commissioners. I agree entirely that the same law does apply; and that process of contempt will not lie against persons refusing to assist commissioners of

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rebellion, unless it would also lie against persons refusing to assist the sheriff; the only difference, as I apprehend, being that in a commission of rebellion the command to all liege subjects to be aiding and assisting is expressly inserted, which is not the case in writs directed to the sheriff: The reason of which appears to be, that, as the authority of the commissioners of rebellion is confined to that particular process, unless such command were expressly inserted, they could not call upon any one to assist, having no general authority whatever: whereas the sheriff has such general authority at common law to take the *posse comitatûs*, and also by the writ of assistance which is given to him together with his patent. I am of opinion, however, for the reasons already given, that process of contempt will lie against all persons who refuse to assist the sheriff in

[*597] *the execution of the process of the Court when lawfully called upon so to do, because the process becomes then in effect addressed to them.

It was observed in the course of the argument, that it is strange that no clause of assistance is inserted either in the writ which precedes, or in that which follows the commission of rebellion. As to that which precedes, the answer is that it is addressed to the sheriff, who has general authority to command assistance; as to that which follows, namely, the sequestration, (for it seems that there is not any process to the Serjeant-at-Arms, Forum Romanum, page 77), I cannot find any reason assigned for the omission of such a clause. However, it does not seem that such omission can in any way prevent the operation of it in the commission of rebellion in which it is inserted.

With respect to the Statute of Westminster, Lord Coke, in his commentary on it, in 2 Inst. 453, and also 193, states it to be in affirmance of the common law, and cites Bracton to that effect. But whether that be so or not, I confess that I cannot but agree with my Lord Chief Justice WILMOT, who in his proposed judgment in *Rex* v. *Almon* (1) says, "Indeed when that Act of Parliament is read, it is impossible to draw the commencement of such a proceeding out of it: it empowers the sheriff to

(1) Wilmot's Opinions, 254.

imprison persons resisting process; but has no more to do with giving Courts of justice a power to vindicate their own dignity than any other chapter in that Act of Parliament." It seems to be understood that at all times the Court had power to punish disobedience to its process, orders, and decrees, by process of contempt; and there is nothing in the Statute of Westminster 2 which can in any way be construed to give any such power. I am, therefore, quite at a loss to see why such power should be *supposed to have originated in, or should be in any way [*598] referred to that statute. So far as regards the punishment of persons who resist and obstruct the execution of process, that statute may possibly be supposed to have given rise to the process of attachment, which is now commonly resorted to: *Gobby* v. *Dewes* (1); but as regards the punishment of those to whom the process is addressed, whether by name or generally, and who being bound to execute or assist in executing that process, refuse so to do in contempt of the Court, the statute seems to be wholly irrelevant.

It does not appear that this question has ever been brought into discussion before any Court and expressly decided; at least no authority to that effect, on one side or the other, was cited at your Lordships' bar; nor have I been able to discover any; nor is it stated, either in Gilbert's Forum Romanum, or any other book of which I am aware, giving an account of the commission of rebellion; nor in Dalton's Sheriff, or other book respecting the sheriff's power of taking the *posse comitatûs*; that is, the proper mode of punishing those who refuse to render assistance when legally called on so to do. Doubtless such disobedience may, in many, if not in all cases, be punishable by indictment; but I apprehend that this circumstance does not in any degree derogate from the power which the Court has of punishing by process of contempt, though it may in many instances furnish a reason why the Court, in the exercise of discretion, may think fit not to exert that power.

It is indeed stated in Brooke's Abridgment, title, Fine pur Contempt, pl. 37, "That if the sheriff or his bailiff have a writ, every man is bound to aid them in their wants (*besoigns*), and

(1) 38 R. R. 410 (10 Bing. 112).

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this by the common law; *and if they do it not, at the request of the sheriff, they shall make fine: as if the sheriff require them to take a felon and they refuse, they shall make fine:" and the Year Book, 3 Hen. VII. 1, is cited. Also, in the same Abridgment, title Trespass, pl. 266, the same law is laid down; and also in title Riots, pl. 2. Lord Coke, also, in his commentary on the Statute of Westminster 1, c. 17, 2 Inst. 193, says, that every man is bound at common law to assist the sheriff; and if he do it not, being required, he shall be fined and imprisoned. It is not, however, stated in these passages how the fine and imprisonment is to be imposed; and as regards any refusal to arrest a felon, probably it must be by indictment; for in such case there would be no process of Court, and therefore no contempt. But in the case of refusal to assist in executing process of the Court it would be otherwise; and the passage being found in Brooke's Abridgment under the head of Fine pur Contempt, seems to indicate that a contempt would be incurred, which is of course punishable by attachment.

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Upon the whole, therefore, with sincere respect for the opinion of those of my learned brothers, from whom I have the misfortune to differ, my answer to your Lordships' fifth question is, that the Court may commit a person under the circumstances stated in that question, as guilty of contempt of Court.

BOSANQUET, J.:

Upon the four first questions proposed by your Lordships to the Judges, I concur with the rest of my learned brothers in the answers given in the names of all the Judges by my LORD CHIEF JUSTICE, and in substance with the reasons assigned for those answers. But having the misfortune to differ from the majority of my learned brothers upon the answer to be given to the 5th question, I proceed with great diffidence *to offer to the House the reasons upon which my opinion, with respect to the important principle which it involves, is founded.

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The fifth question is this, "Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and declining so to do, can the Court out of

which such writ issued commit such a person as guilty of a contempt of such Court?"

The substance of the question is, whether a mere refusal by a stranger to assist the commissioners, upon request, be a misdemeanour, punishable by indictment, or information; or a contempt of Court, punishable by attachment, and, consequently, by imprisonment without trial. Such person may be liable to punishment by indictment or information for a breach of duty cast upon him by law; but it does not follow that he is liable to be attached for a contempt of Court.

A contempt, it is said, in the Practical Register, page 133, is "a disobedience to the Court, or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court. Sometimes it arises by one or more; their opposing or disturbing the execution or service of the process of the Court, or using force to the party that serves it; sometimes by using words importing scorn, reproach, or diminution of the Court, its process, orders, officers, or ministers, upon executing or serving such process or orders."

The commission or writ of rebellion is not addressed, either personally, or by any general description, to the person supposed to be called upon to assist the commissioners: it is addressed to the commissioners only.

If a stranger aid or abet the defendant in his endeavour to evade the execution of the process of the Court, there is no doubt that he may be punished by attachment, his conduct in such case being a clear contempt of the Court. A stranger, who by contrivance, defeats the party of the benefit of an award made under a rule of Court is guilty of a contempt, for which he shall be attached; for which I would refer to *Sir James Butler's* case (1). [601]

The duty imposed upon a stranger who is required to assist a commissioner may be admitted to be analogous to that which every liege subject is bound to render to the sheriff in the execution of the King's writ. But I am not aware that a mere refusal to aid the sheriff in the execution of civil process by a private

(1) 2 Salk. 596.

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person, a stranger to the writ, has ever been visited by attachment. It may be admitted that the right of the sheriff to call for such assistance is a right at common law; and that the Statutes of Marlbridge, and of the 1st and 2nd of Westminster, are only declaratory of the common law; but neither the language of the statutes nor ancient usage show that a mere refusal subjects the party refusing to attachment.

The case of *Rex* v. *White* (1), which has been cited from the report *tempore* Hardwicke, stands upon very different grounds. In that case, the warrant of the Chief Justice of the King's Bench to arrest a felon, was directed to all constables throughout England; and an attachment was moved for against the defendants, constables of Scarborough, for not obeying the warrant. The practice, in such cases, is to address the warrant to all chief and petty constables, and all others whom it may concern. The Courts say, "The Judges of this Court have power to grant [*602] warrants to be executed by *all constables, &c. throughout England; and disobedience to a Judge's warrant is a contempt of the Court—such a contempt as the Court will take notice of by way of attachment." The persons spoken of were officers whose special duty it is to arrest felons, and the writ was addressed to them, though not *nominatim*, yet, by a description which made it an order of the Chief Justice of the King's Bench upon them; in which respect the case differs essentially from the case of a writ directed to a sheriff, who, by virtue of the authority of his office, as such, requires assistance from some one or more of the King's subjects.

A *subpœnâ* to attend as a witness in a cause is a personal order, and imports that the individual therein named is connected with the cause by his personal acquaintance with the matters involved in it. Not so where the command is general upon all liege subjects, and the call is made upon a stranger by a commissioner or other officer of the Court. Unless, therefore, the practice of visiting by attachment a refusal to comply with a request of the commissioner be sanctioned by the authority of text writers, by judicial decisions, or by ancient usage, I think that it cannot be deemed a legal practice.

(1) Cas. temp. Hard. 42.

Some instances, in matters of revenue, have occurred, in which rules for attachments have been granted by the Court of Exchequer against constables for refusing to render assistance to officers of the customs in seizing uncustomed goods, pursuant to the requisition contained in writs of assistance, in one of which cases the rule was made absolute. These writs, which were issued by the Court of Exchequer pursuant to the statute 13 & 14 Charles II. c. 11, s. 5, since repealed by 6 Geo. IV. c. 106, but re-enacted by 6 Geo. IV. c. 108, ss. 41, 42, were addressed to all mayors, constables, and other officers; and after reciting the commission granted to *the commissioners of the customs, [*603] under the Great Seal, commanded all such mayors, constables, and other officers, to aid and assist the commissioners and officers of the customs in the execution of their office. The 13 & 14 Charles II. c. 11, s. 5, provides that it shall be lawful for any person authorised by writ of assistance under the seal of his Majesty's Court of Exchequer, to take a constable, headborough, or other public officer inhabiting near unto the place, and in the daytime, to enter any house, shop, &c., and, in case of resistance, to break open doors and seize uncustomed goods, &c. And by sect. 32, all officers of the admiralty, &c., and also all justices of the peace, mayors, sheriffs, bailiffs, constables, and headboroughs, and all the King's Majesty's officers, ministers, and subjects whom it may concern, shall be aiding and assisting all officers of the customs, and their deputies, in every thing by the Act enjoined, in the execution thereof; and shall be defended and saved harmless.

Such cases can afford little analogy to the case of civil process in a suit between party and party, the only object of which is to compel an appearance in a private suit, though the proceedings assume a criminal form, the neglect to appear being treated as a contempt. The writs issued out of the Court of Exchequer, directed to public officers, commanding them to assist in the collection of the King's revenue, bear a strong resemblance to the warrants issued by the Court of King's Bench, directed to public officers, commanding them to arrest felons; and I can well understand how disobedience to such writs or warrants, when duly served on, or notified to, any of the persons to whom

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they are directed, may be deemed a contempt of the Court authorised by law to issue the command. It may be observed, however, that in the only case in which the rule for an attachment appears to have been made absolute, *Rex* v. *Barton* [*604] **Miles*, on the 21st of January, 1733, the constable not only absolutely refused to assist, but spoke contemptuously of the process, telling the custom-house officer that he valued not his writ of assistance, nor would pay any obedience to it. In the case of *Rex* v. *Kelynach*, on the 15th of November, 1768, the constable, having looked at the writ, refused to go or give any assistance, declaring that the writ was good for nothing. What became of this case does not appear. In the last case, where a high constable made a public acknowledgment of his offence, and paid the costs, *Rex* v. *Roskinge*, on the 20th of June, 1817, the high constable was out hunting, and refused to go unless a 1*l.* note was given him. In the first of these cases the motion was made by the *Attorney-General*, and in the two others by counsel for the Crown, against certain public officers specified in the statute, who are expressly made liable thereby to obey writs of assistance under the seal of the Exchequer.

There might also be ground for contending in the first case, if not in the others also, that the parties had not merely refused to obey the command of the writ, but treated the process with contempt; and in the last, that the officer had attempted to extort a fee to which he was not entitled. A mere refusal to assist upon request, does not necessarily import any denial of the validity of the process, or disrespect to the Court from which it issues, since it is quite possible that the refusal may be founded upon some legal excuse. Accordingly, it appears upon enquiry, that where mayors, and other officers in some other cases, have refused to render assistance to officers of the customs, upon being required so to do by virtue of writs of assistance, the *Attorney-General*, instead of moving for attachments in the Court of Exchequer, has filed informations in the Court of King's Bench; [*605] such are *Rex* v. *The Mayor and *Constables of Gloucester* (1), *Rex* v. *Weaver* and another (2), *Rex* v. *Macklean, Headborough* (3).

(1) Hilary, 55 Geo. III.
(2) Easter, 55 Geo. III.
(3) Easter, 57 Geo. III.

For the Court of King's Bench will not punish by attachment a public officer for a breach of duty, though such duty is imposed upon him by process of law, unless the offence amounts to a contempt of that Court. Thus, in the *Gaoler of Shrewsbury's* case (1), where the *Attorney-General* moved for an attachment against him for a voluntary escape of one in execution for obstructing an Excise officer in the execution of his office, the Court refused to grant it, there being no precedent for that purpose; but they ordered him to show cause why there should not be an information. And in another case, where a rule for an attachment against a sheriff for neglecting to take a replevin bond, was obtained, it was answered, that such an attachment was never granted before; that the party injured might maintain an action, and it could not be construed to be an abuse of the process of the Court, or a contempt; which, it was urged, were the sole grounds for an attachment; and the COURT being of that opinion discharged the rule: *Rex* v. *Lewis* (2).

It is clear, however, that where an officer neglects a duty incumbent on him, either by common law or statute, he is for his default indictable. It was so held by the Queen's Bench in *Reg.* v. *Wyatt* (3), and in *Coleman's* case (4), where Coleman and others, constables of Chichester, were held indictable for refusing to execute the warrant of a justice of the peace directed to them to apprehend one for a contempt; the constable being the proper officer of a justice of the peace.

Lord Chief Justice Gilbert, in his history of the *Common Pleas, page 25, has surmised that the power of the superior Courts of law to punish contempts of their process by attachment, was founded on the Statute of Westminster 2nd. This is denied by *Sir Eardly Wilmot* in the case of *Rex* v. *Almon* (5), in which he says, "that the right of these Courts to issue attachments is coeval with the common law; that it is founded on immemorial usage in particular cases; and is as much a part of the law of the land as trial by jury." The correctness of this latter opinion may be admitted; but the question still remains, what are those

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(1) 1 Str. 535.
(2) 2 T. R. 617.
(3) 1 Salk. 380.
(4) 2 Roll. Rep. 78.
(5) Wilmot's Opinions, 253.

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particular cases in which the punishment by attachment for contempt has been sanctioned by immemorial usage? for no man shall be punished, as Lord Coke says in his 2nd Institute, 454, but *per legem et consuetudinem Angliæ*. Gilbert says, that the Courts must have as great power to attach as the sheriff: and Coke says, that the Statutes of Marlbridge and Westminster are only declaratory of the common law. But, if we look to the particular cases to which the common law is so declared to apply, they do not extend beyond the acts of those who aid, abet, or favour those who resist: *auxiliantes, consentientes, præcipientes, et fautores*. This word *fautores*, Lord Coke translates "favourers," and says it is a word of large extent, and refers to the Statute of Præmunire for purchasing bulls from Rome, 16 Ric. II. c. 5, where the words are "notaries, procurators, maintainers, abettors, fautors, and counsellors," which no doubt included all who by word or deed make themselves parties to the act done. But he who merely withholds his personal assistance to apprehend an offender without any intent to co-operate with such offender, cannot with any justice be charged criminally with aiding, abetting, or favouring him, or as *particeps* of his offence. If, then, *immemorial usage to punish by attachment in such case, is not to be inferred from the language of these ancient statutes, I ask where is any evidence of such ancient usage to be found, which, according to the language of WILMOT, is to be considered and enforced as a part of the law of the land, as much as trial by jury? It is said indeed, by *Serjeant Keble*, in the Year Book, 3 Hen. VII. fol. 1, and the passage is cited in Brooke's Abr., Fine for Contempt, 37, and Trespass, 266, that every man is sworn to aid the sheriff on his *besoignes*, and if they do it not at the request of the sheriff they shall make fine; as if the sheriff require them to take felons, and they refuse, they shall make fine. But this is only the argument of counsel for the defendants in an indictment for a riot, which had been preferred against persons who had accompanied the sheriff's bailiffs with great numbers in arms to execute a replevin. Whether these persons, upon refusal, would have been liable to be fined without a previous conviction, is not said, much less is it alleged that they would have been liable to an attachment. The only object of

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the argument was to show that the defendants would have been punishable if they had not attended the sheriff upon his request. The Court only decided that the sheriff may lawfully take the power of the county before as well as after complaint of resistance. For any act done to obstruct the execution of the King's writ, there is no doubt that an attachment may be issued by authority of the common law; but on account of a mere refusal to assist the sheriff, I find no authority for such a proceeding. Not that the party refusing is dispunishable, for upon the appointment of every sheriff a patent of assistance is issued under the Great Seal, directed to archbishops and knights, freeholders, and all others of the county, reciting the appointment of the sheriff, and commanding all such *persons to be aiding, [*608] answering, and assisting to the sheriff in all things which appertain to his said office. For disobedience to this writ, as well as for refusal to obey the sheriff when lawfully called upon to join the *posse comitatûs*, the party refusing may unquestionably be indicted. But no text writer has been referred to in support of a proceeding by attachment for such refusal. Nor has any judicial authority or precedent been found, except those already mentioned where the King was party, in cases of disobedience, either to a warrant to arrest felons issued out of the Court of King's Bench, or to writs of assistance in revenue matters issued out of the Court of Exchequer, pursuant to the statute of Charles II. And in no one of these was an attachment granted against any private person, or even against any officer not described in the writ.

From such cases it cannot be inferred that any immemorial usage exists to punish by attachment the refusal by a stranger to assist the sheriff in executing a writ in a private suit between party and party, much less a refusal to aid in a commission of rebellion, which is directed to the commissioners only. It may be here observed, that before the Statute of Westminster 2 the sheriff might lawfully return resistance as an excuse for not executing the King's writ, which he is now forbidden by that statute to do. And if he make such return now, he shall be punished, because he ought to have taken the power of the county. But there is no statute which forbids commissioners of

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rebellion to make a return of resistance as an excuse. And I find that in Easter Term, 4th Elizabeth, in a case of *Griffith* v. *Price*, such a return was made. "The commissioners of rebellion return that the defendant locks himself up in his house. Ordered that a commission of rebellion issue to the sheriff, commanding him to use the help of the county to apprehend the defendant
[*609] and bring him to Court." *Hargrave's Manuscripts, No. 170, fol. 149. Commissioners of rebellion, therefore, not being subject to the same responsibility as sheriffs, do not require the same power.

It is remarkable that the serjeant-at-arms, the officer of the Court, who is sent in case the commissioners fail to bring the party into Court, is not invested with any such authority to call for assistance as that which is claimed for the commissioners. The reason of this omission may be, that the serjeant-at-arms is sent for the benefit of the defendant, to see, as Gilbert says, Forum Romanum, 77, whether the defendant really hides himself from justice, lest the commissioners, who are nominated by the plaintiff, should improperly have returned *non est inventus* for the purpose of enabling the plaintiff to obtain a sequestration of the defendant's lands and goods when he might have been brought before the Court. But we find that, upon the appointment of sequestrators in consequence of the failure of the serjeant-at-arms, no such extraordinary power is given to them; but if resistance be offered to the sequestrators, a writ of assistance is then issued to the sheriff, by which, after reciting obstruction to the sequestrators, the sheriff is commanded to go and assist the sequestrators, and to put them into quiet and peaceable possession. Such appears to be the practice both of the Courts of Chancery and of the Exchequer: *Russell* v. *Bodvil* (1).

It is not easy to understand upon what grounds the power of calling all persons to his aid, entrusted to the sheriff, a high and responsible officer of the law, could be transferred by a court of equity to private persons of its own appointment nominated by
[*610] the party in the *cause; and it is still more difficult to understand why the sequestrators appointed by the Court to execute the last process, should be obliged to resort to the sheriff for

(1) 1 Chanc. Rep. 187; 1 Fowler's Exchequer Practice, 181.

protection and assistance, if the commissioners named by the plaintiff in the earlier process are intended to be entrusted with all the powers of the sheriff.

Commissions of rebellion appear from Gilbert's Forum Romanum, pages 17 and 18, to have been anciently directed to the sheriff; and they may be so directed at the present time: Practical Register, 130, Com. Dig. Chancery, D. 5. Gilbert says that the commission of rebellion commanded all constables and bailiffs to assist the sheriff; and speaking of the attachment, proclamation, and commission of rebellion, "these were all directed to public ministers and officers of justice, and plainly appeared to be the ancient prerogative process to compel appearance in the Superior Court of Judicature." Such commissions, however, are now and for a long time have been usually directed to commissioners, of which there is an instance as early as Easter Term, 36 Henry VIII., in Hargrave's Manuscripts, *ubi supra*. In a precedent in the reign of James I., West's Symb. vol. ii. page 185, in the edition of 1627, as well as in those contained in 1 Harrison's Chancery Practice, 289, and 1 Fowler's Practice of the Exchequer, 160, of more modern date, it will be found that, when they are directed to commissioners, not only all mayors, constables, and liege subjects are commanded to assist the commissioners, as they were, according to Gilbert, formerly to assist the sheriff; but in addition to the general words, mayors, constables, &c., used in the commission to the sheriff, the word "sheriffs" is introduced; so that, in whatever county the commissioners exercise their authority, the sheriff of that county is commanded to aid and assist them. From which there seems great reason to infer that, although, for convenience, where a *defendant absconds, the commissioners are empowered to arrest [*611] the defendant in any county in which he may be found, they ought, in case of resistance, requiring the aid of the *posse comitatûs*, to resort to the sheriff of that county, the ancient responsible officer of the Crown, originally authorised to enforce the process. The effect of this course of proceeding is to enable the same commissioners to avail themselves of the power and authority of the sheriff in every county in the kingdom, without conferring upon them such an extraordinary and unknown power

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as that of raising by their own authority, not merely the *posse comitatûs*, but the whole *posse regni*.

The probability of this view is much strengthened, both by the right of the commissioners to make a return of resistance as an excuse for not executing their commission, and the practice of issuing subsequent commissions of rebellion, or writs of assistance to the sheriff after resistance, made either to the commissioners of rebellion, or to sequestrators.

