THE

REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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BARRISTERS-AT-LAW.

VOL. XL.

1834—1836.

3 KNAPP—7 SIMONS—1 ADOLPHUS & ELLIS—3 NEVILE & MANNING—1 CROMPTON, MEESON & ROSCOE—5 TYRWHITT—6 CARRINGTON & PAYNE.

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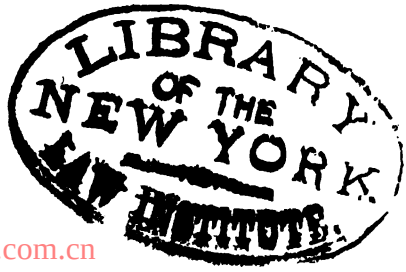

PREFACE TO VOLUME XL.

The proportion of cases having an obvious importance or interest for modern readers increases as the work of the Revised Reports proceeds. *A.-G.* v. *Pearson*, p. 149, is one of the line of cases shewing how a secular court may have to ascertain, as matter of fact, what the tenets of any tolerated denomination are, and to regulate accordingly the application of charitable funds appropriated to that denomination. This has sometimes—but inaccurately, it is conceived—been said to amount to a *quasi* establishment of the institutions affected. A much stronger case is the reconstitution of the Primitive Wesleyan Methodist Society of Ireland, in 1871, by a public Act (34 & 35 Vict. c. 40), to which a catechetical exposition of the Society's principles, so far as regards discipline, is annexed by way of schedule. That exposition certainly disclaims in terms the position of an independent Church for the Methodist Society: but it would seem that, whatever may be the proper name of the action taken by the Legislature on this occasion, the position of a Society which could obtain such an Act cannot be correctly described as one of mere toleration.

A person of anti-ecclesiastic notoriety, Richard Carlile, appears as defendant at the suit of the King—by no means for the first or the last time—at p. 832. Mr. Carlile would not pay Church rates, and, having been distrained on for them, took his revenge by exhibiting effigies of a bishop and a devil arm-in-arm; whereby a crowd collected before his shop in Fleet Street and obstructed the highway

to the common nuisance of the King's subjects. One of Carlile's fancies appearing by his published works was that there was never any such person as King Solomon; if he had never spoken worse of dignities, his acquaintance with King George's and King William's justice would have been less unpleasant. There is no doubt, however, that he was repeatedly treated with harshness which the present age would not approve.

As concerning persons who are disorderly in a more vulgar and secular manner, the Nisi Prius case of *Howell* v. *Jackson*, p. 844, is a sound exposition of the law on what we now call "chucking out." The reporter seems to have thought that the word "skylarking" required explanation (p. 846).

Baron Parke's judgments, which in a few years raised the Exchequer to a fully equal position with the other Courts, are conspicuous in this volume. See for examples *Toogood* v. *Spyring*, p. 523, on privileged communications; *Bright* v. *Walker*, p. 536, on easements and the Prescription Act; *Timothy* v. *Simpson*, p. 722, on the limits of a constable's power to make arrests for the preservation of the peace; and *Joel* v. *Morison*, p. 814, on the distinction between acts of a servant in the course of his employment for which the master is liable and extraneous misuse of the master's property, or other opportunities acquired in the course of service, for which the master is not liable. This last is a Nisi Prius ruling elevated to the first rank of authority by subsequent approval.

Lewis v. *Langdon*, p. 166, shews how far from settled the law of partnership was in Sir Lancelot Shadwell's time. The notion that on the death of one partner the goodwill "survives," which is now thoroughly exploded, appears to have been prevalent in 1835. In *Brooke* v. *Turner*, pp. 218, 225, we find some doubt still lingering whether Bank of England notes were in the nature of money or were only securities; it was an inheritance from one of Lord Eldon's

doubting moods, when he professed not to understand Lord Hardwicke's reason for taking the obviously sound view. Paper which the Legislature has made the lawful equivalent of coined money cannot be treated by the Courts as a mere promise to pay money, though it also be in law and in fact convertible into coin on demand. *Knight* v. *Gibbs*, p. 247, is a rather curious case on special damage in slander; the questions it raises are of a kind which have come to the front again of late years.

The student may not find *Wright* v. *Dewes*, p. 384, very lucid or instructive at first sight; and, as noted at that place, the decision has long ceased to be of direct authority in England. But it belongs to a line of cases which it is not safe to neglect as a whole. The distinction between a sheriff taking goods in execution and a distrainor is that the sheriff acquires possession, and therefore a title of a higher (and more perilous) nature than a distrainor's. A distrainor has not legal possession, cannot maintain trespass, and can become a trespasser only by some positive act of interference: *West* v. *Nibbs*, 1847, 4 C. B. 172, 17 L. J. C. P. 150.

Doe d. *Poole* v. *Errington*, p. 415, is one of the cases which look obsolete at first sight, but probably are not. None of the changes in procedure which, in this jurisdiction, have turned the action of ejectment into a simple action for the recovery of land, independent of any fiction, has abrogated the principle that tenants in common, though they have a single possession, and therefore must join in trespass, have several titles (Litt. s. 314) and therefore must sever in ejectment, as they formerly had to sever in an assize; the real plaintiff's claim, even under the old practice with its fictions, being founded on a right to possess and not necessarily on any actual possession. It would be rash to deny that this principle may be capable of having practical consequences even at this day.

In *Jones* v. *Waters*, p. 694, the Court upheld a custom

for the bellman of Brecon to have the exclusive privilege of proclaiming by sound of bell the sale of all goods brought into the borough to be sold by auction. We do not know whether such a custom is still operative in any common-law jurisdiction, though we have known a reward for the recovery of lost chattels proclaimed with beat of drum—presumably by a privileged officer—in a Norman town. But the argument supplies an interesting collection of authorities on the validity of customs in restraint of trade, which may well be still found useful.

A learned correspondent has pointed out that Lord Eldon's judgment on the appeal from *Allan* v. *Backhouse*, 13 R. R. 23, which is stated in 23 R. R. 167 to be unreported, was printed in 26 Law Mag. 112, see reporter's note to *Jones* v. *Jones*, 5 Ha. at p. 457. On reference to the Law Magazine we find that the judgment is given apparently from some one's uncorrected note, and does not purport to have been reported or authenticated by any member of the Bar. A note of this kind is not properly a report. It certainly could not be used as authority. Being in Lord Eldon's least lucid style, and adding nothing to modern practitioners' knowledge of the long settled law (see per Jessel, M. R., *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591), this note does not seem to us worth reprinting on its merits as a private document.

Colburn v. *Patmore*, p. 493, was discussed at some length in *Burrows* v. *Rhodes*, '99, 1 Q. B. 816, 824, 832, reported too recently for the reference to be noted in the body of this volume. Similarly *Pemberton* v. *Hughes*, '99, 1 Ch. 781, should be noted up against *Alivon* v. *Furnival*, p. 561.

F. P.

JUDGES

OF THE

HIGH COURT OF CHANCERY.

1834—1836.

(4 & 5 Will. IV.—6 & 7 Will. IV.)

Lord Brougham, 1830—1834		*Lord Chancellors.*
Lord Lyndhurst, 1834—1835		
Sir Charles C. Pepys, M. R.	*Commissioners.*	
Sir Lancelot Shadwell, V.-C.		
Sir John B. Bosanquet, J.		
Lord Cottenham, 1836—1841		
Sir John Leach, 1827—1834		*Masters of the Rolls.*
Sir Charles C. Pepys, 1834—1836		
Lord Langdale, 1836—1851		
Sir Lancelot Shadwell, 1827—1850		*Vice-Chancellor.*

COURT OF KING'S BENCH.

Sir Thomas Denman (1), 1832—1850	*Chief Justice.*
Sir Joseph Littledale, 1824—1841	*Judges.*
Sir James Parke, 1828—1834	
Sir W. E. Taunton, 1830—1835	
Sir John Patteson, 1830—1852	
Sir John Williams, 1834—1846	
Sir John T. Coleridge, 1835—1858	

(1) Created Baron Denman March 28, 1834.

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 E. H. Alderson, 1830—1834 . .	
Sir John Vaughan, 1834—1839 . . .	

COURT OF EXCHEQUER.

Lord Lyndhurst, 1831—1834 . . .	*Chief Barons.*
Lord Abinger, 1834—1844	
Sir John Vaughan, 1827—1834 . .	*Barons.*
Sir William Bolland, 1829—1839 . .	
Sir John Bayley, 1830—1834 . . .	
Sir John Gurney, 1832—1845 . . .	
Sir John Williams, 1834	
Sir E. H. Alderson, 1834—1857 . .	
Sir James Parke, 1834—1856 . . .	

Sir William Horne, 1832—1834 . .	*Attorneys-General.*
Sir John Campbell, 1834	
Sir Frederick Pollock, 1834—1835 . .	
Sir John Campbell, 1835—1841 . .	

Sir John Campbell, 1832—1834 . .	*Solicitors-General.*
Sir Charles C. Pepys, 1834 . . .	
Sir Robert M. Rolfe, 1834, 1835—1839 .	
Sir William W. Follett, 1834—1835 .	
Sir Robert M. Rolfe, 1835—1839 .	

TABLE OF CASES

REPRINTED FROM

3 KNAPP; 7 SIMONS; 1 ADOLPHUS & ELLIS; 3 NEVILE & MANNING; 1 CROMPTON, MEESON & ROSCOE; 5 TYRWHITT; 6 CARRINGTON & PAYNE.

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. XL.

BEFORE THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THE NEPTUNE.

WILLIAM HODGES *v.* JACOB SIMS AND WILLIAM UNWIN SIMS (1).

1835.
Feb. 12, 14.
July 1.

The CHIEF JUDGE of the COURT of BANKRUPTCY.

[94]

(3 Knapp, 94—121.) (2)

Material men have no lien for supplies furnished in England on the proceeds remaining in the registry of the Court of Admiralty of a ship sold under a decree of that Court for the payment of seamen's wages.

A mortgagee in possession of a ship so sold is entitled to the remainder of such proceeds after payment of seamen's wages and costs.

ON its return to the port of London from a voyage to Calcutta, the ship *Neptune* was attached, and sold under a decree of the Court of Admiralty, in a suit instituted for the payment of the sailors' wages. After payment of the wages, the remainder of the proceeds, amounting to upwards of 4,000*l.*, were deposited in the registry, and two petitions were presented with respect

(1) Present: The Vice-Chancellor, Mr. J. Bosanquet, the Chief Judge of the Court of Bankruptcy, the Chief Judge of the Prerogative Court.

(2) *The Neptune* has been frequently cited in later decisions. Among the cases in which it has been referred to are *Allen* v. *Garbutt* (1880) 6 Q. B. D. 165, 50 L. J. Q. B. 141; *The Rio Tinto* (1884) 9 App. Cas. 356, 359, 50 L. T. 461; *The Heinrich Bjorn* (1885) 10 P. Div. 44, 51, 54 L. J. Adm. 33, 52 L. T. 560; in H. L. 11 App. Cas. 270, 55 L. J. Adm. 80, 55 L. T. 66.—F. P.

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to them; one by Messrs. Sims & Co., claiming as material men the sum of 361*l.* 11*s.* 3*d.* for ropes and line supplied to the ship for her last and last preceding voyages; and the other by Mr. Hodges, a mortgagee, who had taken possession of the ship by putting a shipkeeper on board before she was seized under the process of the Court, and who claimed the whole of the proceeds in satisfaction of two mortgages for 6,000*l.* and 2,000*l.* and interest, made to him by the owner of the ship subsequently to her leaving London on her last voyage. These mortgages contained the usual power of sale to the mortgagee, and covenant

[*95] *by the mortgagor for the mortgagee's quiet possession in default of payment of the mortgage money; and they had both been duly noted as transfers by way of mortgage on the ship's register, in pursuance of the 6 Geo. IV. c. 110.

On the 7th of February, 1834, the Judge of the Court of Admiralty pronounced the sum of 361*l.* 11*s.* 3*d.* to be due to the Messrs. Sims for the materials and supplies furnished by them for the use and benefit of the said ship, together with the costs of suit, and condemned the proceeds of the said ship, her tackle, apparel and furniture remaining in the registry, in such sum and costs.

An appeal was instituted from this decree to the King in Council.

Holt (K. C.) and *Dr. Phillimore*, for the appellant:

This case presents three points for the consideration of the Court: first, whether any lien at all upon a ship exists by the law of England; secondly, if no such lien exists upon a ship itself, whether it can be deemed to exist upon the proceeds of a ship sold under the decree of the Court of Admiralty, and distributable under that Court's authority; and thirdly, whether the Court of Admiralty is not obliged to notice the rights of a mortgagee of a ship under the Registry Act, when properly brought before it.

On the first point, it is true that doubts formerly existed whether the Court of Admiralty had not the power of enforcing a lien on a ship by the persons who had furnished her outfit, technically called material men. Notwithstanding the statute 15 Ric. II. c. 3, which especially provides that the Admiralty

[*96] *Court shall have no jurisdiction over contracts arising within

the body of any county, as well by land as by water (such as contracts with material men in Great Britain necessarily must be), yet in the reign of Charles II. we find the power of that Court to enforce a lien upon such contracts maintained and asserted in a memorial to the King by Sir LEOLINE JENKINS (1). Two attempts which were made in the Court of Admiralty to enforce such a lien, one in the case of *Hoare* v. *Clement* (2), about the same time, and the other in *Justin* v. *Ballam* (3), in the reign of Queen Anne, were stopped by prohibition. In later times language was held by Lord MANSFIELD, in *Rich* v. *Coe* (4), which seemed to authorize such a lien; but that case has long been held completely overruled by the judgment of the same Judge, in *Wilkins* v. *Carmichael* (5), and is directly opposed to the decisions of Sir JOSEPH JEKYLL, in *Watkinson* v. *Barnardiston* (6), of Lord HARDWICKE, in *Buxton* v. *Snee* (7), and *Ex parte Shank* (8), and of Lord KENYON, in *Westerdell* v. *Dale* (9). The law, indeed, is laid down as settled by Lord TENTERDEN, in his Treatise on Shipping (10), in these terms: "A shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions or other necessaries for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself for the *recovery of their demands." The lien [*97] of a master for advances on account of his ship, either on the ship itself or its freight, is held equally inadmissible: *Wilkins* v. *Carmichael* (5), *Hussey* v. *Christie* (11), and *Smith* v. *Plummer* (12).

Secondly, if material men have no lien on the ship, they can have none on the proceeds of her sale. This very point has been several times determined. In *Watkinson* v. *Barnardiston* (6), which resembles the present case in every point, except that the ship was sold under the decree of the Court of Chancery (as

(1) Life of Sir L. Jenkins, 2nd vol., p. 746.
(2) 2 Show. 338.
(3) Salk. 34; 2 Ld. Ray. 805.
(4) Cowp. 636.
(5) Doug. 101.
(6) 2 P. Wms. 367.
(7) 1 Ves. Sen. 194.
(8) 1 Atk. 234.
(9) 7 T. R. 306, 312.
(10) Part 2, cap. 3, s. 9.
(11) 9 R. R. 585 (9 East, 426).
(12) 19 R. R. 391 (1 B. & Ald. 575).

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appears by Mr. Cox's note to it), it was decided by Sir JOSEPH JEKYLL, that "if a ship be in the river Thames, and money be laid out there, either in the repairing, fitting out, new rigging and apparel of the ship, this is no charge upon the ship, but the person thus employed, or who find these necessaries, must resort to the owner thereof for payment; and in such a case, in a suit in the Court of Admiralty to condemn the ship for non-payment of the money, the courts of law will grant a prohibition; and therefore if the owner, after money thus laid out, mortgages the ship, though it be to one who has notice that the money was so laid out and not paid, yet such mortgagee is well entitled, without being liable for any of the money thus laid out for the benefit of the ship as aforesaid." In *Buxton* v. *Snee* (1), where a similar attempt to the present was made by a person who had repaired a ship, to claim a lien on the proceeds of her sale, Lord HARDWICKE states it as one of the questions in the cause, whether the money arising from the sale should be answerable to the

[*98] *plaintiff; and then, after laying down the law that the ship itself would not be liable, he proceeds to say, "If, therefore, the body of the ship is not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other? so that the foundation of an equity arising from the plaintiff fails." In *Ex parte Shank* (2), Lord HARDWICKE went still further than in the preceding case, for there the person who had repaired the ship, and claimed a lien on it in consequence, had actually got the proceeds of the sale into his own hands; and yet Lord HARDWICKE obliged him to refund it to the assignees of the owner, who was a bankrupt, and ordered him to prove under the commission for the amount due to him for repairs. It would be, indeed, utterly at variance to any analogy drawn from the doctrines of a court of equity, were a distinction taken between the article itself and the proceeds of it when sold. It was said, indeed, in the Court below, that the appellants might have bailed the vessel in the present case, and then no question would have arisen: but what would be thought in the Court of Chancery, if it was asserted that a heir or residuary devisee was not entitled to the surplus of the

(1) 1 Ves. Sen. 155. (2) 1 Atk. 234.

money arising from a sale, under its decree, of land charged with the payment of debts or legacies, because he might have prevented that sale by payment of the charges out of his own pocket?

The whole of the arguments, indeed, on which the Court below rested its decree, depended upon the circumstances of payments having been made to material men out of proceeds remaining in its registry. The principal reported case in which this has been previously *done, is *The John Jackson* (1). In that case, however, not only was the whole proceeding *ex parte*, but Lord STOWELL drew an express distinction between the case of a British owner, as in the present case, against whom the material men could obtain redress in another Court, and that of a foreign owner, as in that case, against whom they could have no other remedy; and on a subsequent application in the same case (2), he rejected the petition, on the ground, "that the Court of Admiralty would not attempt to interfere where the demand itself was the subject of a dispute, which the powers of a court of equity were alone competent to settle." In the latter case of *The Maitland* (3), where the owners appeared and opposed the applications of the material men to be paid out of the proceeds in the registry of a sale of a ship, Sir CHRISTOPHER ROBINSON decided that the demand could not be sustained, after observing, "that there did not appear to be any solid distinction between original suits, and suits against proceeds in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition." It is observable, that all the other cases that have been discovered, in which payments have been directed by the Court of Admiralty of late years to material men, out of proceeds in its registry, such as *Wharton*, *Barbara*, *Adventure*, *Bombay*, and *Unity* (4), have been either *undefended, or the payments have been consented to by the owners.

[*99]

[*100]

Thirdly, the appellant had, by taking possession of the vessel

(1) 3 Rob. 288.
(2) *Ibid.* 292.
(3) 2 Hag. Adm. 253.
(4) See a note of these cases, *post*, p. 14.

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under his mortgage, acquired such an absolute interest in it as entitled him to be considered as the owner in the Court of Admiralty. The 45th section of the 6 Geo. IV. c. 110 (1), provides that no mortgagee of a ship shall merely by reason of the transfer by way of mortgage to him, be deemed to be the owner of it, but that the mortgagor shall not be deemed by reason thereof to have ceased to be the owner, any more than if no such transfer had been made, except so far as may be necessary for rendering the ship available for the payment of the mortgage debt. This provision was intended for the benefit of mortgagees, and to free them from all liability in respect of the repairs or expenses of the ships mortgaged whilst they were not in possession of them; and the 46th section (2) still further protects them, by declaring that their rights shall not be affected by the bankruptcy of the mortgagors, although they may have in their possession or be the reputed owners of the ship. When, however, a mortgagee, as in the present case, has taken possession of the ship, he becomes the legal owner of it, for something more has been done than the mere transfer by way of mortgage, and the provisions of the 45th section no longer apply to him, and the Court of Admiralty is bound therefore to recognize his rights. In the case of *The Flora* (3) the delegates recognized the title of a sheriff who was in possession of a vessel under a writ of *fieri facias* at the time that it was seized under a decree of
[*101] the Court of Admiralty, and ordered *the remainder of the proceeds of the sale, after payment of the wages in respect of which it was seized, to be paid over to him. The legal title of a mortgagee in possession is surely as strong as that of a sheriff under an execution; and there is no decision which at all militates against the apparent duty of the Admiralty Court to notice it, for it retains a jurisdiction over causes of possession: *Warrior* (4). Where, indeed, a mortgagee has not been in possession, that Court has refused to interfere, as in the cases of *The Portsea* (5), *The Exmouth* (6), and *The Fruit Preserver* (7),

(1) Repealed, 3 & 4 Will. IV. c. 50, s. 2. See now Merchant Shipping Act, 1894, s. 34.
(2) See M. S. Act, 1894, s. 36.
(3) 1 Hag. Adm. 198.
(4) 2 Dodson, 288.
(5) 2 Hag. Adm. 84.
(6) 2 Hag. Adm. 88.
(7) 2 Hag. Adm. 181.

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because it has no original jurisdiction over contracts under seal, and its power is not extended in that respect by the 6 Geo. IV. Here, however, the contract was executed, and the mortgagee having become the legal owner of the ship previous to its sale, was entitled to demand the whole of its proceeds, excepting what the Court of Admiralty had legal power of distribution over.

By the general law of the land, no creditors are allowed to sue in the Admiralty Court, unless the contracts under which they claim were made *super altum mare* (1). According to Lord HOLT (2), indeed, it is by mere indulgence, and expressly against the statute of Richard II. Although now *communis error facit jus*, that seamen are permitted to sue in it for their wages, because the remedy there is easier and better. A similar reason may be assigned for its jurisdiction in cases of bottomry bonds. No reason can, however, be assigned for giving it a jurisdiction in the case of debts, either by simple contract or specialty, which have been incurred for the *fitting out of a ship. If it [*102] has exercised such a jurisdiction it is clearly an usurpation; and, as is stated by Lord STOWELL in *The Zodiac* (3), the doctrine which supported it was finally overthrown by the courts of common law, and by the highest judicature of the country, the House of Lords, in the reign of Charles II. (4). The inconvenience of

(1) Com. Dig. tit. "Admiralty," E. 10 and 115.

(2) *Clay* v. *Sudgrave*, 1 Salk. 34.

(3) 1 Hag. Adm. 325.

(4) There does not appear to have been any case decided upon this subject in the House of Lords in the reign of Charles II.; but in the 14 Car. II. a Bill "for settling the Jurisdiction of the Court of Admiralty," was read for the first time in that House on the 3rd February, 1661, Lords' Journals, vol. xi., p. 375; it was read a second time and referred to a committee on the next day (*Ibid.*, p. 377), at which Mr. Justice Hyde and Mr. Justice Twysden were ordered to attend. On the 24th of the following March the Earl of Portland brought up the report of the committee approving the Bill, with amendments, and it was recommitted (*Ibid.*, pp. 415, 416); but nothing further appears to have been done with it. In the 22 Car. II. a Bill for "declaring and ascertaining the Jurisdiction of his Majesty's Court of Admiralty, in Marine Causes," was read for the first time on the 12th March, 1669 (Lords' Journals, vol. xii., p. 307), and on the 14th of the same month read for a second time and referred to a committee, before which the Chief Justice of the Common Pleas, Justice Twysden, Baron Turner, the Judge of the Admiralty, Sir William Turner, and Sir Walter Walker were to attend (*Ibid.*, p. 308). It was before this committee, most probably, that Sir LEOLINE JENKINS, then Judge of the Admiralty, delivered the argu-

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giving a jurisdiction of this kind to a Court which has no power of examining witnesses *viva voce*, or of directing an issue, and which proceeds by different rules of evidence from the courts of common law, is very obvious, especially over a body of [*103] creditors who seldom have their contracts *reduced into writing, and whose demands being for the supply of totally different articles, such as provisions, sails, cordage, &c., furnished by different persons at different times, could not be made the subject of one suit, as seamen's wages are. The affirmance, indeed, of this decree would alter the rights of all persons connected with the shipping of England, and introduce a new system of law utterly at variance with that under which our commerce has had its origin and continued to flourish.

The *King's Advocate* (*Sir D. Dodson*), and *Dr. Lushington*, for the respondents:

By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand. It is useless to cite authorities on this head, for they are undoubted, and are all collected in a note in Lord Tenterden's Treatise on Shipping, part 2, cap. 3, s. 9. The United States of America have in a great measure followed the civil law (1). In England the same law prevailed long after the passing of the statute of Richard II.; for in the resolutions respecting the jurisdiction of the Admiralty, subscribed by all the Judges in 1632, it is specially provided "that if suit be in the Court of Admiralty for building, amending, saving, or necessary victualling a ship against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though [*104] this be *done within the realm" (2). In the reign of Charles II.,

ment which is printed in p. 80 of the first volume of his life, by Sir William Wynn. No report, however, appears to have been made by this committee during that Session of Parliament, and no Bill upon the subject was subsequently brought in.

(1) See the authorities cited in a note to this case, 3 Hag. Adm. p. 14. [Should be 141; but it is thought useless to reproduce that note. See now Kent's Comm. iii. 169—171.—F. P.]

(2) These resolutions are printed

however, suits of this kind in the Admiralty, notwithstanding the able arguments of Sir LEOLINE JENKINS both at the Bar of the House of Lords (1) and in his memorial (2) to the King in Council, were stopped by prohibition from the courts of common law; and since that time, although Lord MANSFIELD expressed himself strongly in favour of them in *Rich* v. *Coe* (3), and *Farmer* v. *Davies* (4), there is no doubt but that the Court of Admiralty has no jurisdiction to entertain a suit by material men against the ship itself.

With regard to the proceeds, however, remaining in the registry of the Court of Admiralty after a sale of a ship under its undoubted jurisdiction, for the payment of the seamen's wages, there is no case in which a prohibition has ever issued from any court of common law to prevent the distribution of them, according to the rules of civil law, amongst the persons who have contributed to her repairs or preservation. Very different considerations apply to the proceeds to those which would apply to the ship itself. The policy of the law of England is, that ships should not be detained in port during the litigation of contested demands. According to the old maxim, "ships were made to plough the ocean, and not to rot in port." No detriment, however, could arise to the commerce of the country by enforcing a lien against the proceeds, whilst the ship herself, released by the sale from the hands of *the marshal, is ready to be employed [*105] in traffic. If the law is settled that tradesmen have no lien at all on vessels for the repairs or provisions they have furnished in England, it will in many cases put foreigners in a much better situation than our own subjects. Suppose, for instance, a ship built in France, repaired in England, and afterwards sold in France or America under a decree of a French or American Court, the proceeds will be divided amongst the creditors according to their demands, the justice of which must be ascertained according to the *lex loci contractus*; and consequently the French material men would be paid to the exclusion of the British. Of

in Brown on the Civil Law, vol. ii. cap. 4, p. 78, and more fully in Prynne on the 4th Institute, cap. 22, p. 100.

(1) Life of Sir L. Jenkins, vol. i., pp. 80 and 84.

(2) *Ibid.*, vol. ii., p. 746.

(3) Cowp. 636.

(4) 1 R. R. 159 (1 T. R. 108).

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late, however, the courts of common law have rather leaned to encourage liens; as in *Franklin* v. *Hosier* (1), where the Court of King's Bench held that shipwrights had a lien on the vessel itself whilst it remained in their possession.

Little weight can be attached to the arguments that have been drawn from the decisions in the Court of Chancery which have been cited. The difference of jurisdictions between the two Courts of Chancery and Admiralty, the one proceeding *in personam*, the other *in rem*, would sufficiently account for the difference in decision; and Lord STOWELL must have been perfectly aware of those cases when he determined the case of *The John Jackson*; and yet, by his judgment there, he must obviously have considered that they ought not to have influenced him. All those decisions, indeed, proceed upon the doctrine that material men have no lien upon the ship itself (which cannot now be controverted), or upon the proceeds of the ship
[*106] when sold under a *decree of the Court of Chancery or a commission of bankruptcy; but they none of them touch the present question, which is, whether they have not a lien upon the proceeds of a ship sold under the decree of the Court of Admiralty, and which can only be determined by the law and practice of that Court, unless where that law is restrained by or opposed to the courts of common law. Natural equity would certainly be in favour of the lien of material men, who would otherwise see their own unpaid-for goods sold to strangers, without being allowed to participate in any part of the produce of the sale.

There can be no doubt of the practice of the Court of Admiralty in cases of this description. From the date of the decree in *The Wharton* in 1761 to the year 1832, a series of precedents have been produced, shewing the constant practice of the Court to allow the lien of material men on the proceeds of sales under its decrees. The decision of Lord STOWELL (a Judge so careful not to exceed his jurisdiction, that no prohibition ever issued against him during the whole time he held the office, from 1798 to 1827), in *The John Jackson*, would by itself be sufficient authority as to the existence and legality of it; and no inference can be drawn from the fact alleged on the other

(1) 23 R. R. 305 (4 B. & Ald. 341).

side, that these decrees were all made in unopposed suits. The very circumstance of the law being established would prevent owners from coming in and offering a hopeless opposition. *The Maitland* (1) is no authority against the practice; for in that case not only were the accounts of the material men disputed, which has not been attempted here, but the owner appeared and contested the demand, which it would have been very inequitable to have enforced *against him, as the supplies had been furnished [*107] at the time that the ship had been chartered for three voyages to other persons who had become bankrupt, and against whom he could only have recovered a dividend. In the present case, however, no owner appears, and unless the law of the Court has been altered since the decisions in *The Portsea*, *Exmouth*, and *Fruit Preserver*, it cannot recognize a mortgagee as a party entitled to appear before it. The statute of 6 Geo. IV. c. 110, in fact, has the effect of preventing a mortgagee, whether in possession or not, from becoming an owner; for the 45th section provides that "the person or persons to whom such transfer (mortgage) shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner of such ship or vessel:" and then it proceeds to declare further, "nor shall the person or persons making such transfer be deemed, by reason thereof, to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred available, by sale or otherwise, for securing the payment of which such transfer shall have been made." And the 46th section goes on to declare, that the right or interest of the mortgagee shall not be in any manner affected by the bankruptcy of the mortgagor, and shall be preferred to any right, claim, or interest of the assignees. The mortgagor, therefore, still remained the owner of this ship when she was seized, although his rights were liable to be defeated by the sale or other disposition of her by the mortgagee, in order to render her available for the payment *of his debt. No owner is [*108]

(1) 2 Hag. Adm. 253.

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therefore now before the Court, and no other person is entitled to oppose the application. Had the mortgagee, indeed, come forward and bailed the ship, there would have been an end of the question. This, however, he did not choose to do; and as a sale under a decree of the Court of Admiralty binds the right even of the Crown, *Attorney-General* v. *Norstedt* (1), he cannot complain of the situation in which he now is.

There can be no difficulty, as has been imagined on the other side, in taking the accounts or ascertaining the demands of material men in suits of this nature. They will be referred to the registrar and merchants, to whom, in cases of bottomry bonds and prizes, questions of a similar and frequently of a much more complicated nature are constantly referred, and who have always given great satisfaction by the way in which they have performed the duties assigned to them.

This Court is now sitting as a Court of Appeal from the Court of Admiralty. In a question exclusively relating to its law and practice, they can only be guided by the law which has been constantly adopted, and the practice which has been without deviation followed in that Court. It is not for them to inquire what would be the course pursued by the courts of common law were a prohibition allowed; and it is undoubted that no prohibition has ever issued to prevent a practice of the nature in question. It is to be hoped, therefore, that they will follow the line of precedents which have been furnished by Lord STOWELL and the other Judges of the Admiralty, and affirm the decision of the Court below.

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Holt (K. C.), in reply:

This Court, sitting as a Court of Appeal from the Court of Admiralty, is bound as much to act according to the law of the land, as the Court of King's Bench would be, if this case were brought before it by an application for a prohibition.

(Mr. J. BOSANQUET: We are bound to restrain the Court of Admiralty, as much as the Court of Admiralty ought to have restrained itself.)

(1) 17 R. R. 554 (3 Price, 97).

If, then, the Court of Admiralty would be restrained from giving a material man satisfaction of his demands out of the ship, it must be equally restrained from giving it to him out of the proceeds of the ship; for as Lord HARDWICKE (1) says, "If the body of the ship is not liable or hypothecated, how can the money arising from the sale be affected or followed, the one being consequential on the other?" There is no difference in principle between the Courts of Admiralty and Chancery as to conversion; they both hold that the proceeds of a thing sold must be subject to the same equities as the thing itself previous to sale. If, indeed, the Court of Admiralty did not do so, what lien would there be on the proceeds of this ship? If there was no lien, on what ground is the present decree attempted to be supported? If it is true that the original jurisdiction of the Court of Chancery is *in personam*, but it has also an auxiliary jurisdiction *in rem* (2), by virtue of which it appoints receivers, and directs the sheriff to deliver over possession of lands.

If the decree in the present case is affirmed, it will have the effect of giving the Court of Admiralty a power *to try questions [*110] triable at common law, in direct opposition to the statutes 13 and 15 Ric. II., and 2 Hen. IV., the view, tendency and purport of which is, as stated by Lord MANSFIELD, in *Lindo* v. *Rodney* (3), to prevent that Court from trying them. This *dictum* is fully warranted by Lord Coke's Institutes, part 4, cap. 22, p. 135, and 2 Rolle's Abridgment, 287. The only cases in which the Court of Admiralty has ever been allowed to exercise any jurisdiction over contracts, are seamen's wages, which is a matter of indulgence, and bottomry bonds, which, being executed in foreign countries, must be judged of according to the rules of civil law, and not of our own common law. The same reasons which have always operated upon the Court of King's Bench, to prohibit the Ecclesiastical Courts from hearing objections to a churchwarden's accounts, as in *Leman* v. *Goulty* (4), and from receiving exceptions to an inventory, as in *Henderson* v. *French* (5), must be equally strong against permitting the Court of Admiralty, with a similarly

(1) 1 Ves. Sen. 155.
(2) Fonblanque on Equity, cap. 1, s. 6, p. 35.
(3) 1 Doug. 615.
(4) 1 R. R. 624 (3 T. R. 3).
(5) 5 M. & S. 406.

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defective jurisdiction, to proceed to decide upon contracts made in England, and which ought to be judged of solely according to the common law of the land in which they have been made.

At the close of the argument the case was adjourned for consideration, and the proctors were desired to furnish the Court with notes of the unreported cases that had been cited in argument (1).

(1) Notes of seven cases, including *The Adventure*, 3 Rob. 290, and *John*, 3 Rob. 288, were furnished by the proctors to the Judicial Committee. The five unreported cases were:

The Wharton, January, 1761.—The ship was sold at the suit of the surgeon, and after the proceeds had been paid into the registry, and he paid thereout, two actions were
[*111, *n.*] commenced against the *remaining proceeds by material men. The Judge, on motion supported by affidavits, decreed the following sums to be due to the parties, with costs; Messrs. Bedd, Ede & Co., as furnishers and fitters out, 183*l.* 8*s.* 7*d.*; Messrs. Ede & Co., ditto, 68*l.* 11*s.* 5*d.* The remaining proceeds were paid out to the assignees of the owners, who had become bankrupts. No appearance was given for the owners or assignees.

The Barbara, 1761.—The ship was sold at the suit of the mate. Afterwards, Messrs. Ede & Co., the furnishers and fitters out, on motion, arrested and received the whole balance remaining, of 82*l.* 4*s.* No appearance was entered on the part of the owners.

The Harmonia, 1817.—This was a Russian-built ship, and although the sole property of a British owner, she
[*112, *n.*] was not entitled to a British register. The owner having become bankrupt she was arrested for wages, and sold with permission of the Russian Consul, and the proceeds paid into the registry. After the wages and costs had been paid, a provision merchant applied to the Court to arrest the proceeds for the amount of his account for provisions furnished to the ship, of 49*l.* 5*s.* 4*d.* The assignees of the owner opposed the motion by counsel, and the Judge decreed to hear both parties on petition, but the assignees were advised by their counsel to abandon their opposition, which accordingly they did. Two bills, one to a provision merchant, for 49*l.* 5*s.* 4*d.*, and another to a brewer, for 50*l.* 13*s.* 6*d.*, were then paid out of the proceeds, and the remainder was paid to the assignees.

The Bombay, 1832.—This ship was sold for wages, and after payment of them and the costs, various applications were made by material men. A proctor appeared on behalf of the owner, but after advising with counsel the opposition was abandoned, and different claims of material men for ropes, for carpets and floor-cloth, for coppering ship, for repairs of ship, for painting ship, for ironmongery, and for shipwrights' work, amounting altogether to 540*l.* 0*s.* 3*d.*, were paid out of the proceeds, the remainder of which were taken out by the owners.

The Unity, 1830.—This ship was sold for wages, and after payment of them and costs out of the proceeds paid into the registry, a *ship-builder, who had repaired the ship, arrested the remaining proceeds, and the Judge ordered him the whole of them, amounting to 68*2l.* 10*s.* 2*d.*, in satisfaction of his claim. There was no appearance by the owner.

THE CHIEF JUDGE OF THE COURT OF BANKRUPTCY:

[111]

In this case, the ship *Neptune* was, in May, 1832, arrested under warrants in different actions in the High *Court of Admiralty, at the suit of the mariners, for their wages. At the time of the arrest the ship was in the possession of the appellant, William Hodges, who had previously taken possession of the ship and her register, by virtue of two several deeds of mortgage, executed by the owner while the vessel was at sea, as a security for debts due to Hodges to the amount of 8,000*l.*; and on the 1st of June, Hodges procured an indorsement of his mortgages to be made on the register, according to the provisions of the Registry Acts. No appearance, however, was given in the Admiralty Court, either for the owner or the mortgagee, and the ship was therefore sold in the usual way, under the directions of the Court, and the proceeds of the sale were deposited in the registry.

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After payment of the wages and costs in the several actions, there remained in the registry a balance of about 4,000*l.*, which was arrested at the suit of Messrs. Sims & Co., rope-makers, who claimed a lien thereon in respect to a debt of 361*l.* 11*s.* 3*d.* for cordage supplied by them for the use of the *Neptune* while lying in the port of London, prior to her last voyage from England in 1831. On the 8th of January, 1834, Mr. Hodges, in his character of mortgagee in possession, appeared in the suit instituted by Messrs. Sims against the proceeds, and denying their right, as material men, to payment of their claim out of the proceeds, prayed that the warrant issued at their suit might be superseded. The learned Judge of the Court of Admiralty, after hearing the parties, decided in *favour of the material men, and pronounced the sum of 361*l.* 11*s.* 3*d.* to be due to Messrs. Sims & Co., and condemned the proceeds remaining in the registry in such sum and costs. Against this sentence Mr. Hodges has appealed to his Majesty in Council; and other demands having been in like manner preferred before the Court of Admiralty by other material men, for supplies furnished in England, their claims have, by agreement between the parties, been suspended, and made to depend upon the result of this appeal, in which the appellant seeks to have the decree in favour of Messrs. Sims & Co. reversed,

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and also to have the proceeds remitted, with a view to their being paid out to him.

Two questions, therefore, were raised and argued; first, whether these material men are entitled to any lien upon the proceeds remaining in the registry; and if not, secondly, whether Mr. Hodges, as mortgagee, is entitled to have the balance paid out to him.

The case was very ably argued before their Lordships on the 12th of February last, when, in deference to the high character and long experience of the very learned Judge who decided the cause below, and in consideration of the extensive importance of the question under discussion, not only to the parties interested in this suit, but also to the commercial world at large; their Lordships postponed their judgment, that they might give the subject the deliberate attention it deserves, and carefully examine the several authorities that were brought under discussion in the argument, or that might be discovered upon further search amongst the records of the Court of Admiralty.

Their Lordships have been since furnished with extracts from
[*114] those records, which they have fully *examined; and I am now commissioned by the members of the Judicial Committee, who were present at the argument, to declare their Lordships' unanimous opinion, that the decree appealed from ought to be reversed, and that the appellant, as mortgagee in actual possession at the time of the seizure, is entitled to have the balance of the proceeds paid out to him.

It is conceded to the appellant by the judgment of the Court below, and was admitted at the argument by the learned counsel for the respondents, that as the law now stands, material men without possession have no lien upon a ship itself for supplies furnished in England, and that Messrs. Sims & Co. could not have prosecuted their suit in the Court of Admiralty against this ship in specie. But a distinction has been taken and relied upon between proceedings instituted by material men against the ship in specie, and proceedings after lawful arrest and sale of the ship, at the suit of the mariners, against the proceeds remaining in the registry. The principles upon which the learned Judge of the Admiralty Court rested his opinion in favour of the material men,

appear from the printed report of this judgment to be these, that when a ship has been arrested, and sold under process from the Court of Admiralty, that Court, after satisfying the immediate object of the sale, holds the balance of the proceeds *in usum jus habentium*. That the *jus habentes* are to be ascertained according to the law of the Court in which the fund is administered; that the law of the Court of Admiralty is the civil and maritime law, except in those points in which it has been expressly controlled by the municipal law of England; that by the civil and maritime law material men have a lien on the ship and proceeds, and that although the municipal *Courts of England have restrained pro- [*115] ceedings in the Court of Admiralty, at the suit of material men against the ship itself, for supplies furnished in England, yet that no prohibition has ever issued with respect to suits against the proceeds after lawful sale; that such suits have, on the contrary, often been instituted, and sentence pronounced in favour of material men, without either prohibition or appeal; that the reasons upon which the right of material men to arrest the ship in such cases has been repudiated by the law of England, are not applicable to the arrest of the proceeds after a lawful sale; and therefore, that as the *Neptune* was lawfully arrested at the suit of the mariners for their wages, and as the appellant did not intervene, as he might have done, to bail the ship and prevent the sale, he had by his own default acquiesced in the sale, and allowed the proceeds to come into the registry of the Court, and thus, according to the rules and practice of the Court, to become subject to the lien of the material men, from which the ship in specie would have been exempt; and the counsel for the respondent endeavoured to support the decree upon the same grounds.

It seems to have been assumed in the argument of this case, that prior to the reign of Charles the Second, the law of England, as administered in our Admiralty Court with respect to the rights of material men, corresponded with the civil and maritime law, as adopted and acted upon by other nations in Europe; and that it was in the reign of Charles the Second that the enforcement of those rights had, from motives of commercial policy, been first limited and restrained by the interference of the municipal Courts in prohibiting all proceedings against the ship itself. And the

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whole fallacy of the respondent's arguments lies in this assumption, *for it must be conceded to them, that if by the maritime law of England, persons furnishing supplies to ships in this country had, prior to the reign of Charles the Second, a lien on the ship for the amount of those supplies, not only would their right to arrest the proceeds of the sale remain unaffected by the prohibitions issued by the municipal Courts in suits against the ship itself, but such prohibitions would themselves have been indefensible upon any known principle of law, for no authority but that of the Legislature could alter the law, or destroy the existing rights of the material men by taking away their remedy. But the common law Courts assumed no such power; they did not affect to alter the law or control the exercise of acknowledged rights, but they declared that the maritime Courts had erroneously applied the doctrine of foreign maritime law to contracts made in this country, and denying that material men ever had by the English maritime law, in respect of such contracts, any lien upon the ship, or any preference over other simple contract creditors, they prohibited those proceedings which could only be justified by the existence of such a lien. It is unnecessary to enter into any detail of the cases upon this subject, the substance and result of which are concisely, and in the opinion of their Lordships correctly stated by Lord Tenterden, in his admirable work on Shipping, and from which he deduces this summary: "that a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions or other necessaries for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of *their demands" (1); and the reason of this, as the learned author states in an earlier passage, is, because the law of England never had adopted the rule of the civil law with regard to necessaries furnished in England (2).

[*117]

If then material men never had any lien on the ship itself, in respect of supplies furnished in England, how could they ever acquire a lien upon the proceeds of the sale of the ship?

(1) Abbott on Shipping, part 2, cap. 3, p. 134, of 4th edition.

(2) *Ibid.*

The language of Lord HARDWICKE, in *Buxton* v. *Snee* (1), seems to be decisive upon both branches of the proposition. In that case, the ship had been sold under the authority of the Court of Chancery, and the proceeds were in the hands of the Registrar of that Court. A party, by bill, claimed to be paid out of those proceeds a debt due to him for repairs done to the ship in England; but Lord HARDWICKE, though he began by saying that it was undoubtedly a harsh defence, dismissed the bill, so far as it sought any remedy against the body of the ship, or the money arising from the sale of it; and in the course of his judgment, after declaring that he knew of no case where the repairs, &c. had been held a charge or lien on the body of the ship, and citing the case of *Watkinson* v. *Barnardiston* (2), as a direct authority to the contrary, he proceeds: "if, therefore, the body of the ship is not liable, or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other?"

But it has been argued, that inasmuch as the Court of Chancery only proceeds *in personam*, and the Court *of Admiralty *in rem*, the decisions in the former Court do not necessarily conclude a similar question in the latter. It should, however, be remembered that this is not a question of jurisdiction but of right; that the question is, whether material men have, by the law of this country, any lien or preferable claim in respect of their debt over other creditors, not in what Court or by what means that claim is to be enforced; and besides this, in the case of *Buxton* v. *Snee*, the fund was in the hands of the Registrar of the Court of Chancery, and was therefore as much under the direct and immediate control of the Lord Chancellor as the proceeds in the registry of the Admiralty are under the dominion of that Court. The cases of *Ex parte Shank* (3), and *Wood* v. *Hamilton* (4), are also authorities for the same position, that material men have no better claim against the proceeds of a ship when sold than they had against the ship itself in specie.

[*118]

But it is said that the right of material men to be paid out of

(1) 1 Ves. Sen. 154.
(2) 2 P. Wms. 367.
(3) 1 Atk. 234.
(4) Abbott on Shipping, part 2, cap. 3, p. 140, 4th edition.

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the proceeds in the registry has been established by a series of decisions in the Court of Admiralty, which have never been called in question, either by prohibition or appeal, and several cases were cited, some from printed reports, others from manuscript, extracts from the original records in the Tower; and their Lordships have been furnished with copies of those extracts. The result of all these cases, upon examination, appears to be this: There are seven cases between the years 1760 and 1833, in which the material men have arrested the balance of the proceeds
[*119] remaining in the registry, and have received payment *of their claims by order of the Court. In five cases out of the seven, there was no appearance on the part of the owners or their representatives; but in one of the five, the assignees of the owners, who had become bankrupt, afterwards claimed and received the residue of the fund still left in the registry, after satisfying the demands of the material men. In the other two cases there was an appearance in the one by the owner himself, in the other by the assignees of the owner, who had become bankrupt; and in both these cases the material men were first paid their claims, and the balance only was paid out to the owners and the assignees; but this appears to have been in both cases with the consent of parties under the advice of counsel.

In the case of the solvent owner, who would be personally responsible for the debt, the course pursued was the most prudent he could adopt, whatever might have been his rights, since he only paid what in law he was liable for, and saved himself all further litigation on the subject. The other case, that of *The Harmonia* in 1817, is the only case where the representatives of the owner appeared, and submitted to the claim of the material men contrary to their interest; but still this was but a sentence by consent, and rests upon no intelligible principle, and cannot therefore be put in competition with the claim of decisions by which the contrary doctrine has been established in other Courts: and there is one case in the Admiralty Court, namely, that of *The Maitland*, reported in 2 Hagg. 253, in which Sir Christopher Robinson places the decisions above referred to in their true light. After some preliminary observations, he says, in p. 255: "There does not seem to be any solid distinction between

original suits, and suits *against proceeds in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the Court, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition." [*120]

The only other argument suggested for giving to material men a lien against the proceeds, which they would not have had against the ship, is that, as the appellant had omitted to bail the ship, as he might have done, he must be taken to have acquiesced in the sale of it, and the application of the proceeds, according to the course and practice of the Court. How far this inference may afford a justification of payments made to material men whose claims are unopposed, it is not necessary in this case to decide; but here the appellant intervened to deny the right of the material men, and it would be rather a strong measure to infer a man's acquiescence in a payment which he expressly resists. Their Lordships are, therefore, unanimously of opinion, that the claim of Messrs. Sims & Co. to payment out of the proceeds cannot be supported, and that the sentence pronounced in their favour must be reversed; and then, adopting the principle correctly laid down by the learned Judge of the Court below, that the proceeds remain in the registry *in usum jus habentium*, according to the law administered in that Court, their Lordships are of opinion, as there is no further claim by any person having a lien upon the proceeds, that the balance should be paid over to the appellant, out of whose possession the ship was taken, and who for the purpose of rendering the ship available for the payment of his debt, must be considered as the owner.

But as the payment of the proceeds to himself formed no part of the appellant's claim in the Court below, it will not be necessary for his Majesty to direct the transmission of the proceeds; it will be sufficient for their Lordships to recommend that the decree in favour of the respondents should be reversed, and that the cause should be remitted to the Court of Admiralty, where the appellant may apply to have the proceeds paid out to him. [121]

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The appellant accordingly, after the report had been confirmed, applied to the Registrar of the Court of Admiralty, who paid out the proceeds to him.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

1835.
May 23.
June 18, 20, 26, 27.
July 3.

Lord BROUGHAM.
PARKE, B.

[257]

WILLIAM RICHARD SWIFT *v.* ELIZABETH CATHERINE KELLY (1).

(3 Knapp, 257—302.) (2)

A marriage having been clandestinely celebrated between two English persons resident at Rome, both previously Protestants, and one a minor; who in conformity with the Roman law had abjured the Protestant faith and been admitted into the Roman Catholic Church, one of them making such abjuration two days previous, and the other immediately before the ceremony, was repudiated by the lady in a suit for restitution of conjugal rights, on the ground that the priest was not properly qualified to perform the ceremony, and that she had never become or intended to become a Roman Catholic, her abjuration being made without her knowledge or consent: Held by the Judicial Committee, reversing the judgment of the Court below, that it appearing by the evidence that the marriage ceremony and act of abjuration were duly performed according to the Roman law, the marriage was a valid and subsisting contract; and restitution of conjugal rights decreed.

THIS was originally a cause of restitution of conjugal rights promoted by the appellant against the respondent, who denied the fact of the marriage, and pleaded that if any marriage did take place in point of form, it was invalid and null by the law
[*258] of Rome, where the parties were then sojourning, and *where the ceremony was performed. The cause therefore assumed the form of a suit to try the validity of the marriage, which had been contracted between the parties under the following circumstances:

In January, 1830, the appellant, Mr. Swift, with his mother, the Countess de Morlandi, and his sister and her husband, the Chevalier de Sodré, were at Florence. The respondent, Miss

(1) Present: The Lord President (the Marquis of Lansdowne), Lord Brougham, the Vice-Chancellor, Mr. Baron Parke, and the Chief Judge of the Court of Bankruptcy. [It is not thought necessary to reproduce Sir JOHN NICHOLL's judgment, which is given as an appendix to the original report.—F. P.]

(2) *Moss* v. *Moss*, '97, P. 263, 66 L. J. P. 154, 77 L. T. 220.

Elizabeth Kelly, and her mother, Mrs. Kelly, were also there at the same time; the families became intimate; and a mutual attachment was formed between Mr. Swift and Miss Kelly, which was concealed from Mrs. Kelly. Both parties were of respectable families in Ireland, and Protestants. Mr. Swift was about 23 years of age, Miss Kelly about 19, and she was entitled to a considerable fortune.

About the 25th February, 1830, Mrs. and Miss Kelly left Florence for Rome. They were overtaken on the road by Mr. Swift, and his mother and her family, and all arrived at Rome together about the 2nd of March, and hired apartments at the "Hotel della Gran Bretagna."

On the 8th March, Mr. Swift, with the consent of Miss Kelly, wrote a letter to Mrs. Kelly, making proposals of marriage for her daughter. On the 9th, Mrs. Kelly wrote an answer, declining his proposals, on the ground that her daughter's fortune was inadequate to support a family, and for other reasons, but expressed her sense of his gentlemanlike conduct, and her hope that they might continue friends, and meet as formerly. Mr. Swift, on the following day, March 10th, wrote again to Mrs. Kelly, urging her to consent to his suit, and answering her objections. Mrs. Kelly, however, on the 11th March, wrote to him in reply to his second letter, finally rejecting his proposals.

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Various letters, written both at Florence and Rome, passed between the parties, evincing, on Miss Kelly's part, her affection for and confidence in Mr. Swift, and proving that they were in the habit of meeting and conversing together clandestinely.

None of these letters were dated; but in one, alleged by Mr. Swift to have been written by Miss Kelly, at Florence, in reply to his proposal of a secret marriage, she told him, that if, after he was acquainted with certain circumstances she then communicated, he was disposed to repeat his questions, she would answer them in any way he wished. Subsequently, but it did not appear when, Miss Kelly wrote and sent a note to Mr. Swift, in the following terms: "*Si la mano, Io ti prometto.* Sunday morning, 4½ o'clock."

About the middle of March, Mr. Swift, with a view to a secret marriage, applied to Signor Piferi, a Tuscan priest, and teacher

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of the English language, at Rome, and by him was introduced to Signor Mazio, a Roman proprietor, to whom Mr. Swift stated the mutual passion between himself and Miss Kelly, that they wished to be united in marriage together, and had between themselves resolved first to make abjuration of the errors of their Protestant religion, and to enter the bosom of the Holy Roman Catholic and Apostolic Church, and then to contract a marriage between them according to the rites of that Church. He therefore requested Signor Mazio's assistance to effect the business. About the 17th March, Signor Mazio introduced Mr. Swift first to the Cardinal Vicar of Rome, who questioned him as to his sincerity; and subsequently to the Reverend Father the Commissioner of the Holy Office, to which tribunal it appertained to [*260] receive the abjuration of the parties. A petition was *afterwards presented in the joint names of Mr. Swift and Miss Kelly, to the Cardinal Vicar, and thereupon, on the 23rd or 24th March, 1830, the "Cardinal Zurla, Vicar General of his Holiness the Pope, granted authority to the Reverend Father Ludovico Lepri, as a special delegate from the Holy Roman and Universal Inquisition, for the purpose of receiving the abjuration of the errors of the Anglican sect hitherto held and professed by William Richard Swift, son of, &c., and Elizabeth Kelly, daughter of, &c.; as well as for receiving the supplemental oath of the parties, in proof of their having been baptized, and their being in a free state, to the end that, (upon consideration of the peculiar and serious circumstances which were represented to him, a general dispensation being first granted of the publication of the banns after previous abjuration, and formal profession on their part of the Roman Catholic faith, upon their solemn oath,) he might assist and officiate in the evening of any day, in any week, and in the presence of witnesses, on the celebration of the marriage which they much wished to contract together; and with due observance of all the formalities which are prescribed by the Holy Council of Trent; of all which an authentic certificate should afterwards be issued and delivered, to be presented and registered in the Secretary's Office of the Tribunal of Marriage of the Vicariat of the Holy Metropolis."

On 25th March the Commissioner of the Holy Office reported

to the Cardinal Vicar, that, "At the audience of yesterday the sentiments of his Eminence the Signor Cardinal Vicar, respecting the prudential motives which rendered expedient the permission of the marriage in question of the two Irish individuals, *being [*261] reported to his Holiness, his Holiness was not opposed to it, but he, however, showed himself immovably desirous that the abjuration should precede; and for the rest left the affair to its course." Accordingly, on the 24th of March, 1830, Mr. Swift appeared before the Office of the Inquisition, and there abjured the Protestant religion, received absolution, and was reconciled to the Roman Catholic Church, in proof of which the Tribunal of the Vicariat granted their certificate. In the evening of the following day, the 25th of March, which was in Lent, the alleged marriage was solemnized by the special delegate, the Abbé Ludovico Lepri, in the presence of Signors Mazio and Gregori, and was certified by Lepri to have been duly performed after all the prescribed preliminaries had been complied with. The circumstances under which the marriage ceremony was solemnized, were sworn to be as follows:

Late in the evening of the 25th of March, the Priest Lepri, Signors Mazio and Gregori, and Mr. Swift, met at the apartments of Mr. Swift at the "Hotel della Gran Bretagna," and after some conversation between them, about eleven o'clock at night, Mr. Swift left the room, and soon after returned with Miss Kelly, whose apartments were below in the same hotel. The Abbé Lepri informed Miss Kelly that he was delegated to receive her abjuration, and assist at her marriage; and asked her if she had any objection. To which she answered in Italian, "None, sir." He asked whether she was disposed to become a Roman Catholic and make abjuration, and she answered "Yes;" upon which her abjuration was taken; she first reading aloud the formula of abjuration, which was in Italian, and shewing that she understood and assented to it. *The Signor Mazio after- [*262] wards, for precaution, interpreted in English the substance of it. Miss Kelly then signed the abjuration, and the previous act of spontaneous assent; and she and Mr. Swift signed the supplemental oath as to their baptism, &c. The Abbé Lepri then called the attention of the parties to the obligations of matrimony,

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blessed the nuptial ring, which was placed by Mr. Swift on the finger of the bride, and asked each of them—"Are you, sir, content, and are you, miss, content, to take each other according to the rites of the Holy Mother Roman Catholic Church?" to which each expressly and verbally assented. Signor Mazio explained everything in English; but both parties appeared quite conversant with the Italian language. The whole transaction occupied about twenty minutes, and Miss Kelly returned downstairs to her mother's apartments.

After the marriage, while the parties remained at Rome, a clandestine correspondence of notes in affectionate terms, but without dates or signature, and of frequent meetings by appointment, was continued between them. Miss Kelly never attended Roman Catholic services, but continued, as before, a Protestant, and received the sacrament as a Protestant at Easter. On the 16th of April, 1830, Mrs. Kelly and her daughter left Rome for Naples, and on the preceding day she sent two notes in pencil to Mr. Swift, informing him at what hotel her mother proposed to stop at Naples. Mr. Swift followed them, and on the 21st of April wrote a letter to Mrs. Kelly, informing her of his marriage with her daughter, with the reasons why it had been solemnized secretly. Mrs. Kelly and her daughter repudiated the marriage,

[*263] and soon after returned to England, where Mr. Swift took *out a citation against his alleged wife for a restitution of conjugal rights.

The facts above-mentioned were pleaded by Mr. Swift in his libel and allegations; and he prayed that the marriage alleged to have thus taken place at Rome might be pronounced good and valid, as being conformable to the laws of that country. On the other hand, in her counter allegation, the lady pleaded that in fact no marriage took place; that she did not at the time intend to marry, but merely to promise to marry Mr. Swift on her coming of age; and that if any marriage ceremony took place, it was without her knowledge or consent; that she never made, or intended to make, abjuration, or did any act whatever knowingly in order to become a Roman Catholic. She also pleaded that even if any ceremony of marriage took place it was unlawful and invalid by the laws of Rome, and particularly by the decree of the Council of Trent, as it was solemnized during Lent, between

heretics, by a priest not their parish priest, and upon a license obtained by fraudulent misrepresentations. And she therefore prayed that the marriage might be declared null and void.

At Rome witnesses were examined on the part of Mr. Swift, under a commission from the Arches Court of Canterbury, including the Priest Lepri, Signor Mazio, and Dominico Gregori, the persons officiating and present at the marriage; and various documents produced, comprising copies of the certificates of the abjuration of both parties; the delegation from the Cardinal Vicar for the celebration of the marriage; the petition of both parties to be allowed to make supplemental oath of their being in a free state, and of their having been baptized; the reference to the *Cardinal Vicar, and delegation to him to receive the [*264] same; the certificate of the Commissioner of the State Office in proof of the approbation by the Pope of the intended marriage of the parties—the abjuration first taking place; and the joint affidavits of the parties of their having been baptized and being in a free state. A certificate of the Cardinal Vicar, being the representative in Rome of the Bishop or Pope, was also put in. The examination of the Chevalier de Sodré, the brother-in-law of Mr. Swift, who deposed to having witnessed Mr. Swift's clandestine admission and departure through the window of Miss Kelly's apartment, subsequent to the 25th of March, was also put in.

The letters and notes of the parties already alluded to were put in, as well as various others, which, like the former, were without date or signature, but bore internal evidence of having been written and sent subsequent to the 25th of March.

On the part of Miss Kelly witnesses were examined (consisting, among others, of her maid), to shew the impossibility of Mr. Swift's having had access to her apartment subsequent to the marriage, as was alleged, and to negative the presumption of the marriage having been consummated. Mrs. Kelly (her mother) was also examined to the same point, and also to shew that Miss Kelly had never conformed to the ceremonies of the Roman Catholic Church, but continued a Protestant, and received the sacrament as such. Several distinguished advocates of the Roman Bar were also examined on both sides upon a supposititious case, with a view to determine whether the conversion *and abjuration [*265]

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which was alleged on the part of Miss Kelly to have been made with a mental reservation, was binding on her conscience, and whether she was properly admitted into the bosom of the Roman Catholic Church; also to state whether the ceremony, being performed by a priest, who was not the parish priest, (though delegated by the Cardinal Vicar, who was presumed to be the representative of the Pope in Rome,) and during the season of Lent, was regular or legal. These advocates, upon some parts of the case, gave conflicting opinions; but all were agreed that marriages at Rome are governed by the decrees of the Council of Trent. And they stated that marriage is thereby declared a sacrament; and in sect. 24 of the Reformation of Marriage, ch. 1, it is decreed that, "If any man shall presume to contract marriage otherwise than in the presence of the parish rector, or of another priest delegated by the said parish rector, or the ordinary, and in the presence of two or three witnesses, the Holy Synod renders them unapt for so contracting, and it declares such contracts null and void." That it is further laid down by Pirking, in the Decretal, Book IV. Tit. 392, No. 10, that "Foreigners who are merely passing through a place in which the decree of the Council of Trent is received, cannot validly contract marriage, unless it be done with the assistance of the parish rector, and before witnesses." It was proved that the Cardinal Vicar, being the representative of the Pope as the Bishop of Rome, has the powers at Rome of the ordinary in respect of marriages, and has the power to delegate a simple priest, not the parish rector, for celebrating marriage; and also by his license (without a dispensation) to permit a marriage to take place in Lent, as, in fact, there is no prohibition against a private marriage, but only against a public wedding, *during the exceptive times.—Council of Trent, ch. 10, sect. 24, of Reformation. The marriage of a minor without consent was also stated to be valid by the same laws, though illicit; there existing only against it an impediment termed (*impediens*), not absolute (*dirimens*), so as to make it void.

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The cause was argued at great length in the Arches Court, and the learned Judge (Sir J. NICHOLL) gave his judgment, having taken time to consider, on 9th July, 1833, and pronounced the

marriage null and void, on the following grounds: 1st, that the fact of the parties having renounced the Protestant religion and become Catholics, was false and colourable; 2ndly, that the license was granted only on the supposition that the parties really wished to abjure Protestantism and become Catholics; that no sincere abjuration was made, and the license was therefore void; and 3rdly, that the marriage ceremony, held by the law of Rome to be a sacrament, was grossly profaned; and consequently that the marriage was, by the law of Rome, null and void.

From this judgment Mr. Swift appealed to his Majesty in Council. The appeal came on for hearing before the Judicial Committee of the Privy Council on the 23rd of May, 1835, and was heard on that and the five successive days of the sittings.

Mr. Pemberton, K. C., and *Dr. Phillimore*, for the appellant:

Mr. Pemberton, K. C.:

The point at issue between the parties is shortly this: The appellant alleges that, having become acquainted with the respondent, they agreed to contract *a marriage; that that [*267] marriage was formally solemnized at Rome according to the laws in force in that country; that a valid marriage was thereby constituted. The respondent, on the other hand, states that, in fact, she was never married to the appellant; that if any marriage ceremony took place, it took place without her knowledge and consent; and further she says that, with respect to one essential part of that ceremony, namely, her renouncing the Protestant religion and being received into the Roman Catholic Church, she never underwent the necessary examinations, and she never performed the necessary services, and there was no *bonâ fide* abjuration, and she never became a Roman Catholic; and she insists the marriage is invalid; first, because no legal marriage can be solemnized at Rome by a Catholic priest between Protestants; and, secondly, according to the laws of the Roman Catholic Church, no marriage can be solemnized in Lent; and, therefore, by the laws prevailing at Rome, and especially by the

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decree of the Council of Trent, the marriage is null. The judgment in the Court below proceeded, first, upon a doubt whether the facts on which the appellant rests his case were sufficiently established in evidence; and, secondly, mainly upon this, that, in the opinion of the learned Judge who decided the case, an abjuration was essentially necessary to the validity of a marriage; that the abjuration in this case was not made *bonâ fide;* and consequently, that, although the marriage in all parts might be complete, and might be accompanied with all the necessary forms, and might be nothing more than the fulfilment of the real intention of the parties, yet that the marriage on that ground, and on that alone, was entirely null and void.

[268] It is obvious that a decision upon this ground must have an extensive influence, and excite great attention in all countries in which the marriage laws are regulated by the Canons of the Council of Trent. The fact of intention is clearly established by the evidence. There was an abjuration with all the necessary forms, and no Court can investigate whether it was founded upon conviction, or occasioned by worldly or mixed motives; and, lastly, if there had been no abjuration, the marriage would still have been valid. The occurrences at Florence and at Rome, the clandestine meetings, communications, and correspondence; the applications to the Papal authorities; the words spoken; the ring blessed; and all the ceremonies which were performed by the priest, and in the presence of witnesses, at the time of the marriage ceremony, are proved, not by their evidence alone, but by the lady's signature, and by the certificates and other documents, from the records of the tribunals at Rome. All these circumstances are inconsistent with Miss Kelly's allegation, that what took place was never meant to be a marriage; that she went through all, supposing that she was only promising a future marriage with Mr. Swift. With respect to the facts spoken to by the witnesses, no doubt can exist. What is wanting to establish the fact of the marriage? The mutual affection of the parties is proved; a promise of marriage proved in the handwriting of the lady; the anxiety of this lady to have that promise perfected by a regular marriage in her own handwriting, and subsequent correspondence and intercourse, which would

not have existed unless, (in Miss Kelly's opinion at least,) a perfect marriage had been solemnized. If Miss Kelly did not consent, was imposed upon, and did not intend or know that she was *contracting a marriage, then, undoubtedly, the marriage [*269] is invalid; for the very reason which supports the appellant's case, namely, that it is the consent of the parties to the marriage which constitutes, and is alone sufficient to constitute, the marriage, except as far as any municipal laws, or any decree of the Council of Trent, adopting the civil law, have introduced limitations or restrictions upon it.

It is important to state this principle as one that cannot be controverted. That, supposing the decrees of the Council of Trent not to interfere, the mere consent of those parties to become man and wife would constitute a marriage, according to the Canon Law: not a regular marriage, because from a very early period indeed, it appears that the publication of banns, and the presence of priests, was required; so that if these ceremonies were neglected, parties would have been subject to ecclesiastical censure, or civil penalties, but the marriage would have been valid.

Lord STOWELL thus states the law in his celebrated judgment in *Dalrymple* v. *Dalrymple* (1): "Marriage being a contract, is of course consensual, for it is of the essence of all contracts to be constituted by the consent of the parties. *Consensus non concubitus facit matrimonium*," &c. "The law of the Church, the Canon Law, although, in conformity to the prevailing theological opinion, it referenced marriage as a sacrament, still so far respected its natural and civil origin as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony, without the intervention of the priest. It had, even in that state, the character of a sacrament; for it is a *misapprehension to suppose that this intervention was required [*270] as a matter of necessity, even for that purpose, before the Council of Trent." Previously, "according to the ancient law of Europe, a contract, *per verba de præsenti*, or a promise, *per verba de futuro cum copulâ*, constituted a valid marriage, without the intervention of a priest." So the only question here can be, whether the

(1) 2 Hagg. Cons. Rep. 62.

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Council of Trent has imposed forms which have been neglected here, and the neglect of which constitute the marriage null, as the penalty for the non-observance.

The distinction is familiar between impediments which invalidate a marriage, as the absence of the parish priest, or of two witnesses, do expressly by the decree; and impediments which make a marriage irregular, and render the parties liable to ecclesiastical and civil penalties, as the absence of the benediction by the proper parish rector, or priest, duly licensed. But nothing can render a marriage made with consent invalid, except the absence of those formalities which the law has expressly declared to be necessary.

The question, therefore, is one that may be as well decided here as by Roman lawyers, whether the circumstances required by the Council of Trent to make a valid marriage are, or are not, existing in this case. You have a priest delegated by the Pope and Cardinal Vicar, the ordinary; you have two witnesses; you have the consent of the parties, which is the essence of the marriage; and all those ceremonies complied with, which are required by the Council of Trent, and are necessary for no other reason.

The position contended for is to introduce a most important qualification in the decree of the Council of Trent,—That the [*271] parties, to be married according to the *Roman Catholic form, must be members of the Roman Catholic Church. The Roman law recognizes only one mode of celebrating marriages; but it is clear from the evidence of the Roman priests in this case, that a marriage between persons, both, or one, not Roman Catholics, would by an express dispensation be perfectly regular.

That such a marriage by a parish priest would be valid has been established in this country in *Lord Herbert's* case (1). The Princess of Butera was resident in Sicily, and Lord Herbert was staying near; they called the parish priest and two witnesses, and in their presence, but while they were ignorant of the nature of the transaction, agreed to be man and wife, and signed a paper to that effect. No ceremony was performed. The opinion of all the priests, and the decision of Lord STOWELL, in that case was,

(1) 2 Hagg. Cons. Rep. 269.

that it was a perfectly valid marriage. Yet so much was it against the law, and irregular, that both Lord Herbert and the Princess were sent to prison for a considerable time. Lord Herbert was not a Roman Catholic: yet, although every possible objection was taken in that case, this was not, and that case affords a complete answer to the allegation of the respondent, that a parish priest cannot marry a person who is not a Roman Catholic.

But has there not passed in this case, that, which for all civil purposes constitutes these individuals members of the Church of Rome? Must not a court of justice decide that at the time of the marriage they were so? If Miss Kelly made her recantation, in ignorance of what was passing; then unquestionably *it [*272] was null and void; but what were the circumstances? Miss Kelly signed a recantation and renunciation of the errors of Protestantism, received absolution, and was admitted by the competent tribunal of the Holy Office into the bosom of the Roman Catholic Church. Before the Court of his Holiness the Pope, would not these parties for civil purposes have been considered members of that Church? This is an appeal from thence; and, after the parties have been admitted into that Church according to its laws and forms by competent authority, no Court has a right to question whether or no they were members of that Church. It is impossible for any human tribunal to say whether their acts were sincere or not.

It is proved by the Roman canonists and jurists, that, provided the parties are baptized, heresy is not an absolute (*dirimens*) impediment, but only an impeding (*impediens*) one, which renders the marriage irregular, but not void; that there is no law requiring abjuration to precede; and that the Cardinal Vicar has full power to grant a dispensation, order, or license for the celebration of marriage between heretics, being Christians, and may appoint a delegate for that purpose in his diocese, no priest being, strictly speaking, the parish priest of persons not Roman Catholics; and that there is no prohibition of marriage, but only of public weddings, in Lent (1).

But the ground on which this case was decided is, not that a

(1) See Council of Trent, 24 sect. of "Reformation."

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dispensation could not by law be granted, but, that the dispensation granted was one to marry Catholics, and that the parties never became *bonâ fide* Catholics. The learned Judge below [*273] supposed an *imposition to have been practised upon the authorities and the Pope, and that the parties never intended to abjure or quit their own communion, or to become members of the Roman Catholic Church. He says, "She went upstairs, and in a quarter of an hour comes down again a good Catholic and a married woman." Can that invalidate a marriage, containing the essence of all marriages—consent, and that which the Council of Trent alone requires in addition, the presence of a priest and two witnesses?

Dr. Phillimore:

It is an established principle in matrimonial law that the *lex loci contractus* is binding. There are but two points to be considered here: 1st, whether a license to perform the marriage was granted by competent authority; and 2ndly, whether the marriage was had with consent of both parties.

The questions, how far the law of a foreign country is to be respected, and what constitutes marriage according to the *jus gentium*, in the absence of any restrictions imposed by any municipal law, are settled by the following cases: *Crompton* v. *Bearcroft* (1), decided by the delegates in 1769; *Scrimshire* v. *Scrimshire* (2), *Middleton* v. *Janverin* (3), *Butler* v. *Freeman* (4), *Dalrymple* v. *Dalrymple* (5), *Lord Herbert's* case (6), *Ruding* v. *Smith* (7), *Duchess of Kingston's* case (8).

The 24th section of the Council of Trent, cap. 1, lays down [*274] the whole law upon the subject of marriages, *and cannot be misunderstood. The object of the law was to make a marriage celebrated by a parish priest in the presence of two witnesses, indissoluble. The canonists divide impediments to marriage into two kinds: *impedimentum impeditivum*, which make a marriage irregular and illicit, but not dissoluble; and *impedimentum dirimens*, which make it null and void. The conduct

(1) Bull. N. P. 113.
(2) 2 Hagg. Cons. Rep. 402.
(3) 2 Hagg. Cons. Rep. 437.
(4) Amb. 301.
(5) 2 Hagg. Cons. Rep. 62.
(6) 2 Hagg. Cons. Rep. 69.
(7) 2 Hagg. Cons. Rep. 378.
(8) 20 State Trials, 355.

of Miss Kelly must be tried by her own acts; she signed the act of abjuration and the act of spontaneous assent; she was a consenting party to the marriage, which is the essential point, for *consensus non concubitus facit conjugium.* No point can examine into the conscience of the party to ascertain whether the abjuration was sincere or colourable; even the Roman Church holds that *de occultis non judicat ecclesia.* The *onus* to shew the want of consent lies upon Miss Kelly, and there is no proof of such want as can justify the Court in declaring against the marriage.