The sheriffs are ministerial officers of the Court, and so are all bailiffs of franchises. It is possible that sheriffs, and all other ministerial officers of the Court of Exchequer, may be liable to attachment for refusing to obey the call of the commissioners; but it is not to be assumed without the sanction of usage, that a court of equity by introducing into a commission directed to private individuals, a description of the persons liable to be called upon by the sheriff, can thereby render all peace officers and all private subjects of the realm, who stand in no such relation to the Court, liable to the proceeding by attachment, to which they would not be liable for disobedience to the sheriff. If a stranger be liable to an attachment, what is to be the consequence, and by what acts is his contempt to be purged? The contempt in question being a mere *non feasance* of something

[*612] *required to be done at a time past, the party attached cannot purge his contempt by compliance. A commissioner who is attached for permitting the defendant, after having taken him, to go at large, must either produce the body or pay the debt: *Sacheverell* v. *Sacheverell* (1), and *Nelson* v. *Yelverton* (2). Is it to be contended that a stranger, in consequence of whose default the defendant has been able to avoid arrest, may be subjected to the same penal consequences? The commission of rebellion is not the only commission which, at the close of it, contains a general command for all mayors, sheriffs, bailiffs, constables, and all other officers, ministers, and subjects whatsoever, to aid and assist the commissioners in the execution of the premises, as they shall answer for the contrary at their peril. These words are found at the close of a commission for dividing lands pursuant to a decree: 2 Fowler's Practice of the Exchequer, 267; yet it

(1) Toth. 38. (2) *Id.* 39, 40.

will scarcely be contended that a private person, a stranger to the subject of the proceeding, would be liable to an attachment for withholding his personal assistance to the commissioners in executing the duties of their commission. In 2 Harrison's Practice in Chancery, 399, we find that when the commissioners in such a case are resisted, a writ of assistance issues, directed to the sheriff, similar to that which issues in case of resistance to sequestrators. And, it is well known, that words of similar import are introduced in various commissions of inquiry, which certainly do not render all the subjects of the realm liable to the penal consequences of imprisonment without trial, for non-compliance with such general command.

That a private person would be justified in rendering assistance to a commissioner, when required by virtue of *the command in [*613] the commission of rebellion, is not disputed; nor that he may possibly render himself obnoxious to a prosecution for a misdemeanor in refusing to lend his assistance; but for the punishment of such refusal by attachment, no single example has been found; and in the absence of express authority or established usage, I feel myself bound to say, that in my humble opinion, the power to issue an attachment in such case does not exist.

BOLLAND, B.:

My Lords, I feel it to be necessary only to say that I concur in the opinion which has been expressed by my learned brothers, Mr. Justice PATTESON and Mr. Justice WILLIAMS.

PARKE, B.:

In answer to the fifth question proposed by your Lordships, the only one on which a difference of opinion exists, I have to state mine, that it is competent for the Court, in the case suggested, to commit for a contempt.

The commissioners being, so to speak, sheriffs for the purpose of executing this process in each and every county, and having, as it were, a special patent of assistance by the words of their commission, possess the like authority which is vested in the known officer of the law, by the common law, to take, if need be, the power of the county in which he is called upon to act in

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order to execute the process; and it follows from thence that every one who would, under the same circumstances, be bound to obey the requisition of the sheriff of his county, is equally bound to obey that of the commissioners, within the same county, and punishable if he do not. That the punishment may be effected by means of an indictment or criminal information, is clear upon the authorities. The only question is, whether it may be done by attachment.

[614] The power which Courts have of vindicating their own authority, by punishing contempt committed in or out of Court, is coeval with the common law, and stands upon immemorial usage; for which I would refer to *Rex* v. *Almon* (1). It is a summary remedy for obstructions in the course of justice, and for causing the process of the law to be obeyed, and upon principle that remedy must be applicable, (whether it ought to be applied or not, is a different question depending on circumstances,) to all cases in which the process has remained unexecuted by a breach of duty in others; whether such breach of duty be by misfeasance or non-feasance; by doing that which ought not to be done, or omitting to do that which ought to be done. And, accordingly, it has been the practice to apply the remedy, not only to cases in which individuals have obstructed the process of the Court, by impeding its officer in the execution of the writ, but where they have omitted to perform a duty which is cast upon them by virtue of the process—as, for instance, where the sheriff have neglected to return a writ or bring in the body; or where a person subpœnaed as a witness, has neglected to attend. Nor is this remedy confined to those cases in which a particular individual is specially named by the writ, for it lies against a constable for not obeying a Judge's warrant, directed to all constables to arrest a man for felony: *Rex* v. *White* (2). Nor need a person be named at all: if a writ be directed to a bishop, his chancellor, whose duty it is to obey it: *Rex* v. *The Bishop of St. Asaph* (3), may be punished for disobedience.

In the Court of Exchequer, constables and peace officers may

(1) Wilmot's Opinions, 254.
(2) Cas. temp. Hard. 42.
(3) 1 Wils. 332.

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be attached for refusing to obey the order *given to all constables in the letters patent of assistance to officers of the customs, issued under the seal of the Exchequer, which are referred to in the 13 & 14 Car. II. c. 11, s. 5. Whether such writ of assistance derive its authority from the common law, or from that statute, is wholly immaterial to this enquiry: it is enough that the constables are bound to obey it. Three instances have been referred to by my brother BOSANQUET of rules made for such attachments on constables in the Court of Exchequer in 1733, 1768, and 1817, which have been found upon a search by the officer of the Court; in one of which the rule was made absolute; in another submitted to: but it is said, that in the case of the writ of assistance, and of the Judge's warrant, the instruments are directed to all constables; and that the *quasi* writ of assistance contained in a commission of rebellion is not so directed. This objection would be well founded, if the subject were not bound to obey such a writ; but if he be, it seems to me to be a distinction without a real difference, and that he is so bound, has been already established, and is a matter conceded. What real difference can the form of the writ make, if in substance it command certain persons to do certain things, and that command is obligatory upon them? In truth the legal effect of the letters patent is just the same, whether in one form or another, and the true question is, whether the writ command the persons mentioned in it, and such persons are bound to obey it. Nor is there any substantial distinction that in the cases cited the public were immediately concerned, and that in this they are not, and that the attachment is sought for the advantage of a private suitor; for the power to attach, in most cases, is executed for securing private rights which the Courts are established to protect as well as those of the people at large. Nor does the absence of a precedent, precisely in point, make in *my judgment the least difference, for there is none in principle.

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I am of opinion, therefore, that the Court out of which the writ issues, has a power to attach for contempt in the case of a stranger, who being liable by law to be called upon to assist, and being duly called upon, declines to do so.

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LITTLEDALE, J.:

The Judges who are in attendance, are all agreed in the answers to the first four questions put by your Lordships, and their opinion has already been delivered as to them, by Lord Chief Justice TINDAL. But on the fifth there is a difference of opinion. That question is, "Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render assistance, and declining so to do, can the Court out of which such writ issued commit such person as guilty of a contempt of such Court?"

There is no doubt whatever but it is a breach of public duty in any of the Queen's subjects to decline giving his aid and assistance, and for which breach of duty he is liable to an indictment or a criminal information: but the question is, is it a contempt of Court for which he may be attached?

I will first consider how it would be, if the process were directed to the sheriff. In such case there is no command or direction to the Queen's subjects in general to aid and assist the sheriff in the execution of it. But nevertheless in a case of actual resistance or opposition, or illtreatment of the sheriff or his officers, or any abusive or contumelious language as to the Court or its process, or its officers, it is a contempt of the Court for which an attachment may be granted; and there are several instances mentioned in our law books, where attachments for such causes have been granted. All *these, however, are cases [*617] of misfeasance: and I cannot find any case where an attachment has been granted, or any authority to say that it may be granted, for the nonfeasance of declining to aid and assist the sheriff.

The sheriff is authorised, in case of need, to call forth the *posse comitatûs* to aid and assist him in the execution of process, and if any of the Queen's subjects refuse to join it, there is no doubt but it is a breach of a public duty, which renders a man liable to an indictment or a criminal information: but on this proceeding also of the *posse comitatûs* I can find no instance of an attachment.

It is said in Brooke's Abr., Fine pur contempt, pl. 37, "if the sheriff or his bailiff serves a writ, every man is bound to aid

them in their needs, and this by the common law; and if they do not do it at the request of the sheriff they shall be fined; as if the sheriff requires them to take a felon, and they refuse, they shall be fined:" so also in Brooke's Abr. tit. Trespass, pl. 266, that "a sheriff or his bailiff may serve a replevin or other writ with 300 men in harness: and every one is bound to aid the sheriff by the common law: and if they do not, they shall be fined, if they are required and make default; and the same law is where the sheriff prays them to take felons." Even supposing this to be the law, yet it does not appear from these authorities how the fine was to be imposed; it could not be for a contempt of Court, because though the punishment is awarded for not aiding the sheriff on process, it is also awarded for not aiding the sheriff in endeavouring to arrest a felon: that arrest might be without any process of any Court, because the sheriff of his own authority has a right to arrest felons without the process of any Court; and therefore the mode of enforcing this fine must either be upon a conviction or on an indictment at the common law, or by some summary mode of inflicting fines which might exist in those times of turbulence, but which is *now forgotten: for it never could be supposed that [*618] the Court of Queen's Bench, as the superior Court of criminal law jurisdiction, could have a power of calling up a person who was a total stranger to their proceedings, to show cause why an attachment should not be granted against him as a punishment for a supposed offence. Indeed it is apparent that this fine could not be imposed for a contempt of Court, for a contempt of Court is punishable by imprisonment as well as fine, if the Court think proper; and therefore the fine which is here mentioned, could not, as it should seem, apply to a proceeding by attachment.

I may further remark on the statute 2 Hen. V. c. 8, which directs in the second section, "that the King's liege people being sufficient to travel in the county where such routs, assemblies, or riots be, shall be assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, sheriff, or under-sheriff in aid to resist such routs, riots, and assemblies, upon pain of imprisonment, and to make fine and ransom to the

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King." Now, here is a parliamentary direction for all persons to be assistant to the justices, commissioners, sheriff, and under-sheriff, and to be punished by imprisonment and fine if they do not. This is subject to the same remark that I have already made as to aiding sheriffs in the execution of process: the people are commanded to do what is required by this Act of Parliament; if they do not, they are subject to an indictment or criminal information; but the fine which is mentioned cannot be for a contempt of Court; for the cases mentioned in the Act, of riots, routs, and assemblies, are wholly unconnected with any Court, and yet the parties may be imprisoned and fined; and therefore, when it is said in the quotation from Brooke's Abridgment, that [*619] persons may be fined who *refuse to assist the sheriff, the proceeding cannot be by attachment for a contempt of Court. The view which I take as to this appears to me to be strengthened by the provisions of the Statute of Westminster 2, 13 Edw. I. c. 39 (1), which, among other things, says, "and as soon as his bailiffs do notify that they found such resistance, forthwith, all things set apart, (taking with him the power of the shire), he shall go in proper person to do execution; and if he find his under-bailiffs false, he shall punish them by imprisonment, so that others, by their example, may be reformed. And if he do find them true, he shall punish the resisters by imprisonment, from whence they shall not be delivered without the King's special commandment. And if per case the sheriff when he cometh do find resistance, he shall certify to the Court the names of the resisters, aiders, consenters, commanders, and favourers, and by writ judicial they shall be attached by their bodies to appear at the King's Court, and if they be convict of such resistance they shall be punished at the King's pleasure. Neither shall any officer of the King meddle in assigning the punishment, for our Lord the King hath reserved it specially to himself, because that resisters have been reputed disturbers of his peace and of his realm." It may be a question whether this Statute of Westminster be in all its parts in affirmance of the common law; in some parts it certainly is so, and is so treated by Lord Coke in his 2nd Institute, p. 449. Lord Coke, in commenting upon the

(1) Repealed 50 & 51 Vict. c. 55, s. 39.

Statute of Westminster 1, 3 Edw. I. c. 17, as to where distresses were impounded in a castle or fortress, 2 Institute, 193, comments more largely upon what was the common law, and it is in his commentary upon that statute that he cites Bracton, who wrote before the statute, to show what the common law was; but Bracton's authority is only as to persons who resist the process of the sheriff. *But I think it is quite immaterial whether the [*620] Statute of Westminster the 2nd, 13 Edw. I. c. 39, be altogether a new law, or only in affirmance of the common law: if it be a new law, it does not extend to proceeding by attachment against those who refuse to assist the sheriff, but only to resisters, aiders, consenters, commanders, or favourers. And again, suppose this Act of Parliament be wholly in affirmance of the common law, then the Act must have been passed with a view of making the law more publicly known, and emphatically to warn the King's subjects of the consequences of disobedience to the law; and it must therefore be presumed that the Act made public and declared the whole body of the law as to this subject; and it was more particularly necessary to declare what the law was as applicable to those who refused to assist the sheriff, because upon that the law might be more doubtful; but nobody could ever doubt what the law was in cases of actual resistance. I think, therefore, that the silence of the Act of Parliament as to persons who refuse to assist the sheriff, and the making the provisions as to those who resist the sheriff, shows that it was not considered that the refusal to assist the sheriff was ground for an attachment.

It is to be observed that I do not mean to contend that the original of a commitment for contempt was derived from this statute; it has been supposed that a passage in Gilbert's History of the Common Pleas, pages 20 and 21, so considers it; but that is not so if you take the whole passage together; and this is explained by Lord Chief Justice WILMOT in *Rex* v. *Almon* in his opinions and judgments, page 255; and on the contrary I say the origin of commitment for contempt is not derived from that statute; and I entirely agree that, if a contempt of Court be committed, the power to commit for a contempt is coeval with the foundation *and jurisdiction of our [*621]

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Courts of justice, and necessary to give effect and respect to their proceedings.

But the question is, what is a contempt? and I think that the mere nonfeasance in refusing to assist a sheriff in the execution of process is not a contempt. No case has occurred, and there is no authority in our text books to say that it is; and the silence for many centuries must be taken as a strong proof that it is not so.

I have hitherto considered the case as standing upon the power of the sheriff as under the writ itself directed to him. But besides that, he has always a patent of assistance from the Crown, by which the King commands that all archbishops, bishops, dukes, earls, barons, knights, freemen, and all others of that county be to the sheriff thereof in *omnibus quæ ad officium illud pertinent auxiliantes et respondentes.*

These patents of assistance are probably as old as the office of sheriff, and are meant to add to the general power of the sheriff at the common law; and I do not mean to say but that as they emanate from the Crown to enforce the authority of the sheriff acting under the orders of the Court, they may not have the same effect as if the clause of assistance had been introduced into every writ. But supposing that to be so, there is no authority or practice that, even with the patent of assistance, a person who refuses to assist the sheriff is guilty of a contempt.

But it may be said that, whatever may be the case of a sheriff, yet that, under a commission of rebellion, all the King's subjects are required by the commission of rebellion to aid and assist the commissioners: but I think that the commissioners stand in the same predicament as the sheriff with his patent of assistance. If this question had arisen on the refusal of the appellants to assist the sheriff in the execution of the writ of attachment prior to the commission of rebellion, *the direction to all the Queen's subjects to aid and assist the sheriff would not have been inserted in the attachment, because he had his patent of assistance. The commission of rebellion is directed to persons named by the Court, and these commissioners have authority all over the kingdom; and it is the same thing as if an attachment issued to every separate sheriff in the kingdom. The word "rebel" is

[*622]

used, but it is not used in a treasonable sense; it is only that he is in contempt and cannot be found in the bailiwick of the sheriff. Now these commissioners, who of course vary from each other in every case, have no patent of assistance to call upon all the Queen's subjects; and therefore, to give them the same power as the sheriffs have, this direction to the Queen's subjects to aid and assist, is inserted in the body of the writ, and by that means they possess the same power that the sheriff would have had upon the attachment; but they are never meant to have greater powers, for they have precisely the same things to do as the sheriff; and if it be not a contempt to refuse to assist the sheriff with his patent of assistance, it can be none to refuse to assist the commissioners who have the clause of assistance inserted in the commission. The object of both is to take care that the King's writ be obeyed; but one officer has the writ and command of assistance separately, and the other officer has them both together.

The ground I go upon is, that a nonfeasance of this kind is not a contempt of the Court; and I know of no instance or authority, except as after mentioned, where an attachment has been granted on a proceeding directed to persons in general, without mentioning their names. There are a great variety of cases where attachments are granted for nonfeasance, but for the most part they are where the parties are described by name or by office. Such are attachments against sheriffs *for not [*623] returning writs, for not paying over money in their hands, or, in general, for not doing any thing which the Court requires them to do in the course of their duty. It lies against the attorneys and other officers of the Court for a great variety of acts of nonfeasance: so also against the suitors of Courts for not paying costs, or not performing an award made under the authority of the Court: so, against a witness for not attending a trial pursuant to a *subpœnâ*: so also, against a person for not making a return to a writ of *habeas corpus* to bring up a person illegally detained. The case of *Rex* v. *White* (1), was where the Court of King's Bench issued an attachment against a constable for not executing a warrant which had been issued; but

(1) Cas. temp. Hard. 42.

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that was in respect of criminal process, and where the Court of King's Bench claimed the power to grant warrants in criminal proceedings. There may, indeed, be an attachment against persons for not returning a writ of *mandamus* directed to many persons who are not a corporation, and who may not be designated by names; but then it is directed to a class of persons; and besides, such an attachment could only be on the party refusing to come into Court and do the thing required, and not for a bye-gone thing.

It may be said, that though the commission of rebellion does not mention any body by name in the clause of aid and assistance, yet that when the commission of rebellion is properly notified to any individual, it is to be considered in the same light as if his name had been inserted in it: but I know of no instance where that has been so held; and I think that a virtual and inferential direction to the party is not to be considered in
[*624] the same light as if he had been named in the commission; *and that it does not make him guilty of a contempt of the Court, and render him liable to a commitment on a summary proceeding.

I must now notice a proceeding under which I understand attachments have been granted in cases something resembling the present; and that is under writs of assistance granted to persons employed in the collection of the revenue of the Crown. Writs of assistance are for some purposes of very ancient date, but as to those for collecting the revenue, I cannot find any trace of them before the 13 & 14 Car. II. c. 40, s. 5, which authorises them to be granted under the seal of the Court of Exchequer, to take a constable, headborough, or other public officer, to do various acts specified: and the same powers have been continued in various subsequent Acts of Parliament, the last of which appears to be the 3 & 4 Will. IV. c. 53, ss. 38 and 39 (1).

There are instances of informations, filed in the Crown Office by the *Attorney-General*, against persons for refusing to aid and assist under a writ of assistance; and there are also, I understand, some instances of attachments being granted by the Court of Exchequer against persons for refusing to aid and assist the revenue officers. I have not been able to learn whether these

(1) Repealed 8 & 9 Vict. c. 84, s. 2.

instances have been numerous; nor whether the question was discussed in the Court of Exchequer; nor whether they were granted on the ground of its being a contempt of the Crown in matters relating to the collection of the revenue; which might be said was as much allowable, as in cases where parties refused to pay obedience to the warrants of the Judges of the King's Bench in criminal proceedings.

Upon the whole consideration of the fifth question, I come to the conclusion, that it is not a contempt of the Court upon which the party can be committed.

PARK, J.: [625]

My Lords, I do not feel it necessary to state more than that I fully agree in the opinion which will be stated by the LORD CHIEF JUSTICE.

TINDAL, Ch. J.:

My Lords, in answer to the last question above proposed to her Majesty's Judges, and upon which I regret to find that two of my brethren differ from me, the opinion at which I have arrived, upon the best consideration I can bring to the subject is this; that if a stranger to the proceedings of the cause, being in other respects liable to be called upon to assist in the execution of a writ of rebellion, has been regularly called upon to render such assistance, and refused or declined so to do, the Court out of which such writ issued may proceed against him by attachment for a contempt of the Court, and if no sufficient answer or excuse be shown on his part, he may be committed for such contempt; and I ground this opinion upon the consideration that the proceeding by attachment is a legal and constitutional mode of punishing persons guilty of contempts against the authority of the superior courts of law; and that the disobedience of the mandatory part of this writ by a person who has been duly made acquainted with its exigency, and required to assist, and has not at the time a legal excuse for refusing or declining to assist, is a denial of the authority, and, therefore, a contempt of the Court.

That there must exist some mode of enforcing the mandatory part of this writ requiring from strangers aid and assistance in

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the execution thereof, is obvious, unless such mandate which has been inserted in the writ from the earliest times, and has been continued without interruption down to the present, is to be regarded as a mere formula of useless words, or an idle and
[*626] empty threat; and, therefore, the great question *that has been argued at your Lordships' bar has been, not whether the Court has the power to issue the mandate, but as to the mode of enforcing it by law; the plaintiff in error contending that the course to be pursued against such as refuse or neglect to obey its authority, is by indictment, and indictment only; the defendant in error insisting, on the other hand, that to proceed against such as refuse obedience to its command by attachment for contempt of the Court out of which the process issues, is a course sanctioned by law.

That the superior Courts have the power of issuing attachments for the purpose of vindicating their own authority, and punishing contempts committed against them, is not denied. It was admitted, in the course of the argument, that attachments may properly issue against those who actually resist the process of the Court, who treat it with contumely, or who commit any act of violence or insult against the ministers of the Court employed in executing such process; such acts are universally allowed to be properly punishable as contempts of the Court, as they amount in effect to an obstruction of the course of justice, and require, upon that account, a more speedy punishment than can be obtained by recourse to indictment.

Indeed, it is difficult, and so far as I have been able to discover, impracticable, to find the period of time when proceedings by attachment were first introduced; such course of proceeding must of necessity have been coeval with the institution of Courts themselves; since without that speedy remedy they could never either have acquired or sustained that dignity and authority in the eyes of the people which is essential for the performance of the duties with which they are entrusted.

It was stated, indeed, in the course of the argument, that
[*627] attachments for contempts owe their origin to the *Statute of Westminster 2, c. 39, and for this the authority of Chief Baron Gilbert has been cited in his history of the Common Pleas,

page 25. Yet upon the accurate consideration of that passage in Gilbert, and of the statute itself, it appears that neither will support such a proposition. In the passage referred to, the Chief Baron lays it down that "the original of commitment for contempt seems to be derived from this statute, for since the sheriff was to imprison those that resisted the process, the Judges that awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to the process, either by word or deed, he is subject to commitment during pleasure; viz. *à quâ non deliberetur sine speciali præcepto Domini Regis;* so that, notwithstanding the Statute of Magna Charta, that none are to be imprisoned, *nisi per legale judicium parium suorum, vel per legem terræ*, this is one part of the law of the land to commit for contempts, and is confirmed by this statute." Now, the very language of Chief Baron Gilbert in the latter part of the clause is at variance with the first; viz., that it is confirmed by the statute, not created by it; and the language of the Statute of Westminster itself imports that the writ of attachment was not then for the first time introduced; the statute enacting, "That if the sheriff, when he cometh do find resistance, he shall certify to the Court the names of the resisters, aiders, consenters, commanders, and favourers; and by a writ judicial, they shall be attached by their bodies to appear at the King's Court, and if they be convict of such resistance, they shall be punished at the King's pleasure:" words, which are consistent rather with the attachment being a mode of proceeding previously known and practised in the Courts, and directed by the statute to be applied to this particular case, than with the institution of a proceeding altogether unheard *of in the Courts [*628] before that time; and the authority of the Year Book, 3 Hen. VII. 1 (which has been before referred to), is express to the point, that the Stat. Westminster 2, c. 39, was not introductory of a new law against resisters of the sheriff, but only confirmatory of the common law.