Sir Charles Wetherell and *Dr. Lushington*, for the respondent.

Sir C. Wetherell:

If this case is decided for the appellant, there will be made a breach and chasm in the *jus gentium*, through which there will be an introduction of fraud and perjury, which will desecrate and profane every foreign matrimonial contract that may be wafted over into this country. The case must be decided, without regard to the disputes of foreign jurists and canonists, upon the principles of British justice.

The basis of the judgment in the Court below is this: That the sham abjuration is a profanation, and *vitiates the license, and [*275] so taints the marriage; that there is therefore a pervading fraud which overrules and destroys the whole transaction. The evidence shews that Miss Kelly did not consent to the ceremony of marriage, and did not recognize what took place as a marriage. This case is founded upon two propositions: 1st, a legal license to marry; and 2ndly, the due and actual execution of the marriage; that is, supposing she ever consented. Then it is necessary to go to the *à priori* principle, that she could not in law consent, because there was no competent authority to take her consent. Her consent to the marriage is compounded of two integral principles, namely, consent to become a Catholic, inseparable from and necessarily included in her consent to marry. She must consent *quâ* Miss Kelly, Catholic, and the consent to become Catholic is as much part and parcel of the entire consent as the consent to the ceremony of marriage.

Miss Kelly never consented to the abjuration, she did not sign

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the petition for it. In the few minutes occupied by the transaction, she could not know what she was about in renouncing upon oath the religion in which she was brought up, and to which she immediately returned, and promising upon oath to conform to the Roman Catholic faith and forms, which she never adopted. She could not know even the civil consequences of such an act; that her children would be intrusted to a Roman Catholic guardian, and would be deprived of certain privileges in Ireland. She did not exercise the volition necessary for abjuration.

The Pope and Cardinal Vicar granted their license upon a *bonâ fide* condition to be actually carried into effect, not for the
[*276] purposes of fraud and perjury. *The rule laid down by Paley and other writers is, that "oaths must be interpreted and performed in the sense in which the imposer intends them, otherwise they afford no security to him." Here the intention must have been that the sacred obligation should be *bonâ fide* performed; not according to the interpretation of the Milanese, (mentioned by Puffendorf,) (1) when they told the Emperor Frederick I., "We swore indeed, but we did not promise to keep our oath."

All the circumstances and evidence shew, and a jury would decide, that Mr. Swift obtained the license fraudulently, because it was conditional upon the performance by Miss Kelly of a condition of which she had no prior knowledge. He practised a fraud upon the Pope, upon the Holy Office, and his asserted wife. This case is of as great importance as that of *Crompton* v. *Bearcroft*. There the marriage was valid upon the principle of the law of Scotland; where, if two persons of a certain age choose to marry, they are asked no questions; their religion, domicile, parents' consent, are matters of indifference. And, therefore, in the first decision after Lord Hardwicke's Marriage Act of 1745, it was held by Sir JOHN HAIG that a Scotch marriage was valid, though the parties went to Scotland for the purpose of evading the law of England. When they were past the Border they were Scotch, for the purposes of Scotch matrimonial law; and, therefore, there was no fraud upon, no evasion of, the Scotch law, but a compliance with it. In this case, there is evasion and

(1) Du Serment, p. 459.

fraud upon the law of Rome; and the true question is *whether the *lex loci contractus* has been complied with or evaded.

[*277]

In England, an infant cannot change his religion, could not formerly become a monk or a nun, because of the civil consequences. Why adopt the law of Rome to sanction a marriage, which must involve the loss of advowsons, exclusion of children from schools and universities, and other serious consequences? Foreign laws are adopted in this country *ex comitate*, not *de jure*, because convenience and public policy require their adoption: will those principles permit it here?

No country has ever held itself bound to recognize a marriage which has been fraudulently obtained in a foreign State (1). Such a marriage as this, such an insult to their religion, would not be tolerated in any Roman Catholic country. Why adopt it here? What distinction is there between a sham abjuration and a false oath as to the parties' age, or of their guardians' consent? If one is in conformity to the law of Rome, so is the other.

It is said, this marriage cannot be impeached because there is the Pope's license to marry, and a certificate of marriage; so said the Duchess of Kingston (2). She was indicted for bigamy; and she pleaded in bar a judgment of divorce in a competent Ecclesiastical Court, which she had procured in a sham suit. But the Judges would not permit such a principle to be laid down; they said such a sentence, so obtained, *should not bind the law of England. There are also cases (3) where persons who had got possession of property under a simulated suit, have been adjudged felons. The principle of the law of England is that any document, any transaction, may be avoided for fraud, so every foreign judgment is examinable. It is no part of the law of nations to recognize foreign frauds. This marriage is a desecration of religion, and a mockery of every principle of the matrimonial law.

[*278]

Dr. Lushington:

The husband who seeks to set up a marriage of this description, must, upon every principle, and for the interests of the public,

(1) Huber, Prælect. Jur. Rom., p. 538. See Hargrave's Co. Litt., p. 79, 80.

(2) 20 State Trials, 355.

(3) Ray. 276.

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be called upon to establish it by irrefragable testimony. He must establish that this marriage is valid according to the law of Rome; but first, as a preliminary, that the law of Rome is the governing rule under the circumstance; that there was no invalidity in the license of the marriage ceremony; and lastly, that there was at the time of the marriage the essential attribute, on both sides, of full, free, solemn, and deliberate consent. It is too late to deny that marriages between British subjects abroad are to be governed by the *lex loci*—that is the general principle, but it is nowhere laid down as universal. * * *

[279] This marriage was only had upon the condition of renouncing the Protestant religion. Whether the abjuration was simulated, or real, the law of England, for the preservation of the established Protestant religion, will equally discourage both. What country requires the adoption of the *lex loci* in such a case as this? Could there be reciprocity? Would the Courts at Rome admit such a marriage? There is no case in which a marriage of this kind has been recognized; the evil consequences of admitting such a principle cannot be exaggerated.

But, assuming that the law of Rome is to govern this marriage, then, what that law is must be taken from the evidence. It is a rule that foreign law must be proved as a fact in the case,—the Judges may not form any opinion of their own upon it. The

[*280] result of the evidence of the majority of the Roman lawyers *in this case establishes this proposition; that, if the abjuration was not a *bonâ fide* abjuration, the license being granted upon that express condition, the marriage itself is void according to the decree of the Council of Trent. There is defect of proof as to the consent of Miss Kelly. All the evidence is of persons admitting themselves accomplices, without corroboration, and depends only upon what they saw in the fifteen minutes; none of them had any prior knowledge of her, except what they heard from the party interested to prejudice their minds, and induce them to receive and give out a false impression of what took place. There is no real evidence to shew that either the marriage or abjuration was previously planned with, or intended by, Miss Kelly; and various prior circumstances, as well as her subsequent conduct, and repudiation of both abjuration and marriage, strongly

shew the contrary. The whole transaction was fraudulent, and all the witnesses knew the design, but there is nothing to shew that Miss Kelly did.

In *Jolly* v. *M'Gregor* (1), decided in the House of Lords, a marriage was set aside for want of consent according to the Scotch law, though there were circumstances in its favour as strong as those alleged in this case. That case was discussed with the utmost deliberation and care. Lord ELDON revised his judgment. The woman there was 26 years of age; they were married upon what are called marriage lines; went before a clergyman, a trafficker in irregular marriages, and returned together to her father's house, where they had previously lived. There was *proof that the woman admitted the fact of marriage [*281] subsequently, and that the man had paid his addresses previously; the marriage was established by the Commissary Court in Scotland, and by the Court of Session, but that judgment was reversed by the House of Lords; and Lord ELDON puts the point thus, and it is the very question in this case: "There is nothing so solemnly required as that the consent to marry should have been full, deliberate, and free—that it should neither be the effect of force or fraud" (2). And again, "Was free, deliberate, and solemn consent given at the time the ceremony passed? or did the ceremony pass without that which constitutes a marriage, such a consent to the *consortium omnis vitæ* at the time of the marriage ceremony?" The conduct of those parties subsequently was of great importance in that cause, as it is in this. The woman married again without objection from Macgregor, though he knew the fact at the time. And, when she was questioned as to her marriage, she said, "What signifies having said a few words before a parson?"—which was an admission; still it was held there was not sufficient consent, though in the case of a person 26 years of age. Compare that with this case; here there is no evidence at all of previous consent to a marriage, or of consent at the time the ceremony passed, except what is derived from the information of Mr. Swift to the witnesses, and none of subsequent recognition. The evidence of the witnesses is contradictory and incredible; and the burden of proof lies upon Mr. Swift upon all

(1) 3 Wils. & Shaw, 85. (2) 3 Wils. & Shaw, 190.

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three grounds: 1st, that the law of Rome ought not to be recognized under the circumstances; *2ndly, that the marriage is
[*282] invalid by reason of the condition not having been performed; and, 3rdly, that a full, free, solemn, and deliberate consent is not established by the evidence. The sentence of the Court below must be supported.

PARKE, B.:

Will you inform me whether there is any case in which a marriage, valid in point of form according to the law of the country, has been set aside upon the ground of it being a fraud upon a third person, the Government of the country being that third person? The judgment of the Court below proceeds upon the ground of its being a fraud upon the Holy See.

Dr. Lushington, at the next meeting, answered:

The only case that can be found in reference to a citation issuing, and assigning as the cause of the nullity the alteration of the license, is *Ewing* v. *Wheatley* (1). The question was raised by Lord STOWELL, and he said, "Now undoubtedly there may be such fraud as would vitiate the license;" but there was no such fraud proved in that case.

Mr. Pemberton, in reply:

The only exceptions to the universality of the rule of the *lex loci* are, where the municipal laws of the particular country have imposed a personal disability on the subject of that country in contracting any obligation, as the restrictions with respect to royal marriages in this country; or, where there is a disability
[*283] created by divine law, as in the case of incestuous *marriages. But even such marriages are valid in countries where the prohibitions do not prevail. But the foundation of the defence is that certain ceremonies and acts are required by the laws of the Council of Trent prevailing at Rome, and that they were not, or not *bonâ fide*, complied with. If the Roman law does not govern, that law which is anterior to the Council of Trent must. And the consent of the parties makes the marriage valid. The

(1) 2 Hagg. Cons. Rep. 181.

fact that the marriage took place is proved by the probabilities, the circumstances, the documents signed by the parties, and the uncontradicted testimony of three witnesses who met for the sole purpose of performing the ceremony; it is not possible that Miss Kelly could have been ignorant of the nature of what passed. It is said she did not intend to abjure; perhaps not, provided she could get married without; but she intended to be married, and whatever was essential to the perfection of that marriage she did, and intended to do. The only point really is, whether the license to marry was dependent upon a *bonâ fide* abjuration, and whether, in that case, the abjuration, not having been, as it is contended, *bonâ fide*, the license itself is to be invalidated. In no country does the non-compliance with conditions or formalities, required to make a marriage regular, invalidate the marriage, unless the pain of nullity is expressly attached to it; but if there was a condition, it has been performed. The abjuration of Miss Kelly in distinct terms is proved by her signature, and by the witnesses: the presumption must be, that what was done, was rightly done. But it is contended that you must regard the internal condition of the mind; if so, what motives, degree of knowledge, or conviction, are sufficient to constitute a *valid abjuration? and who is to be the judge? For spiritual purposes a fictitious conversion, of course, will be worse than unavailing; but, for civil rights, outward acts alone can be regarded.

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LORD BROUGHAM (after stating the facts of the case): *July* 3.

This cause being brought before us by appeal, has been argued at great, but not unnecessary, length, and with much learning and ability, so that we have had all the aid from the Bar which is so desirable both in considering the points of law made, and the questions of fact raised, and we are now to give our judgment upon the whole.

There are two questions raised in this case: 1st, whether, or not, supposing the parties intended to contract a present marriage, there was such a solemnization of it, as constitutes a valid matrimonial contract by the law of Rome, the place where the ceremony took place? 2ndly, whether, or not, if the act done constituted in point of form a marriage by the Roman law, both

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the parties did it with a knowledge of what they were doing, and an intention to marry each other; in a word, whether or not, each party knowingly consented to marry the other?

A third question has been raised by the issue, which Mr. Swift tendered; namely, whether, or not, the alleged marriage was consummated? This, however, is wholly immaterial as a substantive issue, and only acquires importance from the defence set up by Miss Kelly; inasmuch as the cohabitation asserted by the one party, and denied by the other, would render [*285] her alleged ignorance of the contract entered into *much more improbable. The judgment of the Court below turns entirely upon the first point; and while that was elaborately and ably argued by the learned Judge, no opinion was expressed by him upon the second, though upon the third he deemed it right to dwell at considerable length, probably with a view to the characters of the parties, for it has no bearing at all in the view of the question upon which the judgment proceeded. It was assumed that both the parties knew of, and consented to, the marriage, each intending validly to celebrate the nuptial rite; but it was contended that the ceremony which they thus performed, did not by the Roman law constitute a valid marriage. It is fit, then, that we should first consider the case in this point of view.

In the first place, the ground of the judgment now under appeal, assumes that Miss Kelly was not only cognizant of the marriage, but also of the abjuration; for the question is raised upon the sufficiency of an abjuration made with a view to obtaining a valid license, or so arming the priest, acting under the license, with the authority to marry, and not with a sincere intention of renouncing the dogmas of one Church as erroneous, and adopting those of another as true. We shall afterwards, under the second head, speak of the question, whether, or not, Miss Kelly knew of the abjuration she was making? for the present we must assume her knowledge of the abjuration, as well as of the marriage.

Now, the most favourable supposition which we can make for the respondent is to assume that abjuration of the Protestant faith and reception into the bosom of the Roman Catholic Church is a condition precedent to the vesting of the power of nuptial

celebration *in the priest, the parties being previously Protestants, and having on that, or some other account, no parish priest who could have married them without special authority. Let us, then, take it to be so, and that the abjuration was a condition precedent; has it been performed? I put this stronger than I think it can be fairly put, because it does not appear to me at all probable that the solemnization of the marriage contract, according to the Roman law, between two parties, both heretics, and not domiciled, even if celebrated by the parish priest, would have been any thing more than irregular on the part of the parish priest, subjecting him to ecclesiastical censure; but I have put it stronger for the respondent, as if it would have been void, and consequently rendering the license more emphatically necessary. SWIFT v. KELLY. [*286]

We have here by the hypothesis an apparent abjuring and conforming; we have an act done by both parties, which amounts to what the Roman functionaries call abjuration and adoption; but it is alleged that they, and especially the high authority granting the license upon the condition, had been deceived; for that whereas they intended and expected a real, sincere, and hearty renouncing of the Protestant and taking to the Catholic faith, nothing more was done than falsely and fraudulently to go through a ceremony which no feeling or belief of the mind accompanied, and to go through it merely for the purpose of enabling the parties to obtain an object wholly unconnected with one faith or the other, the secular object of being married together. This appears to us to be as strong a mode of putting the argument as can be desired for the purpose of supporting the judgment.

But we are all of opinion that it is insufficient for the purpose, and upon every principle. The Roman authorities can only be supposed to require that a certain outward act should be done; they never can undertake to judge of the inward heart; that belongs not to them, or to their powers, or their tribunals; what the consequence would be of a party stating at the time of performing the ceremony of abjuration, that he did not mean what he said, and was not sincere in what he did; or of two parties previously making evidence, which afterwards came out and shewed the whole to be an imposition and a farce, or even of [287]

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their declaring immediately after, that all they had done amounted to no more; there is no occasion here to inquire, for nothing of the kind exists in the case, though it would be a most perilous thing and inconsistent with the whole marriage law, and its principle, to enable parties by previous contrivance to hold in their hands a power of dissolving their marriage, or by subsequent declaration to free themselves from the fetters of their matrimonial contract. But here we have nothing whatever to shew that at the instant there was not an actual abjuration and conformity; and even if this were practised with the intention of returning afterwards to the bosom of the Protestant Church, and renouncing the errors of Popery by a second abjuration, it would by no means follow that the first abjuration was not valid, for the grant of the license only requires that the abjuration should be made before the authority could vest. There needs no argument to shew the alarming consequences that would follow, from allowing the sincerity of such profession to be afterwards inquired of; withholding in such a case the benefit of the maxim [*288] *which presumes things directed, to have been regularly and rightfully performed; and trying so difficult and so nice an issue in every case as the real motives which influenced the mind in an act, which the mind alone is supposed to perform. How could such an inquiry be separated from another, with which, however, for obvious reasons, no attempt has been made to mix it up; namely, the effect of particular views and interests of a secular kind, upon the feelings of the heart, and the deductions of the reason, in the process of even the most sincere and pious conversion. If we are at liberty to ask, whether he who professes to have become a convert from conviction, is really convinced of the thing for conscience sake, and only clothes himself with the name for the sake of interest; who shall arrest us in this further, but kindred, if not similar inquiry, whether, where no immediate object of a temporal nature exists, he has been turned by conviction or persuasion, by his own reason, or by the intervention of pious friends? and whether his understanding or his heart have not been swayed by the view of possible, nay, even of remote, advantages? A Catholic with us cannot be presented to a living unless he abjures the errors of the Romish Church;

a proof that he abjured, and was all the while a Papist in his heart, never could lead to a deprivation while he conformed to our canons and avoided all ecclesiastical offences; nor could any question ever be suffered to arise, whether his conformity was for conscience sake, and *pro salute animæ*, or for the lucre of gain, and to obtain Protestant preferment.

That these are the conclusions to which such principles as must govern this question would lead us, there can be no doubt; and there appears to be nothing *at all contradictory of them in [*289] the evidence which has been produced on either side, in order to shew in what light the law of the Roman States regards this matter.

Before proceeding to consider the result of the examinations of Roman jurists, it is fit that we make one remark, and keep it distinctly in mind: When lawyers are called as witnesses to state the law, or when the evidence of any other skilful persons is adduced for the purpose of explaining the principles of their own art, in which we are bound to give them credit, they may answer the questions put in two ways: they may either give a mere opinion or *dictum*, or the statement of what the doctrine is, without entering into any reasons; in which case we are bound by what they deliver, if they be unanimous; and if they differ, we are left to weigh the testimony of one against another as best we can: or they may assign the reasons on which their statement is grounded, and then we are not bound by the opinion they give, but may examine the reasons; and being, as it were, admitted to see the particulars of the calculation, and not merely the result, we may form an opinion for ourselves: at all events, we may reject the one they give, on finding it is not come at by the reasoning. It will thus happen, that where divers witnesses have been examined to the same point, and give different statements or opinions with their reasons, we may be enabled to arrive at the truth, notwithstanding this discrepancy, by attending to the reasons adduced by each.

Now in this case, the Roman lawyers have generally entered into the argument, and have enabled us to ascertain what weight is due to their respective declarations of opinion; and here we may confine our attention to the evidence of those whom Miss

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Kelly has examined *in proof of her position, that the abjuration was insufficient to give the officiating priest authority, because it
[*290] was insincere, and was made to compass a particular purpose. Signor Valle asserts this, or rather seems to assert it, in ample terms; but he throws in a parenthesis, which destroys the whole force of his testimony: "Supposing it to be true that her abjuration was made without her knowledge of the act which she was going to do." After this, all the particulars which he states as constituting invalidity, become immaterial, for her ignorance of what she was about is assumed, and that might well be held to destroy the validity of the act. The attention of this and of all the other professional witnesses for Miss Kelly, was particularly pointed to the intentions of the party when she abjured, both by the phraseology of the interrogatories, and by the allegations to which they were examined, and which pleaded her ignorance of what she was about.

Thus Signor Benedetti, in his answer, speaks of a person not being a Roman Catholic, who abjures, "without knowing what he is doing when making abjuration." Signor Soldini assumes the abjuration of Mr. Swift, and particularly of Miss Kelly, to have been simulated, and therefore "null and unconsented to." He afterwards speaks of her abjuration as "not consented to, or feigned." And he states among his reasons, as a fact assumed in his argument, that she only gave a promise of marriage *de futuro*. Indeed, the conclusion to which he ultimately comes, and with which he closes his evidence, may well be taken as shewing the state of facts on which he was all along arguing. "Supposing," he says, "the actual fact to be, that Miss Kelly
[*291] only gave a promise of future *marriage, she being ignorant of the rites of the Roman Catholic Church, she might certainly think she was only giving the promise of future marriage at the time. The invincible ignorance in which she was with regard to the rites of the Roman Catholic Church, and the actual nature of the formula she was uttering, left her unable to give any consent whatever."

Assuredly this concluding passage is not calculated to give us any confidence in the witness's distinctness of statement, or in his powers of reasoning, but it shews the sort of case to which

his attention was directed; and that case is one which all parties admit could never have raised any question at all, or created any doubt.

Signor Belloni, besides having his attention drawn to the same assumed state of facts, gives evidence as to abjuration, which seems to prove too much, for he not only requires a full knowledge to be proved of the principles of the religion abandoned, but a subsequent quitting of its communion; for he considers the parties living on in the English communion, as disproving their previous abjuration. Can there be a doubt that, if the abjuration was ever so sincere, they might afterwards have returned to the bosom of their own Church? But if not, can any thing be more extravagant and more dangerous, than making the validity of a marriage, solemnized on the 25th of March, depend on the Church frequented by the parties in the month of May following.

The other witnesses examined by Miss Kelly, entirely and most explicitly disprove the position which they are adduced to support, and hold the very doctrine *which we have stated to be [*292] incontrovertible, and almost in terms.

Thus Signor Barlieri denies the necessity of previous instruction being given to persons abjuring, though it is, he says, customary; and he distinctly declares that the "end or object in view, or the intention of the abjurist, is wholly immaterial, provided the abjuration is not brought about by compulsion, and is made in the form prescribed by the Church." The excellent sense of this witness is shewn by his declining further to answer on the 11th article of this allegation, as being one of fact, and not of law. It is the article in which the respondent pleads, among other things, that the marriage ceremony took place without her knowing what was going on. So Signor Norcia, though he answers to this allegation explicitly, says that he cannot search into the sincerity of the abjuration. He says, that "he must hold the abjurist a Roman Catholic till the contrary be proved."

We can, therefore, see nothing whatever in the evidence of the Roman lawyers, when taken altogether, to justify the belief that their tribunals will set aside a marriage solemnized by a priest

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who derived his authority from a license granted upon the supposition that the parties had abjured, or would, previous to marriage, abjure their own religion and embrace the religion of Rome. Nothing to justify the belief that those tribunals would annul or declare void the marriage celebrated by such a priest, upon the ground that the change of religion was insincere, or proceeded from the wish to marry, and not from conviction of error. Nothing to justify the belief that those tribunals *would (any more than any tribunals ought) try such an issue, as the grounds, or motives, or reasons, which have induced the parties to make formal abjuration of one faith, and profession of another.

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It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made. If such be the law touching consent to the marriage itself, and the fraud whereby that consent was obtained, it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party, acting immaterially in granting the license to celebrate it.

But although the judgment below rested entirely on the first ground, which we have been considering, the other was also argued before us, and, as we understand, in the Consistorial Court too. It is necessary, therefore, that we should see whether or not the sentence can stand upon that ground.

From the statement of facts with which we have prefaced our argument, it appears that we are called upon to declare a marriage void which three witnesses upon oath state to have been formally and deliberately solemnized by Miss Kelly, with a gentleman for whom it is confessed she had conceived the strongest attachment, *and whom she admits that she had promised to marry some months later. That it would be possible to rebut this evidence

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by shewing her ignorance of what she was about, by proving her only to have intended a renewal of the promise to marry, and not marriage itself, is unquestionable. But then this deception practised on her must be shewn by evidence. Either the credit of the witnesses who attest the contract may be impeached, or satisfactory proof may be made that they were deceived, and that the party who seemed consonant and consenting, did not know, and could not consent. But here we have nothing whatever of the kind; we have the bare assertion or suggestion of Miss Kelly, not even her assertions upon oath, that she did not understand the nature of the ceremony, and did not believe she was marrying Mr. Swift. If not, then it may be asked what she did understand was the meaning of all the apparatus which she saw in the room? Why was she, on the night of the 25th of March, to leave her mother's drawing-room and secretly repair to Mr. Swift's apartment, and there to give a promise before three witnesses, and to sign two papers? All this she herself admits passed; and all the account she can give of it is, that having before made a promise of marriage, and a written one too, she performed this new ceremony at the risk of discovery by her mother, of whom she stood in much awe, merely for the purpose of repeating an act which she had already performed. Credulity has not been often taxed higher than it here is, when we are asked to believe that such could be her understanding of the transaction; and all this is quite independent of the ring, the exhortation, the absolution, the abjuration, which the three witnesses swear to; those three being *unimpeached witnesses, [*295] except by the remark that they were parties to a clandestine marriage, and an abjuration made for a secular purpose; an observation which, while we may fairly be permitted to make it, we must also, in justice to the individuals, admit is much weakened in its application to their credit, by the consideration that their lawful superiors were aware of the whole proceedings, and that consequently it was clandestine and furtive only as regarded Mrs. Kelly.

It must be further observed, that the parties were not only warmly attached to each other, and anxious to form the matrimonial connection, but were carrying on, and had all along been

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carrying on, a secret intercourse. They knew that Mrs. Kelly disapproved of their union: she had positively refused her consent a fortnight before the 25th; and a promise had been given by Mr. Swift to trouble her no more upon that subject. Yet after this, he had continued to communicate with Miss Kelly, as much as the vigilance of the mother would allow. All this is not only proved, but it is admitted by Miss Kelly herself. There certainly is no great improbability that in these circumstances the party should have recourse to a clandestine marriage; and it is in such circumstances as these that the testimony of Abbé Lepri and Signors Mazio and Gregori is introduced, to prove that nuptials were secretly solemnized. Miss Kelly's story is, that she clandestinely, under a cloud of night, in her mother's house, and with an anxious desire to conceal it from her, met her lover, and solemnly, before witnesses, renewed a pledge to marry next year. These witnesses swear that she clandestinely in the night, unknown to her mother, knowingly, and with a perfect understanding [*296] *of what she did, performed the ceremony of marriage, as solemnly and deliberately as that ceremony could be performed. The conduct of this young lady subsequently to the contract (which she denies having made), is very material, as throwing light upon her understanding at the time. She contrived to correspond with Mr. Swift, and her letters are those of the fondest attachment. But this proves little, unless we also advert to the continuance of the fond expressions after the time when she says that Mr. Swift first informed her of the ceremony she had performed being an actual marriage. Her story is, that she had been betrayed and deceived; that Mr. Swift, conspiring with a Romish priest and two witnesses, under the pretext of obtaining a second promise of marriage when her mother should consent or herself be of age, had fraudulently made her marry him, and become his wife for ever. How does she act upon the discovery of this gross fraud—this base conspiracy? How does she represent herself as acting? Her first allegation states that she received the disclosure with great indignation, and declared that she should have no further communication whatever with a person who had so treated her; and to read that allegation, no one would have suspected that after the disclosure she had any

correspondence, personally or by letter, with him, except one interview, in which she confirmed her determination to break off all intercourse. But at the time of pleading this allegation, the correspondence had not been produced; and the second statement is occupied with attempts to explain that away, which, had she or her advisers known to have been in existence, would have materially altered the statement first made.

Into the particulars of these letters it is unnecessary to enter; [297] they have been relied upon with several views: as to prove a sexual intercourse; to shew that after the date of the marriage the style of the correspondence changed, and that on one occasion Miss Kelly called herself Mr. Swift's wife or spouse. On their sufficiency to prove these things, it is unnecessary to pronounce any opinion, because, in the view which we take of the case, their aid is not required to subvert the ground upon which it is now attempted to rest the judgment; but in one part of the question they become material, and upon that they are admitted to throw a light unfavourable to the respondent's contention. At the least three, and most probably four, and these the most tender, and even ardent, are written after the disclosure which Miss Kelly says Mr. Swift made to her of having deceived her, by a conspiracy and gross fraud, into a marriage, of which she was quite ignorant, till he gave her this information. These letters further prove, that four weeks after the period when she pleaded in her first allegation that she had indignantly broken off all intercourse, she was in the habit of having stolen interviews with him, as often as she could deceive the vigilance of her mother and the servants. This intercourse, and the warm expressions of affection in the letters, not only disprove the statements contained in her allegations, but are extremely inconsistent with the position which forms the very foundation of her case, that she had been trepanned by fraud and conspiracy into a marriage, of which she was wholly ignorant.

A distinction has been taken with a view to two different parts of Miss Kelly's case, between the abjuration and the marriage ceremony. It has been *argued that she was not made acquainted [*298] with her having abjured the Protestant and embraced the Catholic faith, till after the 22nd of April, and that no letter appears

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subsequently to this latter date. From hence an attempt is made to account for her breaking off all the intercourse which had been continued after her knowledge of the fraudulent marriage; the argument being, that though she could forgive the marriage, she could not pardon the abjuration; and it is also contended, that though she could be supposed to have known of the marriage, yet if she knew nothing of the abjuration, the condition precedent to the validity of the priest's authority never was performed; and, therefore, the ceremony performed is void, even if she knew what she was about when she was married.

But, besides that this explanation of the period during which the intercourse was continued, and at which it was broken off, is altogether an afterthought, and has never been hinted at in the pleadings, the evidence appears to us to prove that she did not break off as soon as she heard of the abjuration, for independent of the somewhat more than doubtful fixing of the date of Mr. Swift's disclosure to Miss Kelly, and the apparent probability of the letter of the 21st of April having been delivered before Miss
[*299] Kelly's (1) was written, and admitting that the *communication was not received by Mrs. Kelly till the 24th, and after the letter No. 13 had been sent, the pencil note No. 14 (2) appears to have been written near a month later; and, consequently, long after Mrs. and Miss Kelly were both aware of Mr. Swift's whole

[298, n.] (1) No. 13.

"I write this on the chance of your coming this evening. We are going to the Opera, and shall not be home until late. My love, I cannot see you this evening; they are making some alteration in the wainscot in my room, and I shall be in mama's in consequence of it, but to-morrow I come back here. Besides, I suspect F—— heard something to-day, and intends being on the watch; there-
[*299, n.] fore, *I should like to disappoint him. So do, my *sweet little love*, go away when you get this. I hear there is some talk of a party for Mount Vesuvius on the day after to-morrow, and that you are to be of it. I hope it is the *case*. We have been twenty times passing your house to-day, but can never see you in the windows. Adieu, mind what I say, and I will see you to-morrow *night*, but not before *twelve;* the street is not quiet until then, nor the gates shut here. Should I be asleep, you can throw a pebble at the window. Bring this note with you. Adieu, *carino mio*."

(2) No. 14.

"You are a sweet little creature; you shall have the miniature this evening, and shall see a very pretty chalk one in a *day or two*. I cannot believe the story of De Sodré; but in any case make him hold his tongue."

statement as to the abjuration. The way in which that note is written in pencil on a torn scrap of paper suits the increased vigilance of Mrs. Kelly at this time. The texture of the paper is like that of the three other letters written at Naples, and not at all like any of the Florence or Rome letters. The circumstance of Sodré's talking, to which it refers, connects it with what Sodré speaks of; and the attempt to explain this, by referring to the masquerade meeting at Florence, is a signal failure. Upon the whole, therefore, it should seem that for three or four weeks after Mrs. Kelly had received Mr. Swift's letter of the 21st of April, the clandestine intercourse of the parties was continued. But, be this as it may, the fact of Miss Kelly's knowledge that she had abjured, appears to be proved fully as clearly as any part of the case. *We have the distinct testimony to it of the three witnesses to the marriages (1), and we have moreover the affidavit sworn and signed by her, in which she binds herself to conform in all things to here duty as a daughter of the Roman Catholic Apostolic Church. Shall a party, without any proof of fraud, anything but her own mere unsupported suggestion, be heard to say that the paper to which she set her hand, was wholly unknown to her? Where, then, shall the faith of written testimony be rested? Or, where shall we find the means of binding any one by the most solemn written obligations? Being satisfied that there is no ground at all for questioning Miss Kelly's knowledge of the abjuration which she had made, it becomes unnecessary to inquire what effect upon the marriage ceremony, or the priest's authority to solemnize it, would flow from the proof that she had not knowingly abjured, although she might have knowingly consented to her marriage. We are of opinion that she was cognizant both of the marriage, and of the previous abjuration.

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In examining the probabilities as well as the direct evidence in this case, it is impossible that we should fail to perceive the great difficulties under which the respondent's case labours, from the impossibility of placing the three witnesses to the *factum* in any position at one consistent with the facts, which Miss Kelly is constrained to admit, and the case which she has to maintain.

(1) *Sic.*

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Were the Abbé and the two witnesses parties to a conspiracy with Mr. Swift, for entrapping Miss Kelly into a marriage? But what motive can be assigned for their first engaging in so nefarious a scheme, and their supporting it by the foulest perjury? Why [*301] should each of these persons put their *existence in the power of the other two, for nothing but to oblige Mr. Swift, whom they had never seen before the 12th of March? It is suggested that zealous Catholics will do much, and strain many points, to gain over converts to their Church. But this supposition only makes against the respondent, for it shews that the Abbé would be the more careful that all the necessary acts should be rigorously performed; and this assumes that the abjuration and marriage should be duly solemnized. Pressed by this consideration, and aware how hopeless it was to expect any one should believe all those witnesses perjured, the respondent's counsel have recourse to the mixed and wholly arbitrary and gratuitous supposition that the three witnesses were at first deceived by Mr. Swift, and believed in a marriage having been intended by both parties; but that they afterwards joined him in celebrating a fraudulent one. This, no doubt, gets rid of the difficulty raised by the manifest want of motive in the parties to lend themselves to commit a heinous and perilous crime: but it only relieves the case of this difficulty for a time, the same obstacle occurs at the *factum* itself; for nobody can believe that the Abbé supposed he was receiving an abjuration, giving absolution, and celebrating a marriage, without knowing that all the parties neither abjured, nor confessed, nor assented to the nuptials: therefore, they are fain to tack on a second supposition upon the first, and to say that the witnesses were quite innocent up to Miss Kelly's entering the room, for which she had just quitted her mother's company; knew nothing till that moment of Mr. Swift's plot; but that they instantly became, as if by magic, partners in it, and both married a person who knew nothing of the matter, and perjured themselves afterwards in [*302] *order to prove the marriage as well as the abjuration. There is nothing within many degrees of this hypothesis in point of improbability to be met with throughout the whole of the case. Upon the whole, then, we have no doubt of the marriage, as well as the abjuration, having been performed

with the knowledge of both the parties, and that, therefore, the second ground of the judgment fails as entirely as the first.

Such being our opinion, there is no occasion whatever for entering into the remaining point of cohabitation; and it is a question from which, from obvious reasons, one would desire to withdraw, unless forced to discuss it. The parties are now by the effect of our judgment to be declared united in lawful wedlock; and, therefore, it is altogether desirable to refrain from any investigation which might lead in its results to embitter their lot, now united for life. But a regard to the due administration of justice and to public morals, will not permit us to be silent upon one matter connected with this branch of the case. The conduct of one or other of these parties in asserting or denying the facts to which we are generally alluding, must be guilty indeed. We abstain from dwelling on the particulars, but this much it becomes us to observe.

The judgment below is reversed, the prayer of the suit is decreed for, and the respondent is directed to receive the appellant as her lawful husband, and demean herself towards him with conjugal fidelity and affection. I may mention that a noble and learned friend of mine, who has read these arguments and observations, with whom I have conferred upon the subject, and who once held the Great Seal, entirely concurs in the judgment, nor have we entertained the slightest doubt upon this occasion.

CHANCERY.

GOVETT *v.* RICHMOND (1).

1834.
May 8.

SHADWELL, V.-C.

(7 Simons, 1—3.)

[1]

Laches—Award.

A. having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made, without bringing forward his claim: Held that he was bound by the award.

On the 1st of October, 1829, the plaintiff granted to the defendant Richmond, a lease of certain tithes, commencing on the 29th of September in the same year. In 1831 the parties became mutually desirous of putting an end to the lease; but disputes having arisen between them as to the compensation which Richmond was entitled to for surrendering the lease and as to other matters connected with it, they agreed, on the 2nd of September, 1831, to refer the matters in difference to arbitration. On the 10th of November, 1831, the arbitrators made their award, by which they directed that Richmond should receive all the tithes accrued between the commencement of the lease and the 29th of September, 1831, that he should pay to the plaintiff the sum of 30*l.*, being the balance found, by the arbitrators, to be due from him to the plaintiff, after giving him credit for his beneficial interest in the lease and for other allowances, and that he should surrender the lease to the plaintiff.

Richmond having refused to perform the award, the bill was
[*2] filed against him and one Bignold, (to whom *Richmond, in June, 1830, had agreed, in writing, to assign the lease as a security for money lent) praying for a specific performance of the award, and that it might be declared that Bignold was not entitled to any interest in or lien upon the demised premises.

It appeared that, in the early part of September, 1831, Bignold knew that the plaintiff and Richmond had agreed to the reference, but did not inform either the plaintiff or the arbitrators that he had any interest in or lien upon the lease or the demised premises, until some time after the award was

(1) *Martin* v. *L. C. & D. Ry. Co.* (1866) L. R. 1 Ch. 501, 507, 35 L. J. Ch. 795, 14 L. T. 814, where the principal case seems to be at least doubted by Lord Cranworth, L. C. *Quære* whether the decision can be supported.—F. P.

made. He said, in his answer, that, when he was informed of the agreement for the reference, he was resident at a distance in the country, and without any professional assistance or advice, and that he took no notice of the reference, not doubting that, under any circumstances, more would be awarded than would satisfy his demand, and that, at all events, he could not be prejudiced by a proceeding to which he was no party.

Mr. Rolfe and *Mr. Kindersley*, for the plaintiff, cited *Mocatta* v. *Murgatroyd* (1), *Watts* v. *Cresswell* (2), *Savage* v. *Foster* (3).

Mr. Knight appeared for the defendant Richmond; and

Sir E. Sugden and *Mr. Campbell* for the defendant Bignold.

The VICE-CHANCELLOR said that, where a person having a claim upon property which is the subject of a reference, knows that the arbitration is going on, but does not bring forward his claim, he is bound by the award.

The decree declared that the plaintiff was entitled to a specific performance of the award, and that Bignold was not entitled, as against the plaintiff, to retain or hold any charge or lien upon the demised premises, subsequent to the 29th of September, 1831; and ordered the defendants to execute to the plaintiff an assignment of the lease. [3]

RAVENSHAW *v.* HOLLIER.

1834. *June* 3, 5.

SHADWELL, V.-C. [3]

(7 Simons, 3—16; S. C. 4 L. J. (N. S.) Ch. 119.)

Covenant—Lien—Voluntary deed.

A father being seised of estates in tail and in fee, on his daughter's marriage, covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter, out of the rents and income of his real and personal estates, and, by deed or will, to settle an estate of 200*l.* a year, or, at his own election, 4,000*l.* in lieu of it, on certain trusts for the benefit of his daughter and her husband and their issue. By a subsequent deed, the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates and to sell them and also the fee simple estates, and that, out of the proceeds, the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son, for their own use,

(1) 1 P. Wms. 393.
(2) 2 Eq. Ab. 515.
(3) 9 Mod. 36.

RAVENSHAW v. HOLLIER.

and that 4,000*l.* should be paid and provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and, in consideration of the son covenanting to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery: Held that the covenant for payment of the annuity, created a charge on the estates, and that, the mortgagee having had notice of that covenant, the premises were subject to the annuity; but that the covenant to settle the estate or 4,000*l.* in lieu of it, created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary and was fairly abandoned by them.

By articles of the 17th of March, 1809, made in contemplation of the marriage between E. B. Symes and Mary Anne the daughter of William Jemmett, W. Jemmett, for himself and his heirs, covenanted with T. Hughes, deceased, and Henry Jemmett
[*4] the son of William *Jemmett, to pay out of the rents and profits and annual income of his real and personal estates, unto E. B. Symes and Mary Anne Jemmett, during their joint lives, and to the survivor of them, during the life of such survivor, in case W. Jemmett should so long live, the clear annual sum of 50*l.*; and that W. Jemmett would, by his will or some deed or instrument in writing, devise or convey, to trustees to be named by him, a fee simple estate in possession, in England, of the clear value of 200*l.* per annum, free from incumbrances, to be settled to the use of E. B. Symes for life, with remainder to the use of Mary Anne Jemmett, for life, with remainder to the children of the marriage as E. B. Symes and Mary Anne Jemmett should jointly appoint, and, in default thereof, as the survivor of them should appoint, and, in default thereof, then to the use of all the children of the marriage, equally, as tenants in common in fee, and, in case there should be no child of the marriage who should attain 21 or leave issue, then to the use of such persons as Mary Anne Jemmett should appoint, and, in default thereof, to the use of Mary Anne Jemmett in fee: or, otherwise, that W. Jemmett would, in lieu of devising and settling such estate, at his own election, by his will or some deed or instrument in writing, bequeath or secure to trustees to be named by him, the sum of 4,000*l.*, to be laid out and settled as near to the before-mentioned uses as might be. And it was declared that the settlement

to be made, should be framed in the most full, explicit and liberal manner to effect the intent of the parties, and with all usual and proper limitations, trusts, clauses and provisoes for that end.

[5] By articles of agreement of the 4th of July, 1810, made between W. Jemmett of the one part and Henry Jemmett of the other part, after reciting that H. Jemmett had, at the request of W. Jemmett, entered into several securities with him for divers large sums of money, and that W. Jemmett was seised, in fee tail, of a farm called Cottesmore Farm and other hereditaments in Little Milton, and that he was also seised of an orchard in Little Milton for his life, with remainders to his first and other sons successively in tail general, and that he was also seised of several other hereditaments in Little Milton and in Great Milton in fee simple, but subject, as to some parts thereof, to several incumbrances, and that he had contracted with the trustees under the will of Thomas Greenwood, for the purchase of certain lands in Little Milton and Great Milton, and of a leasehold messuage in Little Milton; and that, being desirous to pay the sums for payment whereof Henry Jemmett was engaged with him and also all his other debts, and to make some provision for H. Jemmett, he had come to an agreement with H. Jemmett that all the real estates of him W. Jemmett, and also the estates for which he had contracted, should be sold, and that the proceeds should be disposed of as therein declared; and that W. Jemmett, for the purpose of barring the estate tail in Cottesmore Farm and carrying into effect the purposes of the agreement, had agreed to suffer a recovery thereof, and also of the orchard whereof he was seised for his life, in which recovery H. Jemmett had agreed to join: W. Jemmett covenanted, with H. Jemmett, that it should be lawful for H. Jemmett, with his concurrence, to contract for the sale of the hereditaments in Little Milton and Great Milton, or to raise *money thereon for the purpose of [*6] carrying the agreement into effect: and W. Jemmett and H. Jemmett covenanted with each other, that the money arising from such sales, after all principal and interest due on mortgage affecting the estates or to be charged thereon, should have been paid, should be paid into the hands of Messrs. Walker & Co. of Oxford, on a joint account of W. and H. Jemmett, or in the names

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of two other persons to be mutually agreed upon by them, and that, in the first place, W. Jemmett should take out the sum of 1,000*l.* for his own use, and that, in the next place, all such debts as were due from W. Jemmett, should be paid, and also the costs of suffering the recovery and of the now stating deed and of the sale of the estates, and, in the next place, that the sum of 11,000*l.*, further part of the monies arising from such sale, should be invested on Government or real securities, in the names of two trustees to be mutually chosen by W. and H. Jemmett, in trust for W. Jemmett for life, and, after his decease, upon trust to pay thereout 2,000*l.* unto such persons as W. Jemmett should, by deed or will, appoint, and, in default thereof, to the executors or administrators of W. Jemmett, and upon trust to pay 4,000*l.*, other part of the 11,000*l.*, to the trustees to be nominated pursuant to the articles made on the marriage of E. B. Symes with Mary Anne his wife, and which W. Jemmett had thereby covenanted to pay out of his real or personal estate, to be settled upon the trusts declared by those articles, and to pay the remaining 5,000*l.* unto H. Jemmett, his executors, &c.; and, after the 11,000*l.* should have been so raised, in the next place, out of the monies arising from the sale of the estates, to raise a sum sufficient for securing the payment

[*7]

of an annuity of *50*l.*, which, by the same articles, W. Jemmett had covenanted to pay to E. B. Symes and Mary Anne his wife during the life of W. Jemmett, and which sum should also be invested in the names of the trustees to be nominated by W. and H. Jemmett, for the purpose of securing the payment of the annuity, and the principal, after the decease of W. Jemmett, to be paid to H. Jemmett, his executors, &c. And it was thereby agreed that, until the sale should take place, the rents of the estates should be received by H. Jemmett, and be by him applied as the monies arising from the sale were thereby directed to be applied.

In pursuance of these articles, an indenture of bargain and sale was made, and a recovery was suffered, whereby Cottesmore Farm and other hereditaments in Little Milton were limited to the use of W. and H. Jemmett in fee.

By an indenture of the 25th of March, 1811, E. B. Symes and

his wife, in pursuance of the power given to them by the marriage-articles, made an appointment of the premises thereby agreed to be settled, in favour of their children, and, on failure of their children, Mary Anne Symes appointed the same premises for the benefit of H. Jemmett and his children, with remainder to E. B. Symes in fee.

By lease and release of the 28th and 29th of February, 1816, made between W. Jemmett of the first part, H. Jemmett of the second part, and W. Mister of the third part, after reciting the bargain and sale and recovery, and that W. Jemmett was entitled, in fee simple, to other hereditaments in Little Milton and *Great [*8] Milton, but subject, as to some parts thereof, to several incumbrances, and that W. Jemmett was indebted to divers persons in various sums, which, or a principal part whereof, were set forth in the first schedule thereto, and that W. Jemmett and H. Jemmett had, theretofore, entered into different agreements for selling the estates comprised in the bargain and sale and recovery and also the fee simple estates of W. Jemmett, and applying the money to be produced thereby in payment of the debts of W. Jemmett and for certain further purposes for the benefit of W. and H. Jemmett, but all such agreements were then meant to be relinquished and abandoned, and, in lieu thereof, they had agreed that H. Jemmett should pay, with his own monies, all the debts of W. Jemmett and should indemnify him therefrom, and also that H. Jemmett should pay to E. B. Symes and Mary Anne his wife, during the joint lives of W. Jemmett and Mary Anne Symes, an annuity of 50*l.*, and that, in consideration of the premises, W. Jemmett should convey his share and interest in the hereditaments comprised in the bargain and sale and recovery, and also the entirety of the fee simple hereditaments belonging to him in Little Milton and Great Milton, subject to the charges affecting different parts thereof, to the uses therein declared for the sole benefit of H. Jemmett, his heirs and assigns: it was witnessed that, in consideration of the release thereinafter made, by W. Jemmett, of the hereditaments thereinafter described, H. Jemmett covenanted, with W. Jemmett, that he, his heirs, &c., would pay all the debts of W. Jemmett set forth in the schedule, and would indemnify him therefrom, and also that H. Jemmett would pay

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[*9] to E. B. Symes and Mary Anne his wife, and to her if she should survive her husband, *from thenceforth, during the joint lives of Mary Anne Symes and W. Jemmett, an annuity of 50*l.*: and, in consideration of the covenant entered into by H. Jemmett, W. and H. Jemmett conveyed the hereditaments of which they were jointly seised in fee, and W. Jemmett conveyed the hereditaments of which he was solely seised in fee, subject to the incumbrances thereon, to Mister and his heirs, to such uses as H. Jemmett should appoint, and, subject thereto, to the use of H. Jemmett in fee: and W. and H. Jemmett released each other from all agreements by them entered into and interchanged prior to the date of the release, and from all monies payable and acts to be done by virtue of such prior agreements.

By indentures of the 2nd and 3rd of January, 1818, and made between H. Jemmett of the one part and the plaintiff of the other part, after reciting the deeds of February, 1816; H. Jemmett, in pursuance of the power thereby reserved to him, appointed and also conveyed Cottesmore Farm and certain of the other hereditaments, to the use of the plaintiff in fee, for securing, by way of mortgage, 8,000*l.* and interest. By an indenture of even date, after reciting the marriage-articles, and that W. Jemmett, at the time of entering into those articles, was seised in fee tail in possession of the premises comprised in the mortgage, and also reciting the bargain and sale and recovery and the deeds of February, 1816, and the mortgage to the plaintiff, H. Jemmett demised certain hereditaments of which he was seised in fee, to a trustee, for 500 years, upon certain trusts for indemnifying the plaintiff and the mortgaged premises, from all claims on account of the marriage-articles or any of the covenants of W. Jemmett

[*10] therein contained, and all *actions and suits on account of the same, or the breach or non-performance thereof or in anywise relating thereto.

Mary Anne Symes and W. Jemmett having died, and the issue of the marriage having failed, and Symes having taken the benefit of the Insolvent Debtors' Act, the bill was filed, against him and Hollier, his assignee, and against H. Jemmett, charging that the covenants in the marriage-articles were mere personal covenants on the part of W. Jemmett, and did not, as against the plaintiff,

create any specific liens or charges upon the mortgaged premises; that the covenants in the articles of 1810 were mere private and voluntary agreements between William and Henry Jemmett, and that no person claiming under the marriage-articles was privy thereto or could claim to enforce the performance thereof: that the articles of 1810 were never acted upon, but were abandoned and other arrangements substituted in lieu thereof by the deeds of February, 1816. The bill prayed that the plaintiff might be declared entitled to the benefit of his mortgage discharged from, or, at all events, in priority to the defendants claiming under the marriage-articles, and that the defendants might redeem the mortgage or be foreclosed.

Symes, by his answer, [claimed that the plaintiff ought to be considered as having had notice of the articles of 1810, whereby a specific lien or charge was created, upon the mortgaged premises, for the annuity and for raising the 4,000*l.*, and, therefore that the defendant was entitled to have provision made, out of the mortgaged premises, for payment of the arrears of the annuity due at W. Jemmett's death, and for settling an estate of 200*l.* a year, or the 4,000*l.* in lieu of it. And he further insisted that the provisions of the articles of 1810 were not and could not be superseded or abandoned, without the consent of the parties interested under the marriage-articles: and that the plaintiff was not entitled to the benefit of his mortgage in priority to the parties claiming under the marriage-articles.]

Sir E. Sugden and *Mr. Girdlestone*, for the plaintiff: [12]

There is nothing in the marriage-articles to bind any particular estate. William Jemmett had the whole of his life to perform the covenant to convey an estate of the value of 200*l.* a year, or to settle 4,000*l.* in lieu of it, and, therefore, no person could have enforced the performance of that covenant in W. Jemmett's lifetime. * * The agreements contained in the deed of 1810 were mere private and voluntary agreements between the father and son; and those agreements were wholly put an end to by the deeds of 1816: *Wallwyn* v. *Coutts* (1), *Garrard* v. *Lord Lauderdale* (2). The deed of indemnity (which was taken [*13]

(1) 17 R. R. 173 (3 Mer. 707). (2) 30 R. R. 105 (2 Russ. & Myl. 451).

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a majori cautelâ) gave notice, not of the articles of 1810, but of the articles of 1809: by those articles, however, no charge was created.

Mr. Knight and *Mr. Rudall*, for the defendant Symes:

There are two questions in this case: first, whether the covenant to pay the annuity, created a charge on the estates of which W. Jemmett was then seised: second, whether the covenant to convey an estate of 200*l.* a year, created a charge on those estates.

First: as W. Jemmett covenanted to pay the annuity out of the rents, profits and income of his real and personal estates, it is clear that the annuity was a charge on his estates.

Secondly: * * In the articles of 1810, W. Jemmett expressly states that he intended to satisfy the covenant of 1809 out of his real or personal estate; so that he puts his own construction on that covenant.

[14] (THE VICE-CHANCELLOR: I do not think that the words in the deed of 1810 accurately represent the effect of the articles of 1809.)

The deed of 1810 expressly charges the estates with the 4,000*l.*: and, if W. Jemmett had died the day after the deed of 1810 was executed, the parties claiming under the articles of 1809, might have filed a bill to have the trusts of the deed of 1810 carried into execution. *Wallwyn* v. *Coutts* and *Garrard* v. *Lord Lauderdale* have no application: for H. Jemmett was actually a creditor of his father; and, therefore, the deed of 1810 was not voluntary: and we have a right to consider that deed as perfecting the articles of 1809. * *

[15] H. Jemmett was a trustee under the articles; and it was a breach of trust in him to abandon the devotion of the property which he had obtained in favour of his cestuis que trust: and a party taking with notice of a breach of trust, is, himself, affected by the trust.

The *Solicitor-General* and *Mr. Hayter* appeared for the defendant Hollier.

Mr. Kindersley, for the defendant H. Jemmett.

THE VICE-CHANCELLOR:

By the articles of 1809, W. Jemmett covenanted to pay the annuity of 50*l.*, out of the rents and profits and annual income of his real and personal estate. Those words were, I think, quite sufficient to charge all the estates of which W. Jemmett was seised; and, consequently, the estate in question would be chargeable, in equity, with the annuity. He then covenants to devise or convey a fee simple estate in possession of the clear value of 200*l.* per annum, to the uses after mentioned, or, instead of devising and settling such estate of the clear annual value of 200*l.*, at his own election, to give and bequeath or otherwise secure to *trustees, the sum of 4,000*l.* to be laid out and settled [*16] as near to the uses before-mentioned as might be. With respect to this covenant my opinion is that it was not the intention of W. Jemmett to bind all or any of the estates of which he was seised: and it is, I think, perfectly clear that he did not intend to create any lien or charge on the mortgaged estate, of which he was merely tenant in tail at the date of the articles.

Then I come to the deed of 1810. [His Honour here stated the substance of that deed.] This appears to me to have been a mere voluntary agreement between the father and son, who were dealing with their own property and pointing out, as between themselves, the mode in which that property should be disposed of. Then, by the deeds of 1816, they come to a different arrangement, the effect of which is that, in consideration of the son covenanting to pay his father's debts and the annuity 50*l.*, the estates are conveyed to the son in fee. And, according to the principle of *Wallwyn* v. *Coutts* and *Garrard* v. *Lord Lauderdale*, it was, I think, competent to the father and son to defeat the prior agreement and to settle their estates in what manner they pleased. The consequence is that, if the plaintiff had notice of the deed of 1810, he would not be affected by it.

Declare that the plaintiff is entitled to the benefit of his mortgage discharged from all lien or claim in respect of the covenant, in the articles of 1809, to settle an estate of the value of 200*l.* a year, or the sum of 4,000*l.* in lieu of it; but subject to the covenant to pay the annuity of 50*l.* (1).

(1) Affirmed by Lord LYNDHURST, L.C. 4 April, 1835.

1834.
June 11.

SHADWELL.
V.-C.
[29]

GORDON *v.* HOFFMANN (1).

(7 Simons, 29.)

Will—Construction.

A testator, by his will gave to his son a legacy of 3,000*l.*, and, by a codicil, a legacy of 4,000*l.*, in addition to the legacy of 2,000*l.* given by his will: Held that the son was entitled to the legacy of 3,000*l.* in addition to the legacy of 4,000*l.*

TESTATOR, by his will, gave to his son a legacy of 3,000*l.* and, by a codicil, a legacy of 4,000*l.* in addition to the legacy of 2,000*l.* given by his will.

The bill was filed by legatees under the will, praying that it might be declared that the son was entitled to a legacy of 2,000*l.* only, in addition to the legacy given by the codicil.

The VICE-CHANCELLOR held that the son was entitled to the legacy given by the codicil and also to the legacy of 3,000*l.* given by the will.

Mr. Treslove and *Mr. Wray*, for the plaintiffs.

Mr. Knight, *Mr. Rogers* and *Mr. Kerby*, for the defendants.

1834.
July 5.

SHADWELL,
V.-C.
[30]

MILLS *v.* OSBORNE.

(7 Simons, 30—39.)

Trustee.

Trustees may receive prepayment of money where the postponement is authorized by the trust for the convenience of the person liable to pay the money.

A power to advance trust money to a person on condition that he should to the satisfaction of the trustees give to them the best and most sufficient security in his power would not justify the trustees in advancing the money on his bond.

THIS was a suit by the vendor against the purchaser of an estate, for a specific performance of the contract. The purchaser objected to complete his purchase on the ground that

(1) A clear gift is not cut down by implication, but where a codicil overstates the amount of a legacy given by a previous will the legacy may by implication be increased accordingly: see *Farrer* v. *St. Catherine's College, Cambridge* (1873) L. R. 16 Eq. 19, 42 L. J. Ch. 809, 28 L. T. 800, and the cases there cited.—O. A. S.

the estate was not effectually discharged from a sum of 10,000*l.* with which it had been charged by the will of John Bawtree, a brewer at Colchester, and who was a former owner of the estate. The objection was founded on the following facts:

The testator, by his will dated the 13th of July, 1822, devised the estate in question, with others, and also his general personal estate, to his son, John Bawtree, his heirs, executors &c. charged with the payment of 10,000*l.* to his, the testator's, daughter, Jane, the wife of Thomas Joseph Turner, at the time and upon the conditions after-mentioned: and the testator directed that the 10,000*l.* should continue and be employed in his trade, and should not be drawn therefrom until the expiration of three years from the 5th of July next after his death, and, at the expiration of such three years, that the 10,000*l.* should be paid or secured to his daughter and her husband, but upon the conditions after-mentioned: and the testator further directed that his son, his heirs, executors or administrators, should pay to his daughter, and, in case of her death, to Thomas Joseph Turner, her husband, interest *on the 10,000*l.* at 5*l.* per cent. [*31] per annum, until the 10,000*l.* should be fully paid and satisfied, and that such interest should commence from the quarter-day next after his death; and he expressly directed that, when the 10,000*l.* should be paid to his daughter, or to her husband in case of her death, then that her husband should, to the satisfaction of his son, John Bawtree, his brother, Samuel Bawtree, and his friend, Mathews Corsellis, (three of his executors thereinafter named and trustees for that particular purpose,) well and effectually give and execute, to them, the best and most efficient security in his power, so as that the 10,000*l.* might be properly and effectually secured to them or the survivor of them, [upon certain trusts for the benefit of the testator's daughter and her husband and children.]

The testator died on the 13th of October, 1824, and, after his death, his business was carried on by his son. In April, 1826, the son, being about to retire from the brewery, and not wishing to continue the 10,000*l.* in *the business, at Turner's [*32] request, and with the approbation of Samuel Bawtree and Corsellis, paid to Turner 4,000*l.*, in part of the 10,000*l.*, and

MILLS v. OSBORNE.

executed to him a mortgage of a real estate for securing to him the remaining 6,000*l.*

At the time when the above transaction took place, Turner was a partner in a Bank at Colchester, and the trustees at first proposed that he should give a bond, with a warrant of attorney for that sum; but as, by the articles of co-partnership between him and his partners, it was provided that it should be lawful for the partners to dissolve the partnership as to any partner who should make any mortgage, pledge, sale, assignment or other disposition of his share of the partnership stock and effects, or who should become bankrupt or insolvent, or should permit any part of the partnership property to be taken in execution for his separate debt, the trustees consented to take Turner's bond only as a security for the 10,000*l.*; and, thereupon, Turner executed to John Bawtree, Samuel Bawtree and Corsellis a bond dated the 4th of April, 1826, in the penalty of 20,000*l.*; and, after reciting the testator's will and his death, and that John Bawtree being willing and desirous, notwithstanding that the time limited by the will for the payment of the 10,000*l.* had not expired, to pay off and discharge or otherwise satisfy and secure the same to Turner and wife, had accordingly paid and discharged or otherwise well and sufficiently secured the same to them (as Turner did thereby admit), and further reciting that Turner, being willing and desirous to comply with the condition or desire expressed in the will, had agreed to enter into the before-mentioned bond, being the best

[*33] *and most sufficient security in his power, for the purpose of securing to the obligees the payment of the 10,000*l.* with interest, at the time and in the manner after-mentioned: the condition of the bond was expressed to be that if Turner, his heirs, executors, &c., should pay to the obligors the 10,000*l.* with interest at 5 per cent. per annum, on the 4th of April, 1827, then the bond should be void: and the obligees declared that they would stand possessed of the 10,000*l.* and of the bond and securities upon which that sum should be, from time to time, invested, on the trusts thereof declared by the will. By an indenture of the same date, Turner and his wife, in consideration of the 10,000*l.* therein mentioned to be paid

to them by John Bawtree, released him and his estate from that sum.

On the 10th of October, 1827, John Bawtree paid the 6,000*l.* to Turner; and, thereupon, Turner reconveyed to him the premises upon which that sum had been secured. Before the expiration of the three years from the 5th of July next after the testator's death, John Bawtree had retired from the brewery; but Turner continued to be a partner in the Bank: and, before the expiration of the three years (but it did not precisely appear when) he purchased an estate at Shimpling in Norfolk, for 3,150*l.*, 2,400*l.* of which was lent to him by the trustees of his marriage-settlement and was secured by a deposit of the title-deeds of the estate. But, at the expiration of the three years, he was not seised or possessed of any other freehold, leasehold or copyhold estate, except his share of certain estates belonging to himself and his co-partners and which he was prevented by the articles of partnership from mortgaging. The 10,000*l.* still remained secured by the bond.

It having been referred to the Master to inquire whether the plaintiff could make a good title to the estate contracted to be sold, the following objections were carried in by the defendant: [34]

First: that the 10,000*l.* was paid before the expiration of three years from the 5th of July next after the testator's death.

Secondly: that, supposing the payment to have been properly made in point of time, it had not been shewn that the bond was the best security which it was in Turner's power to give. For if it was in his power to give personal security only, a bond with a warrant of attorney and a judgment entered up thereupon, would have been a better security than a mere bond. But it was submitted that the best security to be obtained from Turner, under the circumstances of the case, was that which he was enabled to give at the time when, according to the provisions of the will, he was entitled to receive the legacy, that is to say, the expiration of the three years.

The answers carried in to these objections by the plaintiff, were,

First: that the provision in the will by which John Bawtree,

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the son, was allowed to employ the 10,000*l.* in his trade until the expiration of the three years, was intended for his benefit merely, and to prevent his being suddenly called upon to take such a sum out of his business, and that he was not precluded from paying it at an earlier time.

[35] Secondly: that the bond was a good performance of the condition contained in the will, being such security as then appeared to the trustees to be the best and most sufficient which it was in Turner's power to give; and that it was a sufficient security without a warrant of attorney, which Turner, consistently with his articles of partnership, could not have consented to give, and that he was not, at the expiration of the three years, in a condition to give any better or more sufficient security.

The Master reported against the title: upon which the plaintiff excepted to his report.

Sir E. Sugden and *Mr. E. Montagu*, in support of the exception:

The testator's son was at liberty, if he thought fit, to pay the 10,000*l.* before the expiration of the three years, as it was for his benefit merely that the payment was postponed. The trustees were made the judges as to what was the best security that Turner could give; and, as he had no real estate, and was prevented, by his partnership articles, from giving a warrant of attorney, the trustees were justified in taking the bond, which was, in fact, the best security he could give. If the testator had intended that the legacy should be perfectly secured, he had it in his power to effect that object, for he might have settled the legacy.

Mr. Preston and *Mr. Jacob*, in support of the report:

This is a case between vendor and purchaser; and the purchaser cannot be protected, by a decree in this cause, from the claims which Mrs. Turner and her children may make.

[36] [The trustees'] discretion, whatever it was, was to be exercised at the end of the three years and not before. Before the expiration of that time, and, perhaps, even before the money was paid, Mr. Turner acquired property which he might have made a

security for the legacy. [*Wilkes* v. *Steward* (1) shews that the trustees had no power to lay out the money on personal security.]

The trustees might have taken a security on his interest under the settlement; or they might have taken a second mortgage on the estate which he purchased in Norfolk, which would have been somewhat better than the bond: or they might have required him to insure his life and pledge the policy, or to give a bill of sale of his furniture, or to get some person to join him as a surety in the bond. It is not to be supposed that he spent the whole of the 10,000*l.*: it is most probable that he invested it either in a purchase or on some security; so that he might have given a security on the purchase or investment. [37]

THE VICE-CHANCELLOR:

I do not think that anything turns on the legacy having been paid before the time pointed out by the *testator; for the extended time was given for the benefit of the son, and not for the benefit of the daughter or her children; and, therefore, it was competent to the son to make the payment at any time he thought fit within the three years, provided proper security was taken. No payment, however, which would discharge the estate, could be made, except upon the condition which the testator has expressed, namely, that the best and most sufficient security which it was in Turner's power to give, should be taken, so as that the legacy might be properly and effectually secured to the trustees upon the trusts declared by the will. But, in any way of viewing this case, I do not think that the trustees did take the best and most sufficient security which it was in Turner's power to give. The bond is not the best form of bond that might have been taken, nor, indeed, is it in the common form; for the money is not made payable until a year after the date; whereas it might have been beneficial to have made it payable on the next day. The affidavits too which have been made in support of the plaintiff's state of facts, are not satisfactory as to the state of Turner's property at the time when [*38]

(1) 14 R. R. 211 (G. Coop. 6).

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the security was given. They allege merely that, to the best of the knowledge, information and belief of the deponents, Turner was not, at the expiration of the term of three years, possessed of any freehold, copyhold or leasehold estate, except his share of the estates belonging to himself and his co-partners, and also except a certain estate at Shimpling in Norfolk, which had then been purchased by him. And Mason, one of the deponents, who was the testator's solicitor, says that the testator, at the time of making his will, was well aware that Turner was [*39] not possessed of any property upon which he could *give any security for the 10,000*l.*; and that the testator then distinctly expressed himself to the deponent, that he did not consider that Turner would be able to give any other or better security than his bond, for the 10,000*l.* It was, however, not improbable that Turner's circumstances might improve between the date of the will, and the time pointed out, by the testator, for paying the legacy; and, therefore, I cannot suppose that the direction in the will as to the security to be given by Turner, was inserted with a view to the state of his circumstances at the date of the will.

It appears, however, by the affidavits, that the trustees might have obtained a better security than the bond: for they might have taken a security either on Turner's interest under his marriage-settlement, or they might have made him insure his life and assign the policy, or they might, for any thing that appears to the contrary, have taken a security on the Shimpling estate: therefore, I am of opinion, from what appears on the face of the evidence, that the security taken was not the best security or such as the trustees ought to have been satisfied with; and I am confirmed in that opinion by the circumstance that the plaintiff has not procured any affidavit to be made by Mr. Turner in support of his case.

Exception overruled.

CRIGAN *v.* BAINES.

(7 Simons, 40—41.)

1834.
July 5.

SHADWELL, V.-C.

[40]

Will—Construction.

Testatrix bequeathed as follows: "I give the legacy of 4,000*l.* to A., and, in case of his decease, I give the same legacy to his wife, and, at her decease to their eldest daughter:" Held that A., having survived the testatrix, was absolutely entitled to the legacy.

MARY BAINES made her will dated the 2nd of December, 1831, [containing the following words:] "I give and bequeath the legacy or sum of 4,000*l.* to my friend and pastor, the Rev. Dr. Alexander Crigan, Rector of Escrick in the county of York, and, in case of his decease, I give and bequeath the same legacy or sum to his wife, Mary Crigan, and, at her decease, to their eldest daughter, Mary Smelt Crigan." * * *

The testatrix died on the 24th of January, 1834.

The bill was filed by Dr. Crigan, praying that he, having survived the testatrix, might be declared to be solely and absolutely entitled to the legacy of 4,000*l.*

[41]

The defendants, Mrs. Crigan and her daughter, submitted that, according to the true construction of the will, the plaintiff was entitled to the legacy for his life only, and that, if Mrs. Crigan survived the plaintiff, she would be entitled to the legacy for her life, and that, after the death of the survivor of them, Mary Smelt Crigan would be absolutely entitled to the legacy.

Mr. Knight and *Mr. Girdlestone*, Jr. for the plaintiff.

Mr. Bagshawe, for the defendants, Mrs. and Miss Crigan, cited *Billings* v. *Sandom* (1), *Cambridge* v. *Rous* (2), *Galland* v. *Leonard* (3), *Montagu* v. *Nucella* (4).

Mr. Cankrien appeared for the defendant Hewley Mortimer Baines.

The VICE-CHANCELLOR held that the plaintiff, having survived the testatrix, was absolutely entitled to the legacy, and directed the costs of all parties to be paid out of the testatrix's residuary estate.

(1) 1 Br. C. C. 393.
(2) 6 R. R. 199 (8 Ves. 12).
(3) 18 R. R. 44 (1 Swanst. 161).
(4) 25 R. R. 25 (1 Russ. 165).

1834.
July 8.
Nov. 21.
Dec. 5.

SHADWELL, V.-C.

[43]

BLOUNT *v.* HIPKINS (1).

(7 Simons, 43—56; S. C. 4 L. J. (N. S.) Ch. 13.)

Will—Construction—Exoneration.

A testator gave to his wife all his personal estate and effects (specifically enumerating various classes of effects), and also certain portions of his real estates free from the mortgages thereon, and the benefit of certain contracts which he had entered into for the purchase of other real estates. And he devised the rest of his real estates to A. B., in trust to sell, and, out of the proceeds, to pay, in the first place, his funeral and testamentary expenses, his debts due on the mortgages of the estates devised to his wife, the sums due on the contracts and all his other debts, and, in the next place, he directed certain sums to be paid, out of the proceeds, to different persons, and gave the residue to C. D. and appointed his wife sole executrix: Held that the personal estate was exonerated from the debts.

A definite liability to pay a subscription for shares in a company within a limited time (such payment being necessary to complete the covenantor's title to the shares (2)) is a general debt, and not a mere liability primarily chargeable upon the shares themselves.

JAMES HIPKINS, by his will dated the 6th of February, 1831, [bequeathed to his wife, Mary Hipkins, all his household goods and furniture, plate, linen, china, pictures, wines, farming stock, ready money, debts, personal estate and effects of every kind and denomination, except his gold watch, riding horse, best saddle and bridle, clothes and wearing apparel, and 10 shares in the Stratford Canal Navigation: to hold the same and every part thereof (except as aforesaid) unto her his said wife, to and for her own absolute use and benefit: also he devised unto his said wife certain real estate therein described, and also the benefit of any contract for the purchase of any part of property agreed to be purchased by him from John Benson, which, at the time of his decease, might not have been carried into effect: to hold the said premises unto her his said wife, her heirs and assigns for ever, freed and discharged of and from any mortgage or mortgages affecting all or any part of the same premises, and he devised all his other real estates unto and to the use of John Blount, his heirs and assigns, according to the nature and quality thereof

(1) *Kilford* v. *Blaney* (1885) 31 Ch. D. 56, 55 L. J. Ch. 185, 54 L. T. 287; *In re Hargreaves* (1890) 44 Ch. Div. 236, 241, per Cotton, L. J.

(2) See *Day* v. *Day* (1860) 1 Dr. & Sm. 261, 29 L. J. Ch. 466, where it was held that a specific legatee of shares not fully paid up was primarily liable to pay calls made after the testator's death.—O. A. S.

respectively, upon trust to sell the same and to hold the money to arise from the sale thereof, and the rents, issues and profits thereof until the same should be so sold and disposed of, upon trust in the first place to pay, satisfy and discharge his funeral expenses, the costs, charges and expenses of proving his will, and all debts due from him upon mortgage of the hereditaments devised to his said wife, and also any sums of money owing for the purchase of any part of the premises so devised to her, if any should appear to be due upon account thereof, and all other just debts that should be due and owing from him at the time of his decease, and the costs and charges of assigning such mortgage or mortgages to his said wife, or to such other person or persons as she should appoint, or otherwise releasing the hereditaments, so devised to her as aforesaid, from the said mortgage or mortgages, and also all such costs, charges and expenses as he or they should be at or be put unto in effecting such sale or sales and in carrying into execution the trusts of that his will, and also should retain unto himself the sum of 50*l.* as a mark of his esteem and friendship: and upon further trust, out of the money to arise from such sale or sales, in the next place, to pay certain legacies thereby directed to be paid, and to pay the residue thereof, after the several thereinbefore mentioned payments and deductions thereout, to James Grove, his executors and administrators, and he appointed his wife sole executrix of his will.

The testator made a codicil (which is not material for the purpose of this report) and died on the 14th of May, 1831.]

The bill was filed, by J. Blount, to have the will established and the trusts performed. The question at the hearing of the cause, was whether the proceeds of the real estates directed to be sold, were not applicable, in the first place, to the payment of *the testator's debts, in exoneration of his personal estate. [49] [*50]

Sir E. Sugden and *Mr. William Lowndes*, for the plaintiff.

Mr. Knight and *Sir George Grey*, for the defendant, the testator's widow, cited *Burton* v. *Knowlton* (1), *Hancox* v.

(1) 3 R. R. 62 (3 Ves. 107).

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Abbey (1), *Bootle* v. *Blundell* (2), *Greene* v. *Greene* (3), *Driver* v. *Ferrand* (4).

Mr. Rolfe and *Mr. Armstrong*, for the defendant James Grove.