That an attachment is a proceeding which has existed time out of mind against persons guilty of a contempt of Court, cannot therefore be doubted, and the question that has been made at your Lordships' bar has been whether the Court has

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any authority to issue it against persons guilty, not of any positive act of contempt, but of mere nonfeasance only: and upon consideration of the cases in which it has been held to apply, it appears to me, if not by direct authority to be drawn from them, at least by necessary analogy, that it must apply to the case of mere nonfeasance; that is, in the particular case, to mere refusals to give aid to the officer.

First, in the case of refusal to aid and assist the sheriff in the execution of an ordinary writ, it may be admitted that the more common course of proceeding would be by indictment or information against the party so refusing, there being in the Crown Office informations to be found upon the file against such offenders. But admitting that such would be the ordinary course of proceeding in that case, it would not govern the present; for there is a broad distinction between the two cases. The writ of execution to the sheriff, in an ordinary suit, is directed to the sheriff; it commands the sheriff alone; it does not call on any of the liege subjects of the King to aid or assist; and consequently the declining to give aid or assistance in the execution of such a writ, would be no direct contempt of the Court, however it might amount to a breach of the subject's duty to the King, and expose the party to an indictment or information; whilst, *on the contrary, the commission of rebellion contains a clause calling on all other ministerial officers, besides the sheriff, and on all other liege subjects, to be aiding and assisting; and consequently the refusal to comply with it is a direct denial of the authority of the Court from which the commission issued.

[*629]

And, accordingly, it appears that when a writ of assistance has issued to the sheriff, there are instances of attachments upon the files of the Court of Exchequer against persons who have refused their aid, which have been more particularly referred to by my brother PARKE who has preceded me.

2. But the question has been argued, Is this mere nonfeasance a contempt at all? The answer appears to be, first, that it falls distinctly within the definition of a contempt adopted by Viner, from the Practical Register of the Court of Chancery. It is "the not doing what the party is commanded or required by the

process or order of the Court:" Viner's Abridgment, Contempt. And still further, it appears that a mere nonfeasance is a contempt in the case of *subpœnâ ad testificandum*, where, if the party to whom it is addressed neglects or refuses to obey it, the ordinary and well known course is to proceed by attachment for a contempt. But it is objected that, in the case of the *subpœnâ*, the process is directed to the party by name. Undoubtedly it is so: I cannot however perceive any difference, in reason and principle, between a process directed to the individual by name, and a process directed to a class of persons by a general description, and personally served upon a particular individual comprised within such class. The authority of the Court which issues the general command is admitted; that the description includes the individual upon whom it is served is admitted also; that it is a command sanctioned by the usage of the Court from earliest time, *and confirmed by law, is also admitted. Upon [*630] what principle, then, can the refusal to obey it be less a contempt of the Court, and less punishable by attachment than in the case of a *subpœnâ* addressed to the particular party?

3. And accordingly, in the case of *Rex* v. *White* and others (1), where an attachment was moved for against the defendants, constables of Scarborough, for not obeying the Chief Justice's warrant, directed "to all constables throughout England," to arrest a man for felony, it was said by the COURT, "that the Judges of this Court have power to grant warrants to be executed by all constables, &c., throughout England; and disobedience to a Judge's warrant is a contempt of the Court, and such a contempt as the Court will take notice of by way of attachment." In that case the direction of the warrant is general; it is the service on the individual constable, and the disobedience by such individual, which form the ground of the attachment. And although it was said, in *Reg.* v. *Wyatt* (2), that the constable to whom a warrant was directed by a justice of the peace is indictable, and that when an officer neglects a duty incumbent on him, either by common law or by statute, he is for his default indictable, it by no means follows that the superior courts of law might not also grant an attachment for a similar neglect of process issued by them. Indeed,

(1) Cas. temp. Hard. 42. (2) 1 Salk. 380.

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the case above referred to is a direct authority that they may; and although it would not form any ground for inferring the authority of the Courts to issue an attachment in this case, if it could not be supported by other considerations, yet it is not immaterial to [*631] observe that the mode of investigating the complaint, by *an application to the Court for an attachment, is in most instances more favourable to the party accused, than that by indictment.

If the charge of disobedience to the mandate is denied, his own denial upon oath is more ready to him than the calling a witness upon an indictment to prove his obedience; for he must know, if any one does, whether he has obeyed it or not; and again, when he has declined or refused to obey it, the ground for his disobedience in most cases must be exclusively confined to his own breast. Was the requisition of the commissioners clearly made known to him? was their authority sufficiently explained at the time the request was made? was their request of assistance justified by the exigency of the occasion? was it a request reasonable as to the individual, respect being had to his age, strength, and condition of mind or body? was the demand upon his services reasonable in respect to their extent or duration? was he prevented by the performance of conflicting duties of an equal or greater pressure? or was he disabled by any private concerns of a nature and description so pressing and overwhelming as at once to rebut the charge or even the suspicion of any contempt of the Court? All these, and many other grounds of denial or excuse, which may vary infinitely in different cases, are extremely difficult to prove by witnesses on an indictment, but may at once be made apparent to the Court by the affidavit of the party charged. And let it not be forgotten, that the party charged has the power of stating the facts in his favour according to his own impression of the truth, which is never likely to be unfavourable to himself; and that the clear and explicit statement of the party so charged is taken by the Court to be true, and cannot be made the subject of contradiction in this stage of the proceedings; whereas, in the case of an indict- [*632] ment, he *cannot be a witness for himself at all; so that the balance of advantage in this mode of prosecuting for the offence is very far in favour of the party accused.

Upon the whole, therefore, from the reason of the thing itself, by analogy to cases which have occurred, and by the authority of those which have any bearing upon the point, I would humbly state my opinion to your Lordships to be, that an attachment for contempt under the circumstances assumed in your Lordships' question is a proceeding justified by law (1).

It was ordered by the House that the further consideration of the cause be put off *sine die*.—Lords Journals, 22 May, 1838, p. 343.

LINE *v.* STEPHENSON AND ANOTHER, EXECUTORS OF THOMAS GUTTERSON, DECEASED (2).

1838. *June* 8.

(4 Bing. N. C. 678—684; S. C. 6 Scott, 447; 7 L. J. (N. S.) C. P. 263.) [678]

The word "demise" in a lease, implies a covenant for title and a covenant for quiet enjoyment: but both branches of such an implied covenant are restrained by an express covenant for quiet enjoyment.

THE declaration stated, that on the 27th of October, 1836, by a certain indenture then made by and between Thomas Gutterson of the one part, and the plaintiff of the other part, the said T. Gutterson for the consideration therein mentioned, did demise, lease, and to farm let unto the plaintiff, two messuages, &c., to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 25th of December then next ensuing, for and during and unto the full end and term of forty-nine years, wanting ten days, from thence next ensuing, and fully to be complete and ended, yielding and paying therefore the rent of 80*l.* a year. And the said T. Gutterson did, by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the plaintiff, his executors, administrators, and assigns, that he the plaintiff, his executors, administrators, and assigns, paying the said yearly rent of 80*l.*, and observing, performing, and keeping all and

(1) It appears from the Lords Journals that Mr. Baron ALDERSON also delivered his opinion upon the 5th question in the affirmative, and gave reasons.—R. C.

(2) Cited as settling the law: *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836, 840, 63 L. J. Q. B. 661, 663, C. A.; *Baynes* v. *Lloyd*, [1895] 1 Q. B. 820, 825, 64 L. J. Q. B. 411, 414; [1895] 2 Q. B. 610, 616, 64 L. J. Q. B. 787, C. A.—R. C.

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singular the covenants and agreements in the said indenture contained, which on his and their part were and ought to be observed, performed, and kept, according to the true intent and meaning of the said indenture, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy, all and singular the several messuages or tenements and premises, with the appurtenances thereunto belonging, for and during the said term, without any let, suit, trouble, hindrance, or interruption whatsoever, by or from the said T. Gutterson, his executors, [*679] administrators, or assigns, or any person or *persons claiming or to claim from, through, under, or in trust for him, them, or any of them. Breach; that the said Thomas Gutterson had not, at the time of the sealing and delivery of the said indenture, or at any other time during his lifetime, nor had the defendants at any time before the commencement of this suit, power and authority to demise, lease, and to farm let the said messuages or tenements and premises, with the appurtenances, to the plaintiff, his executors, administrators, and assigns, for and during the full end and term of forty-nine years, wanting ten days, as in the indenture was mentioned, by means of which said several premises, the plaintiff lost and was deprived of several sums of money paid, laid out, and expended by the plaintiff, in and about the pulling down, altering, rebuilding, amending, improving, cleansing, and repairing the said several messuages or tenements, so alleged to be demised to the plaintiff as aforesaid.

Demurrer, for that the mere want of power to grant the lease for the full term of forty-nine years, wanting ten days, did not appear on the face of the declaration to be a breach of the express covenant declared upon; that the subsequent allegations as to the loss of the money expended, and as to the not keeping and breaking the covenant, were too general; and that the supposed breach or breaches, or what was alleged as such, was merely a state of facts, which, though consistent with the supposition of there having been a breach, might yet have arisen without any breach at all; and that no sufficient breach was alleged.

Joinder.

Channell, in support of the demurrer:

The express covenant for quiet enjoyment during the term, qualifies and restrains the covenant in law contained in the word *"demise": *Nokes's* case (1), *Merrill* v. *Frame* (2). And the [*680] breach assigned is no breach of the covenant for quiet enjoyment: no eviction is stated; and the plaintiff may have enjoyed quietly, notwithstanding the lessor may not have had a good title. As against the lessor the lease was good by estoppel, and the plaintiff could not recover on the lessor's covenant for an eviction by a stranger: 2 Wms. Saund. 178 a.

Ogle, for the plaintiff:

Under the word "demise" two covenants are implied: one that the lessor has power to create the term: *Fraser* v. *Skey* (3); the other, that the lessee shall have quiet enjoyment: and, though an implied covenant is controlled or extinguished by an express covenant to the same effect, yet both the covenants implied in the word "demise" are not extinguished by an express covenant on one point only. The express covenant for quiet enjoyment, therefore, in the present lease extinguished only the implied covenant for quiet enjoyment, but not the implied covenant that the lessor had power to create the lease. In *Holder* v. *Taylor* (4), it was held that a lessee might sue for a breach of that implied covenant, notwithstanding he had never been evicted: and, though at the end of the case the COURT says, "but if there was an express covenant for quiet enjoyment it might be otherwise," the case is cited in the abridgments for the first point only: Com. Dig. Covenant A. C. In *Burnett* v. *Lynch* (5), LITTLEDALE, J. says, "an action for covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; but that word imports a covenant in law on the part of the lessor that he has good title; and that the lessee shall quietly enjoy during the term."

And the proof that these two implied covenants are distinct, [681] is, that if the lessor have not power to create the term, he may

(1) 4 Co. Rep. 80 b.
(2) 13 R. R. 612 (4 Taunt. 329).
(3) 2 Chitty, 646.
(4) Hob. 12.
(5) 29 R. R. 343 (5 B. & C. 589).

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be sued the moment he has executed the lease, whereas on the covenant for quiet enjoyment, he cannot be sued till after an eviction. Upon the first covenant the lessee may recover nominal damages, and if he continues in possession and lays out money on the premises, and is afterwards evicted, he may recover in actual damages the amount he has lost. In *Norman* v. *Foster* (1), HALE, Ch. J. said, "If I covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me, these are two several covenants, and the first is general, and not qualified by the second: and so said *Wylde*; and that one covenant went to the title, and the other to the possession:" and in *Howell* v. *Richards* (2), Lord ELLENBOROUGH said, "The covenant for title, and the covenant for right to convey, are indeed what is somewhat improperly called synonymous covenants; they are, however, connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case, an indefeasible estate in fee-simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbance thereupon."

[*682] It was competent to the plaintiff to set out the deed according to its legal effect, and to have declared on *this as an express covenant for title: *Saltoun* v. *Houston* (3); and the generality of such a covenant for title is not restrained by a subsequent covenant for quiet enjoyment: *Gainsford* v. *Griffiths* (4), *Hesse* v. *Stevenson* (5), *Barton* v. *Fitzgerald* (6), *Smith* v. *Compton* (7). In *Nokes's* case the plaintiff sued for breach of the covenant for quiet enjoyment, and there had been an eviction: the only point

(1) 1 Mod. 101.
(2) 11 R. R. 287 (11 East, 633, 642).
(3) 25 R. R. 665 (1 Bing. 433).
(4) 1 Saund. 59.
(5) Page 880 below (3 Bos. & P. 565).
(6) 13 R. R. 519 (15 East, 330).
(7) 37 R. R. 387 (3 B. & Ad. 189).

decided was, that the express covenant for quiet enjoyment restrained the generality of the covenant in law contained in the word "demise," that is, restrained it as to the implied covenant for quiet enjoyment, but not as to the implied covenant for good title; and even this position is said in the report of the same case by Croke, to have been the opinion of POPHAM, Ch. J. only. The only case which makes against the plaintiff is *Milner* v. *Horton* (1), but that was overruled by *Smith* v. *Compton*.

TINDAL, Ch. J.:

I see no reason to alter the opinion I expressed the other day (2), that the generality of the covenant in law contained in the word "demise," is restrained by the express covenant for quiet enjoyment. The rule is laid down with great generality in *Nokes's* case as reported by Lord Coke, and I must infer that he is correct in describing that rule as laid down by the whole Court, since, he says affirmatively that it was so held by POPHAM, Ch. J. and *totam curiam*, and Croke, after mentioning POPHAM, is merely silent as to the rest of the Court. It has been ingeniously argued, that in the word "demise" two distinct covenants are implied; one for title, *the other for quiet enjoyment: I am not prepared to say that such is not the natural effect of the word "demise"; but there is no authority for saying that an express covenant on one point does not qualify the whole effect of the word. *Fraser* v. *Key* and *Norman* v. *Foster* only show that the word "demise" implies a power to grant; and that where there are two express covenants, one that the lessor has power to grant, the other, that the lessee shall enjoy without interruption from any claiming under the lessor, the generality of the first is not qualified by the second: but I see no reason why, if the covenant implied by the word "demise" be divided into two parts, a subsequent express covenant for quiet enjoyment should not apply to the whole.

[*683]

(1) M'Clel. 647.

(2) The case had been argued on a former day by *Bere* for *Ogle*, who was absent, and judgment was given for the defendants; but the COURT this day consented, as an indulgence, to hear *Ogle* himself.

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PARK, J.:

The rule in *Nokes's* case has been acted on ever since; and Lord Coke's report must be taken to be correct, as he was then Attorney-General, and Croke was not a Judge till twenty-five years after.

There is nothing in *Norman* v. *Foster* incompatible with the proposition that the subsequent express covenant controls the entire effect of the word "demise."

VAUGHAN, J.:

I am of the same opinion. It would be impossible to give judgment for the plaintiff without impugning *Nokes's* case, and renouncing the rule that an express covenant controls a covenant in law. In *Merrill* v. *Frame*, the COURT said that the argument which has been urged to-day, would make *expressum* and *tacitum* mean the same thing.

COLTMAN, J.:

There is a great difference between the covenant implied in the word "demise" and an express covenant for good title. In *Gainsford* v. *Griffith*, *Hesse* v. *Stevenson*, *Barton* v. *Fitzgerald*, and *Smith* v. *Compton*, the covenant for title was express; and
[*684] in *Norman* v. **Foster*, HALE, Ch. J. is speaking of two express covenants. It has been urged, indeed, that the covenant for title might have been pleaded as an express covenant here; but that is confounding a rule of evidence with a rule of construction. It would be dangerous to unsettle the rule in *Nokes's* case, which has never been judicially questioned: and I cannot distinguish the present case from *Merrill* v. *Frame*. There, the word "demise" was followed by a covenant for quiet enjoyment of which covenant there had been no breach, because the party who entered on the lessee did not claim under the lessor: the question, therefore, was whether the implied covenant contained in the word "demise," was not qualified by the express covenant for quiet enjoyment. The COURT held that it was; and therefore our judgment must be for the defendants.

Judgment for the defendants.

[The case having been brought into the Exchequer Chamber, on error from the Court of Common Pleas :]

Ogle now for the plaintiff contended, as before, that in the word "demise," two distinct covenants are implied, *one for title, and the other for quiet enjoyment: that the two are not synonymous: per Lord ELLENBOROUGH, Ch. J., in *Howell* v. *Richards* (1), and HALE, Ch. J., in *Norman* v. *Foster* (2); per LITTLEDALE, J. in *Burnett* v. *Lynch* (3); *Fraser* v. *Skey* (4), Bac. Abr. Covt. B. Com. Dig. Covt. A. 4: and that though an express extinguishes an implied covenant, yet that the express covenant here, only extinguished the particular implied covenant to which it related, namely, the covenant for quiet enjoyment, leaving the implied covenant for title in full force.

(LORD ABINGER, C. B.: Does not an express covenant as to one branch of the covenant implied by the word "demise" exclude the other? *Expressio unius est exclusio alterius.*

PARKE, B.: Would it not be absurd to hold that the lessee meant to covenant absolutely for title by the general word "demise," when he afterwards expressly confines his covenant to the acts of those who claim under him? See *Nokes's* case (5).

LITTLEDALE, J.: According to your argument, it would be a good breach if the plaintiff were evicted by a party who had no title at all.)

The covenant for title and the covenant for quiet enjoyment are so essentially distinct, that a lessee might, before entry, recover nominal damages for a want of title in his lessee, and after entry, actual damages upon an eviction.

(ALDERSON, B.: The whole fallacy is in assuming that upon this indenture, two covenants are to be implied from the word "demise"; it is true that the word if it stands alone raises a covenant, of which either want of title, or eviction would be

(1) 11 R. R. 287 (11 East, 633, 642).
(2) 1 Mod. 101.
(3) 29 R. R. 343 (5 B. & C. 589).
(4) 2 Chitty, 646.
(5) 4 Co. Rep. 80 b.

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a breach; but when it is accompanied with an express covenant against the acts of persons claiming under the lessor, it is confined to the breach by eviction).

[*185] But without actual eviction a lessee may *incur serious loss from a want of title in his lessor, as by effecting extensive improvements, upon the faith of a duration of interest which he has been led to rely on, and discovers, too late, the lessor is unable to secure to him: that, could not have been the intention of the parties; and in order to give effect to such intention, the Courts have often, from an express covenant, raised an implied one, where, without such implication, the express covenant would be fruitless; as in *Earl of Shrewsbury* v. *Gould* (1), *Webb* v. *Plummer* (2), and *Randall* v. *Lynch* (3). The plaintiff, here, might have set out the deed according to its legal effect, and then it would have appeared on the declaration as if there had been an express covenant for title: in such case it would have been unnecessary to allege an eviction. In *Holder* v. *Taylor* (4), it was held that where the lessor has no title, a lessee may sue for a breach of the covenant implied in the word "demise," notwithstanding he has never been evicted; and the language of the COURT at the end of the case, "but if it were an express covenant for quiet enjoyment, there perhaps it were otherwise," is nowise inconsistent with what the plaintiff now contends. The covenant for title, whether express or implied may be broken by defect of title, and without eviction: the covenant for quiet enjoyment can only be broken by eviction: but there is nothing in the case of *Holder* v. *Taylor* which leads to the inference that an express covenant for quiet enjoyment extinguishes an implied covenant for title.

LORD DENMAN, Ch. J.:

We are all satisfied that the Court of Common Pleas is right, and that this case could not have been decided otherwise, without violating the first principles of the construction of deeds, as [*186] established *by *Nokes's* case, and recognised in *Merrill* v.

(1) 21 R. R. 367 (2 B. & Ald. 487).
(2) 21 R. R. 479 (2 B. & Ald. 746).
(3) 11 R. R. 340 (12 East, 179).
(4) Hob. 12.

Frame (1); it is true that the word "demise" does imply a covenant for title, but only when there is no express covenant inconsistent with such a construction.

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Judgment affirmed.

MASON *v.* WHITEHOUSE (2).

1838. *June* 9.

(4 Bing. N. C. 692—693; S. C. 6 Scott, 575; 1 Arn. 261; 2 Jur. 545; 7 L. J. (N. S.) C. P. 295; 6 Dowl. P. C. 602.)

[4 Bing. N. C. 692]

Where costs are ordered to be paid to a defendant (in an ordinary action), his attorney is competent to demand and receive them, without an express power of attorney.

THE defendant's attorney demanded of the plaintiff costs of the day for not proceeding to trial according to notice, which costs the plaintiff had been ordered to pay to the defendant.

The plaintiff omitted to pay, whereupon an attachment was issued against him, which *R. V. Richards*, in Easter Term, obtained a rule *nisi* to set aside, on the ground that the plaintiff, having been ordered to pay the costs to the defendant, and not in the usual way to the defendant or his attorney, was not in contempt for refusing to pay them to the attorney, unless he had an express power of attorney authorising him to demand them: *Dennett* v. *Pass* (3).

Whately, who showed cause, contended that the defendant's attorney was entitled to demand and receive the costs, under an order calling on the plaintiff to pay them to the defendant. If the defendant was entitled to demand the costs, his attorney, who was authorised to act for him, must be equally entitled. And, if it were otherwise with respect to a sum of money due on other accounts, costs, at least, ought to be paid to the attorney, because he might have a lien on them: per HOLROYD, J., MS. T. 1820. Archbold's Practice, 1275, 6th edit. (4).

The COURT at first made the rule absolute; but *Whately* having this day referred to *Newman* v. *Hill* *and another case, [*693]

(1) 13 R. R. 612 (4 Taunt. 329).

(2) Cited and observed upon by MONROE, J. in *In re Brown's Estate, Ex parte Sterling* (1886) 19 L. R. Ir. 132.—R. C.

(3) 1 Bing. N. C. 638; 1 Scott, 586.

(4) See *Clark* v. *Dignum*, 3 M. & W. 319.

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decided in the Court of Exchequer this Term, in which, on a similar order, a demand by the attorney of the party, without an express power of attorney, was held sufficient.

The attachment was allowed to stand.

Rule discharged.

1838. *June* 13.

[706]

FISHER *v.* DEWICK AND ANOTHER (1).

(4 Bing. N. C. 706—711; S. C. 6 Scott, 587; 1 Arn. 282; 7 L. J. (N. S.) C. P. 279; 6 Dowl. P. C. 739.)

A particular of objections delivered by the defendant in an action for infringing a patent right, must be precise and definite. It is not sufficient to say that the improvements or some of them have been used before; the defendant should point out which.

To an action on the case for infringing a patent obtained by William Sneath, and assigned to the plaintiff, for the manufacture of bobbin net lace, the defendants pleaded, first, Not guilty. Secondly, that W. Sneath, in the declaration mentioned, did not, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his alleged invention. Thirdly, that the said alleged invention was not an improvement in such machinery for making bobbin net lace. Fourthly, that W. Sneath was not the true and first inventor of the alleged improvements in the machinery. Fifthly, that the alleged invention was of no use, benefit, or advantage to the public whatsoever. Sixthly, that the alleged invention was not, at the time when the letters patent were granted, a new invention. Seventhly, that W. Sneath did not assign, transfer, and set over unto the plaintiff all that his said alleged invention, and also the said letters patent.

The defendant delivered the following particular of objections:

1. That the grantee of the said patent was not the true or first inventor of the whole or any part of the improvement or improvements described in the declaration, letters patent, specification, or either of them. 2. That the improvements alleged to have been invented by the said W. Sneath were not invented by him. 3. That the said improvements were not, at the time of the granting of the letters patent, nor was any part thereof, new.

(1) Followed in *Morgan* v. *Fuller*, No. 2 (1866) L. R. 2 Eq. 297.—R. C.

4. That if any part thereof were new, the *same was useless or unnecessary, and not the ground of any patent at all; and therefore ought not to have been described in the specification as part of the said improvements. 5. That the specification did not describe with sufficient certainty and precision the nature of the supposed improvements or the manner in which they were performed; and particularly that they were not applicable to every sort and description of the machinery to which, in the specification, they were said to be applicable. 6. That the said improvements, or some of them, had been publicly and generally used long before the granting of the said letters patent. 7. That the alleged improvements, and the means of enabling the public to avail themselves of them, were so imperfectly described in the specification, or instrument in writing in the declaration mentioned, that a machine could not be made by the description in the specification to produce the kind of lace therein mentioned. 8. That it was stated in the said specification, that the said improvements were applicable to machinery for making bobbin net lace, whereas there were several machines for making bobbin net lace to which there was no adaptation of the alleged improvements stated or set out in the specification, and to which those improvements could not be applied by the means, and in the manner, stated in the specification. 9. That the said letters patent, as appeared by the title thereof, were granted to the said W. Sneath for having invented certain improvements in machinery for the manufacture of bobbin net lace, whereas the said specification did not show any improvements in such machinery for the making bobbin net lace. 10. That the machinery for making bobbin net lace was complete in itself, and not improved by any part of the inventions for which the said letters patent were granted. 11. That such of the machinery as was set out in the said specification as applicable to the manufacture of bobbin *net lace, was not new, but was in general use before the date of the letters patent. 12. That the invention for which the said letters patent were granted was more extensive than that shown in the specification. 13. That the invention described in the said letters patent did not correspond with the invention described in the said specification. 14. That the said

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W. Sneath claimed as his invention those parts only of the machine which were described in the said specification by numeral figures, whereas many of the parts which were noted by letters in the said specification must form part of his alleged invention, or the same would be incomplete. 15. That many directions were inserted in such specification which were altogether useless, and only tended to mislead. 16. That the alleged invention was not an improvement, and ought not to be the subject of a patent. 17. That, should the said alleged invention, or any part thereof, be an improvement, the same was not of sufficient consequence to be the subject of a patent. 18. That a certain part or parts of the said alleged invention had been, before the date of the said letters patent, combined and in common use, both severally and together. 19. That the description of certain parts of the said alleged improvement, as set forth in the said specification, and the description thereof as set forth in the plans thereto annexed, were at variance with each other, and did not correspond. 20. The defendants would further show all such objections to the said patent and the specification mentioned in the declaration, as should be considered by the Court to be admissible under their several pleas, and whereof the pleas themselves were sufficient notice.

The plaintiff objecting to these particulars as too general, and as giving no more information than the pleas, obtained a Judge's order for further and better particulars; which order

[709] *Wightman* obtained a rule *nisi* to rescind, contending, that to require particulars more specific would be to compel the defendant to disclose the whole of his case; and that the Legislature, in passing the stat. 5 & 6 Will. IV. c. 83, s. 5 (1), which directs these particulars to be furnished, never intended to proceed to such an extent.

Wilde, Serjt. and *Hoggins*, who shewed cause, argued that these particulars, giving no explanation of the defendant's objection to the patent, were an evasion of the statute. The statute meant that the particulars should at least afford more information

(1) See now sect. 29 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).—R. C.

than the plea; and the defendant ought to specify what parts of the invention were, as he alleged, useless and unnecessary; which of the improvements had been used before, and where: *Bulnois* v. *Mackenzie* (1). A mere literal compliance with the statute was not sufficient: the compliance must be in a spirit of apprising the opposite party what was the real objection meant to be relied on; as in notices under statutes for the protection of magistrates, commissioners, dock companies, and the like. These particulars, as they stood, were calculated to mislead rather than to assist the plaintiff.

Wightman:

Before the new rules the defendant in cases like the present pleaded the general issue, and the plaintiff never knew what objection would be taken to his patent. The object of this statute was to apprise him of the general nature of the objection, whether it was to the invention, or parts of it, or to the specification; but it was never intended to call on a defendant to disclose the particulars of his defence; and if the present order be sustained, applications of the same kind will be interminable. There is no instance of an order *to amend notices of action: whether [*710] the notice is sufficient for the admission of the evidence which the plaintiff proposes to adduce is always a question for the Judge at Nisi Prius. In *Bulnois* v. *Mackenzie* the particulars were amended to a very small extent.

TINDAL, Ch. J.:

I think this rule must be discharged. The question is, whether on this particular of objections the matters alleged are so uncertain and indefinite that they are calculated rather to mislead than to assist the plaintiff. The object of the statute was not, indeed, to limit the defence, but to limit the expense to the parties, and more particularly to prevent the patentee from being upset by some unexpected turn of the evidence. Under the fourth section, therefore, it was intended that the defendant should give an honest statement of the objections on which he means to rely:

(1) P. 668, *ante* (4 Bing. N. C. 127).

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and I am not afraid of the prolixity which has been deprecated by the party applying for this rule; for defendants would soon find it better to go to the jury on the points on which they meant to rely than to seek to mislead their opponents. The present particulars are so vague that they can scarcely have been furnished with any other object. For instance, the objection, "That if any part be new the same is useless and unnecessary:" the defendant should have pointed out what part. "That the improvements, or some of them, have been used long before:" the defendant should have pointed out which. If he would, in the Scotch phrase, *condescend* upon the parts to which he objects, there would be an end of the difficulty.

PARK, J.:

The protection of the patentee was the object of the statute, and particulars so general as these afford him no assistance.

[711] VAUGHAN, J.:

The object of the statute was to limit the expense of actions, and let the patentee know what objection he had to meet. These particulars are an evasion.

COLTMAN, J.:

I am of the same opinion. It is incumbent on the Court to see that the objections are stated in a definite and intelligible form, before the parties go down to trial, that the patentee may not be taken by surprise. The defendant is not precluded from bringing forward any number of objections, but he must state with precision what they are.

Rule discharged.

1838. *June 7.*

[726]

BRINGLOE *v.* GOODSON.

(4 Bing. N. C. 726—736; S. C. 6 Scott, 502; 1 Arn. 322; 8 L. J. (N. S.) C. P. 116.)

By will, a power was given to a tenant for life to demise for twenty-one years, and to executors, to mortgage in fee or for years. In 1812, after testator's death, the tenant for life made a grant for ninety-nine years, if he should so long live; in 1814, he demised, under his power, for

twenty-one years; in 1828, the executors mortgaged for 1,000 years under their power. To an action brought by the mortgagee for rent arising under the lease for twenty-one years: Held, that the lessee could not set up as a defence the interest of the grantee for ninety-nine years.

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THE declaration stated that Peter Sers deceased, being seised in his demesne as of fee of the messuage and lands with the appurtenances hereinafter-mentioned to have been appointed and demised to the defendant, by his will devised the same to Maples and Brown and their heirs, to the use of Peter Sers's son James for life; with power to Peter Sers's executors, Maples and Brown, to raise money by mortgage of his real estate in fee or for years; and a proviso that it should be lawful for the person entitled to the rents and profits for the time being,—and during the minority of such person, for Peter Sers's executors—to lease the premises in a manner there prescribed, at a rack rent, for any term not exceeding twenty-one years to take effect in possession: that Peter Sers died seised of the messuage and lands in November, 1811: that Maples and Brown proved the will; and that Maples died in June, 1822: that James Sers being entitled under the limitations in the will to the rents and profits of the premises hereinafter-mentioned to have been demised to the defendant, being part of the premises in the will mentioned, afterwards, and after he came of age, to wit on the 31st of December, 1814, by an indenture between James Sers of the one part, and the defendant of the other part, in exercise of the power given him by the will of Peter Sers, and by virtue and in exercise of all other powers enabling him in that behalf, did, by way of demise or lease, limit and appoint, and by way of further assurance, did grant, demise, lease, and to farm let to the defendant, his executors, administrators, and *assigns, the [*727] said messuage and lands, from the 11th of October then last past for twenty-one years thence next ensuing, at the rent of 1,500*l.* a year by four equal quarterly payments, and the further yearly rent of 10*l.* for every acre ploughed up, or managed contrary to the covenants in the indenture: covenants by the defendant for payment of rent and good husbandry: that the defendant entered by virtue of the indenture; and that the demise determined on the 11th of October, 1835: that after the death of Maples and

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during the term granted as aforesaid, by an indenture of mortgage of 14th June, 1828, between Brown of the first part, James Sers of the second part, and the plaintiff of the third part, in consideration of 5,666*l.* 15*s.* 8*d.* paid by the plaintiff to the accountant-general, and of 10*s.* to Brown and James Sers, Brown did by virtue of the power in the will of Peter Sers, bargain, sell, and demise, and James Sers granted, demised, and confirmed to the plaintiff, his executors, administrators, and assigns, the said messuage and lands, to hold the same to the plaintiff, his executors, administrators, and assigns from the day before the date of that indenture, for the term of 1,000 years, at the yearly rent of a peppercorn, if demanded; subject to a proviso for redeeming the mortgage on payment of 5,666*l.* 15*s.* 8*d.* with interest: that the plaintiff thereby became entitled to the reversion of the premises demised as aforesaid for the term of twenty-one years, by the first-mentioned indenture; and continued so until the 8th of May, 1835: that the defendant between the 14th of June, 1828, and the 8th of May, 1835, managed and cultivated the land in an unhusband-like manner, and became liable to pay the further rent of 2,000*l.* a year at the rent of 10*l.* an acre, for each acre so managed as aforesaid: breach, nonpayment.

The defendant pleaded,

[*728] Thirdly, that before the making of the indenture *in the declaration first mentioned, to wit on the 7th of May, 1812, by an indenture then made between James Sers of the first part, George Hillyard of the second, Thomas Clement of the third, and George Hillyard King of the fourth, James Sers for the consideration therein-mentioned, demised the messuage and lands described in the indenture in the declaration first above-mentioned to Thomas Clement, his executors, administrators, and assigns for ninety-nine years from the 6th of May, 1812, if James Sers should so long live; and that at the time of making the indenture in the declaration secondly above-mentioned, James Sers was alive, and the term granted to Thomas Clement undetermined.

The plaintiff replied, the power given by the will of Peter Sers to Maples and Brown, or the survivor, his executors and administrators, to raise money by mortgage of the messuage and lands

in question for payment of the debts of Peter Sers: that after the making of the indenture of appointment and demise to the defendant in the declaration mentioned, and after the death of Maples, the personal estate of Peter Sers not being sufficient to discharge his debts, Brown on the 14th of June, 1828, by virtue of the power given him, raised the sum of 5,666*l.* 15*s.* 8*d.* by mortgage of the messuage and lands in question, and for that purpose, with the privity of James Sers demised them to the plaintiff for 1,000 years at a peppercorn rent, subject to a proviso for redemption on payment of principal and interest at a day now past. Averment that the sum of 5,666*l.* 15*s.* 8*d.* remained unpaid, by means whereof the plaintiff was entitled to the reversion of the premises expectant upon the determination of the term granted to the defendant.

Demurrer and joinder.

W. H. Watson, in support of the demurrer:

The plaintiff has no reversion consequent on the lease of *1814, [*729] for that lease was not valid, inasmuch as the demise made by James Sers in 1812, for ninety-nine years, suspended the power of leasing under which he demised to the defendant in 1814. It may be conceded that the mortgage of 1828 by Brown, was valid, under the general power to raise money; and that the plaintiff takes under it: It may be conceded that that power takes precedence of all the others, and over-rides the estate of James Sers the tenant for life; but the plaintiff is not an assignee of the reversion of the lease of 1814, because that lease was not a valid execution of the leasing power in Peter Sers's will; and it was not a valid execution of that power, because James Sers had previously created a term for ninety-nine years out of his life estate, and had thereby suspended his leasing power: *Yelland* v. *Ficlis* (1), *Vincent* v. *Ennis* (2). In other words, the lease of 1814, under which the defendant claims, could only take effect by estoppel.

It is bad also, because it was not granted as the will requires, by the person who for the time being was entitled to the rents and profits. In 1814, the person entitled to the rents and profits was Clement, under the deed executed by James Sers in 1812;

(1) Moore, 788. (2) 3 Vin. Abr. 432.

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and therefore the lease of 1814 could not take effect in possession; *Roe* d. *Brune* v. *Prideaux* (1), *Shaw* v. *Summers* (2); for *Williams* v. *Bosanquet* (3), in effect overrules *Ren* v. *Bulkely* (4).

Therefore, in priority of law, the deed of 1828 executed by Brown stands first; the demise to Clements in 1812, for ninety-nine years, second; the lease to the defendant in 1814, third; and James Sers's life estate, fourth. It is in order to obviate the inconvenience occasioned by a suspension of the leasing power, [*730] when *a tenant for life creates a term by way of security, that modern conveyancers introduce a covenant on the part of the termor, to allow the tenant for life to exercise the leasing power: Sugd. on Powers, 54, 5th ed.; *Long* v. *Rankin*, *id.* Append. 736.

Coote, *contrà*:

The validity of the leasing power is most essential to the interests of all who become in succession entitled to the reversion; and, therefore, if a tenant for life having a leasing power, grants a mortgage for a term of years, he does not suspend the power. Here, the lease of 1814 stands first in priority of law; the mortgage term of 1828, second; the demise of 1812 for ninety-nine years, third; and James Sers's life estate, fourth.

It has for some years been the practice among conveyancers, to make tenants for life with powers, convey for terms of years only, in order to avoid the defeasance of powers appendant: Sugd. on Powers, 54, 5th ed. Here, the term of 1812 was probably created to secure an annuity, but it took effect out of James Sers's life estate, and did not affect his leasing power: for the lease being granted under the power, takes effect as if it were in the instrument creating the power, *i.e.* Peter Sers's will: by operation of law, therefore, in relation to that will, the lease of 1814 takes precedence of the term of 1812, which is derived from a life estate arising subsequently to the will: for the same reason, the mortgage term of 1828 has a like priority to the term of 1812, and the plaintiff, as mortgagee, proceeds for the rents upon his reversion: *Whitlock's* case (5); *Isherwood* v. *Oldknow* (6). It is

(1) 10 R. R. 258 (10 East, 158).
(2) 21 R. R. 717 (3 Moore, 196).
(3) 21 R. R. 585 (1 Brod. & B. 238).
(4) Doug. 291.
(5) 8 Co. Rep. 141.
(6) 16 R. R. 305 (3 M. & S. 382).

true, Sir Edward Sugden says, *ubi suprà*, that the tenant for life, after having created a term, shall not prejudice his own grant; and *he refers to *Attorney-General* v. *Graddyll* (1), which is no authority; but it is clear that he has in view a contest between the first grantee of the tenant for life, and a lessee in the actual occupation of the land; for, in other cases, a lease in possession, so far from prejudicing the tenant for life's grant, is a benefit to it, where the best rent is reserved: where such rent is not reserved, the party may come into Court and object to the lease: and the case of *Ren* v. *Bulkely*, which has latterly been looked on with more favour, is in point for the plaintiff. There, the remainder-man attacked the lease granted by the tenant for life, and Lord MANSFIELD said, "Powers came into the courts of common law with the Statute of Uses, and the construction of them, by the express direction of the statute, must be the same as in courts of equity. The creation, execution, and destruction of them, depend on the substantial intention and purpose of the parties. It is said, first, that the grantor, in this case, was not in possession, and that it was necessary that he should be to execute the power. But, I think, possession here means the receipt of the rents and profits which were applied to his use. If actual possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant. Secondly, it is contended, that, by granting away his life-estate he extinguished the power. Certainly, where the whole life-estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, subject to which, the rents and profits still belonged to Lord Onslow; and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved."

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The great question in modern times has been, whether the leasing power could subsist where the whole life-estate has been granted away: *Long* v. *Rankin* decided that, by means of a covenant, this may be effected; and, *Walmesley* v. *Butterworth* (2), that the leasing power may be exercised notwithstanding grants by way of security.

(1) Bunb. 92. (2) Coote on Mortgages, 698.

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Here, the term for ninety-nine years having been granted by way of security only, the grantor was the person entitled to the rents and profits when he executed the lease of 1814: *Ren* v. *Bulkely*; and that lease was, in fact, a lease in possession.

W. H. Watson, in reply:

It does not appear on the plea, whether the term of ninety-nine years was by way of security, or for an actual possession: and the Court cannot determine whether a lease, at the best rent, is a benefit or an injury to the reversioner: it might be an injury if an insufficient tenant were accepted. But there must be one rule for all cases; and though one lease may be beneficial to the estate, another might be injurious; as a lease created upon a fine paid.

Cur. adv. vult.

TINDAL, Ch. J.:

This was an action of covenant brought against the defendan for the recovery of certain additional rents reserved in a lease by way of penalty for the breach of farming covenants. The lease was made in 1814 by James Sers, the tenant for life, under a power of leasing given to him by the will of his father Peter Sers, and no objection is taken as to the lease not being made in compliance with the particular terms of the power. The plaintiff claims as the assignee of the reversion of such lease, resting his claim upon a term of 1,000 years, created in the year 1828 by the surviving *executor named in the will of the said Peter Sers, under a power given by the will to the executors to raise money for the payment of debts and legacies: and no question whatever is raised as to the due execution of this power.

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But the defendant sets up as an answer to the plaintiff's right of action, a demise by James Sers, the tenant for life, to Thomas Clement, prior in point of date to the execution of the leasing power, viz. upon the 7th of May, 1812, for the term of ninety-nine years, if James Sers should so long live; contending, that the creation of this term for ninety-nine years suspended the exercise of the leasing power during the continuance of such demise.

What the particular object or intent of the demise for ninety-nine

years may have been, does not appear to us judicially either by the plea which sets forth the indenture of demise, or by the replication. No argument, therefore, can be derived from any such object or intention; but the demise must be considered simply as a lease for ninety-nine years, by the tenant for life, not taking its effect under the power, but out of the estate or interest of the tenant for life, and leaving the immediate legal reversion upon such lease in such tenant for life. And whether as against the lessee for 1,000 years the leasing power is or is not suspended by this demise for ninety-nine years, made by the tenant for life, appears to be the principal question in the case.

That the leasing power is not destroyed, appears to be well established by the cases. The tenant for life not having conveyed away his life estate, but only granted a lease for years to Clement, the utmost effect of this lease is, that the power of leasing has been suspended so far as regards the lease and interest of Clement. *Long* v. *Rankin*, Sugden on Powers, App. No. 2, Dom. Proc.: and if there had been no power created by the *will besides that leasing power, and the contest had taken [*734] place between the grantee of the term for ninety-nine years created by the tenant for life, and the lessee for twenty-one years under the leasing power, there can be no question but that the former must have prevailed, if the leasing power subsequently exercised operated to the prejudice of the grantee.

But the question in this case arises between the plaintiff claiming under a power given by the will to the executors in trust, and the lessee of the tenant for life under his power; and to determine whether the lessee can set up the prior grant of the tenant for life, it is necessary to observe the legal relation in which the several estates stand with respect to each other as to their priority. It is well established, that whatever estates are granted by virtue of a power, take effect as if they were granted by the deed creating the power. And consequently, in the present case, the demise for 1,000 years, under which the plaintiff claims, being granted under the power given by the will, operates as if it had been created by the will itself, which gives such power to the executors. And if considered as created by the will, it must of necessity over-ride the lease for ninety-nine

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years, granted by the tenant for life out of his own estate. Again, the lease for twenty-one years, which was granted under the leasing power, supposing that power not to be absolutely suspended, must be considered as if granted by the will itself, and therefore, in any case not affecting the interest of the lessee, as over-riding the grant made by the tenant for life out of his own estate. The case, therefore, may be considered as if it stood thus: the donor of the power, having granted a lease for twenty-one years to Goodson, afterwards grants the reversion to Bringloe for 1,000 years, and then grants an estate for life to James Sers, who demises to Clement for ninety-nine years, if he James Sers
[*735] should so *long live. Now, if the lease for 1,000 years, made in 1828, instead of being granted, as it is, under the power given to the executors, had been granted under a power given to the tenant for life, Clement, the grantee of the term for ninety-nine years, whether it was a mortgage term or otherwise, might well insist upon his right to the rents and profits in preference to the appointee of his lessor; or if the lease for twenty-one years had been disadvantageous to him, he might possibly have a right to dispute that also, as being granted in derogation of his lease: but if his term for ninety-nine years is over-reached by the lease for 1,000 years, the term for ninety-nine years cannot, as it appears to us, stand in the way of the plaintiff the termor for 1,000 years, to prevent his recovering the rent, in the same manner in which he might have done if the lease for ninety-nine years had never existed, in which case it appears clear that the plaintiff might sue the lessee, as assignee of the reversion, upon the principle laid down in the case of *Isherwood* v. *Oldknow* (1).

The lease for 1,000 years being granted by Brown the surviving executor, under a power distinct from that given to the tenant for life, and which power the tenant for life had no right to obstruct, Clement, the lessee for ninety-nine years under the tenant for life, could not stand in a better situation than the tenant for life, and, therefore, could have no right to set up his interest against that of the grantee of Brown under the power; and if Clement himself could have no such right, what right can

(1) 16 R. R. 305 (3 M. & S. 382).

the lessee for twenty-one years under the power have to set up the right of Clement against the grantee of Brown? In other words, as the defendant derives his interest in the lease for twenty years from the donor of the power, and as the plaintiff derives his *reversionary interest from the same donor, what right can the former have to set up against the latter a lease granted to a third person by the tenant for life?