Mr. G. Richards and *Mr. Chichester*, for the other legatees.

Mr. Wilcock, for the heir.

THE VICE-CHANCELLOR:

The testator gives to his wife, not his personal estate, generally, but a great variety of articles which he specifically enumerates; he also gives to her a portion of his real estates, freed and discharged from any mortgages affecting the same, and he directs that she shall have the benefit of certain contracts which he had entered into for the purchase of other real estates. He then gives all his real estates, except those which he had devised to his wife, to the plaintiff, in trust to sell, and, out of the proceeds to pay, in the first place, his funeral and testamentary expenses,
[*51] his debts due *on mortgage of the estates devised to his wife, the sums due on the contracts the benefit of which he had given to his wife, and all other debts that might be due from him at his death and the costs of assigning the mortgages and of carrying into execution the trusts of his will. The testator, therefore, must, necessarily, have had his personal estate in his contemplation, and must have intended that his widow should take his personal estate exonerated from his debts.

Declare that the real estates devised to the plaintiff, are the primary fund for payment of the testator's debts.

At the time when the London and Birmingham Railroad was projected, the testator subscribed for 20 shares, of 100*l.* each, in the undertaking, and paid 5*l.* on each share; and he executed a deed of covenant for payment of the remainder, within 10 years from the date of the deed. At the time of his death the shares were at a premium of 4*l.* each; but he had not been called upon to make any further payment on his shares. The Act of Parliament for making the railroad, (3 & 4 Will. IV. chap. 36) was

(1) 8 R. R. 124 (11 Ves. 179).
(2) 15 R. R. 93 (1 Mer. 193).
(3) 20 R. R. 284 (4 Madd. 148).
(4) 32 R. R. 315 (1 Russ. & Myl. 681).

not passed *until the 6th of May, 1833 (1), which was nearly two years after the testator's death.

[*52]

The question which now came on to be argued, and which had been reserved at the hearing of the cause, was whether the instalments on the shares, remaining unpaid at the testator's death, were to be considered as debts which, under his will, were to be paid out of the proceeds of his real estates directed to be sold, or whether the shares passed to his widow, subject to the payment of those instalments.

Mr. Knight and *Mr. Blunt*, for the testator's widow, said that the obligation to pay the instalments on the shares was contracted by the testator: that, on his death, his personal estate was fixed with the liability; but, by the will, it was to be exonerated out of the proceeds of the real estates: that, at the testator's death, his widow was entitled to have the shares free of charge, and that her rights, as they stood at the testator's death, could not be affected by the Act of Parliament.

The *Solicitor-General* (2) and *Mr. Armstrong*, for the defendant James Grove:

The money remaining due for the shares, was not a debt within the meaning of the charge created by the will. Nothing was due from the testator at his death. No call had been made upon him; and it was uncertain whether any call would be made. The unpaid instalments, therefore, were not a debt due from the *testator; they could not have been recovered otherwise than as damages for the non-performance of the covenant. * * *

[*53]

The Act did not pass until two years after the testator's death, and then all liability under the deed of covenant ceased: *The Huddersfield Canal Company* v. *Buckley* (3).

THE VICE-CHANCELLOR, after stating the substance of the will and codicil, proceeded thus:

The testator, when the London and Birmingham Railway was projected, subscribed for 20 shares in the undertaking, and paid

(1) The sections of the Act, which were referred to in the argument, are stated in the judgment.

(2) Mr. Rolfe.

(3) 7 T. R. 36.

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a deposit of 5*l.* on each share, and signed a contract and executed a deed bearing date the 15th of October, 1830. The deed and contract were prepared pursuant to standing orders of both Houses of Parliament. By that deed, the testator, for himself, his heirs, executors and administrators, covenanted with persons named, that he, his heirs, executors, administrators or assigns would pay the amount subscribed by him, which was 2,000*l.*, within 10 years from the date of the deed, in such sums and at such places and times as, until the passing of the intended Act of Parliament, should be required by the Directors for the time [*54] being engaged *in the undertaking, and, after the passing of the Act, as the Directors or others authorized by the Act, should appoint or direct.

On the 14th of May, 1831, the testator died. No call was made, before his death, for payment on any of his shares, except the deposit.

On the 6th of May, 1833, the Act for making the railway, passed. By the first section, certain persons named and all other persons who had subscribed or should thereafter subscribe towards the undertaking, and their several executors, administrators and assigns were united into a Company, and made one body corporate, by the name of the London and Birmingham Railway Company. By the 3rd section, the Company were authorized to raise 2,500,000*l.* in 25,000 shares of 100*l.* each. By the 151st section, Directors were appointed. Then follow several regulations for the payment of subscriptions. The 161st section seems not applicable to the present case; for it only speaks of the parties who have subscribed or who shall hereafter subscribe, and says they are hereby required to pay the sums by them respectively subscribed. The executrix of a person who had subscribed and died before the passing of the Act, is not within those words. The 162nd section uses more extensive language, and enables the Directors to make calls of money from the subscribers to and proprietors of the undertaking, and directs that the owners of shares shall pay, and that, if any owner shall not pay, it shall be lawful for the Company to recover by action of debt or on the case, or to declare the shares of the person so [*55] refusing to be forfeited, and to sell *them. The 164th section

enacts that, in any such action, it shall be sufficient to declare that the defendant, being a proprietor, is indebted, and that, on the trial, it shall only be necessary to prove that the defendant was, at the time of making such calls, a proprietor. The 166th section makes the shares personal estate; and though, by the 167th section, power is given to the proprietors to sell their shares, yet, by the 168th section, no person shall sell any share, after any call has been made by the Directors for any sum in respect of such share, unless he, at the time of such sale, shall have paid the full sum which shall have been called for. But I see nothing in the Act of Parliament which destroys the right that the directors had to sue, in the names of their trustees, upon the indenture of the 15th of October, 1830.

After the Act was passed, three calls were made, and the question before me is whether Mrs. Hipkins is not entitled to have the amount of those calls, as, also, of all future calls raised out of the residuary real estate of her husband.

It appears to me that the covenant in the indenture of the 15th of October, 1830, constituted a debt within the meaning of the testator's will, though payable *in futuro*, and, to a certain extent, contingent, but no otherwise contingent than as the shares given to Mrs. Hipkins were, themselves, contingent upon the proceeding of the undertaking and the passing of the Act. He meant, I think, to give her, as a purchaser for valuable consideration, his general personal estate free from any obligation which affected him to pay money in respect of it, in the same manner as he devised *to her estates liable to mortgages, and estates agreed to be bought and not paid for. And, if the Act of Parliament has destroyed the covenant, yet the liability of the executrix and legatee as owner under the Act, would only be a substitution at law for the covenant, and her equity would remain the same: and I am of opinion that the amount of the past as well as of future calls, must be raised out of the residuary real estate.

[*56]

1834.
July 15, 16, 18.
Aug. 7, 20.

SHADWELL, V.-C.

[92]

TWYFORD *v.* TRAIL.

(7 Simons, 92—108.)

Representation.

A. died in India. B. one of his executors proved his will in India. B. died, and C. his executor, proved his will in England. C. is not the personal representative of A.

Breach of trust—Partners.

A. a partner in a house of agency in India, died, having by his will, directed his estate to be called in, and invested on certain trusts, and appointed two of his copartners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed: Held that B. and C. were not responsible for the breach of trust committed by their copartners, the executors.

By an indenture, dated the 1st of May, 1809, John Palmer, William Logan, Patrick Maitland, George Augustus Simpson and William Hall agreed to become partners, as agents or factors, at Calcutta, for three years from the date of the deed, under the style or firm of Palmer & Co.; and it was agreed that the profits of the partnership should be divided into 24 parts, and that George Augustus Simpson should be entitled to five of such parts, and that the remainder should be divided amongst the other partners as therein mentioned: and it was also agreed that the accounts of the partnership should be made out on the 1st of May in every year; and that, if any of the partners should die before the end of the partnership term, the survivors should, in full of his share of the capital, stock, and profits of the partnership, pay, to his executors, within six months after the accounts of the year in which he should die should have been made up, so much money as would have been due to the deceased if he had been living at the last settlement of accounts.

[93] Not long after the formation of the partnership, William Logan died, and, after his death, the surviving partners, under a proviso for that purpose contained in the deed, carried on the business, under the firm of Palmer & Co., upon the same terms as before.

In March, 1811, George Augustus Simpson died, leaving his wife, (who afterwards married John Maitland) and three children,

the eldest of whom was only five years old, him surviving. George Augustus Simpson, by his will, appointed Patrick Maitland, William Hall and his brother, James Archibald Simpson, his executors; and he gave to them all his personal property, in trust, as soon as conveniently might be after his decease, to convert the same into money and invest it, either in Government securities in India, or in the public funds in England, and to pay 800*l.* a year to his wife, during the minority of his children, and, on their attaining 21, to divide his property, in certain proportions, between his wife and children. In March, 1811, William Hall and James Archibald Simpson proved George Augustus Simpson's will, in Calcutta. Shortly after George Augustus Simpson's death, his widow and children returned to England; and the widow opened an account with the house of Cockerell, Trail & Co. of London, as her bankers; and Trail, who was connected with her by marriage, acted as her friend or agent in respect of her late husband's property in India. The house of Cockerell & Co. were, also, the agents, consignees and correspondents of Palmer & Co. After George Augustus Simpson's death, the business of the Calcutta house was carried on as before, by the surviving partners; and, by an account made out by them on the 1st of May, 1811, it appeared that a balance of *280,526 rupees was due to the estate of [*94] George Augustus Simpson, in respect of his share of the capital, stock and profits of the partnership. This balance was not paid to the executors; but they suffered it to be retained by Palmer & Co., who opened an account in their books, which was headed: "Estate of George Augustus Simpson, in account with Palmer & Co.;" and Palmer & Co. from time to time received further sums of money on account of the estate, and, from time to time, sent to Cockerell & Co. accounts of the monies in their hands belonging to the estate, and made remittances to them on account of the interest of such monies: and they debited themselves with and gave credit to the estate for the sums which they received, and took credit for, and debited the estate with the sums which they paid on account of it.

Soon after George Augustus Simpson's death, his surviving partners signed a memorandum, by which they agreed that

TWYFORD v. TRAIL.

his executors should from the 1st of May, 1811, to the 30th of April, 1812, receive three-twenty-fourths of the profits of the house of Palmer & Co., for the purpose of enabling them to improve the widow's income, and, generally, for the benefit of her late husband's estate as the firm might thereafter direct.

In the year 1814, Patrick Maitland returned to England; and, in November of that year, he proved George Augustus Simpson's will in the Prerogative Court of Canterbury. In 1818 William Hall died, having appointed Henry Trail his executor in England, [*95] and John Palmer, Patrick Maitland, Francis Tipping *Hall and two other persons his executors in India; and Francis Tipping Hall alone proved his will in India. About the year 1820 Francis Tipping Hall, and John Brownrigg were admitted as partners in the firm of Palmer & Co.; and, in the same year, Henry William Hobhouse, who had been a partner in the firm, and had retired from it in the lifetime of William Hall, was readmitted a partner. The new partnerships successively assumed and adopted the debts, credits and accounts of the former partnerships; and the accounts of the monies belonging to George Augustus Simpson's estate were entered in the books of the house as before; and the dealings and transactions of the house, in respect to those monies, were continued. Trail, as the agent or friend of Mrs. Maitland, frequently urged Palmer & Co. to invest the monies in their hands belonging to George Augustus Simpson's estate, in Government securities in India, and in March, 1820, they did invest 100,000 rupees, part of that balance, in a Government note.

In January, 1821, Patrick Maitland died, insolvent; and, in May of the same year, James Archibald Simpson died, having appointed Palmer, Brownrigg, Hobhouse and Francis Tipping Hall his executors in India, and Trail and two other persons his executors in England, and his will was proved in Calcutta, by Francis Tipping Hall alone, soon after his death; and, in December, 1821, his will was proved by Trail, in the Prerogative Court of Canterbury. On the 18th of June, 1822, administration *de bonis non* of George Augustus Simpson, was granted, by the same Court, to Mrs. Maitland, and, in 1823, Trail proved William Hall's will in the same Court.

In 1823 Palmer & Co. altered the title of their account with George Augustus Simpson's estate, and headed it: "Trust for Mrs. Maitland and minor Simpsons in account with Messrs. Palmer & Co." In 1825, Hobhouse and Brownrigg retired from the partnership, and by the deeds of dissolution which were executed on those occasions, they assigned their interests in the partnership property to the continuing partners, and the latter (one of whom was Francis Tipping Hall, the personal representative of George Augustus Simpson in India) took upon themselves and covenanted to pay all the debts and sums of money due from the partnership, and released Brownrigg and Hobhouse from all demands respecting any matter relating to the partnership. At different times afterwards, certain other persons were admitted into the partnership. In January, 1830, Palmer & Co. became bankrupts. [96]

In 1831 the plaintiff, Samuel Twyford, married one of the daughters of George Augustus Simpson, who was only one year old at her father's death; and, in March, 1832, they filed the bill in this cause, against Trail, Sir Charles Cockerell and the other partners in the house of Cockerell, Trail & Co., and against Brownrigg, Hobhouse, Francis Tipping Hall, who was out of the jurisdiction of the Court, Mrs. Maitland and her husband, and certain formal parties, alleging that William Hall and James Archibald Simpson, as the executors of George Augustus Simpson, ought to have caused the monies belonging to his estate which were in the hands of Palmer & Co. in their lifetime, to be invested on proper securities; and, that, as they had neglected to do so, the amount of such monies ought to be made good out of their assets: that Brownrigg *and Hobhouse, during the [*97] times that they were partners in the firm of Palmer & Co., were, together with the other members of the firm, indebted to George Augustus Simpson's estate in the sums belonging to his estate which were in the hands of the firm during those periods, and that they still continued so indebted; and that they had notice, by the manner in which the accounts relating to those monies were entered in their books, and from the accounts relating thereto which were from time to time sent to Cockerell & Co., that the same were trust monies and subject to the trusts

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of George Augustus Simpson's will, and that such monies were thereby directed to be, or otherwise ought to have been invested on Government securities; and that they ought to have caused the same so to be invested; and that such monies were suffered to remain in the hands of the firm, by a breach of trust, of which they were aware, and in which they concurred, and that they became trustees thereof for the persons interested in George Augustus Simpson's estate, and became, and still were responsible for the same. The bill further alleged that Trail, after the death of James Archibald Simpson, and after having proved his will, became the personal representative of George Augustus Simpson, and that the letters of administration granted to Mrs. Maitland, were void; and that Trail, as such personal representative, ought to have procured the monies in the hands of Palmer & Co., to be remitted to England; but that he neglected so to do, and permitted and sanctioned their retaining the same, and he thereby became and still was responsible for the same, or so much thereof as might be lost by the insolvency of Palmer & Co. The bill further charged that, in October,

[*98] 1828, Palmer & Co. remitted to Trail or to Cockerell, Trail *& Co. a bill of exchange for 5,000*l.*, drawn by them upon Cockerell, Trail & Co., on account of George Augustus Simpson's estate; and that they returned the bill, unaccepted, to Palmer & Co. The bill prayed that the usual accounts might be taken of George Augustus Simpson's estate possessed by his personal representatives, or which, without their default or neglect, might have been possessed by them, and that it might be declared that the personal estates of James Archibald Simpson and William Hall, and, also, the defendants Trail, Francis Tipping Hall, Brownrigg and Hobhouse were bound to make good the monies belonging to George Augustus Simpson's estate, which were left in the hands of and were due from the firm, or successive firms of Palmer & Co.; and that it might be also declared that Cockerell & Co. were bound to make good the amount of the monies received by them on account of George Augustus Simpson's estate and of the bill of exchange which had been returned to Palmer & Co.

Trail, in his answer, submitted to the judgment of the Court.

whether, by proving the will of James Archibald Simpson in England, he became the personal representative of George Augustus Simpson.

Brownrigg and Hobhouse, in their answers, said that the monies belonging to George Augustus Simpson's estate were entered to the debit of Palmer & Co. in account between them and the estate, in their books of account, and, in all the accounts furnished by them from time to time to his executors, as monies in the hands of Palmer & Co., as bankers or agents for the executors, and payable to their order and under their control: and they said that their retirement from the *partnership was well known to George Augustus Simpson's [*99] personal representatives, who adopted the remaining partners and also the succeeding members of the firm, as their debtors in respect of the monies belonging to George Augustus Simpson's estate: and they relied on the releases executed to them on retiring from the partnership, and on the Statute of Limitations.

Mr. Rolfe, *Mr. Jacob* and *Mr. Wigram*, for the plaintiffs:

It was the duty of George Augustus Simpson's executors to call in and invest their testator's estate as directed by his will; and, as they did not do so, but suffered it to remain in the house in which two of them were partners, they were guilty of a breach of trust, and so also were all the persons who were partners in the firm at the death of George Augustus Simpson. There was always in the firm a personal representative of George Augustus Simpson who was guilty of a breach of trust. Although Hobhouse and Brownrigg did not become partners in the house till after George Augustus Simpson's death, they had constructive notice, at the least, from the manner in which the accounts with his estate were headed in the books of the firm, that there was a trust fund which they and their partners were holding at their peril. And, in the accounts which were sent to England from time to time during their continuance in the partnership, they recognised the fund as a trust fund. Hobhouse and Brownrigg, therefore, became trustees: and, as they were accessaries to the breach of trust, they became responsible for it equally with the

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executors themselves: *Mucklow* *v. *Fuller* (1), *Ex parte Watson* (2) [*Wilson* v. *Moore* (3), *Gedge* v. *Traill* (4), *Walker* v. *Symonds* (5), and other cases].

[*100]

Palmer & Co. were not merely the bankers of the executors. It is the custom of Indian houses to receive monies as a permanent investment: and the monies belonging to George Augustus Simpson's estate, were placed in the hands of Palmer & Co., not as a mere temporary deposit, but as an investment or loan; and the firm dealt with the cestuis que trust, and not merely with the executors.

The Statute of Limitations does not apply; on account of the infancy of the cestuis que trust, and because the partners in the house for the time being, continued to make payments on account, and also because the defendants were parties to a breach of trust.

The releases executed on the retirement of Hobhouse and Brownrigg, were executed to them for allowing the remaining partners to continue in the same course of breach of trust. The cestuis que trust were no parties to those releases, and, therefore, their claims were not affected by them. It is questionable whether even a payment to the person legally entitled to receive the money, would have absolved the defendants, they knowing that he meant to be guilty of a breach of trust.

[101]

Trail, by proving James Archibald Simpson's will, became the personal representative of George Augustus Simpson. He knew, from the beginning, that the testator's assets had been misapplied; and it was his duty to see that they were called in and invested. After he had proved the will, he did write out to Calcutta, to say that the property ought to be called in and invested; but he afterwards let the matter drop until it was too late. Trail, therefore, is liable personally, as well as in respect of the assets of James Archibald Simpson and William Hall which were received by him.

Cockerell & Co. knew that the monies which they received

(1) 23 R. R. 29 (Jac. 198).
(2) 13 R. R. 128 (2 V. & B. 414).
(3) 36 R. R. 272 (1 M. & K. 126 and 337).
(4) 32 R. R. 212, *n.* (1 Russ. & Myl. 281, *n.*).
(5) 19 R. R. 155 (3 Swanst. 1).

were trust-monies; and they are liable for what they received, and also for the amount of the bill of exchange which they returned.

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The *Solicitor-General* and *Mr. Cockerell*, for the defendant Trail, contended that Mrs. Maitland, and not Trail, was the personal representative, in England, of George Augustus Simpson.

Sir E. Sugden and *Mr. Walker*, for the defendants Cockerell & Co.

Mr. Knight and *Mr. Kindersley*, for the defendant Brownrigg.

Mr. Sharpe, for the defendant Hobhouse.

Mr. Rennalls, for the other defendants.

* * * * *

Aug. 20.

[104]

His Honour, after stating the facts of the case, delivered judgment as follows:

There is no doubt that it was the duty of William Hall and James Archibald Simpson to withdraw from the house of Palmer & Co. the share belonging to George Augustus Simpson. They, however, suffered it to remain in the house, and their assets, therefore, are responsible for the loss sustained in consequence: and, to the extent in which Trail has possessed assets of William Hall or of James Archibald Simpson, he will be liable to make good that default.

But the plaintiffs seek to make him, as well as Sir Charles Cockerell and his partners, and the defendants Hobhouse and Brownrigg, personally responsible. It has been argued that, by proving, in England, the will of James Archibald Simpson, who had proved in India the will of George Augustus Simpson, Trail became the personal representative of George Augustus Simpson, and that, therefore, it was his duty to withdraw George Augustus Simpson's share from the house of Palmer & Co., and that he is responsible for the loss arising from the non-performance of that duty.

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I apprehend the law clearly to be otherwise, and that, as James Archibald Simpson proved his testator's will in India only, Trail did not, by proving James Archibald Simpson's will in England, become, and is not now the personal representative of George Augustus Simpson, either in England or in India. In order to make him the representative of George Augustus
[*105] *Simpson, it was necessary that he should prove the will of his testator in that Ecclesiastical Court wherein his testator had proved the will of George Augustus Simpson. But that he did not do. Therefore, he is not personally responsible, for the loss in question, as the representative of George Augustus Simpson; and his voluntarily acting as the agent, trustee or friend of Mrs. Maitland and her children, or as one of the partners of Sir Charles Cockerell & Co. (the only characters in which he did act) cannot make him personally liable. So far, therefore, as the bill seeks to make him personally liable for the loss, it must be dismissed with costs.

With respect to Sir Charles Cockerell & Co., they acted merely as the agents and correspondents of Palmer & Co., and there is no pretence for charging them. Therefore, so far as the bill seeks to charge them with the loss, it must also be dismissed with costs.

As to the defendants Hobhouse and Brownrigg, it is to be observed that they, in common with their partners, did, by the consent of James Archibald Simpson during his life, and, after his death, by the consent of Francis Tipping Hall, who was the Indian representative of George Augustus Simpson, merely act in the same manner as the house of Palmer & Co. had acted before they were admitted: and to assert that they must now be personally responsible, merely because, while they remained in the house, they allowed the account with the estate of George Augustus Simpson to subsist in the same manner as it had done before they became partners, is to assert a proposition somewhat
[*105] *new and rather alarming. Besides, when they retired from the firm in 1825, they each received a release from Francis Tipping Hall, the executor in India of George Augustus Simpson, of all demands in respect of any matter relating to their copartnership. I am of opinion, therefore, that, as to them, the bill must be dismissed with costs.

The bill also prays for a declaration that Trail and his partners are responsible for the amount of the monies received by them on account of the estate of George Augustus Simpson, and for the amount of the bill of exchange returned by them. It appears that Trail, by a letter of the 10th of January, 1827, had directed Palmer & Co. to invest the estate of George Augustus Simpson in Government securities in India. In answer they sent a letter of the 5th of June, 1827, saying that, on the 31st of December next, they would invest 100,000 sicca rupees, and that a like sum should be invested in December, 1828, and so on, yearly, till the whole was completed. But, on the 9th of February, 1828, they wrote to Trail, stating that his instructions of the 10th of January, 1827, would be sufficiently and most clearly met by periodical remittances instead of investments, and that they, accordingly, had elected the alternative of remittance, and sent a draft for 5,000*l.* on themselves, and six months hence they would send an equal sum, and so on every six months until the whole of the balance should have been absorbed. The receipt of that letter and of the draft was acknowledged by Cockerell & Co., in a letter of the 21st of July, 1828, and Trail also wrote to Palmer & Co. a letter of the same date, requesting they would refrain from sending home any further sum on account of the *estate, repeating his instructions of the 10th of January, 1827, [*107] and desiring that they would carry his instructions into effect according to the tenor of their letter to him of the 5th of June last year. Palmer & Co., however, sent to Trail a letter of the 1st of October, 1828, enclosing a bill on Cockerell & Co. in favour of Trail, for the cost of which they said they debited the trust for Mrs. Maitland and the minor Simpsons. Cockerell & Co., under Trail's directions, returned that bill in a letter dated the 21st of April, 1829, and, in two letters, each dated the 2nd of January, 1830, one to Trail, the other to Cockerell & Co., Palmer & Co. acknowledged the receipt of the returned bill, and stated that the value of it, with interest, had been written back to the trust account, and that Mr. Trail's instructions regarding the investment of the trust funds, should be carried into effect. In respect of this second bill the plaintiffs ask for relief.

So far as Trail, or Cockerell & Co. received any of the assets

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of George Augustus Simpson, they are liable to a common account. But, with respect to this second bill, it does not, in the first place, appear that Cockerell & Co. had assets of Palmer & Co. to answer it; and, if they had, Trail was under no obligation to receive money which he had expressly desired should not be sent to him; and, in the return of the bill, Cockerell & Co. merely acted as Trail's agents. In respect, therefore, of this returned bill, no case for relief is established; and the bill must be dismissed as against Trail and Cockerell & Co. with costs.

The result, upon the whole, is that relief can only be given in
[*108] the shape of common accounts; and, so far as *the plaintiffs do not choose to have the common accounts against any of the defendants who are accountable, the bill must be dismissed with costs.

The decree dismissed the bill, with costs, as against Cockerell & Co. and Brownrigg and Hobhouse, and as against Trail, so far as it sought to make him personally responsible as the alleged personal representative of George Augustus Simpson, or sought any relief against him as one of the partners in the firm of Cockerell & Co.; and declared that it was the duty of William Hall and James Archibald Simpson to withdraw, from the house of Palmer & Co., the monies belonging to George Augustus Simpson's estate; and that their estates were responsible for the loss occasioned by their neglect; and referred it to the Master to ascertain the amount of such loss, with liberty to state special circumstances; and also to take an account of the estates of William Hall and James Archibald Simpson come to the hands of Trail, their legal personal representative in England, and to inquire what sums belonging to the estate of George Augustus Simpson, had come to Trail's hands and under what circumstances, and how the same had been applied; and to inquire and state the amount of the monies belonging to the estate of George Augustus Simpson, which were in the hands or due from Palmer & Co. when they failed, and what dividends had become payable in respect thereof and by whom received, and how applied.

BURN *v.* CARVALHO.

(7 Simons, 109—120.)

1834. *July* 19.

[109]

[SEE the report of this case before Lord Cottenham, L. C., taken from 4 My. & Cr. 690, to be contained in a later volume of the Revised Reports.]

LAYFIELD *v.* LAYFIELD.

(7 Simons, 172; S. C. 4 L. J. (N. S.) Ch. 2.)

1834. *Nov.* 17.

SHADWELL, V.-C.

[172]

Account—Executor *de son tort.*

Payments made by an administrator *de son tort*, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit and was thereupon made a co-defendant, will not be allowed.

THE bill was filed for the usual accounts of an intestate's estate, against Thomas and John Layfield, who had possessed part of the intestate's assets without having taken out administration to him. Afterwards, Robert Layfield, the father of Thomas and John, took out administration to the intestate, and, thereupon, he was made a defendant. Pending the suit but before the decree, the sons paid, to their father, certain sums on account of the assets possessed by them. On taking the accounts directed by the decree, the Master refused to allow them those payments; upon which they excepted to the report.

Mr. Ching, in support of the exception, referred to *Perry* v. *Phelips* (1) and *Maltby* v. *Russell* (2).

Mr. Knight and *Mr. Parker*, in support of the report, contended that the cases cited had no application: and that, as the payments were made pending the suit, the Master was justified in disallowing them. They referred to *Padget* v. *Priest* (3), *Curtis* v. *Vernon* (4) and *Oxenham* v. *Clapp* (5).

THE VICE-CHANCELLOR:

The payments were made, in the course of the cause, by the sons to their father, who, in the course of the cause, became

(1) 7 R. R. 331 (10 Ves. 34).
(2) 25 R. R. 191 (2 Sim. & St. 227).
(3) 1 R. R. 440 (2 T. R. 97).
(4) 1 R. R. 774 (3 T. R. 587).
(5) 2 B. & Ad. 309.

LAYFIELD v. LAYFIELD.

the administrator of the intestate. If such a transaction were allowed, a court of equity would exist for no useful purpose: and, therefore, I

Overrule the exception.

1834. *Nov.* 11, 18, 19.

SHADWELL, V.-C.

[173]

HAWKINS *v.* HAWKINS.

(7 Simons, 173—178; S. C. 4 L. J. (N. S.) Ch. 9.)

Settlement—Construction—Next of kin.

By a marriage settlement, a fund, the property of the wife, was settled on her and her husband and their issue, and, in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her: Held that the fund belonged to the husband as administrator to his wife, who became entitled under a resulting trust upon failure of the limitations of the settlement.

A testator gave a sum of money to trustees, in trust only and for the use and benefit of his adopted daughter, which he desired might be paid to her, and be settled on her during her life, in case of her marriage: or, in case she did not marry, then the interest of the money, being vested in Government securities, to be paid to her: and, in the event of her not marrying or dying, then the money to go to his nephews. The daughter married, and, shortly afterwards, died without issue: Held that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund.

THIS was a suit for the administration of the estate of the late Sir Christopher Hawkins, who, by his will dated the 28th of January, 1823, after devising his freehold estates, subject to the payment of his debts and legacies, to the plaintiff for life, with divers remainders over, gave to his sister, Mary Trelawny Brereton, and to her son, Harry Brereton Trelawny, Esq., the sum of 12,000*l.*, in trust only and for the use and benefit of his adopted daughter, Christiana Dutton, then aged about 18 years, which sum of 12,000*l.* the testator desired might be paid to her the said Christiana Dutton, and to be settled on her, during her said life, at the time of her marriage; or in case if that she did not marry, then the interest of the said money, being vested in Government securities, to be paid to her; and, in the event of her not marrying or dying, then the said sum of 12,000*l.* to be divided in equal parts, and one half to be paid to Harry Brereton Trelawny or his heirs, and the other part, to the testator's nephew, John Trelawny, or his heirs, or the heirs of either; in default, to the heirs of the testator's brother, John Hawkins.

The testator, by a codicil dated the 28th of April, 1825, gave to Christiana Dutton, 8,000*l.*, in addition to the above sum of 12,000*l.*, and directed that, in case he had no legal issue, the above sum of 8,000*l.* additional should be paid to her on his decease.

The testator died in April, 1829, without issue. On the 26th of January, 1832, Miss Dutton (who was an illegitimate child) married Henry Trewhitt. By the settlement made previous to their marriage, after reciting that Miss Dutton was or claimed to be entitled to the sum of 12,000*l.* under the will of Sir Christopher Hawkins, it was agreed that that sum should be held, by the trustees of the settlement, in trust, during the joint lives of Henry Trewhitt and Christiana Dutton, for the separate use of Christiana Dutton, and, in case she should survive Henry Trewhitt, in trust for her for the remainder of her life, and, if Henry Trewhitt should survive her, then for him for life, and, after the decease of the survivor of them, in trust for their issue; and, in case there should be no issue of the marriage who should obtain a vested interest in the 12,000*l.*, then, if Christiana Dutton should die in the lifetime of Henry Trewhitt, in trust for such person or persons as she should, by will, appoint, and, in default of such appointment, in trust for the person or persons who, according to the statutes for the distribution of the estates of intestates, would, at the time of such failure of issue as aforesaid, be next of kin of Christiana Dutton if she had died without having been married, to be divided between and among such persons, if more than one, in the shares and manner prescribed by such statutes for the distribution of estates of intestates; but if Christiana Dutton should survive Henry Trewhitt, *then in trust for her, her executors, administrators and assigns. [*175]

On the 12th of September, 1832, Christiana Trewhitt died without issue, and without having made any testamentary disposition under the power reserved to her by the settlement, and her husband, who had taken out administration to her, presented a petition in the cause, praying that he might be declared to be entitled, as her administrator, to the 12,000*l.* and 8,000*l.*

The petition was served upon Harry Brereton Trelawny, John Trelawny and the parties in the cause. On the petition being

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called on, it was suggested that, as Mrs. Trewhitt left no next of kin, the law officers of the Crown ought to have been served; and the petition was ordered to stand over for the purpose of serving them; which was accordingly done.

Nov. 18.

Mr. Knight and *Mr. Campbell*, for the petitioner [claimed under a resulting trust for the wife upon failure of the limitations of the settlement].

The *Solicitor-General* and *Mr. Wray*, for the Crown:

If there had been any next of kin of Mrs. Trewhitt, the fund
[*176] would have gone to them: but, there being *none, the Crown takes. It is in the nature of *bona vacantia*.

It is clear that the husband and wife intended, by their contract, to divest themselves of all beneficial interest in the fund, except that which was expressly limited to them. The husband has, certainly, excluded himself from taking beneficially: and, as the whole interest is divested and given to parties who do not exist, the Crown is entitled to the fund: *Middleton* v. *Spicer* (1).

THE VICE-CHANCELLOR:

The Crown has no right to the fund as against the husband. He was intended to be excluded in favour only of such next of kin as there might be; and, as there were no next of kin, the title of the wife was unaffected by the settlement, and the fund resulted to her, and goes to her husband as her personal representative.

[Secondly, as to the question upon the construction of the will:]

Nov. 19.

Mr. Knight and *Mr. Campbell* [for the wife's representative].

[177]

Sir E. Sugden and *Mr. Simons*, for H. B. Trelawny and John Trelawny. * * *

Mr. Sidebottom, for the plaintiff.

Mr. Jacob, for the defendants.

(1) 1 Br. C. C. 201.

THE VICE-CHANCELLOR:

The intention of the testator, though not technically expressed, is sufficiently apparent. He first gives the sum of 12,000*l.* to his sister and her son, in trust only and for the use and benefit of his adopted daughter. Those words would give her the absolute interest in the money. He then desires that it shall be paid to her and settled on her, during her life, at the time of her marriage. These latter words and those that precede them, must be considered as forming one sentence; and the testator meant by them, that, on the marriage of his adopted daughter, a life-interest should, at all events, be secured to her. He next prescribes what is to be done with the money in case she does not marry; *and he directs that, in that event, the interest shall be paid to her. Now, according to *Adamson* v. *Armitage* (19 Ves. 416), and many other cases, the gift of the interest of a fund will pass the capital. Then follow these words: "And, in the event of the said Christiana Dutton not marrying or dying:" by which he must have meant: "in the event of her dying unmarried."

[*178]

Therefore, declare the petitioner

Entitled to the 12,000*l.* *as well as to the* 8,000*l.*

MACDONNELL *v.* HARDING.

1834.
Nov. 19, 21.
Dec. 5.

(7 Simons, 178—194; S. C. 4 L. J. (N. S.) Ch. 10.)

SHADWELL, V.-C.

[178]

Agent—Solicitor—Trustee.

Preparatory to the final winding-up of a trust, the agent and solicitor of the trustee paid the trust-money to his bankers, to the credit of his general account with them, and informed the cestui que trust that the money was lying idle at his bankers. The cestui que trust took no notice of the information; and, more than a month afterwards, the bankers failed: Held that, as the agent did not inform the cestui que trust that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding-up of the trust, the agent and the trustee were jointly liable for the money.

THE defendant Elizabeth Harding, who resided at Shrewsbury, was the personal representative of the surviving trustee of a settlement dated in 1786, under which the plaintiffs Francis, Thomas and Eliza Macdonnell were entitled to two sums of

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stock, subject to the life-interest of their mother, Fanny Macdonnell, therein.

On the 9th of March, 1827, Francis Macdonnell, who resided at Usk in Monmouthshire, wrote a letter to the defendant,
[*179] *Fisher, (who was Mrs. Harding's solicitor, and resided at Newport in Shropshire), which was partly as follows: "On the part of myself and my brother and sister, who are, jointly with myself, entitled to the reversion of the stock mentioned in the other half, I beg leave to propose to you, as the solicitor of Mrs. Harding, that the same should be sold out and the produce invested in a good mortgage. If you find any difficulty in procuring such a security, I have no doubt I could do so in this neighbourhood: but I have no desire to interfere in the transaction; my object in the suggestion being to avoid any loss in the capital to which we might be subjected by a fluctuation in the Funds. My mother's income would be, also, considerably increased; and I hope, therefore, that neither she or yourself will object to comply with our wishes.—P.S. It may be as well to mention to you that my sister's share has been assigned to me in consideration of 800*l.* paid to her in 1811, and an annuity of 10*l.* for her life, from that time, which has been regularly paid to her since that time. She will, however, readily concur in any act that I may approve of and that you may think necessary."

Several other letters passed between Francis Macdonnell and Fisher: and, in January, 1830, Fisher having obtained the necessary powers of attorney through Messrs. Sansom & Co., his London bankers, and having procured them to be executed by Mrs. Harding, the stock was sold, and produced 2,076*l.* 15*s.* 10*d.* A few days afterwards, 1,500*l.*, part of that sum, was invested on a mortgage in Mrs. Harding's name; and the balance, amounting to 576*l.* 15*s.* 10*d.*, remained in Fisher's hands.