[*736]

Upon a careful examination of the several cases which have been referred to, and which cases are collected in the last edition of Sugden on Powers (especially *Ren* v. *Bulkely*, *Goodright* v. *Cator* (1), *Tyrrell* v. *Marsh* (2), and *Long* v. *Rankin*), it will be found that they are all so much distinguished by their circumstances from the present, that no one of them affords an authority in point; it becomes necessary therefore to look at the principle upon which this case is to be decided, and upon principle we think that there has been no suspension of the leasing power given to the tenant for life, so far as regards the grantee of the term under the power to demise by way of mortgage given to the executors; and upon that ground we think such grantee has the immediate reversion in him, and may sue upon the covenants in the lease.

Judgment for plaintiff.

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1838. *June* 13.

(4 Bing. N. C. 758—782; S. C. 6 Scott, 469; 1 Arn. 299; 2 Jur. 892; 8 L. J. (N. S.) C. P. 59.)

[758]

A sum falling short of three years annual value of the premises is not an unreasonable fine for the renewal of a lease by the Duchy of Cornwall; and the rack rent paid by actual occupiers is a fair criterion of the annual value. Therefore, a lessee of the Duchy, who had underlet on building leases, with a covenant to apply for and do his utmost to procure a renewal, and who, without success, offered for such renewal less than the amount of two years' rack rent paid by the occupiers of the under lessees, was held to have failed in the performance of his covenant.

THE declaration stated that Sir W. Clayton, being possessed of the tenements and premises hereinafter mentioned to have been demised, for the residue and remainder of a certain term of years, to wit, the residue of a term of ninety-nine years, commencing

(1) 2 Doug. 460. (2) 28 R. R. 577 (3 Bing. 31).

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from 5th of March, 1777, theretofore granted of the said premises (*inter alia*) under and by virtue of certain letters patent under the great seal of the Duchy of Cornwall, if three persons, viz., the said Sir W. Clayton, George Clayton, and James Medwin, the lives nominated in the said letters patent, should so long live,—by indenture of the 1st of August, 1789, demised them to Ismay and Harrison for sixty-five years and one quarter, if Sir W. Clayton, G. Clayton, and J. Medwin should so long live; and covenanted that he, Sir W. Clayton, his executors, administrators, and assigns, and all other persons who for the time being should be entitled to the said letters patent and the premises thereby demised, in order to confirm the said term thereby granted in the said premises to Ismay and Harrison, their executors, administrators, and assigns, absolutely should and would from time to time, when either of them, the said Sir W. Clayton, G. Clayton, and J. Medwin, or any other person or persons whose life or lives should be nominated and appointed in any future letters patent in his or their place or stead, should happen to die or depart this life during the said term of sixty-five years and one quarter of a year, apply for and do his and [*759] their utmost endeavours to procure a *renewal or renewals of such letters patent for another life or lives; so as the said Ismay and Harrison, their executors, administrators and assigns might hold and enjoy all and singular the premises thereby demised to them, for the whole of the said term of sixty-five years and one quarter of a year, thereby demised, subject only to the rents and covenants in the indenture mentioned, and without the said Ismay and Harrison, their executors, administrators, and assigns being compelled, or compellable, or liable to pay any part of the fine or fines that should be paid on such renewal. Covenant for quiet enjoyment. The declaration then stated the entry of the lessees, and several mesne assignments, by which five sixths of the premises became vested in the plaintiff: that on the 1st of October, 1828, G. Clayton died; that on the 28th of July, 1833, J. Medwin died; and that on the 26th of January, 1834, Sir W. Clayton died; and then alleged, as a breach, that Sir W. Clayton, in his lifetime, did not nor would, either on the death of the said G. Clayton or J. Medwin, in order to confirm the said

term granted in the said premises to the said Ismay and Harrison, absolutely apply for and do his utmost endeavours to procure a renewal of the said letters patent for another life or lives, so as the plaintiff might hold and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter of a year, subject only to the rents and covenants in the said indenture contained, but wholly neglected and refused so to do: that thereupon, and by reason thereof, and on the death of the said Sir W. Clayton, the said term granted to Ismay and Harrison, ceased, and became and was ended and determined: by means of which several premises the plaintiff had lost and been deprived of all the rents, profits, benefits, and advantages which would have arisen and accrued to him from the performance of the covenant of Sir W. Clayton in that behalf.

Plea, That Sir W. Clayton did, on the death of G. Clayton and J. Medwin respectively, in order to confirm the said term granted in the premises to Ismay and Harrison, absolutely apply for and do his utmost endeavours to procure a renewal of the said letters patent, for another life and lives. [760]

By a special verdict it appeared that, between the years 1671 and 1765, seven leases of the property in question had been successively granted by the Duchy of Cornwall to the Clayton family for terms not exceeding thirty-one years: the first for a fine of 288*l.*, and a rent of 50*l.*; the second for a fine of 532*l.* 6*s.*, and a rent of 50*l.*; the third for a fine of 350*l.*, and a rent of 16*l.* 10*s.* 9*d.* (the residue of the 50*l.* rent having been discharged for a fine of 234*l.* 4*s.*); the fourth for a fine of 354*l.*, and a rent of 16*l.* 10*s.* 9*d.*; the fifth for the same fine and rent; the sixth for the same fine and rent; and the seventh for a fine of 690*l.*, and a rent of 16*l.* 10*s.* 9*d.*

In 1776 a private Act was passed, entitled, "An Act to enable W. Clayton, Esq., during his life, and the guardians of his infant children after his decease, to make building and improving leases of certain lands and premises, part of the manor of Kennington, in the county of Surrey, held by letters patent from his Majesty as part of the Duchy of Cornwall, and to raise money for payment of the fines and expenses of renewing the said letters patent, and for defraying the expenses to attend the granting building and

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improving leases:" by which, after reciting, among other things, that the said premises held under the afore-mentioned letters patent, were then let to divers tenants at rack rents by and under leases for several terms of years, at several yearly rents, amounting in the whole to the yearly rent of 327*l.*; that other parts of
[*761] the property were let to tenants *at will at the yearly rent of 31*l.*; that it was apprehended and believed that many persons would be willing to enter into contracts for and take leases in possession or reversion of many parts of the said premises for the purposes of building or improvements, and would pay considerable improved yearly rents for the same; that some of the tenants might be willing to surrender their then present lease or leases upon reasonable satisfaction being made to them for the same, which would be amply compensated by the great increase of rent such building lease or leases would produce; that the said W. Clayton had applied to the lords of his Majesty's treasury to accept of a surrender of the then present lease, and for the grant of a new lease for the term of ninety-nine years, determinable at the end of three lives, which their Lordships had agreed to, it was enacted, among other things, that it should and might be lawful to and for the said W. Clayton the elder, and others specified in the Act, from and after the obtaining the said letters patent or lease from his Majesty for the term of ninety-nine years, determinable as aforesaid, from time to time to demise, lease, or grant, or to contract for the demising, leasing, or granting all or any part of the said premises unto any person or persons who should be willing to build upon or in any other manner improve the same for any term or number of years, in possession or reversion, not exceeding ninety-nine years, to be computed from the 5th of April, 1776, determinable on the dropping of such lives as should be mentioned and contained in the said letters patent or lease so intended to be granted; so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best and most improved yearly rent or rents that could be reasonably had or obtained for the same; and so as no fine or income, or anything in the nature of a fine
[*762] or income, should be taken *for the same: that it should and might be lawful to and for the said W. Clayton the elder, to enter

into a covenant or covenants in all or any of the lease or leases to be by him respectively granted by virtue of the said Act, that he and all other persons claiming under him should and would from time to time, and as often as occasion should be or require, apply for, and, in case the same could be obtained on reasonable terms, procure such a renewal or renewals of the said lease or letters patent as should, from time to time enable him or them to complete and make up the full term and terms for years which should be so granted or be contracted to be granted; and that when and so often as the said premises should be renewed by the said W. Clayton the elder, or by any person or persons claiming under him, he, the said W. Clayton the elder, or such other person or persons who for the time being should procure such renewal of the said lease or letters patent, should and would,—upon the request of any person or persons, who for the time being should be entitled to the term or terms of years then subsisting in such lease or leases as should be so granted by the said W. Clayton the elder,—grant to him or them such further or other lease or leases, term or terms for years, of and in the respective premises so leased by the said W. Clayton the elder, as would from time to time make up his, her, or their term or number of years, the full and complete term or number of years which, in and by such original lease or leases, so to be granted by the said W. Clayton the elder, should be or be agreed to be granted; so as the person or persons requesting such further lease or leases should pay unto the person or persons who should have procured such renewed lease or letters patent as aforesaid such sum or sums of money as should be an equal share of the fine or fees which should have been paid for procuring such renewed lease or letters patent, in such proportion *as the annual rent of the premises to be comprised in such [*763] further lease or leases should bear to the annual rent of the whole of the said premises to be comprised in such renewed lease or letters patent; save and except as to such fines and fees as should be paid for any renewal or renewals of the said lease or letters patent which should be procured within the last twenty years of such term or terms as should be granted or be contracted to be granted by the said W. Clayton the elder: with

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power to W. Clayton the elder to borrow money on mortgage to reimburse the said W. Clayton the elder, his executors or administrators, so much money as he or they should pay or lay out for the fine or fees to be paid for granting or renewing the said thereinbefore mentioned lease or letters patent from his Majesty.

By letters patent of 5th March, 1777, in consideration of the surrender of the former letters patent, and of a fine of 468*l.*, and a rent of 16*l.* 10*s.* 9*d.*, the officers of the Crown, during the minority of the Prince of Wales, demised and granted the premises to trustees for the Clayton family for ninety-nine years, if W. Clayton, George Clayton, and James Medwin should so long live.

The value of the interest surrendered by W. Clayton as part consideration for the granting of the new letters patent was, in the then present money, equal in value to a sum of 1,006*l.* 18*s.* payable nineteen years thereafter, that is to say, at the expiration of the term surrendered by W. Clayton as aforesaid.

The grant by the last-mentioned letters patent was not made dispunishable of waste; and by the same there was reserved the ancient and most usual rent for the premises, payable in manner and form as by the above-mentioned Act of Parliament was in that behalf required.

Divers demises and leases, in all twenty-five in number,—one [*764] of the leases having been made by the W. *Clayton in the Act of Parliament mentioned, in pursuance of the power and authority thereby given him, and containing the covenant on the part of the lessor to apply for a renewal, and on the part of the lessee to contribute to the fine to be paid on such renewal as in the Act mentioned, and the remaining twenty-four of the said leases (including therein the lease to Ismay and Harrison in the declaration mentioned) having been made by Sir W. Clayton, Bart., after he became entitled to the rents and profits of the estate and premises as aforesaid, and each of the leases being a demise or lease of a certain part of the premises mentioned and comprised in the letters patent, for a term of years therein mentioned, determinable as therein mentioned,—were duly granted; and by the several leases aforesaid the whole of the premises mentioned and comprised in the letters patent were demised and leased.

The terms created by the said leases were long terms of years, namely, one for ninety-seven years and three quarters, one for eighty-four years, one for seventy-three years, one for sixty-nine years and three quarters, one for sixty-nine years, one for sixty-five years and a quarter, ten for sixty-five years, one for sixty-four years and a half, one for sixty-one years and three quarters, one for sixty-one years, three for fifty-eight years, and one for twenty-four years; and were, with the exception of the last-mentioned, respectively subject to be determined by the death of W. Clayton, G. Clayton, and J. Medwin, in the declaration mentioned: at the time of this action, one only of the terms for which the leases were granted, viz., the said term of twenty-four years, had expired or run out by effluxion of time, or had ceased or determined otherwise than by the deaths of the three before named parties; and, but for the same deaths, the terms so granted, except as aforesaid, would have continued for many years.

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The total amount of rent or income which, during the existence of the said terms of years, was or could be received by Sir W. Clayton from the premises comprised in the letters patent, was the annual sum of 1,238*l.* 7*s.* 6*d.*

Of the twenty-five leases, nine were granted previous to the lease of Ismay and Harrison, and fifteen subsequently thereto. Six of such leases were granted at pepper-corn rents; and in one other of the leases, comprising one sixth part of the whole premises demised by the letters patent, there was contained a covenant on the part of the lessee to pay an equal share of the fine and fees to be paid on any renewal of the said letters patent, in such proportion as the annual rent of the premises demised to such lessee bore to the annual rent of the whole of the premises comprised in the letters patent; with a covenant on the part of such lessee to build seventy houses. In three other of the leases there was contained a covenant to contribute one-twentieth part of the fine to be paid upon any renewal of the said letters patent. Eight of the leases, prior in date to the lease to Ismay and Harrison, were granted in consideration of contracts to cover the whole frontage of the land thereby demised with good and substantial messuages or dwelling-houses.

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The fifteen leases, granted subsequently to the lease to Ismay and Harrison, were granted in consideration of contracts to build 124 houses. On the 29th of September, 1791, Sir W. Clayton received a fine of 1,200*l.* as the consideration for granting one of the leases; and on the 23rd of September, 1802, a fine of 1,400*l.* as the consideration for granting one other of the leases; such two last-mentioned leases being two of the leases above-mentioned to have been granted at pepper-corn rents.

[*766] The plaintiff was in no wise party to or cognisant of *any such leases, or the terms and conditions thereof, save the said lease in the declaration mentioned.

Sir W. Clayton, on the 1st of August, 1789, by an indenture of lease then made between him of the one part, and Ismay and Harrison of the other part, did demise, lease, and to farm let unto the said Ismay and Harrison, their heirs, executors, administrators, and assigns, certain pieces or parcels of land, in the indenture and in the declaration particularly described, and on the terms and conditions in the declaration mentioned.

By divers mesne conveyances and assurances, five sixth parts of the estate and interest of the said Ismay and Harrison in the premises demised under the said indenture of the 1st of August, 1789, vested in the plaintiff.

On the 11th of October, 1828, George Clayton, one of the persons named in the letters patent, died.

On the 17th of October, 1828, Sir W. Clayton applied to the Crown, with great urgency, for a renewal; however, taking into account the fines taken by himself in two instances, he offered less than three years' annual value of the premises, calculated according to the rents paid by his sub-lessees, and, after a protracted negotiation, the Crown, in September, 1831, demanded a fine of 46,917*l.* and a rent of 1,000*l.* a year, or a fine of 63,210*l.* without a rent.

This demand was resisted as unreasonable: two memorials were sent in by the sub-lessees, showing the hardship of their case, and a fine of 30,000*l.* was offered by them: this being refused, Sir W. Clayton, in March, 1833, presented a petition of right; but the *Attorney-General* objecting to that course of proceeding, and consenting to become a defendant in a bill in

Chancery, a bill was filed in July, 1833, which alleged as a custom, "that the manor of Kennington, with the demesne lands thereof, situate in or near the parish of *Lambeth, in the [*767] county of Surrey, is parcel of the possessions of the Duchy of Cornwall, and such demesne lands are and have been usually granted or demised for terms of years at fixed annual rents, and such leases have been constantly renewed at fines, which have hitherto been assessed in a certain and established manner; that such grants or demises of the said demesne lands have been at all times made to a few persons only, who thereby become and are the chief or immediate tenants to the Duchy of Cornwall, but by whom the lands have been again usually demised or sublet in small portions to under-tenants; that large portions of such demesne lands, and particularly such parts thereof as are herein-before described, were originally of very little or no value, being marshy and wholly uncultivated, and requiring a great expenditure, to an amount exceeding the full value thereof, before the same could be made applicable to any useful purpose; that, in consequence thereof, and in order to promote the cultivation and draining and improvement of the said lands, and at the same time to provide for a just correspondent increase of the revenue of the said Duchy, a certain fixed tenure or mode of letting (the date and commencement of which are unknown) was introduced, and has been uniformly established and adhered to, whereby said lands have been from time to time let to the tenants and their assigns at certain small fixed annual rents; and such leases or demises have been from time to time renewed on payment of reasonable fines ascertained by a certain fixed mode of calculation, which fines have in all cases never exceeded the amount of two years' gross, and, deducting one third for repairs and other out-goings, or what was deemed equivalent thereto, one and a half years' net value of the lands demised; and thus the tenants, having a certain established right, were encouraged to improve *the said estates, and the Duchy derived [*768] the benefit thereof in the augmented fines of successive renewals; that, pursuant to such custom, portions of such demesne lands, hereinafter described, have, from a period beyond memory, from time to time, been granted and demised by the Duke of

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Cornwall for the time being to persons under whom the ancestors of the plaintiff derived title, and to the plaintiff and his ancestors for terms of years; and that in all such leases a rent, then called and being an ancient yearly rent of 16*l.* 10*s.* 9*d.*, has been constantly reserved and made payable; and such leases have, according to the custom, been renewable, and have, in fact, from time to time been renewed, in consideration of the payment at each renewal of a reasonable fine or premium, which has been uniformly calculated and assessed according to or in conformity with such established rule or standard as aforesaid."

The lords of the Treasury filed their answer, but before the cause could be heard Sir W. Clayton died. A bill of revivor was filed by his administrator; and the said suit and the matters thereof were, on the 29th of May, 1834, brought before the Court of Chancery for hearing and determination, by or on behalf of Sir William Robert Clayton, the defendant, upon a motion for an injunction to restrain the defendants in the said suit from granting leases of the said property which had been formerly held by Sir W. Clayton, and of which the premises demised by the indenture of the 1st of August, 1789, formed part.

On the 11th of June, 1834, the then LORD CHANCELLOR gave judgment in the matter of the said petition against Sir W. Clayton's claim to a renewal of the letters patent, and dismissed the motion, but without costs.

James Medwin died in July, 1833.

No other persons were, either before or after the making of the
[*769] indenture of the 1st of August, 1789, *nominated or appointed, in any letters patent granted from the Duchy of Cornwall, in the place, or places, or stead of George Clayton, James Medwin, or Sir W. Clayton, or either of them; and upon the death of Sir W. Clayton, as hereinbefore mentioned, the terms respectively granted by the letters patent of the 5th of March, 1777, and by the before-mentioned indenture, ended and determined.

All the various proceedings taken by Sir W. Clayton, down to the time of the LORD CHANCELLOR'S judgment on the 11th of June, 1834, were sanctioned by the plaintiff.

The annual rack rent value of the premises demised by the letters patent was, at the time of the death of George Clayton, and in September, 1831, 21,095*l.*; and if the fine so demanded by the Duchy of Cornwall, for a renewal of the letters patent, ought to be calculated on the annual value of the premises taken at rack rent, the jury found that the fine demanded in September, 1831, was, on such calculation, a reasonable fine. They found, also, that

One moiety of the rents received by Sir William Clayton, annually laid by, would exceed the fine demanded by the Duchy of Cornwall, at the time the same was so demanded; and that the value of the fines of 1,200*l.* and 1,400*l.*, paid to Sir William Clayton as a consideration for the granting of two leases as aforesaid, would, at the like period, if they had accumulated at the rate of 4 per cent. per annum, amount to the sum of 9,001*l.*:

That Sir William Clayton was always ready and willing to take, that he offered to his Majesty's special commissioners for managing the affairs of the Duchy of Cornwall, to take, and that he used his best endeavours to obtain a renewal of the letters patent for another life or lives, upon the terms stated in the memorials presented, and in letters addressed to the officers of the Duchy, and in the bill filed in the Court of Chancery on *his [*770] behalf, and to pay for the same a fine to be estimated in any of the modes, or upon any of the principles, pointed out and stated on behalf of Sir William Clayton, in the said memorials and letters, or either of them, or in the bill in Chancery so filed as aforesaid:

That Sir William Clayton did, on the death of George Clayton and James Medwin respectively, in order to confirm the term granted to Ismay and Harrison, absolutely apply for and do his utmost endeavours to procure a renewal of the letters patent for another life and lives, so that the plaintiff might have and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter, subject only to the rents and covenants in the indenture contained, according to the tenor and effect, true intent and meaning, of the said indenture and of the said covenant of Sir William Clayton, by him in that behalf made; unless it was incumbent on him, in point of law, to pay

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the fine required by the Duchy, or to do any other act or acts than those by the jurors above stated.

The case was argued in Easter Term by *Law* for the plaintiff. He contended:

1st. That the covenant in the lease stated in the declaration ought to be construed without reference to the letters patent prior to those dated 5th March, 1777, or to any other leases; and that neither those letters patent nor leases were evidence in the cause.

2nd. That Sir William Clayton, by his covenant to use his utmost endeavours to obtain a renewal, was bound to pay or offer to pay such a fine as that renewal was marketably worth, upon the respective deaths of George Clayton and James Medwin.

3rd. That the fine so to be paid was properly calculated on the annual rack rental or improved value of the property held under
[*771] the letters patent dated 5th *March, 1777; that, therefore, it was incumbent on Sir William Clayton to pay the fine demanded by the Duchy in September, 1831: and that he broke his covenant by omitting to do so. In two instances only had he exacted suitable and proper covenants from his sub-lessees to contribute towards the fine; if he had done so with all, as required by the private Act of Parliament, he would have had no difficulty in performing his own covenant. A fine short of three years annual value had never been held unreasonable for a renewal; and there was no better criterion of the annual value than the rent actually paid: there was no privity between the Duchy and the sublessees; and if Sir W. Clayton had built houses himself, the rent paid by the occupiers to him would have been conclusive as to the annual value of the property.

4th. That Sir William Clayton likewise broke his covenant after the death of James Medwin, by omitting to propose to the Duchy proper terms for the renewal of the letters patent. The presenting a petition of right, and filing a bill in Chancery, was no performance of the covenant to propose terms.

Platt, for the defendant, contended:

1st. That the question whether Sir William Clayton, the testator, did, on the deaths of George Clayton and James Medwin

respectively, apply for and do his utmost endeavours to procure a renewal of the letters patent in the declaration mentioned, so that the plaintiff might have and enjoy the demised premises for the whole of the term of sixty-five years and one quarter, subject only to the rents and covenants in the lease contained, (being the only issue raised by the pleadings), was a question of fact for the determination of the jury; that the jury had found, as a matter of fact, "that Sir William Clayton did so apply for, and use his utmost endeavours *to procure, a renewal of his said [*772] letters patent according to his covenant, unless it was incumbent on him, in point of law, to pay the fine required by the Duchy, or to do any other act or acts than those by the jurors in their verdict stated;" that it was not incumbent on Sir William Clayton, in point of law, to pay the fine demanded by the Duchy, or to do any other act or acts than those by the jurors found; and that the acts done by Sir William Clayton, as found by the jurors, showed a sufficient performance of the covenant to entitle the defendant to the judgment of the Court upon the special verdict.

2nd. That Sir William Clayton was not bound by the private Act of 1776, but his father and guardians only; and as the mode of calculating the fine had been at all times on the basis of the rents actually paid by the sub-lessees, and not on the rent due from the occupiers of the houses, to calculate it on the latter basis was unreasonable in law. It would be absurd that Sir William Clayton, in the receipt of no more than 1,238*l.* 7*s.* 6*d.* a year, should pay a fine as if he were in receipt of 20,000*l.* a year. His fine should be in proportion to his interest. The case differed from a renewal of copyholds, for there the party paying the fine took the whole.

(TINDAL, Ch. J.: Suppose the lord of a manor gives a license to a copyhold tenant to lease for fifty years; the lessee builds, and the tenant dies; is not the fine to be according to the improved value? *Halton* v. *Hassell* (1), 3 Com. Dig. 179.)

Here, by the practice of the Duchy, the fine had always been calculated by the amount of rent received by the party to whom

(1) 2 Str. 1042.

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the renewal was granted. But the judgment ought to be arrested, because the covenant declared on was not a covenant which ran with the land so as to enable the plaintiff, as assignee [*773] of the *term, to sue for a breach of that covenant; and because it appeared by the declaration that the plaintiff was possessed of a part only, viz. of five sixths, and not of the entirety of the demised premises for the term granted; whereas the assignee of a part only of the demised premises cannot by law sue alone for the breach of a covenant which is not capable of being apportioned.

The covenant did not run with the land, for it did not affect the land itself, but merely the collateral interest of the lessor: *Spencer's* case (1), *Mayor of Congleton* v. *Pattison* (2); and it was not apportionable. If the possessor of five-sixths of the property should require a renewal, and the possessor of the remaining sixth decline to accept one, what could the lessor do? A covenant to repair or to pay rent might be divided, but a covenant to renew could not.

Law, in reply:

The finding of the jury is only in the alternative; and the covenant runs with the land, being in the nature of a covenant for title or for quiet enjoyment, and therefore of the essence of the grant: Moore, 159, Condition; *Isted* v. *Stonely* (3), *Bally* v. *Wells* (4), *Hyde* v. *Skinner* (5), *Roe* d. *Bamford* v. *Hayley* (6), *Vyvyan* v. *Arthur* (7), *Sampson* v. *Easterby* (8), Shep. Touchst. 176. There can be no difficulty as to the apportionment, for the consent of the lessees is not necessary for the renewal; the effect of it is merely to confirm the estate they have already; and during the continuance of that estate the lessees or their assignees are bound by the lease. But covenants of a similar description have been [*774] held susceptible of *apportionment: *Gammon* v. *Vernon* (9), *Congham* v. *King* (10), *Stevenson* v. *Lambard* (11); the plaintiff and

(1) 5 Co. Rep. 16.
(2) 10 East, 130.
(3) Anders. 82.
(4) 3 Wils. 25.
(5) 2 P. Wms. 196.
(6) 11 R. R. 455 (12 East, 464).
(7) 25 R. R. 437 (1 B. & C. 410).
(8) 33 R. R. 239 (9 B. & C. 505).
(9) 2 Lev. 231.
(10) Cro. Car. 221.
(11) 6 R. R. 511 (2 East, 575). See also *Twynam* v. *Pickard*, 20 R. R. 368 (2 B. & Ald. 105); *Palmer* v. *Edwards*, Doug. 187, *n*.

the owner of the remaining sixth part are tenants in common; and though tenants in common may join in covenant, there is no authority which decides that they must join: at all events the objection can only be taken by plea in abatement: *Merceron* v. *Dowson* (1), *Hare* v. *Cator* (2).

Cur. adv. vult.

TINDAL, Ch. J.:

The special verdict in this case has been found in an action of covenant brought by the plaintiff, who claims as assignee of five-sixths of the interest of the original lessee, against the defendant as administrator of the lessor.

It appears upon the record, that the lessor William Clayton, Esq., afterwards Sir William Clayton, Bart., at the time of granting the lease, held the premises in question (*inter alia*) by letters patent under the great seal of the Duchy of Cornwall for the residue of a term of ninety-nine years, if he, the said Sir William Clayton, George Clayton, his brother, and James Medwin, should so long live: and that the said Sir William Clayton, by indenture of lease dated the 1st of August, 1789, demised two parcels of land therein described, being part of the premises comprised in the Duchy lease to Ismay and Harrison, to hold to them, their heirs, executors, administrators, and assigns, for sixty-five years and one quarter of a year, from the 24th of June last preceding, if the three persons named in the said letters patent, or if any other person or persons who should be nominated (in manner therein described) in any future letters patent of the *said premises, should so long live. And after [*775] setting out the covenant by the lessor, as to procuring a renewal of the letters patent when any of the lives should fall in, upon which the breach is afterwards assigned, and also a covenant for quiet enjoyment, it appears by the record that the precise issue raised for the determination of the jury was this: whether the said Sir William Clayton the lessor did, on the death of George Clayton and James Medwin respectively, in order to confirm the said term granted to Ismay and Harrison, absolutely apply for and do his utmost endeavour to procure a renewal of the said letters patent for another life and lives, so as the lessees, their

(1) 5 B. & C. 479. (2) Cowp. 766.

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executors, administrators, or assigns, might hold and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter of a year, subject only to the rent and covenants in the indenture of demise contained.

The main question, therefore, between the parties turns upon the proper sense and meaning of the covenant: for when the intention of the contracting parties is once ascertained from the covenant itself, it is not difficult to decide whether the fact found by the jury upon the special verdict amounts to a performance thereof or not. The lessor covenanted that he would, when either of the cestui que vies happened to die or depart this life, during the term of sixty-five years and a quarter, "apply for and do his utmost endeavour to procure a renewal of the letters patent for another life or lives." There can be no difficulty in construing the meaning of the former part of the covenant, viz., "that the lessor should apply for a renewal of the letters patent;" and there can be as little difficulty in arriving at the conclusion upon the facts found, that the lessor did fully satisfy and perform this, the first part of the covenant, when the life of George Clayton fell in; by making application for the renewal in the proper quarter; repeating *his application with great urgency; and pressing it by every means in his power. This appears both from the fact found by the jury, and also from the various documents set out in the special verdict, perhaps at greater length and with more of prolixity than was absolutely necessary for the establishment of that point. But the more difficult question remains, namely, what construction is to be put upon the latter branch of the covenant, "that he would do his utmost endeavour to procure a renewal of the letters patent." That the parties did not mean that the lessor should bind himself to procure a renewal, absolutely and at all events, is evident from the very words of the covenant. The subject-matter of the covenant leads also to the same conclusion. The lessor could not compel the Duchy of Cornwall to renew any life or lives as they fell in. The Duchy was not compellable to renew, either by any statutory obligation, any prescriptive liability, or any covenant. So far as appears upon the special verdict, the renewal was a matter of compact and agreement only. The fact

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found that, in four out of the seven instances of letters patent, granted to the family of Sir William Clayton, and set out in the special verdict, the fine paid upon the renewal of each was of very different amount, affords the strongest proof that such amount was matter of compact and agreement, and nothing else. When, therefore, the lessor covenanted, "that he would do his utmost endeavour to procure a renewal for another life," the necessary intendment is that he covenanted to do every thing that was known to be usual, necessary, and proper, for the insuring the success of his endeavour; of which, as it appears to us, the very first step was, to bargain with the Duchy for such a fine as would induce them to renew, and to pay such fine. Sir William Clayton had himself paid a fine on the granting of the letters patent under which he then held, and all his predecessors had done the same *as they renewed in succession. It could [*777] not, therefore, but have been known to him, that doing his utmost endeavour must necessarily have comprised the payment of some fine to the Duchy. And any doubt upon such interpretation of the covenant under consideration must be removed by the concluding terms of the covenant itself. For the covenant goes on thus: "without the said lessees being compelled or compellable, or liable to pay any part of the fine or fines that should be paid on such renewal." Words which we consider to be capable of only one interpretation, namely, that both the lessor and the lessees understood that some fine was to be paid on renewal of the letters patent; but that it was agreed between them that the whole of such fine, whatever might be its amount, should be borne by the lessor alone. Now, if the performance of the covenant had become impossible by reason of the absolute refusal of the Duchy to renew on any terms whatever, no doubt the defendant would have excused himself from any breach, by showing that he had used his utmost endeavour, though ineffectually, to procure the renewal; for that was all he had covenanted to do. Or again, if the officers of the Duchy had refused to renew, except upon the payment of a fine extravagant and unreasonable, in proportion to the value of the property, there seems little doubt but that such a refusal on their part would have equally excused the covenantor, as amounting in effect to

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an absolute refusal to renew. For the covenant must have a reasonable construction; and it never could have been intended by the contracting parties, that, by doing his utmost endeavour, he was called upon to do more than to pay a reasonable fine; that is, the fair and marketable price, according to the actual value of the estate at the time when it became necessary to put in a new life. And we, therefore, think the whole of the inquiry, as to the breach of the covenant *having been incurred or not, is narrowed to this single point: whether it appears, upon the facts found, that Sir William Clayton has been ready to pay to the Duchy a reasonable fine for putting in a new life; which is, in effect, the same question as that contained in the concluding words of the special verdict, "Whether it was incumbent on him, in point of law, to pay the fine required by the Duchy." Now, the special verdict finds, in terms, that the fine demanded by the Duchy of Cornwall, in September, 1831, for the renewal of the letters patent upon the death of the said George Clayton, was a reasonable fine, if such fine ought to be calculated on the annual value of the premises, taken at rack rent. And, if it is to be considered as a question of law, whether the fine demanded was reasonable or not, we have no difficulty in saying that, in our judgment, a fine which falls short in amount of three years' annual value of the premises cannot, upon any principle of law, or analogy to cases which have any bearing on the subject-matter of inquiry, be deemed unreasonable.

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But the question still arises, and it is that upon which considerable argument has been raised, whether the Duchy can calculate the amount of their fine, not by reference to the rent paid by the lessee, but upon the rack rent of the houses which is paid by the tenants in actual occupation. Now, in the first place, we see no rule of law, nor has any such been pointed out to us, by which the Duchy is called upon to look to any other value of the premises at the time when they are contracting for the renewal of the letters patent, than the actual value of the premises at that time, at the rack rent. If the premises, instead of being demised to sub-lessees, had been built upon and improved by the immediate lessee of the Duchy, at his own expense, there could have existed no better criterion or test of

the real annual value of the premises, than the rent actually received by the lessee from the *tenants in possession of the houses built by himself on the land. And the right of the Duchy to assess and claim a particular amount of fine upon renewal appears to us to be precisely the same, whether the improvements have taken place by the act, and at the expense of the lessee, or at the expense of others to whom such lessee has subdemised the land. There is no privity between the Duchy and the sub-lessee: the Duchy is not bound to take notice that there is any sublease in existence; all that must necessarily come to the knowledge of the Duchy is the annual value of the land at the time when the renewal is required. [*779]

But, in the second place, the point now under consideration bears a very close analogy to that of a fine claimed by the lord of a manor upon the admission of a new tenant to a copyhold, where the estate has been improved during the continuance of an old lease granted by a former copyhold tenant under a license from the lord: in which case it has been held that the lord may calculate his fine upon the actual improved value, though it exceeds the amount of the annual rent received by the tenant himself: *Sir William Halton, Bart.* v. *Hassell* (1); a case much stronger than the present, as the lord of the manor is bound to admit on payment of a reasonable fine. We cannot, therefore, hold that the fine demanded by the Duchy for the renewal of the letters patent, on the death of George Clayton, falling short in amount, as it does, of three years' actual value of the premises at rack rent, is any other than a reasonable fine. And as it appears, upon the facts found, that Sir William Clayton declined or neglected to renew upon the payment of that fine, we think he has not, within the proper meaning of the covenant, done his utmost endeavour to procure a renewal of the letters *patent. And even in the calculation of the amount of the fine which he professed himself willing to pay, it does not appear that he allowed for the full annual value of the premises to himself; for although he included the whole of the annual rents which were paid to him, he did not make allowance for the fines which, in some instances, he had taken upon granting the [*780]

(1) 2 Str. 1042.

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leases. And such being the view we take of the breach of the covenant on the death of George Clayton, the same reasoning must apply to the endeavour to procure a renewal upon the death of the next life, James Medwin; and it is therefore unnecessary to say more than that there appears to have been a second breach of the covenant upon the occasion of his death.

The defendant, however, has urged two objections against the right of the plaintiff to recover in this action. In the first place, he contends that the covenant upon which the action is brought is not a covenant which runs with the land. As to which we can feel no doubt, but that a covenant made with the lessee to procure the original letters patent to be renewed, and the lease itself under which the tenant holds, to be confirmed absolutely for a certain term, is of all others a covenant, which more strictly and peculiarly may be said to run with the land, than any other; inasmuch as it affects the very existence and continuance of the term itself created by the lease. And the judgment of the Court of King's Bench, in the case of *Roe* v. *Hayley* (1), affords an authority directly in point upon the subject.

It is further objected, that the plaintiff, being assignee of part only of the interest of the original lessee, cannot sue upon this covenant to procure a renewal of the letters patent, inasmuch as such covenant cannot, in its *nature, be apportioned. For in what manner, it is asked, can the defendant procure a renewal of five-sixths of the interest which passed under the Duchy lease? And again, if the assignee of the remaining one sixth should be unwilling to continue tenant as to that interest, is the defendant compellable to take to it himself? The latter difficulty, however, does not seem to apply to the case. The original lessees, Ismay and Harrison, took an interest for sixty-five years and a quarter, not only if the three lives named in the Duchy lease should so long live, but if any other person or persons to be nominated upon the falling in of their lives, should so long live; it being declared to be the object and intention of the renewal that the lessee's interest should be confirmed

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(1) 11 R. R. 455 (12 East, 464).

absolutely for sixty-five years and a quarter. It is not, therefore, optional in the assignees of the original lessees to declare whether they will take any interest after such renewal or not: they take for the whole term, if the Duchy lease is renewed for that term from time to time. And as to the right of the plaintiff to sue, without joining the assignee of the remaining one sixth, it is to be observed that the plaintiff and the assignee of that interest are tenants in common, having separate and distinct interests in the term; and that the damages are, in their nature, severable, and may well be apportioned by the jury according to the value of the share of each. And no case appears to have laid it down that tenants in common must join in an action of covenant: the utmost that has been established seems to be that tenants in common may join in those actions of covenant which was merely personal, and several in damages only, as on the covenant to repair: 1 Lev. 109, Raym. 80.

Upon the whole, therefore, it appears to us that, notwithstanding the objections urged by the defendant, the plaintiff has the right to sue for the proportion of *the damages sustained by him; and that, as there has been a breach of the covenant declared upon, the plaintiff is entitled to our judgment upon the facts found in this special verdict.

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Judgment for the plaintiff.

MAGRATH *v.* HARDY (1).

1838. *June* 13.

(4 Bing. N. C. 782—798; S. C. 6 Scott, 627; 1 Arn. 352; 2 Jur. 594; 7 L. J. (N. S.) C. P. 299; 6 Dowl. P. C. 749.)

[782]

To an action for money had and received defendant pleaded a recovery by foreign attachment at the suit of a creditor of plaintiff's, and that the creditor had execution of the sum recovered according to the custom of London: plaintiff replied that no execution was executed; on which defendant joined issue:

Held, that without execution executed, he was not discharged from his debt to plaintiff; and that, having joined issue on the fact of the execution, the jury were not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact: that the attorney

(1) Cited and followed in judgment of LUSH, J. in *Richter* v. *Laxton* (1878) 48 L. J. Q. B. 184.—R. C.

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of defendant, the garnishee in the foreign attachment, was not incompetent to prove the custom in such attachment: and that it is no answer to a plea of recovery under foreign attachment that plaintiff has had no notice of the proceedings.

THIS was an action for money had and received to the plaintiff's use, to which the defendant pleaded, fourthly, a recovery against him of the debt sued for, by foreign attachment in the Mayor's Court in London, in which attachment one Tyrie was the plaintiff, the present plaintiff was the defendant, and the present defendant was the garnishee.

The plea set out with particularity the custom of London with respect to foreign attachment, of which the part which was material to the present purpose was, that the custom was alleged to be that, after pledges found by the plaintiff in foreign attachment and execution had and executed of the monies in the hands of the garnishee, the garnishee was discharged against the defendant of the sum so attached and had in execution. The plea then stated the confirmation of the custom by Act of Parliament, and set out the proceedings in the usual form, and the judgment that Tyrie should have execution of 410*l*., parcel
[*783] of the sum attached, by *pledges to restore the same if Magrath should appear within a year and a day and disprove the debt.

The plea then stated the issuing of a precept to the serjeant-at-mace for levying the amount, and the delivery thereof to him to be executed; that thereupon the serjeant-at-mace did take and receive from the now defendant the said sum of 410*l*. so attached as aforesaid, and without delay had the same in Court to satisfy Tyrie; and that he paid and delivered the same to Tyrie. The plea then averred that Tyrie thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record more fully appeared.

To that plea the now plaintiff replied that he never had notice of the proceedings in the fourth plea mentioned; that Tyrie had not execution executed of the said sums according to the custom of the city; that the monies of the now plaintiff in the hands of the now defendant were never had in execution, as by the fourth plea might be supposed; that no execution founded upon the said supposed judgment in the said fourth plea mentioned,

was ever executed; that the now defendant paid the said sum of 410*l.*, if ever it was paid, without compulsion and by connivance and collusion with the said Tyrie; and this, the plaintiff prayed might be inquired of by the country.

The defendant thereupon joined issue.

At the trial after Michaelmas Term, 1836, a verdict was found for the plaintiff, with 1,000*l.* damages, subject to the opinion of the Court upon the following case:

The plaintiff was a merchant who carried on his business and resided at Jacmel, St. Domingo, from 1824 to 1834 inclusive, and returned to England in the latter year. The defendant was also a merchant in London.

In the year 1827, the plaintiff upon his own account, *remitted [*784] to the defendant a bill of exchange for 79*l.* 17*s.* 4*d.*, and also consigned a cargo of coffee for sale to the defendant.

This action was brought to recover the sum of 585*l.* 13*s.* 7*d.* being the proceeds of the bill of exchange and the coffee, and interest thereon, up to the 31st of December, 1835.

It appeared, by a correspondence between the plaintiff and defendant, that, in June, 1827, the plaintiff, being uncertain whether or not Tyrie, his usual agent, was in London, consigned to the defendant 180 bags of coffee, with directions to hold the proceeds to the plaintiff's order; also a bill of exchange for 79*l.* 17*s.* 4*d.*, which the defendant was also to hold to the plaintiff's order.

In October, 1827, the defendant apprised the plaintiff that the coffee had been sold, and the proceeds paid to Tyrie; but with the understanding that the defendant was to account to the plaintiff for the amount if he did not confirm the act, or if he drew on the defendant in the mean time.

In January, 1828, the plaintiff wrote to say he should dispose of these funds, either by drawing on the defendant, or requesting the proceeds to be paid to the plaintiff's order.

In April, 1828, the defendant wrote (in answer to a letter of the plaintiff's of February, 1828, containing a duplicate of the letter of January) that, subsequently to the defendant's letter of October, 1827, Tyrie had lodged an attachment on the amount in the defendant's hands, but that it had not been followed by any ulterior proceedings.

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In June, 1828, the plaintiff wrote to the defendant that he should look to him for the proceeds of the coffee, in virtue of his letter of October, 1827.

The plaintiff afterwards drew a bill on the defendant, dated
[*785] Jacmel, 30th of April, 1830, for 412*l.* 0*s.* 10*d.*, *payable at three days' sight to Messrs. Oldroyd, Magrath, and Ward, who presented it for acceptance to the defendant on the 23rd of June following, when the defendant declined to accept it.

The present action was commenced in January, 1836.

On the 31st of January, 1828, an action was commenced by John Garnett Tyrie, the son-in-law of the defendant, against the plaintiff, in the Mayor's Court of London, founded upon an affidavit of debt for the sum of 500*l.* and upwards; proceedings by foreign attachment were adopted against the present defendant as garnishee, and such cause proceeded to judgment in manner hereinafter stated; but no writs or precepts of execution were issued or executed in that cause, or served upon the defendant in that cause, or the garnishee, the now defendant.

At the trial of the present cause, Ashley, one of the attorneys of the Lord Mayor's Court, was called by the present plaintiff: he was the partner of Wardell the attorney for Hardy, the garnishee in the Mayor's Court, during the proceedings in *Tyrie* v. *Magrath*; and the defendant's counsel objected to his disclosure of any facts connected with that cause. The evidence was received subject to the opinion of this Court as to its admissibility. He stated the practice of that Court in proceedings by foreign attachment during his experience of twenty-five years, to have been according to the course hereinafter set forth:

A public book called the Action Book is kept in the Mayor's Court office, used by all the attorneys. The first step, with a view to obtain foreign attachment, is, that the plaintiff makes affidavit of debt, prepared by and sworn before the plaintiff's attorney in the cause; which affidavit afterwards remains in his possession; the plaintiff's attorney then makes
[*786] an entry in the Action *Book of the names of the parties, &c. thus: "In the Mayor's Court, London, 1828. January 31st. *Henry Jason Magrath*, defendant, at the suit of *John Garnett*

Tyrie, plaintiff, in a plea of debt upon demand of 1,000*l.* of lawful money of Great Britain: sworn 500*l.* and upwards. REYNAL (attorney's name). Pledges, &c.

"Attachment thereon made in the hands of John Hardy, the same day, between two and three afternoon, by C. Sewell."

This book is kept in the Lord Mayor's Court, lying open in the office; but no one has the custody of it. A paper is next prepared by the plaintiff's attorney, directed to the garnishee, called an attachment paper: no precept or process is issued against the defendant, nor any actual default made, nor are there any returns of *nihil* or defaults or otherwise, made to any process: the defendant is not actually called: the serjeant-at-mace serves the attachment on the garnishee, and then makes an entry in the Action Book that he has done so, and signs it: upon the expiration of four clear days,—neither of the days being a *dies non*,—after service of the attachment, if no appearance is entered, a paper is prepared by the plaintiff's attorney, called a summons, directed to the garnishee: no entry is made of that summons, or of the service of it: the serjeant-at-mace delivers the original summons, but makes no entry of it, and communicates orally to the plaintiff's attorney the fact of service: when the garnishee appears, such appearance is made by his attorney marking in the Action Book that he appears for the garnishee, naming him; and these are the only entries in the book. A record is then made up by the plaintiff's attorney, stating the cause of action; that the plaintiff prayed process according to the custom, &c., which was granted: that the serjeant-at-mace had summoned the defendant to answer the plaintiff; that *the said serjeant-at-mace, at the same [*787] Court, returned, according to the said custom, that the defendant had nothing within the said city whereby he could summon him, nor was he found within the same; and that at the same Court the defendant was solemnly called, and did not appear, but made default: then it is alleged, at the same Court, that the garnishee owes to the defendant 500*l.*; process is thereupon prayed against him to attach the same, so that the defendant may appear, &c.; and then it is commanded to the serjeant-at-mace, that he attach the said defendant by the said 500*l.*, so

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being in the hands of the garnishee, so that the defendant may appear, &c. It is then stated by the record that the defendant was afterwards summoned to, and solemnly called at, four several subsequent Courts, but did not appear, and made four defaults; and, thereupon, after the said four defaults recorded by the Court, process is prayed to warn the garnishee. The record is made up before the garnishee pleads, containing his appearance, and the record in that state is handed by the plaintiff's attorney to the registrar, who enters an imparlance; the parchment roll and the record is then handed to the garnishee's attorney by the registrar. A rule to plead is given orally by the plaintiff's attorney, and the registrar makes an entry of such rule upon the roll and in his own book. The record is then handed to the attorney of the garnishee, and when the time for pleading is expired, the attorney for the plaintiff again demands the record; the attorney for the garnishee puts his plea on the record; the registrar then authenticates it by an entry on the record; and joins the issue upon it: but no other than the entries before stated are made of any of these proceedings.