[180] On the 23rd of February, 1830, Fisher wrote to Francis Macdonnell, from Newport, as follows: "On the other side I send you a copy of the stock-broker's account of the stock standing in Mrs. Elizabeth Harding's name, as the executrix of Dr. Goodinge, the surviving trustee of your mother's trust fund. Fifteen hundred pounds of the money has been invested on the security

of a transfer of a mortgage to that extent, upon an estate of Wm. Lloyd Jones, Esq., in Denbighshire. I am under a treaty with other persons as to the investment of the remainder, and I will inform you of the result: in the mean time, that money remains in my hands, and I will allow two-and-a-half per cent. for it, the same as the bankers here allow on deposits."

In September, 1830, Fanny Macdonnell, the mother of the plaintiffs and the tenant for life under the settlement, died, and, shortly afterwards, Francis Macdonnell communicated that event to Fisher and Mrs. Harding, and requested a transfer of the trust fund. On the 1st of November, 1830, Fisher wrote to Francis Macdonnell as follows: "I informed you that 1,500*l*. had been invested by Mrs. Harding on the security of a mortgage of an estate in Denbighshire. There is a second mortgagee, who is willing now to advance this 1,500*l*., if you wish to have the money in preference to a transfer of this security." On the 6th of November, Francis Macdonnell wrote in reply, as follows: "I shall be obliged to you to expedite the transfer as much, and to let it be with as little expense as you can. I have an opportunity of investing 3,000*l*. at seven-and-a-half per cent. which I should not like to lose, and, therefore, I would rather take the 1,500*l*. in cash. My *brother and sister will leave the [*181] settlement of the business to me. I have long since purchased the interest in my sister's share; and I have arranged, lately, with my brother, to give him 10*l*. per cent. for his life, upon his share." On the 16th of December, 1830, Fisher wrote to Francis Macdonnell, as follows: "I have delayed writing to you, from not being able to obtain a final answer of my client, as to the time when he would advance the 1,500*l*. on the security placed in Mrs. Harding's name with part of your trust fund. He has now fixed to do so about the 16th of January; and, in the mean time, in a few days, that matter being arranged, I will send you the draft of the proposed release of the trust."

On the 21st of January, 1831, the mortgage was transferred by Mrs. Harding to the Rev. John Nanney, who, thereupon, gave to Fisher, two Bank post bills for 1,000*l*. each, and received back from Fisher 500*l*. On the same day, Fisher, who knew that Francis Macdonnell was then staying in London, transmitted

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to him an account, purporting to be between the plaintiffs and Mrs. Harding, in respect of the trust, together with his bill of costs relating thereto, headed: "Mrs. Elizabeth Harding to Robert Fisher Dr., *In re* Macdonnell," and also the draft of a release from the plaintiffs to Mrs. Harding, for the perusal of F. Macdonnell on behalf of himself and his brother and sister. On the following day, Fisher remitted the Bank post bills to Sansom & Co., and wrote to them as follows: "I enclose you two Bank post bills for 1,000*l.* each, to be placed to my credit. I shall be obliged to you to acknowledge the receipt by return of post. This money will be wanted to pay over to a Mr. Macdonnell in a few days, probably."

[182] Sansom & Co. placed the amount of the Bank post bills to the credit of Fisher's account current with them.

On the 3rd of February, Fisher sent a letter to Mr. F. Macdonnell, to this effect: "On the 21st ult. I sent, in a parcel from hence, per Albion Chester coach which goes to the 'Bull and Mouth' Inn, the draft of a proposed release to Mrs. Harding, and also her cash account, directed to you at Will's Coffee-house, Lincoln's Inn; which I fear has not got to your hands, or I should have heard from you ere this. As the money balance is lying idle at Sansom & Co.'s, I am anxious that this matter should be concluded. I have addressed a similar letter to you at Usk, in case you should have left London." On the 15th of February, that letter was answered by Francis Macdonnell (who had then returned to Usk) as follows: "I have had your deed of release engrossed, and sent it to my sister for her signature. When she returns it, I will send it to my brother, and, when he returns it, I will forward it to Mr. White, of Lincoln's Inn, my agent, to be exchanged for the money. I do not like to make observations on your bill of costs; but I think, at any rate, the expense of the assignment to Mr. Nanney should not be charged to us, nor should the release have been prepared by any person but myself, as I am in the profession, according to the usual etiquette. We are also entitled to 4*l.* per cent. on the balance over the 1,500*l.*: but, not to be too particular, I have no objections to receive 2,110*l.* in full. Be so good as to let me hear from you. I should have written to you before, but I have

been too unwell to attend to business.—P.S. I never had any written instrument from my brother; and my sister's was only an executory instrument. I have thought it better, *therefore, [*183] to take no notice of it, and that they should be parties." On the 19th of February, Fisher wrote to F. Macdonnell a letter, in which he objected to pay more than 2,100*l.*, and added: "On hearing from you that the assignment is completely executed and returned to Mr. White, I will write to my agent, with an order on Sansom & Co., directing them to pay, to the cheque of any person whom you may name, the sum of 2,100*l.* in exchange for the release."

Francis Macdonnell having forwarded the release to Eliza Macdonnell, who resided in Dorsetshire, and to Thomas Macdonnell, who resided at Birmingham, and they having executed it and returned it to him, he executed it himself; and, on the 7th of March, 1831, wrote to Fisher as follows: "I have had the deed executed: and, by to-morrow's post, I shall send it to Mr. Thomas White of Lincoln's Inn, my agent, that it may be exchanged for the money. You will be pleased therefore to instruct your agents, Messrs. Alban & Co., accordingly. I understood from you that the sum is to be 2,100*l.*, and I am sorry that, all circumstances considered, you have not acceded to my proposal of making it 2,110*l.*"

On the same 7th of March, Sansom & Co. stopped payment; and they were afterwards declared bankrupts. At the time of their stopping payment, the balance due on Fisher's general account current with them, was 2,145*l.* On the 8th of March, Fisher wrote to Francis Macdonnell the following letter: "I have been much hurt to-day by the arrival of the unexpected news of Messrs. Sansom & Co. having yesterday stopped payment; and, at present, no information has been given *of the [*184] cause or probable consequences to the creditors. I shall write to London to-night, to make inquiries about it, and I will let you know the result. It is most unfortunate that the execution of the release should have been so long delayed, or you would have had the money out from their hands. Neither Mrs. Harding, as a mere trustee, or I, as her solicitor, are in any way responsible for this unfortunate failure, and

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we shall take your direction what to do in respect of the 2,100*l.* debt."

Francis Macdonnell afterwards wrote several letters to Mrs. Harding and to Fisher, in which he threatened to file a bill against Mrs. Harding, if she refused to pay the 2,100*l.*, and said that he should consider her as alone liable for the loss, and that all his former communications were made to Fisher, as her solicitor only.

However, in Easter Term, 1831, the bill was filed against both Mrs. Harding and Fisher, charging that the 2,000*l.* was remitted by Fisher to Sansom & Co., by the order or with the privity of Mrs. Harding, without any specific direction to place the same to a separate account, or giving any special direction in respect thereof; but, having been paid in as Fisher's monies, was carried, by Sansom & Co., to his general credit in his account current with them: that the 2,100*l.* which was alleged to have been in the hands of Sansom & Co. was merely part of Fisher's general balance, and was not in any manner distinguished therefrom; and no specific payment or appropriation was ever made of a sum of 2,100*l.*, to answer the plaintiff's demand, and the firm had no notice that any part of Fisher's

[*185] *monies in their hands, was subject to any trust, nor was there any privity between them and the plaintiffs. The bill prayed that Fisher might be declared to be liable to pay the 576*l.* 15*s.* 10*d.* retained by him as before-mentioned, with interest, and that either Mrs. Harding or Fisher might be declared to be liable to pay the remainder of the 2,100*l.* with interest. * * *

[186] Subsequent to the institution of the suit, F. Macdonnell, by arrangement between the parties and without prejudice to any question in the cause, received from the assignees of Sansom & Co. the sum of 1,260*l.*, being the amount of a dividend of 12*s.*

[*187] in the pound, *upon 2,100*l.*, which Fisher had proved under their bankruptcy.

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

Mrs. Harding was not justified in making Fisher her depositary of the money, and allowing him to deal with it as his own. She

ought either to have directed the mortgagee to pay the money to the plaintiffs, or to have taken the Bank post bills and secured them in her own chest, or to have appropriated them at a banker's: in which case, the banker, if he had misapplied them, would have been guilty of a transportable offence.

Fisher did not so deal with the fund as to exonerate himself from responsibility. He had the same means of protecting it as Mrs. Harding had. But he sent the Bank post bills to his bankers, and allowed them to carry the amount to his general account. The money ought to have been paid into a banker's, in the joint names of Mrs. Harding and the plaintiffs. The defence is that the plaintiffs knew that the money was in the hands of Sansom & Co. Fisher, however, in his letter of the 22nd of January, 1831, did not tell the plaintiffs what he had done with the money: and, though, in his letter of the 3rd of February, he informed them that it was at Sansom's he did not tell them that it was not appropriated, but was mixed with his own monies, nor did he tell them that it had been remitted in Bank post bills. Mrs. Harding had no right to demand a formal release before the money was paid; and, therefore, the money was improperly detained from the plaintiffs: *Massey* v. *Banner* (1), *Wren* v. *Kirton* (2).

Sir Chas. Wetherell and *Mr. B. Anderdon*, for the defendant Mrs. Harding: [188]

Mrs. Harding was not compellable, by the terms of the settlement, to shift the trust-monies, from an investment in the Funds, to a mortgage: but she did so at the instance and for the profit of the cestuis que trust, who were anxious to take advantage of the high price of the Funds. After the trust stock had been sold out, Francis Macdonnell dealt with the money as his own. He corresponded with Fisher and gave him directions as to the mode in which the money was to be dealt with. He superseded Mrs. Harding and adopted Fisher as his trustee or agent. He did not object to the 576*l.* 15*s.* 10*d.* remaining in Fisher's hands, or to the 1,500*l.* being remitted to Sansom & Co. That remittance was made in order to facilitate the payment to

(1) 21 R. R. 150 (1 Jac. & W. 241). (2) 8 R. R. 174 (11 Ves. 377).

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Francis Macdonnell, who was then in London; and, on the 3rd of February (which was more than a month before the failure of Sansom & Co.) Fisher informed him that the money was lying idle in their hands. They, therefore, were his depositaries of the money until the release was executed, as much as if he had named them; and it was owing to his delay that the money remained in their hands at the time of their failure. Under these circumstances, it is impossible to contend that Mrs. Harding is responsible for the loss.

Mr. Wigram, for the defendant Fisher:

Mrs. Harding is primarily liable to make good the loss. There was no privity between Fisher and the plaintiffs. He was merely the middle-man, representing Mrs. Harding; and the whole of the correspondence shews that Francis Macdonnell dealt with him, merely as the solicitor or agent of Mrs. Harding, and that he considered her alone to be liable for the loss.

[189] Francis Macdonnell, who was himself a solicitor, never took the point that has been raised by *Sir E. Sugden*, namely, that Mrs. Harding was not entitled to insist on being released before the money was paid over to the plaintiffs: but he acquiesced in the release as a thing to be done.

Fisher informed him that the money was lying idle at Sansom's; and, as he made no objection, we have a right to say that he acquiesced in the money being in their hands: it was placed there for the convenience of Francis Macdonnell; and its remaining there at the time when the Bank failed, was owing to the delay which took place in consequence of F. Macdonnell sending the release to different parts of the country, to be executed.

THE VICE-CHANCELLOR:

In this case, the defendant, Elizabeth Harding, as the executrix of the survivor of two trustees under a settlement dated the 8th of December, 1786, was a trustee of certain sums of Three-and-a-half per cent. Reduced Annuities and New Four per cents., for Mrs. Macdonnell for her life, and, after her death, for the plaintiffs. The plaintiff, Francis Macdonnell, resided at that

time at Usk in Monmouthshire, and the plaintiff, Thomas Macdonnell, at Birmingham, the plaintiff, Eliza Macdonnell, at Spitsbury near Blandford, and Elizabeth Harding, the defendant, resided at Shrewsbury, and the other defendant, Fisher, who was her solicitor, resided at Newport in Shropshire. On the 9th of March, 1827, the plaintiff, Francis Macdonnell, sent a letter, from Usk, to Mr. Fisher at Newport, which was to this effect (see p. 96).

It does not appear that the share of the plaintiff, Eliza Macdonnell, was assigned to her brother, Francis Macdonnell: but whatever, in the course of the transaction, would bind the plaintiff, Francis, so as to prevent him from obtaining relief in this cause, would equally bind the co-plaintiffs. [190]

This letter of the 9th of March was the commencement of a long correspondence between the parties, from which it appears that, in January, 1830, the trust stock was sold and produced two sums, making, together, 2,076*l.* 15*s.* 10*d.*, of which 1,500*l.* was invested on a mortgage in the name of Mrs. Harding, and the remainder, being a sum of 576*l.* 15*s.* 10*d.*, lay in the hands of Mr. Fisher.

On the 23rd of February, 1830, Fisher wrote to Francis Macdonnell the following letter (see p. 96).

That letter distinctly informed the plaintiff, Francis Macdonnell, that the 576*l.* 15*s.* 10*d.* was in the hands of Fisher, who offered to keep it, allowing him interest for it: and, as Francis Macdonnell never objected to its continuing in Fisher's hands, Fisher alone must be considered as responsible, to the plaintiff, for that sum:

On the 14th of September, 1830, the tenant for life died; and information of that event was, shortly afterwards, sent to the defendant by Francis Macdonnell, who required a transfer of the trust fund. On the 1st of November, 1830, Fisher wrote to Francis Macdonnell a letter, in which, after alluding to the mortgage for 1,500*l.*, he said: "There is a second mortgagee, who is willing now to advance the 1,500*l.*, if you wish to *have the money in preference to a transfer of the security:" and, in answer, Francis Macdonnell wrote to Fisher a letter of the 6th of November, 1830, in which he said: "I have, long since, purchased the interest of my sister's share, and have arranged, [*191]

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lately, with my brother, to give him ten per cent., for his life, upon his share. I shall be obliged to you to expedite the transfer as much, and let it be with as little expense as you can. I have an opportunity of investing 3,000*l.* at seven-and-a-half per cent., which I should not like to lose; and, therefore, I would rather take the 1,500*l.* in cash."

On the 16th of December, 1830, Fisher wrote to Francis Macdonnell a letter, in which he said: "I have delayed writing to you from not being able to obtain a final answer, of my client, as to the time when he would advance 1,500*l.* on the security placed out in Mrs. Harding's name with part of your trust fund. He has now fixed to do so about the 16th of January; in the meantime, in a few days, that matter being arranged, I will send you the draft of the proposed release of the trust."

On the 21st of January, 1831, the mortgage for 1,500*l.* was transferred to Mr. Nanney, who paid the 1,500*l.* to Fisher, by giving him two Bank post bills for 1,000*l.* each, and received back, from him, 500*l.* On the same day, Fisher transmitted to Francis Macdonnell, who was then, and for some time before had been, and for some time after remained at Will's Coffee-house in London, for some temporary purpose, an account current and a bill of costs headed: "Mrs. Elizabeth Harding
[*192] to Robert Fisher Dr., *In re* Macdonnell," and a draft *release. In the bill of costs, a charge was made for delivering over the security, and receiving the 1,500*l.*

On the 21st of January, 1831, Fisher transmitted, from Belmont near Llanrwst, which was the residence of his client, Mr. Nanney, the two Bank post bills, to Messrs. Sansom & Co., in the following letter: "I enclose you two Bank post bills for 1,000*l.* each, to be placed to my credit; and I shall be obliged to you to acknowledge the receipt by the return of post to me as under. This money will be wanted by me to pay over to a Mr. Macdonnell, in a few days probably." The amount of the bills was placed, by Sansom & Co., to the credit of Fisher's general account with them.

On the 3rd of February, Fisher sent the following letter to Mr. Macdonnell, who was then in London (see p. 98). And that letter seems to have been answered by Mr. Macdonnell,

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from Usk, on the 15th (see p. 98). And, on the 19th of February, Fisher wrote to Macdonnell a letter containing the following passage: "On hearing from you that the assignment is completely executed and returned to Mr. White, I will write to my agents, with an order on Sansom & Co., directing them to pay, to the cheque of any person whom you may require, the sum of 2,100*l.* in exchange for the release." Mr. White was Mr. Macdonnell's London agent. On the 7th of March, Mr. Macdonnell sent the following letter to Mr. Fisher (see p. 99). On the same 7th of March, Messrs. Sansom & Co. stopped payment. On the 8th of March, the release, which had been executed by all the plaintiffs, was sent by F. Macdonnell to Mr. White. On the 10th of March he tendered it to Fisher's London agents; but Mrs. *Harding refused to pay the 2,100*l.* [*193] mentioned in the release. The subsequent correspondence does not affect the case. A commission issued against Sansom & Co. on the 7th of May, 1831. At the time of their stoppage, the balance due on Fisher's account current with them was 2,145*l.* Fisher made an affidavit of debt of 2,100*l.*, part of that balance; and, on the 13th of January, 1832, F. Macdonnell received from the assignees a composition of 1,260*l.*, by arrangement with the defendants, and with their consent, and without prejudice to any question between the parties to this suit. The question before me, is upon whom must the loss fall.

If the payment of the 2,000*l.* into Sansom & Company's, in the manner in which it was paid, had been necessary for the final winding-up of the trust, or if, with full notice of the manner in which it was paid, Macdonnell had acquiesced, the loss must, upon the principles laid down in *Wren* v. *Kirton* and *Massey* v. *Banner*, have been borne by the plaintiff. The correspondence shews that F. Macdonnell admitted that Mrs. Harding had a right to a release: yet there is nothing to shew that, in order to procure an exchange of the release for the money, it was necessary to send the money to a London banker's: certainly, it was not necessary that it should be placed, at the banker's, to the credit of the general account which Fisher kept with them. And, if Fisher thought proper so to place it, he ought, in order to throw the responsibility on Francis Macdonnell, to have given

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[*194]

distinct notice that the money was so placed. But neither the letter of the 3rd of February, 1831, nor the letter of the 19th of the same month, conveyed any such notice. The loss, therefore, must be borne by the defendants. But, as I *have already stated, in consequence of the letter of the 23rd of February, 1830, and of Mr. Macdonnell's acting upon it, Mrs. Harding will not be liable for the excess beyond 1,500*l.*: and, as 1,260*l.* has been already paid to Mr. Macdonnell, Mrs. Harding is, in my judgment, liable to pay 240*l.* only (which, with 1,260*l.*, makes up the 1,500*l.*) with such interest as may be due: and Fisher, who throughout acted as her solicitor, is liable to pay the 240*l.*, and also the additional sum of 600*l.* (1) with interest: and the defendants must pay the plaintiffs' costs of the suit.

1834. *Dec.* 11.

SHADWELL, V.-C.

[199]

HAWKINS *v.* WATTS.

(7 Simons, 199—200.)

Parent and child—Maintenance.

A testator gave a share of his personal estate to his son-in-law, in trust, to apply the same for the maintenance and use of his children by the testator's daughter: Held that the son-in-law was entitled to apply the interest of the share, for his children's maintenance, notwithstanding he might be of ability to maintain them.

THE plaintiff had married the daughter of the testator in the cause; and the daughter had died leaving two infant children. The testator gave two fifth parts of his personal estate to the plaintiff, in trust to apply the same for the maintenance and use of the plaintiff's children by the testator's late daughter.

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The VICE-CHANCELLOR held that the plaintiff was entitled to apply the interest of the two fifths, for the maintenance of his children by his late wife, notwithstanding he might be of ability to maintain them.

Sir E. Sugden and *Mr. James Russell*, for the plaintiff.

Mr. Knight, *Mr. Simons* and *Mr. Daniell*, for the defendants.

(1) *Qu.* Whether Fisher ought to have been made exclusively liable for more than the 576*l.* 15*s.* 10*d.* with interest.

RICKETTS *v.* MORNINGTON (1).

1834.
Dec. 12.

SHADWELL, V.-C.

[200]

(7 Simons, 200; S. C. 4 L. J. (N. S.) Ch. 21.)

Defendant—Contempt.

A defendant cannot object to a cause being heard, on the ground that the plaintiff is in contempt.

On this cause being called on, *Mr. Knight*, for the defendant, objected to its being heard, as the plaintiff was in contempt, an attachment having issued against him for disobedience to an order in the cause.

The Vice-Chancellor:

Suppose the defendant had moved to dismiss the bill, the plaintiff, notwithstanding he was in contempt, might have come forward and assigned reasons why his bill should not be dismissed.

Lord Bacon's order, as administered in practice, is confined to cases where parties who are in contempt come forward, voluntarily, and ask for indulgences. But the rules of the Court make it imperative on the plaintiff to bring his cause to a hearing at a certain time; and, therefore, the cause must proceed.

CROSS *v.* CROSS.

1834.
Dec. 15.

SHADWELL, V.-C.

[201]

(7 Simons, 201—204; S. C. 4 L. J. (N. S.) Ch. 38.)

Will—Construction.

Testatrix bequeathed her residuary estate to trustees, in trust to pay and divide the interest between her two nieces, equally, during their lives, and, after their deaths, to pay and divide the principal, unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue, equally, *per stirpes* and not *per capita;* and, in default of such issue, to pay the interest to certain other persons, for their lives, &c. One of the nieces died, having had seven children, five only of whom survived her: Held, that those five became entitled, on their mother's death, to her moiety of the residue.

The testatrix in this cause gave the residue of her personal estate to William Holt Davison and William Painter, upon trust to invest the same on good security; and then continued as follows: "And I do hereby will, order and direct the said

(1) *Graham* v. *Sutton*, '97, 2 Ch. 367, 66 L. J. Ch. 666, 77 L. T. 35, C. A.

CROSS v. CROSS.

William Holt Davison and William Painter, to pay and divide the interest, income, dividends and produce arising from my said personal estate, between my nieces, Charlotte Elizabeth Cheatell, spinster, and Margery Allen Murrey Cross, the wife of John Cross, and their assigns, in equal parts, shares and proportions, during the term of their natural lives, and, from and after the decease of my said nieces, Charlotte Elizabeth Cheatell and Margery Allen Murrey Cross, upon trust to pay and divide all and singular the said trust-monies and premises, unto and amongst the lawful issue of the said Charlotte Elizabeth Cheatell and Margery Allen Murrey Cross, or of such of them as shall leave issue, in equal parts, shares and proportions, *per stirpes* and not *per capita;* and, in default of such issue, upon further trust to pay the interest, income, dividends and produce arising from my said trust-monies and premises, unto William Wright, Robert Wright and W. Walton Wright, and their assigns, during the term of their natural lives, in equal parts, shares and proportions; and, from and after the decease of the said William Wright, Robert Wright and W. Walton Wright, upon trust to pay and divide, all and singular the said trust-monies and premises, unto and amongst the lawful issue of the said William
[*202] Wright, *Robert Wright and W. Walton Wright, or such of them as shall leave issue, in equal parts, shares and proportions, *per stirpes* and not *per capita;* and, in default of such issue, then upon further trust to pay and divide all and singular the said trust-monies, unto such person or persons as shall become entitled to and possessed of my real estate under the limitations of this my will, in equal parts, shares and proportions, if more than one, and, if but one, then to such one person only."

The testatrix died in 1818. After her death, Charlotte Elizabeth Cheatell married George Houghton, and had issue by him two children, both of whom were infants and unmarried. Mrs. Cross died in 1834, having had issue seven children, five of whom survived her; the other two died infants and unmarried; and, after her death, one of the five died unmarried.

The bill was filed by three of Mrs. Cross's surviving children, against the fourth child (all of whom were infants and unmarried), and against the representatives of the three deceased children,

and the other parties interested in the residue, praying that the trusts of the will might be performed and the rights of all parties declared. CROSS v. CROSS.

Mr. Rolfe and *Mr. Bacon*, for the plaintiffs, contended that such only of the children of Mrs. Cross as were living at her decease, became entitled to the moiety of the residue given to her for life.

Sir E. Sugden and *Mr. Simons*, for the fourth surviving child and the representative of the child who died after Mrs. Cross.

Mr. Knight and *Mr. O. Anderdon*, for Mr. and Mrs. Houghton and their children, said that it would be premature for the Court to make any declaration as to Mrs. Houghton's moiety. [203]

Mr. Preston and *Mr. Daniell*, for the representative of the two children of Mrs. Cross who died in their mother's life-time. * * *

Sir C. Wetherell, *Mr. Beames* and *Mr. Jemmett*, for the Wright family, said that the interests of the children of both the testatrix's nieces, would remain in contingency until the death of the surviving niece, and that such only of their children as should be then living, would become entitled to the residue; and, if there should be no child of one of them then living, the whole would go to the children of the other; and, if no child of either of them should be then living, it would go over to the Wrights.

The VICE-CHANCELLOR having said, in the course of the argument, that he ought not to pronounce any decision as to Mrs. Houghton's moiety, delivered judgment as follows:

The question is what class of issue is meant by the expression: "The lawful issue of the said Charlotte Elizabeth Cheatell and Margery Allen Murrey Cross." If you read on a little further, you will find that the construction is afforded by the subsequent words: "or of such of them as shall leave issue." The word *"issue," therefore, in the first part of the sentence, means [*204]

CROSS v. CROSS.

those who are left by the parent of the issue. And, consequently, the five children of Mrs. Cross who survived her, are entitled to her moiety of the residue. * * *

1834. *Dec.* 17.

SHADWELL, V.-C.

[204]

AITON *v.* BROOKS (1).

(7 Simons, 204—208.)

Will—Construction.

Testator bequeathed a sum of stock to A. and B., for their lives, and, on their deaths, to their children then living who should attain 21, with a gift over to the survivor of A. and B. in case the children of either of them should die under 21. A. died leaving a child who had attained 21. B. afterwards died without having had a child: Held that A.'s personal representatives were entitled to B.'s moiety of the stock.

CHARLES COX having power to dispose, by will, of 1,500*l.* Three per cents., which was standing in the names of John Blakeney and James Findlay, and which, in default of appointment, was limited to his next of kin, exercised the power in the following words: "Now I the said Charles Cox, by virtue of the power &c., do give, bequeath, direct, limit and appoint the interest, dividends and produce of the said sum of 1,500*l.* stock, unto and amongst Eleanor Beazley, the wife of John Beazley, and Mary Houshold, wife of Abraham Houshold, daughters of my late sister, Elizabeth Loder, for and during the terms of their natural lives, in equal shares and proportions, and, immediately upon the death of either of them, then I direct my said trustees and the survivor of them, his executors or administrators, to pay, apply and dispose of the share of such deceasing legatee (being a moiety) of and in the said principal

[*205]

sum of 1,500*l.* stock, unto and amongst all *and every the children of such deceasing legatee, born in lawful matrimony (if any) which shall be living at the time of the decease of their mother, who shall then have attained or thereafter shall live to attain the age of 21 years, share and share alike, and the interest, dividends and produce of each respective share of such

(1) This case is not quite consistent either with previous authorities (*Greenwood* v. *Percy* (1859) 26 Beav. 573) or with the general current of later authorities (*In re Benn* (1885) 29 Ch. D. 839, 53 L. T. 240, C. A.), many of which cases are collected in *In re Bowman* (1889) 41 Ch. D. 525, 60 L. T. 888; but the case presents some peculiarities which may distinguish it from ordinary cases of this class.—O. A. S.

of the said children as shall not then have attained the age of 21 years, in the meantime, to be paid and applied for or towards their respective maintenance, education and bringing-up; but in case any of such children shall happen to die before they shall attain the age of 21 years, then I give and bequeath, the part, share and proportion of such deceasing child, unto the survivors of them, if more than one, share and share alike, and, if but one such child, then to such only one, and to be paid and applied in like manner as is hereinbefore mentioned. Provided always that, in case either of them, the said Eleanor Beazley and Mary Houshold, shall have any child or children living at the time of their respective deceases, but which shall all die before they attain the age of 21 years, then my said trustees, John Blakeney and James Findlay, their executors or administrators, shall assign the part or share of such legatee so dying (without issue to enjoy as aforesaid) of and in the said 1,500*l.* stock, unto the survivor of them the said Eleanor Beazley and Mary Houshold, her executors or administrators."

Mrs. Beazley and Mrs. Houshold survived the testator. In 1827 Mrs. Beazley died leaving Elizabeth, the wife of Harry Jackson, who had attained 21, her only child. In 1829 Mrs. Houshold died, without having had any issue.

The plaintiffs were the representatives of the surviving trustee of the stock, and also of the testator. *The bill was [*206] filed to have the trusts of the will carried into execution, and the rights of the parties claiming the moiety of the stock limited to Mrs. Houshold for life, declared. The question was whether, in the event, which happened, of Mrs. Houshold dying without having a child living at her death, that moiety of the stock was disposed of by the will; or whether the testator's next of kin were not entitled to it by virtue of the limitation contained in the settlement, in default of appointment.

Mr. Wilbraham appeared for the plaintiffs.

Mr. Knight, for the defendants, the personal representatives of Mrs. Beazley, cited *Murray* v. *Jones* (1), and *Mackinnon* v. *Sewell* (2).

(1) 13 R. R. 104 (2 V. & B. 313). (2) 39 R. R. 175 (2 Myl. & K. 202).

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Mr. Beames, *Mr. Bacon* and *Mr. O. Anderdon*, for the other defendants.

THE VICE-CHANCELLOR:

The question is whether the testator, by the words he has used, has exercised the power over the moiety of the stock given to Mrs. Houshold and her children, so as to make a complete disposition of it.

The testator seems to have taken it for granted that both Mrs. Beazley and Mrs. Houshold would have children, and that the only doubt was whether their children would live to attain 21. After giving the stock to those ladies for their lives, he says: "And, immediately upon the death of either of them, [*207] then *I direct my said trustees and the survivor of them, his executors or administrators, to pay, apply and dispose of the share of such deceasing legatee (being a moiety) of and in the said principal sum of 1,500*l.* stock, unto and amongst all and every the children of such deceasing legatee born in lawful matrimony (if any) which shall be living at the time of the decease of their mother, who shall then have attained, or thereafter shall live to attain the age of 21 years, share and share alike, and the interest, dividends, and produce of each respective share of such of the said children as shall not then have attained the age of 21 years, in the meantime, to be paid and applied for or towards their respective maintenance, education and bringing up: but, in case any of such children shall happen to die before they shall attain the age of 21 years, then I give and bequeath, the part, share and proportion of such deceasing child, unto the survivors of them, if more than one, share and share alike, and, if but one such child, then to such only one, and to be paid and applied in like manner as is hereinbefore mentioned." There is, therefore, no gift to a child, except in the event of there being a child living at the death of the mother and attaining 21. The testator then says: "Provided always that, in case either of them, the said Eleanor Beazley and Mary Houshold, shall have any child or children living at the time of their respective deceases, but which shall all die before they attain the age of 21 years, then my said trustees, J. Blakeney and J. Finlay,

their executors or administrators, shall assign the part or share of such legatee, so dying without issue to enjoy as aforesaid, of and in the sum of 1,500*l.* stock, unto the survivor of them, the said Eleanor Beazley and Mary Houshold, their executors or administrators." I cannot but think that the testator intended the limitation *over to take effect in the event of either of those ladies not having a child to take, as well as in the event of either of them not having a child who should take so as to enjoy, although she has expressed that the limitation over should take effect in the latter event only.

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My opinion, therefore, is that, according to *Mackinnon* v. *Sewell*, the limitation over has taken effect.

I am also of opinion that the word "survivor" must, of necessity, be taken to mean "other." For the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, but of one of them dying childless. The consequence is that the parties who represent Mrs. Beazley, are entitled to Mrs. Houshold's moiety of the stock.

CARTER *v.* DEAN AND CHAPTER OF ELY.

(7 Simons, 211—230; S. C. 4 L. J. (N. S.) Ch. 132.)

1834. *Dec.* 6, 8, 10, 11.
1835. *Jan.* 13.
SHADWELL, V.-C.
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Agreement—Specific performance—Ecclesiastical corporation.

An entry, in the books of a corporation, of the terms of an agreement entered into by them, does not bind them, although it is signed by a majority of the members (1).

An executory agreement for a concurrent lease on payment of a fine may be determined by the acquiescence of the lessee in a verbal notice by the lessor that the lessee's admitted inability to pay the fine required for some months must put an end to the agreement.

Time is, to a great extent, of the essence of a contract entered into with an ecclesiastical corporation, whose members may be prejudicially affected by any delay. Therefore, where A. agreed to take a concurrent lease of a Dean and Chapter and to pay the fine in January, but was not ready with the money in March following, a bill filed by him for a specific performance, was dismissed with costs.

IN November, 1830, the plaintiff proposed, in writing, to the Dean and Chapter of Ely, to take a concurrent lease of their

(1) In the case of a contract by a Company registered under the Companies Act, 1862, a resolution embodying the terms of an agreement and signed by the chairman of the meeting in the Company's

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rectory and manor of Lakenheath, in Suffolk, for 21 years from Michaelmas then last, at the yearly rent of 42*l.* 10*s.* 4*d.*, under the covenants contained in the then existing lease (which would expire at Michaelmas, 1831) and to pay to the Dean and Chapter a fine of 2,950*l.* in January then next. At an audit held on the 25th of November, 1830, at which the plaintiff and the Dean and five of the Prebendaries (who constituted a majority of the body) were present, the plaintiff's proposal was taken into consideration and accepted by the Dean and Chapter; and they caused an
[*212] entry to be made, in *one of their books called the Rough Book, to the following effect: "Nov. 25th, 1830. The subject of the Lakenheath Manor and Rectory was taken into consideration, when an offer was made, by a Mr. Carter, for a concurrent lease of the same. After much discussion, the lease was granted to him, upon paying 2,950*l.* as a fine for the lease for 21 years, to be dated from Michaelmas Day last. It was finally arranged to accept the above Mr. Carter as our lessee, upon the payment of the sum before mentioned, namely, 2,950*l.* To this Mr. Carter consented." At the same audit, the Dean and Chapter caused an entry to be made by their registrar, in their chapter book, to the following effect: "25th Nov. 1830. Agreed that a concurrent lease of the Manor and Rectory of Lakenheath be granted to W. P. Carter, Esq., for 21 years from Michaelmas last. Fine 2,950*l.* Seal 2*l.*" This entry was signed by the Dean and the five Prebendaries who were present; but it was not, nor was the prior entry made in Carter's presence. A few days afterwards, R. H. Evans, who was the solicitor and agent of the Dean and Chapter, sent a letter to a Mr. Eagle (who, also, had applied for the lease), stating that the Dean and Chapter had agreed, with Carter, for a concurrent lease of Lakenheath Rectory.

On the 10th of December, 1830, Evans sent to Carter the draft of the proposed lease for his perusal, and, on the 24th of that month wrote to him a letter containing the following passage: "As I understand the fine to be paid by you for the concurrent lease of Lakenheath Rectory, is to be paid early in January, I

minute book, may be sufficient to satisfy the requirements of the Statute of Frauds: *Jones* v. *Victoria Graving Dock* (1877) 2 Q. B. D. 314. —O. A. S.

shall be thankful to hear from you with my draft of the proposed lease." On the 8th of January, 1831, Evans again wrote to Carter as follows: "I am desired by the Dean to ask you how soon you will be prepared to pay the money for the concurrent *lease of Lakenheath Rectory; as the members of the Chapter understood the business was to be settled in the early part of this month." On the 10th of January, Carter sent the following answer: "I have not the slightest recollection that any mention was made of the early part of January for the payment of the fine; but I will, in the course of the present week, write you fully as to it and my other Lakenheath matters." On the 27th of January, Evans wrote to Carter as follows: "January (the month, certainly, in which the sum for the concurrent lease of Lakenheath Rectory was agreed to be paid,) is fast approaching to a close. On the 10th of December last I sent you the draft of the proposed lease: on the 10th instant you wrote me to say that, before the end of that week, you would write to me fully as to it and your other Lakenheath matters. I am still without any further communication from you. I shewed your last letter to the Dean, who desired me to express his hope you would finish the business before the end of the month. The sum agreed for forms part of the audit division for last November, which has been kept open on account of the present sum not having come in. Allow me, therefore, respectfully to press the business upon your immediate attention." On the 31st of January, Carter wrote to Evans a letter which concluded in these words: "I will, if possible, send you down the draft on Thursday, and, so soon as it is approved and can be engrossed, I shall be ready to exchange the money for it." On the 8th of February, Evans wrote to Carter as follows: "From the tenor of your last letter of the 31st ult., I fully expected you would have returned me my draft of the proposed concurrent lease of Lakenheath Rectory, which I sent you on the 10th of December last, on Thursday last, the 3rd instant, according to your promise. I can assure you your delay in concluding the business relative to the proposed purchase *of the concurrent lease, has given great dissatisfaction and been productive of no little inconvenience to the affairs of the Dean and Chapter, and of actual loss to the estate of one of the

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Prebendaries, who died on Saturday last, of the whole of his proportion of the money which, as you admit, was to be paid in January last. You had been fully acquainted by me with the reasons that made the completion of the business so necessary. Allow me to press the matter on your immediate attention." Carter afterwards sent to Evans the draft of the lease; and on the 11th of February the latter wrote to the former, as follows: "I have got the draft, but I do not feel myself authorized to agree to the additions you have made in it, without the consent of the Dean and resident Prebendaries. I am, however, going to Cambridge to-morrow, for the purpose of meeting them at the Dean's. I will write to you as soon as the meeting is over." Again, on the 12th, Evans wrote to Carter as follows: "In the hopes that you can give me a meeting at your chambers, on Tuesday morning between 10 and 11 o'clock, I will run up to town and see you. An hour's conversation will do more than a week's writing. The Dean and Chapter are about to hold a special meeting in a few days, and it is, for many reasons, highly desirable the business with you should be brought to an immediate close."