The record is handed by the registrar back to the plaintiff's attorney, and remains with him, and he inserts the cause in the [*788] list of causes for trial prepared by *the registrar. If the cause be tried, the registrar marks the verdict, and no further entry of it is made. The *postea* is made up by the plaintiff's attorney, who retains the record afterwards in his own possession. An entry of judgment is made by the registrar forthwith upon the record at the instance of the successful party, who is entitled to sign judgment on the day following that of the trial. The plaintiff afterwards finds pledges; and it is the duty of his attorney to see that they are substantial. In *Tyrie* v. *Magrath*, the pledges were substantial and responsible persons. A certificate of judgment is afterwards made out by the plaintiff's attorney, according to the following form:

"Mr. JOHN HARDY.—I do hereby certify that judgment hath been entered against you in the Lord Mayor's Court, London, at the suit of John Garnett Tyrie, plaintiff, for the sum of 410*l.* heretofore attached in your hands, as the proper monies of Henry Jason Magrath, defendant; and that security hath been

given by the plaintiff in the said attachment for restitution of the said monies, if his debt shall be disproved according to the custom: as by the record of the said judgment, now remaining in the said Court appears. Dated the 22nd day of July, 1830. G. T. R. REYNAL, plaintiff's attorney, Lord Mayor's Court office, Royal Exchange."

No entry is made of that certificate; it is usually served on the garnishee's attorney; and the plaintiff, or his attorney, if the garnishee will pay, receives the money. If he refuses to pay, he may be taken into custody. When the money is paid, the practice is to make an entry of satisfaction on the record; and that was done in *Tyrie* v. *Magrath*. The debtor (defendant) may at any time come in and dissolve the attachment before satisfaction has been entered; but when it is entered of record, he must come in within a year and day afterwards.

It was further proved that, until lately, writs of execution were rarely issued or executed; but that, latterly, it had been considered necessary, and such writs were accordingly issued and executed. [789]

The proceedings in the cause, *Tyrie* v. *Magrath*, were conducted throughout in conformity with the practice above set forth.

The present defendant called no witnesses, but gave in evidence an examined copy of a judgment in the cause of *Tyrie* v. *Magrath*.

It was agreed that the Court might exercise the same power and discretion of amending the record as the Judge at Nisi Prius could under 4 & 5 Will. IV. c. 42 (1); and that the Court should be at liberty to draw the same conclusions as the jury might have done from the facts stated.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover; and if so, the damages were to be 410*l*., with interest thereon from the 23rd of June, 1830, till final judgment: but if not, then a nonsuit was to be entered.

Wilde, Serjt. for the plaintiff:

The jury having expressly found that no execution was executed in the foreign attachment, the substance of the replication

(1) Repealed 52 & 53 Vict. c. 10, s. 12.

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must be taken to have been established in evidence. The Court, however, would draw the same conclusion from the facts stated. No notice was ever given to Magrath; no process actually issued; nor was there any proceeding except the entries in the book of the Lord Mayor's Court. Such a practice ought to be strictly watched, and cannot be sanctioned unless in exact conformity with the custom: *Wetter* v. *Rucker* (1).

[790] And Hardy's attorney, although he could not be examined as to any communications with his client, was competent to prove the course of proceedings in the Mayor's Court; a matter altogether of a public nature.

It may be contended that the plaintiff is estopped by the record of satisfaction in the Mayor's Court; but if the defendant meant to rely on that he should have demurred to the replication; when he joins issue on the question whether execution has been executed or not, the jury are not precluded from finding according to the fact: 1 Starkie on Evidence, 226, *Vooght* v. *Winch* (2), *Paramore* v. *Pain* (3), *Palmer* v. *Hooke* (4).

And without proof of execution executed, the plea is not established, and the defendant not discharged: *Wetter* v. *Rucker*, 1 Wms. Saund. 67, note 1, *M'Daniel* v. *Hughes* (5).

Bompas, Serjt. for the defendant:

The replication has not been proved; for the defendant's attorney was not a competent witness to show what was done towards his client the garnishee, although he might show the general practice of the Mayor's Court. And the plea is established; because the issuing of a certificate of judgment and the payment of the sum specified in it is, in effect, execution executed.

Then, the record in the Mayor's Court was conclusive to show that Tyrie had been satisfied, and the defendant discharged. A record is conclusive evidence of the facts stated in it: Co. Litt. 117 b, 260 a, *Mackalley's* case (6).

(TINDAL, Ch. J.: Should you not have rejoined the estoppel?)

(1) 21 R. R. 690 (1 Brod. & B. 491).
(2) 21 R. R. 446 (2 B. & Ald. 662).
(3) Cro. Eliz. 598.
(4) 1 Ld. Ray. 727.
(5) 3 East, 367.
(6) 9 Co. Rep. 69 a.

This is not in the nature of an estoppel, which applies only between the parties to a deed; but a record is conclusive against the whole world *as to the facts stated in it. *Reed* v. *Jackson* (1), *Vooght* v. *Winch* and *Hooper* v. *Hooper* (2), only show that records of a judgment are evidence to go to a jury; not, that they are not conclusive evidence. In *Ramsbottom* v. *Buckhurst* (3), Lord ELLENBOROUGH said, "The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration, or plea, or trial; or that the Court did not pronounce such judgment as stated in the record? I apprehend that it would not; and therefore every part of the record, as long as it remains on the files of the Court, must be taken to speak absolute verity:" and in *Rex* v. *Hopper* (4) it was held, with reference to a deed of bargain and sale enrolled, that the indorsement of the clerk of the enrolments is a part of the record, and cannot be averred against. In *Dudlow* v. *Watchorn* (5), which may be cited in reply, it was held that the practice of the Court is pleadable where the point of the case depends on it; but it was not contested that the record of proceedings in the Court is conclusive. *Huxham* v. *Smith* (6) is in point for the defendant. There, it was held that, to prove that the defendant, under process of foreign attachment, had paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, was conclusive evidence. And Lord ELLENBOROUGH said, "If the money was attached in the defendant's hands, and he paid it pursuant to the judgment of a court of competent jurisdiction, I must suppose *omnia rite acta*. Sitting at Nisi Prius, can I unravel the proceedings before the Recorder of London, *and grant a new trial in the cause which he has decided? I must give credit to the record which is produced." *M'Daniel* v. *Hughes* shows that the garnishee may protect himself without

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(1) 6 R. R. 283 (1 East, 355).
(2) 29 R. R. 834 (M'Clel. & Younge, 509).
(3) 15 R. R. 352 (2 M. & S. 565, 567).
(4) 18 R. R. 641 (3 Price, 495).
(5) 16 East, 39.
(6) 11 R. R. 651 (2 Camp. 19).

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proving the debt due to the plaintiff below. So, in cases of convictions by magistrates, and probate of wills, the record is always conclusive, and proof of the facts asserted in it is not required. In *Wetter* v. *Rucker*, it did not appear on the record that the plaintiff below had been satisfied.

If the record is conclusive, the plea is an answer to the plaintiff's claim; the payment made by the defendant under the authority of the Mayor's Court was compulsory; for he was not bound to wait till his goods were seized in execution: *Carter* v. *Carter* (1); and he is discharged from any further demand.

According to the practice of the Court, it was not necessary that the defendant below should have notice of the proceedings; but if it were, he received notice by the garnishee's letter of April, 1829, in time to have interposed before judgment. And as to the alleged collusion, the garnishee may voluntarily disclose to the plaintiff below the debt due from him to the defendant below; for in *Paramore* v. *Pain* a party was allowed to attach even a debt in his own hands.

Wilde, in reply:

The broad question here is, whether the defendant has paid the money under the compulsory process of the Mayor's Court; and though he might have demurred to the replication, or have rejoined the estoppel, yet as he has elected to go to the country on that point, the jury are authorised to find it: *Outram* v. *Morewood* (2), *Vooght* v. *Winch*, *Doe* v. *Huddart* (3). The point in *Mackalley's* case was that the judgment was repugnant on the face of it; and *Ramsbottom* v. **Buckhurst* only decided that a party claiming under an *elegit* may prove his title by an examined copy of the judgment roll, containing an award of an *elegit*, without giving in evidence a copy of the *elegit*. In *Huxham* v. *Smith*, the acknowledgment of satisfaction was regularly entered: here it was not regular, there having been no execution executed: *Wetter* v. *Rucker*. The Courts which grant probate have exclusive jurisdiction in such matters; but neither with respect to probates, nor convictions by magistrates, is there any case which

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(1) 30 R. R. 677 (5 Bing. 406).
(2) 7 R. R. 473 (3 East, 346).
(3) 2 C. M. & R. 316.

decides that, where a party has waived his estoppel, and raised a question for the jury, the production of a record is to preclude the jury from finding the fact.

Cur. adv. vult.

TINDAL, Ch. J., after stating the pleadings, as *ante*, page 862, now said :

Upon the facts proved in this case three questions arise: first, whether the material allegations of the replication were proved in point of fact; secondly, whether, by any technical rule of law, the plaintiff was precluded from proving, and the jury from finding, the truth of the case; and, thirdly, whether the facts stated in the replication contain a sufficient answer to the plea.

It will be most convenient to consider first in order the last of these three questions. The first allegation of the replication is, that the plaintiff had no notice of the proceedings in the foreign attachment. This allegation does not furnish any ground of answer to the plea, for the custom of the city, as set out in the plea, is admitted in the replication, and has been confirmed in Parliament; and the custom does not require that any notice should be given to the defendant in the attachment of the proceedings in the Mayor's Court. That *allegation, therefore, [*794] appears to us to be immaterial and idle.

The next allegation is that there was no execution executed. This allegation is three times repeated with some slight variation in terms; but the whole amounts to an allegation that there was no execution executed pursuant to the custom. It scarcely requires an authority to show that this allegation contains, in substance, a good answer to the plea; for the plea being only good by the custom, it follows that, unless the custom be pursued, the defendant must fail in his defence. Now the custom is alleged in the plea to be, that after execution had and executed, the garnishee shall be discharged as against the defendant below. The allegation in the replication shows, therefore, that the custom has not been complied with. If an authority were required on this point, the case of *Wetter* v. *Rucker* (1), and the other cases there cited, are in point to show that, under such

(1) 21 R. R. 690 (1 Brod. & B. 491; 4 Moore, 172).

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circumstances, the defendant is not discharged. The replication contains, further, a statement that the money paid was paid without compulsion, and by connivance and collusion. It is not very clear what precise legal ground of defence is here meant to be relied on, nor is it essential to inquire, as, for the reasons already assigned, the replication contains a sufficient answer to the plea.

The next question for consideration is, whether the material allegations of the replication were proved in fact. The only allegation which it was essential for the plaintiff to prove was that there was no execution executed according to the custom. For, by the ordinary rule of pleading, a party is only bound to prove the substance of the matter pleaded, that is to say, so much of a plea or replication as constitutes a complete and

[*795] *valid answer to the matter alleged in the adverse pleading which it professes to answer. Now it is expressly found in the case that no writs or precepts of execution were issued or executed in the cause, or served upon the defendant in that cause, or on the garnishee, the now defendant. The replication, therefore, must be considered as proved in point of fact. And this seems to be a convenient place for noticing an objection which was made on the defendant's behalf to the examination by the plaintiff of Mr. Ashley. Mr. Ashley was, at the time of his examination, the partner of Mr. Wardell, who had been the attorney for Mr. Hardy in the foreign attachment. The counsel for the defendant objected, on that ground, to his disclosing any facts connected with the cause. But we think this objection is far too wide. The party objected to was not the attorney in the cause; and, if he had been, an attorney may know many facts connected with the cause which he has not learnt from his client, or in the course of the cause; and there is nothing to show that he was examined, in the present instance, to any facts which came to his knowledge under the seal of professional confidence.

It remains only to consider the second question, which is, whether the plaintiff was precluded from proving, and the jury from finding, the truth of the case by a technical rule of law.

It was strongly insisted in argument on the defendant's behalf, that the record in the foreign attachment was conclusive; and that not only the plaintiff but the jury also were concluded by it;

and the case of *Reed* v. *Jackson* (1), *Rex* v. *Hopper* (2), and *Huxham* v. *Smith* (3), were relied on; the cases were referred to in which convictions before magistrates have been said to be conclusive of the facts stated in them; it was *asked whether a probate could be controverted in evidence; it was insisted that in no case could the facts stated in a record be disputed; and the judgment of Lord ELLENBOROUGH, in *Ramsbottom* v. *Buckhurst* (4), was cited in support of the proposition contended for in its fullest extent.

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It is undoubtedly true, as a general rule, that no man can take any averment contradictory to a record. Our law books are full of cases in which this doctrine is stated, or distinctly implied: see Plowden, 491, *Johnson* v. *Smith* (5) *Baily* v. *Bunning* (6), *Rex* v. *Mann* (7), *Hynde's* case (8), and the cases cited above. But although it is true that no one can be allowed to aver against a record, and that not only parties and privies, but even strangers also, are estopped to aver any thing to the contrary, it is a different question whether this estoppel will bind the jury from finding the truth of the fact where the estoppel is not pleaded and relied on. A jury may indeed, it is said, find matter of estoppel, though it is not pleaded and relied on; and when it is found, the Court shall judge according to law: Com. Dig. Pleader, S. 4. And, therefore, if a man makes a lease by indenture to A. of his own land, whereby A. is estopped to say it was not demised, the jury may find such matter, though it be not pleaded; Com. Dig. *quà suprà*. And in *Pleadal's* case, cited in *Rawlins's* case, 4 Co. Rep. 53, and in Cro. Eliz. 36, 37, which was an ejectment, to which the general issue had been pleaded, because the jury did not find a deed indented, which took its operation only by conclusion, they were attainted; and judgment accordingly; the reason of which case may perhaps be collected from what is said in *Trevivan* v. *Lawrence* (9), that where an *estoppel is of such a nature that it creates an interest and works upon the estate of the land, the jury are estopped.

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(1) 6 R. R. 283 (1 East, 355).
(2) 18 R. R. 641 (3 Price, 495).
(3) 11 R. R. 651 (2 Camp. 19).
(4) 15 R. R. 352 (2 M. & S. 567).
(5) 2 Burr. 950.
(6) Sid. 271.
(7) 2 Str. 749.
(8) 4 Co. Rep. 72; 2 Leon. 121; Owen, 138.
(9) 2 Ld. Ray. 1051.

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But however the case may be in the special case of an estate in the land by estoppel, and where the question arises upon the general issue, there are not wanting cases to show that in general an estoppel does not bind the jury, and more particularly that if the estoppel appears upon the record, and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel. Thus in *Goddard's* case (1), which was debt on bond, the reason of the judgment was said to be that, although the obligee was estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth; and therefore jurors cannot be estopped, because they are sworn to say the truth. So in the case of *Speake* v. *Richards* (2), which was an action of debt for 523*l.* 17*s.*, against Richards, sheriff of Southampton, on his return to a *levari facias*, that he had levied the said monies, which he had ready; the defendant *quoad* 308*l.*, pleaded *nil debet;* whereupon the plaintiff took issue; and as to the rest, pleaded payment and an acquittance; whereupon the plaintiff demurred. One point urged for the plaintiff was that the plea of *nil debet* was naught, being directly contrary to return of record: but it was answered, that since they have not relied on the estoppel, but taken issue, that could give no advantage.

The law on this point is laid down with great distinctness in the case of *Trevivan* v. *Lawrence* (3): "The Court," it is said, [*798] "took this difference, that where *the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel, for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence

(1) 2 Co. Rep. 4.
(2) Hob. 206.
(3) 2 Ld. Ray. 1048; 1 Salk. 276.

that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him: but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel and leaves it at large, and the jury shall find the truth, notwithstanding the indenture."

These cases, we think, furnish a sufficient ground for holding, in the present case, that the defendant by taking issue on the replication has waived any benefit he might have derived from the estoppel, and has left the matter at large to be decided according to the truth and justice of the case.

Our decision, standing on the ground above explained, does not clash with the cases cited on behalf of the defendant, being distinguishable therefrom on the ground that the defendant has, by his own act, expressly and in terms waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury.

Upon the whole, therefore, we think that the issue raised on the fourth plea must be considered as having been found for the plaintiff, and, consequently, that he will be entitled to judgment in his favour.

Judgment for the plaintiff.

SPARKES *v.* BARRETT AND ANOTHER (1).

1837. *Nov.* 23.

(5 Scott, 402—404.)

[402]

To induce the Court to refuse to allow a commission to issue for the examination of a defendant's witnesses abroad, a very strong case of misconduct on the part of the defendant must be made out. But, where there is reason to suspect the defendant's object to be to delay the plaintiff, they will order him to bring the money into Court.

The Court will sometimes limit the time within which the commission must be returned.

R. V. RICHARDS, on a former day, obtained a rule *nisi* on the part of the defendant Barrett, for a commission for the examination

(1) "The granting of the commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case": *Coch* v. *Allcock* (1888) 21 Q. B. Div. 178. *Quære* as to the correctness of the head-note in the principal case, which seems to go somewhat beyond the text.—F. P.

SPARKES v. BARRETT.

of a witness named Abraham Hopkins Davis, at Adelaide or elsewhere in the colony of Australia. The application was founded upon an affidavit stating that the party in question was a material and necessary witness, and that he had been subpœnaed to give evidence upon the trial of this cause on the 13th October last, but that he was then about to sail, and did actually on the 14th sail for Australia; and that the cause might have been set down for trial earlier had the plaintiff used due diligence.

The affidavits upon which cause was shown, stated, that the delay in proceeding to trial was occasioned in the first instance by a fortnight's time being given to the defendants to plead, and afterwards by their severally amending their pleas after the issues were delivered, and then severally refusing to allow the issues delivered to be amended until a Judge's order had been obtained for that purpose; and disclosed several other circumstances tending to show that the defendants had unnecessarily delayed the proceedings.

Wilde, Serjt., now showed cause:

After such palpable and numerous attempts on the part of the defendants to postpone and impede the trial, and unreasonably and unnecessarily to harass and delay the plaintiff, as are disclosed upon the affidavits, the discretion of the Court will be best exercised by discharging this rule. The question is, whether the Court will, upon this general affidavit, and the witness having only been subpœnaed on the morning of his departure, allow the Act of Parliament to be made a means of further and
[*403] ruinous delay. To entitle himself to *a commission, the defendant is bound clearly to satisfy the Court, not only that the witness is material and necessary, but that the application is made *bonâ fide*. In *Lloyd* v. *Key* (1), PARKE, B. says: "Where a witness resides at such a great distance as the witness does in the present instance [Upper Canada], it ought to be clearly made out to the satisfaction of the Court, not only that the evidence which the witness is expected to give is material and necessary, but also that it is admissible." Here, the defendant has not done so.

(1) 3 Dowl. 253.

R. V. Richards, in support of his rule:

Lloyd v. *Key* was an action against the acceptor of a bill of exchange, and therefore very different in its circumstances from the present case. The Court will determine this and all other cases of the same kind without reference to the distance at which the witness may happen to reside. Nor is it necessary in any case to state the particulars in respect of which the witness is material: it is enough, to entitle the party to a commission, if the Court be satisfied that the examination will conduce to justice.

TINDAL, Ch. J.:

It is impossible for us to hear the statement of what has taken place, without suspecting that the defendants are keeping the plaintiff at arm's length. I allude more particularly to the fact of Barrett's attorney refusing to accept the amended issue. That refusal was unreasonable. It was altogether indifferent to Barrett, what the state of the pleadings might be as regarded the other defendant. At the same time, I cannot help feeling that it would be hard to prevent the defendant from having the benefit of the evidence of the absent witness. Upon payment into Court of the sum sought to be recovered (307*l.*) within ten days, the commission may issue.

Wilde, Serjt., upon the authority of *Shovey* v. *Shebelli* (1), prayed that the time for the return of *the commission might [*404
be limited, and proposed that the last day of Hilary Term, 1839, should be the limit. And—

Richards suggested that a *mandamus* should issue as well as a commission, according to the course usually adopted in the Court of Exchequer, to be put in force should the witness be within the jurisdiction of any of the Courts.

Both these suggestions were acceded to by the COURT.

Rule accordingly (2).

(1) 1 Tyr. 505 (a).

(2) The rule was never drawn up.

1837.
Nov. 25.

[418]

PIZANI *v.* LAWSON (1).

(5 Scott, 418; S. C. nom. *Vizor* v. *Lawson*, 2 Jur. 48.

In an action for a libel on a Turkish minister, the defendant having obtained an order for security for costs to the extent of 400*l.*, the Court refused to increase the sum, upon a suggestion that the expenses of witnesses necessary to support the defendant's justification would greatly exceed that sum.

THIS was an action brought by the plaintiff, the chief Dragoman at the Ottoman Porte, against the defendant, for a libel published in the *Times* newspaper. The defendant had obtained an order to compel the plaintiff to find security for costs, on the ground of his being a foreigner and resident abroad, to the extent of 400*l.*

Wilde, Serjt., now moved that that sum should be increased by such additional sum as the Court should think reasonable. The affidavit upon which he moved stated that the defendant, in order to support his plea of justification, would be compelled to obtain the evidence of a very large number of witnesses resident in Turkey and elsewhere, and would require to issue commissions for the examination of those witnesses, and to procure interpretors, &c.; to meet which the security ordered was wholly inadequate.

TINDAL, Ch. J.:

I feel reluctant to throw too great a burthen upon a foreigner. The sum for which the defendant has already got security is large. To increase it would be very much like a denial of justice to the plaintiff.

The rest of the COURT concurring—

Rule refused.

1824.
May 11.

[248]

DOE D. LORD HUNTINGTOWER *v.* J. CULLIFORD (2).

(4 Dowl. & Ry. 248—249.)

A notice dated 27th and served on the 28th September, requiring a tenant to quit "at Lady Day next, or at the end of his current year," must be understood to mean a six months', and not a two days' notice to quit.

EJECTMENT for a dwelling-house and an acre of land, with the appurtenances, situate in the parish of Ilchester, in the county

(1) *Foster* v. *Colby* (1857) 27 L. J. Ex. 55; *Haseltine* v. *Watkins* (1858) 28 L. J. Ex. 40.

(2) This decision was dissented from and not followed by a strong Court in the Queen's Bench in *Doe* v. *Morphett* (1845) 7 Q. B. 577; but has been followed by a Divisional Court in *Wride* v. *Dyer* [1900] 1 Q. B. 23, 69 L. J. Q. B. 17.—R. C.

of Somerset. At the trial before Burrough, J. at the last Assizes for Somersetshire, a verdict was found for the plaintiff.

Manning now moved for a rule *nisi* to enter a nonsuit for an objection to the terms of the notice to quit:

The defendant was admitted into possession of the premises in question on the 4th August, 1821, as tenant to the plaintiff. On the 28th September, 1822, a notice to quit was served upon the defendant in the following terms: "James Culliford: I give you notice to quit the house and land you rent of me in the parish of Ilchester, and to deliver up the same to me or my heirs or assigns, at Lady Day next, or at the end of your current *year. [*249] Dated this 27th September, 1822." This, he submitted, was an insufficient notice, inasmuch as it having been dated on the 27th September, it would apply to the then current year ending on the 29th September, in which case the defendant would only have two days' notice to quit. The notice ought to be construed strictly, and the Court are bound to assume that the landlord meant to give his tenant nothing but a legal notice. This is not a legal notice, and therefore the defendant is entitled to have a nonsuit entered.

ABBOTT, Ch. J.:

There is no valid objection to this notice. There is one rule of construction in cases of this nature, which is no less sound than ancient, namely, to give such a sense to ambiguous words, as will effectuate the intention of the parties. Applying that rule to this case, it appears to me that the words, "at the end of your current year," may be understood to mean the end of the current year ending at the ensuing Lady Day. The words, I think, are plainly applicable to the current year ending at Lady Day, 1823.

BAYLEY, J.:

We are to look to the intention of the landlord. When general language is used, which is open to doubt, the rule is to make it sensible, not insensible. The state of the defendant's holding, shows it to be quite clear that the landlord did not

DOE d. LORD HUNTINGTOWER v. CULLIFORD.

mean the year ending at Michaelmas Day. He could not intend to give a notice to quit in two days, because that would be no notice whatever. By mentioning Lady Day next, it is clear he meant to give a six months' notice, or such a notice as the law required. He intended to give an effective notice, and it is quite sufficient if the tenant understands what is meant.

The other Judges concurred.

Rule refused.

1803. *Nov.* 28.

[565]

HESSE *v.* STEVENSON (1).

(3 Bos. & P. 565—578.)

Covenant by the assignor of certain shares in a patent right that he has good right, full power, and lawful authority to assign and convey the said shares, and that he has not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same: Held, that the generality of the former words of the covenant is not restrained by the latter. If the assignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may sign the said deed, release the bankrupt from all actions, suits, claims, and demands against him or his estate, and such deed be not signed by all the creditors of the bankrupt, the assignees are not barred from claiming as assignees the benefit of a patent-right previously obtained by the bankrupt. A patent-right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees.

An Act of Parliament, empowering such bankrupt-patentee, his executors, administrators, and assigns, to assign the right to a greater number of persons than allowed by the letters patent, and declared to be a public Act, does not enable either the bankrupt or his assigns to make a better title than they could before the Act.

THIS was an action of covenant, tried before Lord Alvanley, Ch. J. at the sittings after Easter Term, 1803. The declaration stated, that by deed poll made by the defendant on the 5th of January, 1802, reciting that certain letters patent had been granted by his present Majesty to one Matthias Koops, bearing date respectively the 17th day of February and the 18th day of May, 1801, granting unto the said M. Koops, his executors, administrators, and assigns, the sole privilege of making paper from straw, hay, thistles, waste and refuse of hemp and flax,

(1) Cited by LINDLEY, M. R., *In re Roberts* [1900] 1 Q. B. 122, 128, 69 L. J. Q. B. 19, 22.—R. C.

and different kinds of wood and bark, for the term of 14 years, and 14 years, from the respective dates of the said respective letters patent, and for the places in the said letters patent particularly and respectively mentioned; also reciting, that the said M. Koops, by deed of assignment of the 26th of February, 1801, assigned over certain shares of the said letters patent unto James Stevenson, (the defendant,) John Forbes, John Hunter, and William Tate, their executors, administrators, and assigns; and also reciting, that by an Act of Parliament passed in the 41st year of his present Majesty's reign it was (among other things) enacted, that it should and might be lawful to and for the said M. Koops, his executors, administrators, and assigns, or any or either of them, to transfer or assign the said letters patent respectively, or either of them or any part or share, parts or shares thereof, or any benefit or advantage to arise therefrom, to any number of persons not exceeding 60; and also reciting, that the said James Stevenson had agreed to sell and dispose of ten 1,000th parts or shares of and in the said letters patent to the plaintiff in consideration of the sum of 1,800*l.*, and that the said James Stevenson assigned the same accordingly; the said James Stevenson did by the said deed poll covenant, promise and agree to and with the said O. L. Hesse, his executors, administrators, and assigns, that he the said James Stevenson had good right, full power, and absolute and lawful authority to assign and convey *the said ten 1,000th parts or shares of and in the said letters [*566] patent and concern for making paper from straw and other base materials, and then the plaintiff assigned by way of breach that the said James Stevenson had not good right, full power, or absolute or lawful authority to assign and convey the said ten 1,000th parts or shares of and in the said letters patent and concern, according to the tenor and effect, intent and meaning of the said deed poll. The defendant by his plea craved *oyer* of the deed, and the covenant was stated in these words, "That I, the said James Stevenson, have good right, full power, and absolute and lawful authority to assign and convey the said ten 1,000th parts or shares of and in the said letters patent and concern for making paper, &c. and that I have not, by any means, directly or indirectly, forfeited any right or authority I

HESSE v. STEVENSON.

ever had, or might have had, over the same ten 1,000th parts or shares." And then the defendant pleaded, that he had good right, full power, and absolute and lawful authority to assign and convey the said ten 1,000th parts or shares of and in the said letters patent and concern, according to the tenor, effect, intent and meaning of the said deed poll, and of the covenant of the said James Stevenson in that behalf made as aforesaid; upon which issue was joined. The jury found a verdict for the plaintiff for 1,800*l.*, subject to the opinion of the Court upon the following case:

On the 30th June, in the year 1790, a commission of bankrupt issued against the said M. Koops, whereupon he was duly declared a bankrupt, and William Chapman and Thomas Hill were chosen assignees under the same; and from that time to this, the said M. Koops hath not obtained his certificate. On the 17th day of February and the 18th day of May, 1801, the said M. Koops obtained his Majesty's letters patent, as stated in the declaration. An Act of Parliament, passed in the 41st year of the reign of his present Majesty, recited in the deed and in the said declaration, enabling the said M. Koops, his executors, administrators, and assigns, to assign the benefit of the said invention to any number of persons not exceeding 60, &c. which Act is declared to be a public Act. On the 9th day of September, 1801, the creditors of the said M. Koops executed a deed, which, after reciting the commission of bankrupt, and the several proceedings had under the same, and that the said M. Koops had, by advertisement in the *London Gazette*, called a meeting of his creditors on the 12th day of June, at which he [*567] proposed to pay *all his creditors, who had proved their debts under the said commission, as much as then remained due to them, namely, five shillings in the pound, within one month, and the remainder by three instalments, to be secured by the said M. Koops in such manner as his said assignees should think proper; but that such instalments of the foreign debts should be deposited in the hands of bankers to be approved of by his said assignees, or paid into the Court of Chancery, to abide the event of an application to that Court, to be made within twelve months; and that the said M. Koops should

indemnify the assignees against all the costs of such application, and the carrying the agreement after mentioned into effect; and that thereupon, by a memorandum in writing, signed by the creditors of the said M. Koops, parties thereto, dated the said 12th day of June, 1801, after reciting the said proposal, it was unanimously agreed by the said several creditors that the said proposal should be acceded to, and that the assignees should take such measures as might be necessary to carry the same into effect; and that, on receipt of the first instalment, and such security being given for the payment of such respective debts, and depositing the first dividends on the foreign debts by the said M. Koops, the said several creditors did thereby undertake, so far as concerned themselves, respectively to execute good and sufficient releases in the law to the said M. Koops, and to give him such assistance in superseding the commission of bankrupt as the said assignees should think proper; and further reciting, that the said M. Koops had, in pursuance of the aforesaid agreement, paid to the assignees, and such other of the said several creditors of the said M. Koops, parties thereto, as were resident in England, five shillings in the pound upon the amount of their respective debts proved; and that on the day of the date of the said deed, he paid into the banking-house of Baron Dimsdale & Co., to the account of the assignees, five shillings in the pound on the foreign debts; and also, that in pursuance thereof the said M. Koops had given to the assignees a warrant of attorney for 20,000*l.* to secure the remaining fifteen shillings in the pound. It was witnessed, that in consideration of the premises, the said M. Koops did undertake to pay the said William Chapman and Thomas Hill, their executors, administrators, or assigns, the remaining fifteen shillings in the pound, in trust, to pay themselves and the rest of the creditors, parties thereto, resident within this kingdom, the remaining *fifteen shillings in [*568] the pound on their respective debts, by three instalments; and also to pay into the said banking-house, in the name of the assignees, the remaining fifteen shillings in the pound upon the foreign debts: and in case of any surplus after payment of such debts, and all costs and expenses, to pay the same to the said M. Koops, his executors or administrators, or otherwise, as he

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or they should direct; and it was further witnessed, that in pursuance of the aforesaid agreement, and in consideration of the premises, they, the said William Chapman and Thomas Hill, and the several other creditors of the said M. Koops, parties thereto, did remise, release, and quit claim unto the said M. Koops, his heirs, executors, and administrators, all actions, suits, claims, and demands whatsoever, which they or any or either of them then had or hath, or thereafter should or might have, challenge, claim or demand, against the said M. Koops, his heirs, executors, administrators, or his or their estate or effects, on account of the debts to them or any or either of them then due and owing from the said M. Koops, or of any other cause, matter, or thing whatsoever, save and except such actions, suits, claims, or demands as might arise under or by virtue of the said deed, or of the said bond or judgment therein-before recited; and further, that until default in payment of the instalments, the said William Chapman and Thomas Hill should not take out execution on the said judgment, or proceed on the said bond, or otherwise molest the said M. Koops; and that upon payment of the said instalments satisfaction should be acknowledged on the roll. Three of the creditors of the said M. Koops, who had proved debts under his commission to the amount of about 600*l.* never executed such deed. The said M. Koops paid the first instalments, but failing to pay the subsequent instalments, he lodged certain securities in the hands of the solicitor to the assignees, amounting to 1,690*l.* 11*s.* 6*d.*, the produce of which has since been received by the assignees for the benefit of the creditors. He also lodged certain securities from a Mr. Richard Twiss in the same hands, to the amount of 3,500*l.* which has since been proved by the said William Chapman and Thomas Hill, under a commission of bankrupt against the said Richard Twiss, and the remainder of the said fifteen shillings in the pound not having been satisfied by the said M. Koops, the said William Chapman and Thomas Hill entered up judgment against the

[*569] said M. Koops *on the warrant of attorney given by the said M. Koops on the 31st day of March, 1802, and on the 14th day of October, 1802, issued a *fi. fa.* thereon, against the said effects of the said M. Koops, and entered the dwelling-house of the said

M. Koops, sold his furniture and other effects therein, amounting to a considerable sum of money, and also entered upon the premises where the manufactory under the said letters patent and Act of Parliament were carried on, and took possession of the same and the effects therein, under the said execution, and still continue to keep possession thereof.

The question was, whether the plaintiff was intitled to recover? if so, the verdict to stand, if not, to be entered for the defendant.

Onslow, Serjt. for the defendant, was called upon by the COURT to begin. * * *

Bayley, Serjt. for the plaintiff. * * * [571]

Cur. adv. vult.

On this day the opinion of the COURT was delivered by [573]

LORD ALVANLEY, Ch. J.:

The question in this case arises upon a deed poll, bearing date the 5th of January, 1802, by which the defendant gives and grants to the plaintiff a share in his patent-right. The deed is not stated at length upon the record, but we consider the case as if the whole deed were now before us, because the covenants contained in that deed which are not set forth, are not at variance with the covenant upon which the breach is assigned. The covenant, upon which the question immediately arises, is, that the defendant had good right, full power, and absolute and lawful authority to convey; and that he had not by any *means, [*574] directly or indirectly, forfeited any right or authority he ever had, or might have had over the property in question. This action arises upon the first part of the covenant, and the breach assigned is, that the defendant had not good right, full power, and absolute and lawful authority to convey. We are called upon to decide upon the true construction of this covenant. It has been contended, upon the authority chiefly of *Browning* v. *Wright* (1), that this does not amount to an absolute covenant for good title, but must be confined to the acts of the party himself. We have looked with great attention into that case; and after the very able manner in which the principles which govern the

(1) 5 R. R. 521 (2 Bos. & P. 13).

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construction of covenants, were then laid down by Lord ELDON and the other Judges, it is unnecessary for me to enter at any length into the subject. Almost every case which bears upon the point is there cited; and indeed I find more of them there stated than I expected, for I did not think that the Courts had formerly been so liberal in the construction of covenants as it appears that they have been. I have examined all these cases, but I do not think necessary to state them, for we not only agree with the principles laid down in *Browning* v. *Wright* (1); but we think that the case might have been decided as it was upon the very words of the covenant, which was restrained to the acts of the party himself by the introductory words, "notwithstanding any thing by him done to the contrary;" and so Lord ELDON thought, though he adds, that if such were not the construction of the covenant itself, yet being coupled with the other covenant which was so restrained, it must be construed in the same manner. The defendant having covenanted that, "for and notwithstanding any thing by him done to the contrary," he was seised in fee, and that he had good right to convey; the latter part of the covenant, coupled as it was with the former part, by the words "and that," must necessarily be overridden by the introductory words "for and notwithstanding any thing by him done to the contrary;" and this appears to have been the opinion of the whole Court: but taking the latter covenant not to be restrained in terms, they proceeded to consider the rules by which covenants of this description are to be construed. From all the cases upon this subject it appears to be determined, that however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed it is plainly [*575] and irresistibly to be inferred that the party could not *have intended to use the words in the general sense which they import, the Court will limit the operation of the general words. The question therefore always has been, whether such an irresistible inference does arise? for if such an inference does arise from concomitant covenants they will control the general words of an independent covenant in the same deed. In Lord ELDON'S judgment one case is mentioned which I think deserves

(1) 5 R. R. 521 (2 Bos. & P. 13).

some notice, because his Lordship seemed to suppose that the judgment of the Court proceeded upon the mere legal construction of the deed, without regard to any circumstances *dehors* the deed. The case to which I allude is *Fielder* v. *Studley* (1); which appears to me to be an extremely strong case in favour of the present plaintiff, if the general covenant which was restrained by the other special covenants be considered as an independent covenant. Lord ELDON observes, that the Court must have proceeded "on the ground of the intent of the parties appearing on the instrument, since that intent and the consequent legal effect of the instrument could only be collected from the instrument itself, and not from any thing *dehors*." It must be remembered, however, that the application there was made to the Court of Chancery upon equitable as well as legal grounds; for, on looking into the case, I find that the defendant's father, in 1657, had sold lands belonging to the Dean and Chapter of Sarum, which had been dissolved during the Commonwealth. It was not very likely therefore that a party selling under these circumstances would covenant for any thing more than his own acts. It appearing that the general covenant was manifestly contrary to the true intent of the parties, application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct mistakes in marriage articles where clauses are inserted contrary to the intent of the parties. The decision therefore did not merely proceed upon the construction of a legal instrument, but the circumstances entitled the party to have the covenant rectified as having gone beyond the intention of the parties. But supposing that case to have been decided as a question at law, the question here is, whether the principle I have here stated, applied to this case, requires the Court to restrain the general words of the covenant sued upon? If the inference be irresistible that the parties could not intend to make a general covenant, we are bound to give the defendant the *benefit of [*576] that inference. The property assigned is a share in a patent-right: and it could not be unknown to the defendant that Koops, the original proprietor, had been a bankrupt, though possibly the

(1) Finch, 90.

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plaintiff might be ignorant of that circumstance. I have looked anxiously through all the concomitant covenants, in order to ascertain whether they afforded any inference of an intention to restrain the covenant in question, but I find none. The deed, after reciting the manner in which the property came to Koops ten years before, and the assignment to Stevenson, contains a conveyance of his interest to the plaintiff; and then follows the warranty in question, which, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz. "for and notwithstanding any act by him done to the contrary," omits them altogether; besides which, the defendant covenants, that the assignee shall enjoy the property assigned in as ample a manner as the assignor. The omission of these words is almost of itself decisive. The attention of the purchaser is not called by any words to the intent of the vendor to confine his covenant to his own acts. The covenant that the defendant has paid all the calls is certainly personal; but the covenant for title is general; and the Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood. The argument on the part of the defendant arises from the latter part of the covenant in question. If the party meant to covenant for an absolute right to convey, why, it is asked, does he covenant that he has not forfeited such right? To this it may be answered, that the latter stipulation, though unnecessary, is not inconsistent with the former. The rule of construction adopted in *Browning* v. *Wright* (1) has never been carried to such a length as to decide, that because some clauses are introduced into a deed which do not add to the security provided by the other clauses, the security so provided is to be restrained. We are therefore of opinion, that the covenant for absolute right to convey is not restrained by the other parts of the deed. It is contended, however, that the defendant has conveyed a good title to the plaintiff. And first, it is said, that admitting the interest in the patent-right to have passed under the assignment of the commissioners, yet the assignees have reconveyed to the bankrupt the whole of their

(1) 5 R. R. 521 (2 Bos. & P. 13).

interest therein by the deed of the 9th of September, 1801. It must be remembered, however, that nothing short of an actual conveyance by the assignees can sustain that argument, and that a mere release will not be sufficient; and it was therefore insisted that the deed amounted to a conveyance. But I have no hesitation in saying, that the deed alluded to was neither intended to convey, nor did it operate in law as a conveyance. By that deed the two persons who were the assignees of Koops, together with his several other creditors, parties thereto, in consideration of his having agreed to pay them fifteen shillings in the pound, and to secure the debts of the foreign creditors after the same rate, did remise, release, and quit claim to him, all actions, suits, claims, and demands whatsoever. But it is to be observed that the persons who were assignees did not convey as such. Indeed, if they acted as assignees, why was it necessary that the other creditors should join? and they do not pretend to bind the other creditors, who were not parties to the deed. This is the deed which is said to convey to Koops as a purchaser all the interest of the assignees, and to make him a new man. But the words are not sufficient for that purpose. It could not have been the intention of the parties. The assignees do not affect to convey for any persons not parties to the deed. And the instalments have not been paid according to the agreement. We are therefore clearly of opinion, that it is impossible to construe this deed to be such a conveyance as has been contended for on the part of the defendant. With respect to the supposed power of the assignees to make such a compromise with the bankrupt as that stated in the case, and the attempt to show that it amounts to a sale of the property to him; it was not competent to assignees to make such compromise unless the other creditors had consented; nor could the transaction be deemed a sale under the usual powers. Next it is contended, that the nature of the property in this patent was such that it did not pass under the assignment; and several cases were cited in support of this proposition. It is said, that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own

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invention do not pass. It is true, that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes do not pass, nor [*578] could the assignees require him *to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt, that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot indeed take the profits of his daily labour. He must live. But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it; though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property by setting up his bankruptcy. We are therefore clearly of opinion, that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners. Lastly, it is contended, that the Act of Parliament stated in the case, vested a legal interest in Koops, for that he must be taken against all the world to have that interest which the Act of Parliament recites to be vested in him, that Act being a public Act. But though the Act be public, it is of a private nature; the only object of the proviso for making it a public Act is, that it may be judicially taken notice of instead of being specially pleaded, and to save the expense of proving an attested copy. But it never has been held, that an Act of a private nature derives any additional weight or authority from such a proviso; it only affects Koops and those claiming under him, and authorises him to do certain acts, which by the letters patent he could not have done. It recites the letters patent containing a clause which prevents him from assigning to more than five persons, and then enables him to assign to any number of persons not exceeding sixty. It is not possible then to consider this Act as giving any title to Koops which he had not at the time when it passed. Such has been the construction which has always been put upon

Acts of Parliament of this nature. We are therefore of opinion, that no aid is to be derived to the defendant from that Act of Parliament.

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Per CURIAM:

Judgment for the plaintiff.

BURN *v.* MORRIS (1).

1834.

(4 Tyr. 485—486; S. C. 2 Cr. & M. 579; 3 L. J. Ex. 193.)

[485]

Trover lies for a lost bank-note, which the defendant has tortiously converted to his own use, though part of the proceeds has been paid by him to the plaintiff. The acceptance of part does not affirm the taking, so as to waive the tort, but the amount received will go in reduction of damages.

TROVER for a bank note for 20*l.* A clerk of the plaintiff had lost the note in the street; it had been picked up by a woman; the defendant's son took it to the Bank of England to be changed, and brought *the proceeds to the woman, who then gave him two sovereigns. The woman was afterwards taken before the Lord Mayor, and seven sovereigns, which were found upon her, were restored to the clerk as part of the proceeds. At the last London sittings before Bolland, B. the jury thought that the son was agent to his father the defendant, and found a verdict for the plaintiff, damages 13*l.* The learned Judge having reserved leave to move to enter a nonsuit,

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Bompas, Serjt. now moved:

Trover does not lie for the whole note, after the clerk had received 7*l.* as part of its proceeds: for the party must either affirm or disaffirm the whole transaction. Taking the change was affirming the act, and the plaintiff cannot now say that it is wrongful. As where a sheriff sells property of a bankrupt, the assignees of a bankrupt have a right to treat him as a wrong-doer; but if they claim the produce they affirm the sale, and cannot turn round and say it was wrongful: *Brewer* v. *Sparrow* (2).

(1) *Rice* v. *Reed* [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, C. A.

(2) 7 B. & C. 310.

BURN v. MORRIS.

LORD LYNDHURST, C. B.:

In that case the whole proceeds of the sale were taken; that is an adoption of the act; here the receipt of the 7*l.* does not ratify the act of the parties, it only goes in diminution of damages.

VAUGHAN, B.:

Property in the note was proved and a conversion, and there was no waiver of the tort.

Rule refused.

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