At the meeting between Carter and Evans on the 15th of February, the draft of the lease was finally settled and signed by Evans on behalf of the Dean and Chapter: and Carter then told Evans that he did not expect to be in a condition to pay the fine before June then next. On the 18th Evans sent to Carter the following letter: "I am sorry to say the Dean and such of the Prebendaries as I have seen since my return, are by no means satisfied as to the causes of your delay in paying them the sum
[*215] *which they offered to take for the concurrent lease of Lakenheath Rectory; as it was upon the faith of your paying the money in time for it to form part of the audit receipts, they listened to your proposals. If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the calculation will have to be recast, with reference to that circumstance. A special Chapter will be called in the course of a very few days. I earnestly recommend it to you, therefore, to prepare yourself with the money in the meantime. It would be in the power of any future Prebend to refuse his sanction to the com-

pletion with you upon the terms contained in your proposals." On the 26th Evans wrote to Carter as follows: "A special Chapter is summoned for the 4th of next month, at the Deanery in Ely, at 11 o'clock in the forenoon. I advise you, by all means, to bring your negotiation with the Dean and Chapter to a satisfactory close before that day, or upon it at the latest. From what I know of the sentiments of several of the members of the Chapter, I am satisfied they fully expect you will be prepared to do so. I have been waiting in the hopes of hearing from you in answer to my last letter." On the 28th of February Carter wrote to Evans as follows: "I had your letter of the 18th. I should have written you in reply to it to-day, if I had not received your letter of Saturday. Some indisposition and much vexation at not being able to complete my contract as I wished, so perplex me as to preclude me the power of determining what to do. Although I could wish, just now, to be spared a journey to Ely, I will, if I do not hear further from you, be there on Thursday evening." On the 1st of March Evans again wrote to Carter, urging him, by all means, to come to Ely.

On the 4th of March Carter went to Ely and attended the special Chapter, and one of the members of the *Chapter then [*216] informed him that they had been, already, put to great inconvenience by his having delayed to pay the fine, as they had been prevented thereby from making a dividend of their audit fines at the usual period: that a loss had been already occasioned to Mr. King (one of the Prebendaries who died after the meeting in November, 1830) and that a loss might ensue to other aged members of the body; and, therefore, the Chapter had determined not to allow him any further time; and, if he did not then pay the fine, they would not execute the lease, but must put an end, at once, to the business then pending between them. Carter, in reply, said that he was not then prepared to pay the fine, and that he could not expect the Chapter to wait any longer, nor could he expect them to come to any other determination than to put an end to the business. The Chapter then said that the books must be closed, as they could not allow further time; and Carter left the meeting, without making any complaint or remonstrance. The Chapter, considering that, after what had taken

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place, the business between them and Carter was concluded, asked Evans whether he was willing to take the lease on the terms proposed by Carter; and Evans having assented, they resolved that his name should be substituted for Carter's in the lease, which had been already engrossed, blanks being left for the name of the lessee. The blanks were accordingly filled up with Evans's name, and the lease was executed to him. Afterwards Carter returned to the Chapter-room, and stated that he then recollected that he had 500*l.* at his banker's, and pressed the Chapter to receive that sum as part of his fine; but they declared that they thought it trifling with them, and that they could not accede to his request. Upon which Carter said that he should expect to have the lease, and would pursue it wherever he found it, and [*217] *threatened to file a bill in Chancery against the Dean and Chapter, to which they paid no attention.

On the 14th of March, Evans paid the fine.

On the 16th of April, Carter commenced another correspondence with Evans, by writing to him a letter stating that he was then quite ready to complete his contract with the Dean and Chapter, and that he would exchange the money for the lease on such day after Monday week as Evans might appoint; and that, if Evans would send the lease and counterpart to his agents in London, he, Carter, would execute the counterpart. On the 20th of April, Evans sent the following answer: "I have shewn your letter to the Dean, who directs me to express his great surprise at its contents. I assure you my surprise is equal to the Dean's. When you were present with the Dean and Prebendaries, at their capitular meeting at Ely on the 4th of last month, you were expressly told by them that the negotiation between you and them must then be closed, on account of your acknowledged inability to pay the money at that time. To this you assented, adding you could not expect the Dean and Chapter would wait any longer; and you were afterwards acquainted by me, in answer to your question to that effect, that, in consequence of what had passed at the meeting, the lease had been subsequently offered to me at the sum which you had proposed to give for it, and that it would be sealed before the meeting was closed. This was accordingly done, and the money has been paid and divided."

After some further correspondence had taken place between Carter and Evans, but which led to no result, Mr. Frere, of Lincoln's Inn, wrote to Evans on the 7th of June, 1831, saying that he was desired by Carter to say that 3,000*l.* had been lodged in his hands, for *paying the fine and fees on the lease to be granted to Carter by the Dean and Chapter. [*218]

In Trinity Term, 1831, the bill was filed against the Dean and Chapter and Evans, insisting that there was a binding agreement between the plaintiff and the Dean and Chapter, and that the lease which had been granted to Evans, had been fraudulently obtained by him; and praying that the Dean and Chapter might be decreed specifically to perform their agreement with the plaintiff; and that the lease granted to Evans might be set aside.

Sir E. Sugden and *Mr. Wright*, for the plaintiff:

The entries in the books of the Dean and Chapter, though not under their seal, bound them: for it has been decided that a resolution entered in the books of a corporation and signed by a majority of the body, is binding on them: *Maxwell* v. *Dulwich College* (1), *Marshall* v. *The Corporation of Queenborough* (2). The proposal was that the fine should be paid in January, 1831; but the entry of the agreement is silent on that head. The draft of the lease was settled and signed by Evans on behalf of the Dean and Chapter on the 15th of February, but no stipulation was made that the money should be ready on any given day. On the 4th of March, Carter went down to Ely, and was told that, if he did not then pay the fine, the contract must be put an end to. This was a surprise upon him, for no previous intimation had been given to him that he must pay the money, or else the Dean and Chapter would rescind the contract. Evans no more had the money ready than Carter had. The Dean and Chapter allowed him ten days to pay it; *why did they not give that time to Carter? Early in April he informed them that he was ready to pay the money. Evans, in his letter of the 18th of February, says: "If you cannot be prepared to pay before June, there will [*219]

(1) Fully stated from the Registrar's book, *post*, p. 121.

(2) 24 R. R. 220 (1 Sim. & St. 520).

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be another half year elapsed, and, of course, the calculation will have to be recast: so that he holds out to Carter that he would be allowed till June to pay the money. The Dean and Chapter ought to have given reasonable notice to Carter, that he would be required to pay the fine on a certain day, and, if he had not complied, they then might have put an end to the contract; but it is not the law of this Court that a party who has entered into a contract must be ready with his money at an hour's notice.

Sir Wm. Horne and *Mr. Tennant* (1), for the Dean and Chapter of Ely:

The Dean and Chapter are a fluctuating body, and, therefore, it was very important that there should be no delay in payment of the fine; and, after the delay that has taken place, this Court will not interfere. When the bill was filed, Carter was ignorant of the entries in the books of the Dean and Chapter; and he did not become acquainted with them until they had filed their answer. The entries were not made in his presence, nor were they intended to be communicated to him. They were the private memoranda of the Dean and Chapter, and were never intended by them to constitute a binding agreement. Besides, a corporation cannot be bound except by their common seal: [*220] *Taylor* v. *Dulwich Hospital* (2). The entry was signed by *five only of the members of the body. What authority had those five individuals to bind the other members? In *Maxwell* v. *Dulwich College*, Maxwell had been the assignee of an existing lease, and, before the expiration of that lease, he made an agreement with the College to take a new lease, at an increased rent. He had signed the agreement and was suffered to remain in possession after the expiration of the original lease; and he was paying the increased rent; and, moreover, he had laid out money on the land. It was, therefore, a case of fraud and oppression on the part of the College; and the Court must have repudiated its principles, if it had not decreed a specific performance of the agreement. The case of *Maxwell* v. *Dulwich College* does not, therefore, contradict *Taylor* v. *Dulwich Hospital*. *Marshall* v.

(1) *Mr. Tennant* appeared for Evans as well as for the Dean and Chapter.

(2) 1 P. Wms. 655.

The Corporation of Queenborough stands on the same principle as *Maxwell* v. *Dulwich College*.

Mr. Knight, for Evans. * * *

THE VICE-CHANCELLOR:

1835. *Jan.* 13.

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The first question is whether there was any agreement which, in point of law, could bind the Dean and Chapter. It is insisted that they were bound by the entry which is to be found in their Chapter book. I take that entry and the entry in the Rough Book, to be all one for that purpose.

It was said that it has been decided that, where the majority of an eleemosynary body corporate enter in their books a resolution that they will grant a lease of their property, it constitutes such an agreement as this Court will specifically execute: and the decision in the case of *Maxwell* v. *Dulwich College* was relied on as an authority for that proposition. The question then is whether *Maxwell* v. *Dulwich College* is an authority to that effect. I have, for the third time, read over the extract of that case from the Registrar's book, without being able to make out that it is at all parallel to the present case.

It appears that, in 1773, the College, who were incorporated by letters patent in the reign of King James the 1st, granted a lease of a house and land to James Rowles, for 21 years from Michaelmas, 1759, at the yearly rent of 14*l*. There was a walk through a wood which belonged to the College, and which was in front of the house; and the lease contained a covenant that the College, whenever they cut down the *wood, would preserve, for shade to the walk, half a rood of wood on each side of it, and that Rowles would pay 4*l*. to the College, so often as the wood should be cut down and the half rood preserved. In 1774 the plaintiff, Maxwell, became the assignee of the lease; and, soon afterwards, as the bill alleges, laid out considerable sums in necessary repairs of the demised premises, in full confidence of a renewal of the lease being granted to him at the expiration of it, as had been usual. The lease expired at Michaelmas, 1780, and thereupon Maxwell applied to the College for a renewal; but the College refused to renew unless he would

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agree to pay a rent of 22*l.* for the premises. Maxwell agreed to pay the increased rent, and, as the bill represents, to take a lease of the premises for 21 years from Lady Day, 1781, subject to the same covenants as were contained in Rowles's lease; and thereupon the College caused an order to be entered in their books, which, according to the statement in the bill, was that Maxwell should have a new lease according to the proposal and agreement. The bill then alleges that the Master, who always insisted on preparing the leases granted by the College, prepared a draft, which Maxwell found, on perusal, omitted the footway or walk through the wood, and also the word "assigns," in the *habendum*, and contained a covenant by the plaintiff to insure, which was not in Rowles's lease; and thereupon Maxwell's solicitor, on the 16th of April, 1781, applied to the College to have the draft made conformable to the proposal and to the former lease. This application caused a schism between the Master and the Warden and Fellows, the latter of whom sided with Maxwell and directed his solicitor to prepare a lease according to the terms of the alleged [*224] agreement: which was accordingly done, and Maxwell *executed the counterpart; but the seal of the College was not put to the original. On the 16th of June, 1781, the Warden and Fellows entered and signed a protest, in one of their books, against what they termed the arbitrary proceedings of the Master, who, as they asserted, had acted from private pique against Maxwell, and in direct opposition to the statutes of the College, which invested the majority of the corporation with the controlling power. The bill further stated that, on the 28th of January, 1782, the College received, from Maxwell, the rent for the walk, together with 11*l.* in full of all rent due to them on Michaelmas Day, 1781: and it prayed that the College might be decreed to execute to the plaintiff a lease pursuant to the proposal and agreement before stated.

The College, in their answer, admitted that a lease in the terms stated in the bill had been granted to Rowles; and that the plaintiff took possession of the premises under colour of some assignment of such lease, and that he might have laid out some money on the premises; and that they refused to grant him a new lease, unless he would agree to pay the rent of 22*l.*, and,

if he had not complied, they should have turned him out of possession. They said that, on the 5th of March, 1781, the following entry was made in one of their books: "Ordered that Charles Maxwell shall have a new lease of the premises he now holds of the College, consisting of about 10 acres of land, dwelling-house and appurtenances, to commence at Lady Day next, for the term of 21 years, at the yearly rent of 22*l.*, with the usual covenants, and such other covenants as the Master, Warden and Fellows shall appoint;" and that Maxwell signed his name to the following agreement under the order: "I do agree and comply with the preceding, *and, on the foregoing conditions, [*225] will accept the lease and execute a counterpart on demand:" that, in consequence of such order and agreement, a draft of a lease was prepared by the Master, with the omissions and addition mentioned in the bill, and which the interests of the College (which the Master was bound, by his oath, to promote) required: that Maxwell had regularly paid the rent reserved by the old lease, from the time when he alleged that he had purchased the same, to the time of its expiration, and, from that time, to the 29th of September, 1781: that the College had, ever since Maxwell's alleged purchase of that lease, deemed him as tenant of the premises and accounted him as such, nevertheless on such terms only as were expressed in the draft prepared by the Master: that the acts in the bill in that behalf stated, were done by the Warden and Fellows, but that the College were not bound thereby, as the same were not done as corporate acts: that the then majority of the College were convinced that the lease ought not to be granted to the plaintiff, on the terms insisted on by him: and they submitted whether, under the said agreement and the circumstances aforesaid, they ought to grant a lease to Maxwell, on the terms mentioned in the bill or on what other terms.

Now it is observable that Maxwell states, in his bill, that, after the old lease had expired, he paid the increased rent of 22*l.* And, although the College do not admit the fact in their answer, they state what appears to be equivalent; for they admit that they refused to renew the lease unless Maxwell would agree to pay the increased rent, and that, if he had not complied, they should have insisted on turning him out of possession. The fact,

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however, is that he remained in possession; and I must suppose that he remained in possession *by virtue of doing that which, if he had not done, he would have been turned out of possession. Besides, if he had not paid the increased rent, the College, of course, would have so alleged in their answer. Therefore it may be fairly taken, as a fact, that he did pay the increased rent. The College did, unquestionably, take from him an obligation to pay the rent; because they procured him to sign the agreement which was written under the order of the 5th of March, 1781. The answer admits that, ever since Maxwell's purchase of the lease, the College had deemed him as tenant of the premises and accounted him as such, nevertheless, on such terms only as were expressed in the draft prepared by the Master. It is alleged, in the entry made in College books on the 16th of June, 1781, that the Corporation was so constituted as that the majority should have the controlling power; but whether that is the fact, we have no means of ascertaining.

I caused application to be made to the Registrar's office, in order to find out whether the answer was replied to, and I have been informed that it was.

The cause was heard on the 14th of July, 1783, before the Lords Commissioners, Lord Loughborough, Sir W. H. Ashurst and Sir B. Hotham; and the decree was drawn up in the following words: "Whereupon and upon debate of the matter and hearing the agreement dated the 5th day of March, 1781, read, and what was alleged by the counsel on both sides: Their Lordships do declare that the agreement bearing date the 5th day of March, 1781, for a lease of the premises in question, ought to be specifically performed and carried into execution, and do order and decree the same accordingly: And it is further

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ordered that it be *referred to Mr. Halford, one of the Masters of this Court, to settle a lease between the parties according to the terms of the said agreement."

Now, in my opinion, the Lords Commissioners might very fairly hold that, independently of the general law, the particular circumstances of this case were such as to make it just and right to compel the corporation to grant a lease to Mr. Maxwell. And I cannot think that this decision can be considered as

impugning, in the least, that which I take to be the clear law of the land, namely, that eleemosynary and ecclesiastical corporations are not bound by anything in the shape of an agreement regarding their lands, unless it is evidenced by a deed or writing with their corporate seal affixed to it. And I confess that I feel so strongly that to be the law of the land, that, if the case of *Maxwell* v. *Dulwich College* had been weaker in its circumstances for procuring a decree for a specific performance to the plaintiff, than it is, I should not have felt myself bound by it.

That case was very strongly urged by *Sir E. Sugden*, when he argued the case now before me; but I could not help noticing that, both in the opening and, certainly, in the reply, he shrunk from a very critical examination of the singular circumstances which are contained in that case.

I will now return to the case before me. There is not any evidence that the plaintiff was, at any time, ready to pay the fine. I consider that, where a person is dealing with an ecclesiastical corporation, time must, of necessity, be in a very great degree of the essence of the contract; especially where the plaintiff is not *dealing for the purchase of a fee-simple [*228] estate in possession, (in which case, the interest of the purchase-money is considered as an equivalent for the rents and profits) but for a concurrent lease; in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the sum to be paid. That it was so in this case is beyond all doubt, because Mr. King, one of the Prebendaries, died between the 25th of November and the 4th of March; and, since the 4th of March, two of the other Prebendaries have died. Therefore it would be the grossest injustice to hold that the agreement of the Dean and Chapter is to be treated in precisely the same manner as the agreement of a single individual, the effect of which would be to give the benefits of the resolution, not to those persons who signed it in the expectation of participating in the benefits of it, but to their successors. I think, therefore, that non-payment of the consideration is, of itself, fatal to the plaintiff's case.

I also think that what took place on the 4th of March, 1831, is a decisive answer to this bill. Because Mr. Carter, at his first

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interview with the Dean and Chapter on that day, declared that he was not ready to pay the fine, (and, according to his own representation, he was not, at any time on that day, able to pay more than the sum of 500*l.*) and the Dean and Chapter then said that there must be an end of the negotiation; upon which Carter left the room without making any complaint or remonstrance: and my opinion is that, from that moment, the Dean and Chapter were utterly absolved.

What took place afterwards is of very little importance. For [*229] no further attempt was made to represent *that there was a possibility of the money being ready, until Mr. Carter wrote the letter of the 16th of April; and even then he does not propose to pay it till some day after the Monday week. Indeed, there is no evidence that the money was ready to be paid at any time whatever, for Mr. Frere, who wrote the letter of the 7th of June, was not examined as a witness to prove the fact that he had the 3,000*l.* in his hands.

Therefore the case, as against the Dean and Chapter, fails in every respect. And I wish to have it understood that I rest my judgment on all the grounds which I have stated. First: the entries in the books of the Dean and Chapter did not constitute an agreement which was binding upon them. Secondly: the conduct of Mr. Carter in holding out, when he was dealing with a body that was fluctuating in its nature, that he should have the money ready in the month of January, but not being prepared with it on the 4th of March, (which was after the lapse of more than a fortnight from the time when the drafts were completely settled by himself as well as by Mr. Evans) is, of itself, a reason why the Dean and Chapter should not be held bound. And, thirdly: Mr. Carter's conduct on the 4th of March would have absolved the Dean and Chapter, if there ever had been any agreement that was binding upon them.

Then it was said that Carter was induced to expect that further time would be given him; and that is rested upon a passage in Mr. Evans's letter of the 18th of February. Now, in that letter, Mr. Evans says: "If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the calculation will have to be recast with reference to

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that *circumstance." Now, if there was to be a departure from the original valuation, what was the sum that ought to have been paid? That does not appear; and, therefore, on Mr. Carter's own shewing, his case must fail; because this letter cannot be taken in the sense of a mere postponement of payment; for Mr. Evans says, if there be a postponement, it must be accompanied with the circumstance of a recasting of the calculation. The letter then proceeds thus: "A special Chapter will be called in the course of a very few days. I earnestly recommend it to you, therefore, to prepare yourself with the money in the meantime. It would be in the power of any future Prebend to refuse his sanction to the completion with you upon the terms contained in your proposals." And Evans, in his subsequent letters, urges Carter to come to Ely prepared with the money. It cannot, therefore, be said that there has been any giving of time in this case.

His Honour then observed upon the charges of fraud made by the bill against Mr. Evans, and said that they were most unjust and improper, and that Mr. Evans had conducted himself with the utmost fairness to Mr. Carter. His Honour concluded by dismissing the bill as against Mr. Evans, as well as the Dean and Chapter, with costs.

WALKER *v.* ELSE.

1835. *Jan.* 12.

SHADWELL, V.-C. [234]

(7 Simons, 234—236; 4 L. J. (N. S.) Ch. 54.)

Infant—Next friend.

A bill filed on behalf of an infant, ordered to be taken off the file, with costs to be paid by the next friend, he being a person in low circumstances, and of immoral character, and there being reason to suppose that he had instituted the suit from spite against one of the defendants.

THE testator in this cause died in 1833, leaving his wife and an infant daughter by a former marriage, his only child and heir-at-law him surviving. By his will he gave all his real and personal property to his wife, subject to her maintaining and educating his daughter during her infancy, and, on his daughter attaining 21, he gave to her one of his farms, for life with remainder to her children, and appointed his wife and

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the trustees and executors of his will, the guardians of his daughter.

On the 6th of August, 1834, a bill was filed by one Parkin as next friend to the infant, against the testator's widow and
[*235] the executors and trustees of *his will, containing allegations prejudicial to the widow's character, and praying for the usual accounts of the testator's estate, and that the widow might be removed from the guardianship of the infant. On the 30th of October, 1834, the widow filed a bill against the trustees and executors and the infant, praying that the will might be established and the trusts of it performed.

A motion was then made, on behalf of the widow, either that the bill in the first suit might be taken off the file with costs to be paid by Parkin, or that it might be referred to the Master to inquire and state which of the two suits was most for the infant's benefit.

The affidavits stated that Parkin had been a day-labourer in the widow's service, at wages of 12*s*. a week, and had been discharged by her: that he had deserted his wife and children, and was then living in adultery with another woman.

The motion was heard in his Honour's private room, either in Michaelmas Term, 1834, or in the following sittings.

Sir E. Sugden and *Mr. James Parker* appeared in support of the motion.

Mr. Knight and *Mr. Faber*, for Parkin.

THE VICE-CHANCELLOR:

This motion was heard in my private room; but, as the point is of considerable importance, I have thought it right to deliver my judgment in open Court.

[236] His Honour then detailed the facts stated in the affidavits relative to Parkin, and said: It is impossible that a suit conducted by a person of such a character, can be well conducted. Where a suit is instituted on behalf of an infant, it should be manifest to the Court that the next friend is likely to conduct the suit for the benefit of the infant. It is reasonably plain, from the facts stated in the affidavits, that the bill in the

first cause was filed, not for the benefit of the infant, but to gratify a spite entertained by the next friend against the testator's widow, because she had discharged him from her service. It appears also that he is a person in low circumstances, and, therefore, there is no security for his being able to pay the costs of the suit, in case it should be allowed to proceed and he should be, ultimately, ordered to pay them.

The bill, therefore, must be taken off the file, with costs to be paid by the next friend.

THE EARL OF SHAFTESBURY *v.* THE DUKE OF MARLBOROUGH (1).

1835. *Jan.* 15.

SHADWELL, V.-C.

(7 Simons, 237—238.)

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A substituted gift in a codicil is subject to the incidents attached by will to the original gift, *e.g.* exemption from legacy duty.

THE late Duke of Marlborough devised certain of his estates to trustees for 500 years, in trust, after his decease, to pay out of the rents to his grandson, the present Marquis of Blandford, at his age of 21, if his father the present Duke should be then living, the clear yearly sum of 1,000*l.*, by four equal quarterly payments, until he should attain 25, if his father should so long live, and, as soon as he should attain that age, if his father should so long live, to pay to him, during the life of his father, the clear yearly sum of 2,000*l.*, by like equal quarterly payments. In a subsequent part of his will the testator directed his executors to pay the legacy-duty on all the legacies and annuities thereby given.

The testator, by a codicil, after reciting the devise to the trustees in trust to pay the annuities, expressed himself as follows: "Now I do hereby revoke the said two yearly sums of 1,000*l.* and 2,000*l.* in my said will named to my said grandson, and, in lieu thereof, I direct my trustees possessed of the said term, to pay, by and out of the rents, issues and profits of the said hereditaments comprised in the said term of 500 years, unto my said grandson, the clear yearly sum of 3,000*l.*, to

(1) *In re Boddington* (1884) 25 Ch. Div. 685, 53 L. J. Ch. 475, 50 L. T. 761.

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commence from the day of my death, by four equal quarterly payments, and to continue payable during the life of his father."

On the hearing of a petition presented by the Marquis of Blandford, the question was whether the annuity given by the codicil, was free from legacy-duty.

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Mr. Rolfe and *Mr. J. Romilly*, for the petitioner.

Mr. Jacob, for the trustees.

THE VICE-CHANCELLOR:

When the thing bequeathed by the codicil is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents. Therefore, the legacy-duty on the annuity given by the codicil must be paid out of the testator's residuary estate.

1835.
Jan. 15.

SHADWELL, V.-C.

[238]

PETERS *v.* GROTE.

(7 Simons, 238—239.)

Feme coverte—Maintenance.

Part of the capital of a fund in Court, belonging to a married woman, who was deranged and had been deserted by her husband, ordered to be applied for her maintenance.

A MARRIED woman, entitled to a fund in Court standing to the account of herself and her husband, was of unsound mind, and had been placed by her husband in a lunatic asylum. In August, 1833, he obtained an order, on petition, for payment to him of 800*l.* out of the capital of the fund, for the purpose of paying a debt incurred to the proprietor of the asylum, on his wife's account. He applied part of the money for that purpose, and the residue to his own use. Afterwards he went to Jamaica, where he held a lucrative appointment under Government. The proprietor of the asylum being unable to obtain any further payment from the husband, the lady's brother, who was a defendant in the suit, presented a petition stating to the effect before-mentioned, and that the lady had

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*no property except the fund in Court, and that no settlement

was made on her marriage, and praying that a further part of the capital of the fund might be sold and the proceeds paid to the proprietor of the asylum, in discharge of the debt then due to him.

PETERS v. GROTE.

Mr. Knight appeared in support of the petition (1).

The VICE-CHANCELLOR

Made the order.

THE ATTORNEY-GENERAL *v.* ST. JOHN'S COLLEGE.

1835. *Jan.* 19, 21.

SHADWELL, V.-C.

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(7 Simons, 241—255; S. C. 4 L. J. (N. S.) Ch. 73.)

[IN this case questions of multifariousness and want of parties were raised by demurrer to an information. The case is reported on another point in Cooper t. Brougham, 394, for which see 38 R. R., p. 60.]

RICHARDS *v.* THE EARL OF MACCLESFIELD (2).

1835. *Jan.* 30.

SHADWELL, V.-C.

[257]

(7 Simons, 257—260; 4 L. J. (N. S.) Ch. 153.)

Advowson—Right of presentation—Coparceners.

An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F. however presented, and, on the next avoidance, E. presented: Held that the presentations by E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that, on the seventh avoidance, F. would be again entitled to present.

THIS was a suit for specific performance by the vendors against the purchaser of the next presentation to the vicarage of Chew Magna, with the chapelry of Dundrey annexed, in Somersetshire. The Master having reported in favour of the title, the defendant excepted to his report. The exception now came on to be argued.

It appeared that in 1622 one Roberts, being seised in fee of the advowson of the vicarage, (which was an advowson in gross) died intestate, and that it descended to his four daughters and

(1) The petition had not been served on any one.

(2) *Keen* v. *Denny*, '94, 3 Ch. 169, 64 L. J. Ch. 55, 71 L. T. 566.

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co-heirs, Mary, Jane, Prudence (under whom the vendors claimed) and Grace. On the happening of the first avoidance after the intestate's death, his daughters did not agree among themselves to present jointly to the vicarage, and therefore Mary, the eldest daughter, became entitled to present to it, for that turn: and, on the happening of the subsequent avoidances, the other daughters became entitled to present to it, successively, according to their seniority. Consequently, Prudence, the third daughter, or those claiming under her, would be entitled to the third, seventh and eleventh turns. On the happening of the first six vacancies, the presentations were regularly made. When the seventh vacancy occurred, Prudence had died leaving two daughters, her co-heirs, of whom Frances was the elder and Prudence the younger; and the right of presenting on that occasion was claimed by Silvanus

[*258] Bond, as being entitled under Frances, and *by Thomas Gibbon, as being entitled under Prudence the younger. Bond and Gibbon not being able to agree, between themselves, as to the right to the presentation, the former brought a *quare impedit* against the latter (1); pending which, Gibbon presented one Rogers to the vicarage. Not long afterwards, Rogers died incumbent of the living. If the presentation of Rogers was not void, but was to be counted, his death caused the eighth avoidance after the death of the intestate, and, consequently, the presentation for that turn belonged to his fourth daughter, Grace, or to those who claimed under her. Bond, however, presented W. Smith to the living; and, on Smith's death, persons who claimed under Grace presented Robert Pyke. On Pyke's death the turn to present was disputed by the parties claiming under Mary, the intestate's eldest daughter, on the one hand, and by parties claiming under Jane, the second daughter, on the other; and thence arose the *quare impedit* between Pyke and the Bishop of Bath and Wells and Lindsey, in which judgment was given for the defendant.

The right to present when the living should again become

(1) The only account that could be found of the above claim and the proceedings under it, is in the report of *Pyke* v. *Bishop of Bath and Wells and Lindsey*, in Bacon's Ab. Title Joint-tenants (H.). See vol. 4, page 482, 7th edition.

vacant was claimed by the vendors, as representing Prudence the younger, and was the subject of the contract between the parties to this suit.

Mr. Jacob and *Mr. Chandless*, in support of the exception:

The case of *Pyke* v. *The Bishop of Bath and Wells* seems to have been decided on a defect in the pleadings. *It does not [*259] appear that any judgment was entered up in that case; and, unless it was, the Court would not issue the writ to the Bishop. Besides, the judgment, if it was entered up, could not affect third parties.

The question is whether the turn that is now coming is the 10th or the 11th turn. How is the Court to know that it is the 11th? The case of *Pyke* v. *The Bishop of Bath and Wells* (supposing it to be rightly decided) does not amount to a decision that the presentation by Gibbon is to be reckoned; and, if it is not to be reckoned, the next turn will be the 10th; and, even if it should be the 11th, there may be a question whether, as the parties who claimed under Prudence the younger had the seventh turn, the vendors, who now claim under her, are to have the 11th; or whether it does not belong to the representatives of Silvanus Bond. If there is a doubt, the Court will not compel the purchaser to take the title.

Mr. Coote, *Mr. G. Richards*, *Mr. Keene* and *Mr. Bagshawe*, in support of the report:

We contend that the next turn is the 11th, and that those who claim under Prudence the younger are entitled to it. It is not necessary for us to shew that the prior presentations were rightfully made: *Gully* v. *The Bishop of Exeter* (1). Although Gibbon usurped the right of Bond, and Bond usurped the right of Grace, their presentations must be counted. Bond, if he had the right, lost it; and, on the next avoidance, the turn will come round again to those who represent Prudence the younger; for usurpation does not disturb the turn, *or, in other words, does not [*260] deprive the coparcener of her right to present, when her turn again comes round.

(1) 10 B. & C. 584.

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THE VICE-CHANCELLOR:

I am of opinion that the title is good.

It is evident that Silvanus Bond and Thomas Gibbon, who represented, respectively, the elder and the younger daughter of Prudence, who was the intestate's third daughter, did not agree as to the mode of presentation on the happening of the third avoidance, and that the presentation by Gibbon on that occasion was a usurpation of the right of Bond. When the living again became void, Bond presented, and thereby usurped the right of Grace, the intestate's fourth daughter, or of those who claimed under her. These two presentations had, however, the effect of supplying the avoidances on which they were made. The cycle then recommenced; for it seems to have been decided by the Court of Common Pleas in the case cited from Bacon's Abridgement, that the turn which was then in dispute was the 10th turn. The consequence is that the next will be the 11th turn; and I cannot but think that it belongs to those who represent the younger of the two branches of which Prudence, the intestate's third daughter, was the root. The exception, therefore, must be

Overruled.

1835.
Jan. 30.

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WALDO *v.* WALDO (1).

(7 Simons, 261—263.)

Timber—Tenant for life.

Testatrix devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life *sans* waste, remainder to his first and other sons in tail. The trustee, under a surveyor's advice, and with the consent of the tenants for life, ordered timber on the estate to be felled, and invested the proceeds in the purchase of stock in his own name: Held that A. was entitled to the dividends of the stock for her life.

JANE MEDLEY, by her will dated the 8th of June, 1827, devised the manor of Heaver, in Kent, and other real estates, unto and to the use of Spencer Newcomb Meredith and his heirs, upon trust to settle the same to the use of Jane Waldo and her assigns, during her life (but she not to have any power of cutting down more timber than was merely necessary for repairs), with

(1) *Ex relatione.*

remainder to trustees to preserve contingent remainders, with remainder to the use of Edward Wakefield Mead, Esq. during his life, without impeachment of waste, with remainder to trustees to preserve &c., with remainder to the use of the first and other sons of Edward Wakefield Mead in tail, with remainders over.

The testatrix died in December, 1829; and, shortly afterwards, before the settlement directed by the will had been made, a considerable quantity of timber on the estates was cut and sold under the circumstances after mentioned, and the proceeds were invested in the purchase of stock in Meredith's name. The bill was filed by Edward Wakefield Mead (who had taken the name of Waldo) against Jane Waldo, the plaintiff's eldest son, who was an infant, and the trustee, for the purpose of having the rights and interests of the parties in the stock ascertained and declared.

The cause now came on for further directions.

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It appeared from the Master's report made in pursuance of the decree, that a surveyor employed by Meredith with the concurrence of the plaintiff and the defendant, Mrs. Waldo, had reported that there was a considerable quantity of timber on the estates, which had arrived at maturity, and ought to be cut down, as it would not improve, but, on the contrary, many of the trees would decrease in value, if allowed to stand, having already shewn symptoms of decay, and that some of such timber was absolutely required to be cut with a due regard to the growth of the surrounding trees: that Meredith, thereupon, consulted with the plaintiff and the defendant Mrs. Waldo, and, with their consent, ordered the trees which the surveyor had marked to be cut down and sold, but that there remained standing on the estates much more than sufficient for any future repairs.

It was contended by *Mr. Knight* for the plaintiff, and by *Mr. Tennant* for the infant defendant, that, before the timber was cut, an application ought (as in the case of *Tooker* v. *Annesley*) (1) to have been made to the Court for its sanction,

(1) 5 Sim. 235. An illustration of the well settled rule that a tenant for life was entitled to the interest on money produced by the sale of timber cut by the order of the Court. The principle of that class of authorities is explained by Lord LYNDHURST, L.C. in *Butler* v. *Kynnersley*, 33 R. R. at p. 188. The tenant for life has now more extensive statutory rights under s. 35 of the Settled Land Act, 1882.—O. A. S.

WALDO v. WALDO.

and that, as it had been done without any competent authority, the tenant for life ought not to receive any benefit from it.

Mr. Jacob and *Mr. Gresley* appeared for the defendant Mrs. Waldo.

The VICE-CHANCELLOR said that he considered the timber to have been cut by the authority of the trustee, who had a superintending control over the estate; that it was not a wrongful act; and that the effect of it must *be the same as if it had been done with the sanction of the Court.

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His Honour, therefore, ordered, as in the case of *Tooker* v. *Annesley*, that the tenant for life should have the dividends of the stock during her life, and that all parties should be at liberty to apply at her death.

[On the death of Jane Waldo the capital of the stock was ordered to be transferred to the next tenant for life who was unimpeachable for waste (see 12 Sim. 107).]

1835. *Feb.* 18.

SHADWELL, V.-C.

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GAMBIER *v.* GAMBIER.

(7 Simons, 263—270; S. C. 4 L. J. (N. S.) Ch. 81.)

Domicile—Personal property—International law.

By the law of Holland, the surviving parent is entitled to the income of the children's property until they attain 18.

By a judicial compromise of a suit in Holland, two infant children, who were resident and domiciled (1) in this country, were adjudged to be entitled to one fourth of their deceased mother's personal estate: Held that their father was not entitled to the income of their property until they attained 18.

IN 1818 the late Earl of Athlone in Ireland and Count de Reede in Holland, married, at Paris, Miss Hope, who was possessed of large personal property. The Earl was domiciled in Holland. Miss Hope was born at Amsterdam, of English parents, and, at the time of her marriage, declared her domicile to be at the Hague.

By the Code Napoleon, which is the law of Holland as well

(1) It is not quite clear whethe the V.-C. meant to decide that the law of England prevailed as the law of the children's domicil, or as the law of the country where they happened to be: see Dicey, Conflict of Laws, 491, 492.—F. P.

as of France, the parties to a marriage, unless the contract contains an express stipulation to the contrary, marry with community of property, and, in that case, the husband and wife enjoy, during their marriage, the whole of the property belonging to each of them, and, in the event of the marriage being dissolved, either by legal separation or by death, the joint property is divided between them or their representatives, as the case may be, in moieties. If, however, it is stated in the contract, that the parties marry without *community of property, then [*264] they retain the same rights to property possessed at the time of the marriage or acquired after it, as they would have had if they had remained single.

Previously to the marriage of the Earl of Athlone with Miss Hope, they executed a contract, in the Dutch language, in which it was provided that the marriage should be without community of property; but the contract was not passed before a notary, according to the forms prescribed by the law of Holland, to make it valid.

The Earl died in 1823, leaving his wife and a son and two daughters, one of whom afterwards died, him surviving. In 1825 the Countess married the defendant William Gambier, who was a British subject. Previous to the marriage, a contract dated the 16th of April, 1825, was drawn up at the Hague, in the Dutch language, and passed before a notary, according to the forms above-mentioned, in which community of property was excluded; and it was, among other things, declared that, in case the intended wife should happen to die first, whether with or without having a child, children or other descendants, the intended husband should, in such event, provided the marriage still continued to exist, obtain one fourth part of the net property by her left, as the same might be found at her death, under and subject to this condition, that such one fourth should be, exclusively, borne by the hereditary portions of the children who might be born of that marriage, should the same be two or more in number, the wife, in that case, giving to her husband such right and disposition thereof as the English laws might allow in that respect.

There was issue of this marriage a daughter and a son, both [265]

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of whom were born in London, the daughter in 1826, and the son in 1827.

In 1829 a suit was instituted in the Dutch Courts by William Frederick Count Van Reede, as the guardian, by the laws of Holland, of the children of the first marriage, against the defendant Mr. Gambier, (who then was, and, for some years before, had been resident, with his wife, in England) for the purpose of ascertaining the legal rights of the children of the first marriage; the Count contending that the contract entered into on the first marriage was void, and, therefore, that there was a community of property between the Earl and Countess, and that, at the Earl's death, his children became entitled, independently of the Countess, to a moiety of her property, in right of their father, and that they would also be entitled to a share in the moiety belonging to the Countess. Mr. Gambier pleaded that the Dutch Courts had no jurisdiction over the subject-matter of the suit, inasmuch as the late Earl and the Countess and their children were English. In 1830, whilst these proceedings were pending, the Countess died in England, where she and Mr. Gambier and their children were domiciled. After her death the proceedings were continued; and Mr. Gambier contended that, by his wife's death, he had become entitled to all her property, which was chiefly in the English Funds, and which, at the time of the second marriage, was transferred into and still remained in the names of two trustees (who were Dutchmen domiciled in Holland) and of the Countess.

Afterwards, a judicial compromise was made of the matter in
[*266] dispute; and on the 24th of February, 1831, *an instrument, by which all parties were irrevocably bound, was drawn up at the Hague in the Dutch language, and thereby Mr. Gambier withdrew his plea to the jurisdiction, and disclaimed all right acquired by the laws of England to his late wife's property, either as her husband or by virtue of the letters of administration to her estate which had been granted to him by the Archbishop of Canterbury; and it was declared that the contract entered into on the first marriage should remain, in every respect, perfect and entire, and that, in conformity thereto and to the contract entered into on the second marriage, partition should be made of every thing which the Countess had left, in such a manner that thereof one

moiety should be allotted to her children by the first marriage, and the other moiety to Mr. Gambier, as well for himself as for his children, who were to share in the same, each for one half, so that Mr. Gambier was to have one fourth and his children the other fourth. In pursuance of this instrument, one moiety of the Countess's stock in the English Funds was transferred into Mr. Gambier's name.

By the 384th Article of the Code Napoleon, the father, if the surviving parent, has the enjoyment of the property of his children until they attain the age of 18 years; and, by Articles 1387 and 1388, it is provided that the parents themselves cannot, by any special conventions, derogate from the right which is conferred upon the survivor of such parents, by Article 384.

Mr. Gambier having insisted that, as the instrument of compromise was made in Holland, all parties taking property under it must take subject to the law *of that country, and, therefore, [*267] that he was entitled to the income of his children's share of their late mother's property until they attained 18, the bill was filed by his children, who were born in England, and had always resided there, insisting that, by the instrument of compromise, one half of the stock which had been transferred into the defendant's name became, absolutely, the property of the plaintiffs, and that, whatever the law of Holland might be, the defendant was not entitled to the dividends of that moiety until the plaintiffs attained 18; and it prayed for a declaration to that effect.

Sir W. Horne and *Mr. G. Richards*, for the plaintiffs:

We contend that the Dutch law regulated the acquisition of the shares of Lady Athlone's property to which Mr. Gambier and his children have become entitled; but that, when those shares were acquired, they became the property of British subjects, and, thereupon, the Dutch law became *functus officio*, and was superseded by the law of England.

The contract made on the second marriage, and on which the instrument of compromise was engrafted, contains an express stipulation that, with respect to the one fourth of the Countess's property which Mr. Gambier was to take on the Countess's death, he was to have such right and disposition thereof as the English

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laws might allow. Therefore, there was an express stipulation that, after the property had been acquired, the enjoyment of it should be regulated by the English law: and, if the father takes as a British subject, the children must take in the same character:

[*268] *and, consequently, the father can have no rights but what the English law gives him.

Supposing, however, that there had been no such stipulation in the marriage contract, the claim set up by the defendant could not prevail; for the children of the second marriage, as well as their parents, were domiciled in England; and, therefore, as soon as the instrument of compromise was executed, the law of England applied to the property taken under it: *Melan* v. *The Duke de Fitzjames* (1), *De la Vega* v. *Vianna* (2), *Sawer* v. *Shute* (3), *Campbell* v. *French* (4).

Mr. Knight and *Mr. Short*, for the defendant Mr. Gambier:

Our case is that, according to the true construction of the instruments, the shares of the children of the second marriage in their late mother's property have never come to them for the purpose of enjoyment. Lady Athlone was domiciled in Holland at the time of her second marriage. The settlement made on that occasion was Dutch both in form and language; and the trustees were Dutchmen. When you have to construe an instrument conferring property, you must construe it according to the law of the country in which it is made. The marriage contract left the rights of the children to be regulated by the law of Holland, which gives, to the father, the right to the enjoyment of his children's property until they attain 18, and expressly provides that the parents shall not, by any special conventions,

[*269] derogate from that right. *A change of domicile does not affect a previously acquired right. The children never acquired an absolute right to the property. The marriage contract did not give the property to them, except *sub modo*. It would be unjust to apply the English law to the compromise; for the advocates of the different parties, who arranged the terms of it, could not have had in view any thing but the law of Holland: and

(1) 1 Bos. & P. 138. See 142.
(2) 35 R. R. 298 (1 B. & Ad. 284).
(3) 1 Anstr. 63.
(4) 4 R. R. 5 (3 Ves. 321).

Mr. Gambier, in his answer, says that the advocate employed by him did not insert in the instrument of compromise a special convention or stipulation to the effect of the 384th Article of the Code Napoleon, because he assumed, and correctly assumed that it was unnecessary, inasmuch as the plaintiffs, taking the benefit of the concession made on their behalf under the compromise, must take it subject to the Dutch law. By the law of this country, Mr. Gambier would have taken the whole of Lady Athlone's property. What the children acquired, they acquired by the law of Holland: can they then say that what they so acquired is to be regulated by the law of England, when, by the law of England, their father would have taken the whole? The language and effect of a foreign contract cannot be affected by the domicile of the parties.

THE VICE-CHANCELLOR:

The rights of the plaintiffs are not derived under the settlement made upon their mother's marriage with Mr. Gambier; but under the judicial compromise, which I must consider as a judicial decree which adjudicated that the children were entitled to one fourth of their mother's personal estate. They take by virtue of that judicial decision: the contract is entirely out of the question.

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By the Code Napoleon, which is the law of Holland, as well as of France, when children are under the age of 18, their surviving parent has the enjoyment of their property until they attain that age. But that is nothing more than a mere local right, given to the surviving parent by the law of a particular country, so long as the children remain subject to that law; and, as soon as the children are in a country where that law is not in force, their rights must be determined by the law of the country where they happen to be. These children were never subject to the law of Holland: they were both born in this country, and have resided there ever since. The consequence is that this judicial decree has adjudged certain property to belong to two British-born subjects domiciled in this country; and so long as they are domiciled in this country, their personal property must be administered according to the law of this country. The claim of their father does not arise by virtue of the contract, but solely by the local law of the country where he was residing at the time

GAMBIER v. GAMBIER.

of his marriage; and, therefore, this property must be considered just as if it had been an English legacy given to the children: and all that the father is entitled to, is the usual reference to the Master to inquire what allowance ought to be made to him for the past and future maintenance of his children.

1835.
Jan. 26, 27.
May 12.

SHADWELL, V.-C.

[271]

RANDALL *v.* RANDALL (1).

(7 Simons, 271—289; S. C. 4 L. J. (N. S.) Ch. 187.)

Partnership—Conversion.

Land purchased by partners in trade out of partnership funds, but not required or used for trade purposes, is not necessarily partnership property. In such case the intention to be co-owners of the land purchased instead of partners may be inferred where the land is conveyed to them as tenants in common.

IN 1792, Richard Randall, William Randall, James Randall and Elizabeth Randall, upon the death of their father, became entitled, as tenants in common, to an estate, partly freehold and partly leasehold, consisting of a dwelling-house, farm-yard, barn, stable, garden, and lands, in the parish of Romsey Extra, in Hampshire. Richard Randall was a land-surveyor, and William Randall a grocer; and the former had a separate property in the parish. Richard and William Randall, shortly after their father's death, agreed to become co-partners, in equal shares, in the business of farming, including the growing of hops; and in 1794 they entered into partnership together, in like shares, in the business of making malt. Not long afterwards they entered into a joint-contract with the Commissioners of the Navy, for supplying the Navy with biscuit, and commenced the manufacture of biscuit in co-partnership together. The farming and malting businesses were carried on upon the family estate; and the manufacture of biscuit, partly on the family estate and partly on Richard Randall's separate property. In 1802, Richard and William Randall purchased of James Randall his one fourth of the family estate for 280*l.*, and the purchase-money was paid or satisfied out of the

[*272] funds or other property of the partnership: but no *conveyance

(1) *Davis* v. *Davis*, '94, 1 Ch. 393, 63 L. J. Ch. 219, 70 L. T. 265, contains references to later cases on this subject; and see the Partnership Act, 1890, ss. 20, 22.—O. A. S.

of the share so purchased was executed to them. In 1803 they purchased of Miss Long some pieces of land, containing 17a. 1r. 25p., in Romsey Extra. The price was paid out of the partnership funds, but no conveyance was executed to them; and the land was used by them for farming and agricultural purposes. In 1805 they purchased of Joseph Tarver 12 acres of land, in Romsey Extra, one moiety of which was conveyed to Richard Randall (who was single), in fee, and the other moiety to William Randall (who was married), and a trustee for him, to the usual uses to bar dower. This land also was paid for out of the partnership funds, and was used by the purchasers for farming and agricultural purposes. In 1808, in pursuance of an Act of Parliament for enclosing lands in Romsey Extra, certain allotments containing 27a. 3r. 26p., were made to Richard and William Randall, generally, in respect of their freehold and leasehold lands in the parish. The expenses of fencing, embanking, cultivating and improving these allotments were paid out of the funds of the partnership; and the allotments were used by the brothers for farming and agricultural purposes. In 1820, two messuages and gardens in Portsea were purchased by them with the partnership monies, of one Reeves, and were conveyed in the same manner as the lands purchased from Tarver. These messuages and gardens were let to tenants: and the rents, and all other receipts and payments in respect of the rest of the estates, were regularly entered, by Richard and William Randall, in the books of the partnership, and were carried to the account thereof; because, as the answer alleged, Richard and William Randall were tenants in common of those estates, and therefore it was not thought necessary by them to open any separate or distinct account of such receipts *and payments. The malting business was discontinued in 1807; but the partnership in the farming business was continued until August, 1827, when Richard Randall died intestate as to his real estates, leaving his brother William his heir-at-law, and having by his will, which was not duly attested, given the residue of his personal estate to the plaintiff, who took out administration to him with the will annexed. At Richard Randall's death a suit which he had instituted in December, 1824, for taking the partnership accounts, (which

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RANDALL v. RANDALL.

had never been settled) was pending. After his death the matters in difference were referred, by the plaintiff and the defendant, to arbitrators, who afterwards made their award, but which did not relate to the premises purchased and allotted as before-mentioned.

The bill prayed that it might be declared that one undivided moiety of the estates which had been purchased by Richard and William Randall, formed part of the personal estate of Richard Randall, and that the defendant, William Randall, might be declared to be a trustee of such moiety for the plaintiff, as the personal representative of Richard Randall.

The answer stated that Richard and William Randall having, from time to time, a large surplus capital unemployed and not wanted for the purposes of their co-partnership, agreed to invest the same in occasional purchases of land, which it was agreed should be paid for out of such surplus capital, and conveyed to them in undivided moieties, as tenants in common, but not as joint-tenants or as partners; and that, in pursuance of such agreement, the several before-mentioned purchases were made
[*274] and paid for out of such surplus capital: *that these purchases were not, in any manner, required for the purposes of the biscuit-baking and malting concerns, nor were the same made otherwise than as a mode of employing monies not then wanted, by the co-partners, for the purposes of the partnership or for the purposes of their respective separate businesses: that the lands so purchased and the allotments made under the Inclosure Act, were used for farming and agricultural purposes only, and the houses and gardens bought of Reeves, were let to tenants, and the rents were received by the defendant and Richard Randall as tenants in common and in no other character.

Mr. Knight and *Mr. K. Parker*, for the plaintiff:

The estates were purchased out of the partnership funds. The partnership businesses were connected with the produce of land, and the sums received and paid in respect of the estates, were entered in the books of the partnership; so that all the partnerships were blended together. The law on this subject is settled by *Phillips* v. *Phillips* (1).

(1) 36 R. R. 410 (1 My. & K. 649).

Sir William Horne and *Mr. Sandys*, for the defendant: RANDALL v. RANDALL.

The defendant and his brother having succeeded to certain real estates which were their patrimonial inheritance, began life by agreeing to occupy them in common. A joint occupation by two brothers of their paternal estates, cannot, strictly speaking, be called a partnership. The estates were real estates when they began to occupy them, and, from the manner in which they *dealt with those estates, it is clear that they intended [*275] them to continue so. Richard Randall was a surveyor, and William Randall was a grocer; and each of them continued to follow his separate trade. In 1794 they engaged in the malting business; which is a business much connected with farming, and, in some parts of the country, is incident to it. Having advanced a little in the world, they entered into a contract for supplying the Navy with biscuit. Though the accounts between the two brothers never were balanced, yet, at certain periods, they laid out their surplus money (which is what the bill terms their surplus capital) in the purchase of land. They wished to realize and to make an addition to their paternal estates; but they did not employ the land so purchased, in trade. The mode in which the property so purchased was conveyed is evidence of the intention of the parties. If they had meant to convert it into personalty, they would have taken a conveyance to themselves, as joint-tenants, in fee: they, however, took a conveyance, as to one moiety, to Richard Randall, who was a bachelor, in fee, and, as to the other moiety, to William Randall, who was married, and to a trustee, to uses to bar dower. Each of them, therefore, took a share distinct from the other; and there can be no doubt that they intended to hold the property, not as partners, but in their separate and individual capacities, and that it should remain inheritable in each of them. The malting business ceased in 1802, and the manufacture of biscuit terminated with the war, in 1815.

In 1820, which was five years after all the trading had ceased, they purchased houses in Portsea, and had them conveyed in the same manner as before. They *continued to occupy the land as [*276] tenants in common, until 1827, when Richard Randall died.

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The doctrine of this Court, as to real estate being considered as personal, is applicable to trading partnerships only. In *Phillips* v. *Phillips* the testator was a brewer at his death, and the property as to which the question arose, consisted of public-houses, which are an important part of a brewer's stock in trade; they were purchased for the purposes of the trade, and were conveyed to the testator and his partner, as joint-tenants in fee.

May 12.

THE VICE-CHANCELLOR:

The circumstances of this case, which are very special, are as follows:

In the year 1792, Richard Randall, a land surveyor, William Randall, a grocer, together with James Randall and Elizabeth Randall, became entitled, on the death of their father, to a freehold estate consisting of a dwelling-house, garden and lands, in the parish of Romsey Extra, and also to certain leasehold estates in the same parish, where Richard Randall had separate property. Richard and William, shortly after their father's death, commenced the business of farming and growing of hops, which was a branch of the farming business. In 1794 they commenced the business of making malt; and, not long afterwards, they commenced the business of biscuit-baking, in
[*277] consequence *of a contract which they had made with the Commissioners of the Navy. At that time and during all the subsequent time, Richard Randall carried on his separate business of a land surveyor, and William Randall the business of a grocer. The farming business was carried on upon the family estate, and the manufacture of biscuit partly on the family estate, and partly on Richard Randall's separate property. [His Honour then detailed the particulars of the purchases and allotments of land made by and to Richard and William Randall.] No conveyance was executed of the lands so purchased, except those purchased of Tarver, which were conveyed, as to one moiety, to the use of Richard Randall in fee, and, as to the other moiety, to the use of William Randall and a trustee, in the usual manner to bar dower. All the lands so purchased were paid for out of the partnership monies, and were used

solely for farming and agricultural purposes. In 1820 Richard and William Randall purchased, with partnership monies, two messuages and gardens in Portsea, which were conveyed in the same manner as the lands purchased from Tarver. This property was not used for any partnership purposes, but was let to tenants. In or before 1815, all the partnership business in trade had been given up; but the farming business was carried on, in partnership, up to August, 1827, when it was terminated by the death of Richard Randall. He died intestate as to his real estates, leaving his brother, William, his heir-at-law; and the plaintiff took out administration to him with his will annexed. Richard Randall, before his death, filed a bill against William, for an account of the partnership dealings. After Richard Randall's death, the plaintiff and the defendant agreed to refer the matters in dispute to arbitration.

The arbitrators decided on every point which was then considered to be a point in the cause, but there was nothing in their award which could be considered as concluding the present question; it having been taken for granted, throughout the reference, that Richard Randall's share of the landed property had descended to his brother William. The object of the present bill is to obtain a declaration that all the property is personal estate. [278]

[His Honour then referred to a number of cases shewing that land purchased by partners for the purposes of their partnership business is partnership property (see *Selkrig* v. *Davies* (1), *Crawshay* v. *Maule* (2), *Fereday* v. *Wightwick* (3), and *Phillips* v. *Phillips* (4).]

Taking then the law to be as it is to be collected from the cases to which I have referred, the question is, whether the real estates in this case are to be considered as personal property. Now, it does not appear that the parties purchased any part of the land for the purposes of their partnership in trade. Having, in the first instance, agreed to carry on the farming business in partnership, they subsequently agreed to become [287]

(1) 14 R. R. 146, at p. 154 (2 Dow, 230, 242).
(2) 18 R. R. 126 (1 Swanst. 495).
(3) 32 R. R. 136, 138 (1 Russ. & My. 45, 49).
(4) 36 R. R. 410 (1 My. & K. 649).

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co-partners, first as maltsters, and afterwards as biscuit-bakers. The first purchase that they made was of an undivided fourth part of an estate of which they previously had a moiety as tenants in common. It would, however, be strong to say that because these parties, being partners in the farming business which is not a trade, happen, collaterally to that business, to [*288] *carry on a trade, therefore the nature of the property which they so purchased is to be changed. And, consequently, I do not think that it would be right to hold that the one-fourth of the family estates, which Richard and William Randall purchased of their brother James, is to be considered as partaking of the nature of personal estate.

The next estate was purchased of Miss Long; but it was never used for any of the purposes of the partnership trade: and, as the Judges who decided the cases to which I have alluded have expressed their opinions to be, that land cannot become personal estate unless it is purchased for the purposes of the partnership trade, the land purchased of Miss Long, although it may have been paid for out of the partnership capital, cannot be considered as partaking of the nature of personal estate.

With respect to the land purchased from Tarver, it was conveyed, as to one moiety, to the use of Richard Randall in fee, and, as to the other moiety, to the use of William Randall and his trustee, to the usual uses to bar dower. Therefore there was no contract, either express or implied, that it should have any nature except that which was originally impressed upon it.

The malting business ceased in 1807, and the biscuit-baking in 1815. In 1820 the two brothers purchased two houses and gardens in Portsea, which, of course, were not used for farming purposes, but were let to tenants. Those premises were conveyed in the same manner as the land purchased of Tarver: and if, in those instances in which the lands purchased by the [*289] brothers were conveyed to them, it is to be inferred, *from the form of the conveyance, that they intended to hold them as real estate, it is but fair to conclude that they intended to hold those lands which were not conveyed to them, in like manner; for

it would be unreasonable to suppose that they meant to hold part as land, and part as impressed with the character of personal estate.

The fair inference to be drawn from the facts of this case, is that the trade was collateral to and arose out of the principal business of farming: and there is no reason to conclude, from any of the decided cases, that any of the property to which this suit relates ought to be considered as personal estate.

Then as to the costs: both parties appear to have been asleep, so far as the present question is concerned; and it is too much to say, in a case like this, which depends on a minute consideration of cases and of circumstances, that the plaintiff is to blame because he has taken the opinion of the Court; and, therefore, the bill ought to be

Dismissed without costs.

THE ATTORNEY-GENERAL *v.* PEARSON (1).

1835. *Feb.* 20, 27 *March* 6.

SHADWELL, V.-C.

[290]

(7 Simons, 290—317.)

Dissenting meeting-house—Trust charity.

In 1701 a meeting-house was founded by certain Protestant Dissenters, for the worship and service of God: Held that no doctrines ought to be taught in it which are opposed to the opinions of the founders; and, in ascertaining those opinions, the state of the law when the meeting-house was founded, is to be regarded: as the Court will intend that the founders did not mean any doctrines to be taught, which were then illegal.

[THIS was a supplemental information and bill in reference to certain disputes which had arisen respecting the proper doctrines to be taught in a dissenting chapel founded by Protestant Dissenters in 1701 "for the worship and service of God." The original information and bill filed in 1817 came before Lord Eldon upon an application for an injunction as reported in 3 Mer. 353 (see 17 R. R. 100), and his views as to the regulation of religious trusts of this description by the Court of Chancery are there stated at great length; he then directed inquiries to be made as to the nature and object (with respect to worship and doctrine) of the charitable foundation in this particular case.—O. A. S.]

(1) *Shore* v. *Wilson* (1842) 9 Cl. & Fin. 355; *Attorney-General* v. *St. John's Hospital, Bath* (1876) 2 Ch. D. 554, 573.

A.-G. v. PEARSON.

[292] The founders of the meeting-house, and the original subscribers and contributors to it, were Dissenters of the Presbyterian sect or denomination, and it was alleged that they believed in the doctrine of the Trinity, as Presbyterians in general did, in and about 1701. In the course of time, however, a change of opinion gradually took place in the sect, and the greater number repudiated that doctrine. The new principles gained ground amongst the congregation of the meeting-house in question; and, for some years before the end of the last century, the trustees, ministers and the majority of the congregation, had ceased to be Trinitarians. * * *

[294] In April, 1822, the cause was heard and a decree was made directing the same inquiries as the order of 1817 had directed, and also who were proper persons to be trustees of the funds and estates, and who had, from time to time, been in the occupation or receipt of the rents of the property.

[Supplemental proceedings having become necessary by reason of death and other changes, the present information and

[296] bill was filed praying] for a declaration that the meeting-house and other property ought not to be applied to the support or teaching of the doctrines of any sect of Protestant Dissenters who denied the Trinity, or professed any opinions which, at the time of the erection of the meeting-house, could not be legally taught or preached; and for a declaration that the defendants were not duly appointed trustees, or, if they were so appointed, that they ought to be removed and some proper persons appointed new trustees jointly with the plaintiff. * * *

Feb. 27.

Mr. Knight and *Mr. James Russell:*

[303] The meeting-house could not have been founded for the purpose of propagating Unitarian doctrines; for those doctrines could not then be legally taught. * * *

[304] The chapel was registered, which it could not have been, if it had been a Unitarian chapel; and, in the licence, it is termed a Presbyterian chapel. The opinions of the original Presbyterians with respect to the Trinity accorded with the doctrine of the Established Church on that subject. The chief, if not the only point on which they dissented, was Church government.

A.-G. v. PEARSON.

Our evidence shews that the congregation who attended the chapel up to 1780, were Trinitarians.

At all events this Court will not allow the revenues of a charity to be severed from the charity.

Mr. Rolfe, *Mr. Booth* and *Mr. Falconer*, for the defendants:

The question is whether the maintaining of any particular tenets is necessary to the execution of the trusts created by the deeds by which this chapel was founded and endowed. It was founded by certain Protestant Dissenters who, in the beginning of the 18th century, were called Presbyterians. The characteristic of that sect was that they admitted of no creed, but all persons who received the Holy Scriptures as the Word of God, were admitted to the communion of their Church. They abjured all tests and every restraint on the freedom of inquiry, and left every one at liberty to entertain and inculcate those doctrines which were the result of that inquiry. The language of the deeds, as is the case in all the Presbyterian trust deeds of the same period, is very general. They do not, like the deeds of almost every other class of Dissenters, prescribe what particular doctrines are to be preached in the chapel. All that is *expressed [*305] in the deed of 1701, is that the meeting-house was intended to be used for the service and worship of God. If the founders had intended to limit the doctrines to be taught in the chapel, they would have followed the example set them by other Dissenters, and have mentioned them specifically. * * *

If a chapel were founded at this day, by a Unitarian, for the service and worship of God, and the minister, trustees and all the congregation, were, at some future time, to be convinced of their error and become converts to Trinitarianism, would this Court compel them to *continue in error, although the chapel [*306] was founded, simply, for the service and worship of God. * * *

Part of the funds was given to the chapel during the time when the Unitarian doctrine was preached in it. The decree ought, therefore, to direct an inquiry, at what times the several gifts were made to the chapel; and it must also declare what doctrines ought to be preached in the chapel, and not merely what doctrines ought not to be preached in it.

A.-G. v. PEARSON. *March* 6.

THE VICE-CHANCELLOR:

When, as in the present case, a gift is made or a trust is created by certain persons, of certain funds, for the service and worship of Almighty God, the thing to be regarded, is what were the religious tenets in general of those persons? Because it would not be a just application of those trust funds, if they were allowed to be employed for the sustentation of religious opinions which the donors themselves would have disavowed. The state of the law, too, at the time when the gift was made or the trust created, is not to be disregarded. It must be regarded in some sense and in some degree; because it may assist in determining what were the opinions of the persons who created such a religious trust as we find in this case. And if we do find that, at that time, the preaching and promulgating certain doctrines and opinions were prohibited by the statute law, it may be reasonably inferred that the *persons who created the trust for the worship and service of God, did mean such a trust as would not include the promulgating of those doctrines and opinions which, at the time, it was illegal to promulgate.

[*307]

I have heard and read a great deal about the extreme anxiety which was manifested by the Presbyterians, the Independents and the Baptists (the three principal classes of Dissenters) to have their societies unfettered by creeds: I cannot, however, but think that, in their minds, it was of much more importance that their ministers should inculcate certain religious doctrines upon the minds of their hearers, than, simply that they should be at liberty to preach what they pleased; and that they thought that the supporting and inculcating of certain doctrines, assumed by them to be religious truths, was of more importance than the method by which those truths should be disseminated. They meant, without doubt, that those opinions should be taught which they themselves entertained; but they objected to their being taught by means of a creed: and the result has shewn how very much their object has failed with respect to the Presbyterians at least. In a late edition of Neal's History of the Puritans, it is stated that, in almost all the Presbyterian congregations there has taken place a change of opinions, and that they have swerved from the doctrines of their

forefathers and have now become advocates of very different tenets. A.-G. v. PEARSON.

My opinion, therefore, is that, looking at what, as is not denied, were the opinions of the Presbyterians at the time when this charity was founded (which was from 1701 to 1726) we may reasonably infer that they never could have meant that that particular doctrine should be taught, in this chapel, as part of the worship and *service of God, which is attacked by the present information. So, supposing the state of the law had permitted it, if the persons who founded this chapel had been Mahometans, and they had directed that it should be used for the service and worship of God, I should have thought it to be a matter of course, that they must have meant the service of God by means of disseminating Mahometan principles. And unless the construction which I have mentioned can be put on the language of these deeds, there is no limit to the doctrines which it might be said may be taught in this chapel consistently with the views of the original founders. [*308]

The decree, therefore, ought to be so framed as to exclude those particular doctrines which the information complains of, from being preached in the chapel. But I do not agree with the defendants' counsel, that the decree ought to specify, affirmatively, all the doctrines that may be taught; for that would be endless. If the charity is found in such a state that some opinions are intended, by the present holders of the chapel, to be disseminated which one may be reasonably sure were not contemplated by the original founders, it is quite sufficient to declare that those opinions shall not be maintained by the persons who preach in the chapel; and those persons who do avowedly maintain the opinions which according to the view of the Court, ought not to be preached in the chapel, ought not to be trustees of the chapel: for there is a manifest incongruity in having persons of one strong religious belief administering a trust created in favour of persons of another religious belief.

I say this without, in the least, animadverting on the personal character of the gentlemen who are concerned; *because I know nothing whatever to impeach it: and it is, merely, because they entertain opinions which, in my opinion, ought not to be [*309]

A.-G. v. PEARSON.

preached in the chapel, that I shall direct them to be removed from being trustees of the trust property, and direct other persons to be appointed in their place, who do not profess those doctrines and opinions.

Declare that the meeting-house, tenements and hereditaments and other property in the pleadings mentioned, ought not to be applied to the support or teaching of the doctrines of any sect of Protestant Dissenters who deny the doctrine of the Holy Trinity, or profess opinions as to the Christian religion, which, at the time of the erection of the said meeting-house, could not be legally taught or preached therein.

* * * * *

1835. *Feb.* 20.

SHADWELL, V.-C.

[317]

KERRICK *v.* SAFFERY.

(7 Simons, 317—318; S. C. 4 L. J. (N. S.) Ch. 162.)

Mortgagor and mortgagee—Bankrupt—Parties.

Where money is secured by a mortgage for a term, and by a trust for sale of the fee, the mortgagee, if he files a bill praying for a sale only, is not entitled to foreclose the fee, nor, unless he amends his bill, to foreclose the term.

The mortgagor, who had become bankrupt, was held not to be a necessary party to the suit.

A SUM of money lent by the plaintiff, was secured by a mortgage of an estate for a term of years, and by a trust for sale of the fee. The mortgagor afterwards became bankrupt. The bill was filed against him, his assignees and the trustees, and also against *other persons interested in the estate, praying for a sale, but not for a foreclosure.

[*318]

Mr. Knight and *Mr. Bethell*, for the plaintiff, contended that the plaintiff was entitled to a decree for a foreclosure of the fee.

Mr. Cooper, for the defendant, the mortgagor, said that, as he had become bankrupt, he was not a necessary party to the suit: *Collins* v. *Shirley* (1).

Mr. Evans, for the assignees.

(1) 32 R. R. 307 (1 Russ. & My. 638).

Sir W. Horne, Mr. Rolfe, Mr. C. Romilly, Mr. J. Romilly and *Mr. Haldane*, for the other defendants.

The VICE-CHANCELLOR said that, as the bill prayed for a sale only, the plaintiff was not entitled to any other relief: but that he would give the plaintiff leave to amend his bill for the purpose of praying a foreclosure of the term; and that, when the term was foreclosed, the debt would be satisfied, and the fee would be held in trust for the assignees of the mortgagor.

His Honour also ruled that the mortgagor was not a necessary party to the suit; as the whole of his property, and, consequently, his right to redeem the term, were vested in his assignees.

FAULKNER *v.* BOLTON (1).

1835. *Feb.* 16.

SHADWELL V.-C. [319]

(7 Simons, 319; S. C. 4 L. J. (N. S.) Ch. 81.)

Mortgagor and mortgagee—Redemption.

If the plaintiff in a suit for redemption, does not pay the principal and interest at the time appointed, he will not be allowed to redeem, although, before the motion to dismiss is made, he has tendered the amount reported due, with the subsequent interest.

THIS was a suit for the redemption of a mortgage; and a decree had been made in the usual terms. The defendant attended to receive the money, at the time and place appointed by the Master; but the plaintiff did not attend.

Mr. Tennant, for the defendant, now moved that the bill might be dismissed, with costs.

Mr. Wigram, for the plaintiff, said that the plaintiff was ready to pay the principal, with interest up to the present time, and asked that he might be allowed to redeem: and that it appeared, by affidavit, that, about seven weeks after the time fixed by the Master, the plaintiff had tendered to the defendant the principal and interest up to that time, and 25*l.* in addition.

But the VICE-CHANCELLOR refused to allow the plaintiff to redeem, and ordered the bill to be

Dismissed.

(1) *Collinson* v. *Jeffery*, '96, 1 Ch. 644, 65 L. J. Ch. 375, 74 L. T. 78.

1835.
March 11.

SHADWELL, V.-C.

[321]

ATTORNEY-GENERAL *v.* AKED (1).

(7 Simons, 321—325.)

Dissenting meeting-house.

The management of the affairs of a Dissenting chapel, was vested in the communicants. The congregation being dissatisfied with their minister, held a meeting, at which they resolved that he should be recommended to resign. Neither the minister, nor a majority of the communicants was present at the meeting: but the resolution was afterwards signed by a majority of them, and communicated to the minister: Held, that the resolution was tantamount to a dismissal, although it was not come to at a meeting, at which a majority of the communicants was present.

THE defendants were the trustees of two buildings, one of which was a meeting-house for Protestant Dissenters holding the Westminster confession of faith and independent form of church government, and the other, a dwelling-house for the minister of the meeting-house. Among Dissenters of that class, no persons are admitted to any voice or share in the management of their affairs, either spiritual or temporal, but such of the congregation as sit down at the Lord's table, and their final determination and resolution is declared by the opinion of the majority of such communicants; and, ever since the foundation and establishment of the meeting-house in question, such had been, invariably, the custom and practice in the management of the spiritual and temporal matters connected therewith.

In December, 1832, several of the frequenters of the chapel
[*322] being dissatisfied with Newell's conduct, on *account of his having neglected his duty and on other grounds, a meeting was held, at which it was unanimously resolved to address, to Newell, a letter to the following effect: "Reverend Sir: We the undersigned, being trustees, church-members or seat-holders now or formerly assembling at Booth Chapel, finding it utterly impossible for us to derive that comfort and spiritual benefit under your administration which we conceive the Gospel is so abundantly calculated to impart, we, therefore, most earnestly request you to take into serious consideration the importance and responsibility connected with the office you sustain and the uncomfortable state of the church and congregation, and we most earnestly

(1) *Cooper* v. *Gordon* (1869) L. R. 8 Eq. 249, 38 L. J. Ch. 489, 20 L. T. 732.

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entreat you to tender in your resignation at as early a period as you possibly can." A majority of the communicants was not present at the meeting; but the letter was, afterwards, signed by a majority of them. The defendant Calvert, one of the communicants, waited upon Newell with the letter, after it had been so signed, and explained to him its contents; but Newell refused to look at the letter, and said that he would remain where he was and that it was his determination to take shelter under the law. The trustees then caused a special meeting of the ministers and deacons of the same denomination of Dissenters, to be summoned as an Association; and such Association was held in the vestry of Sion Chapel, Halifax. Newell attended, the letter was read, the number of signatures thereto and the total number of the members of the congregation was stated, and the reasons why the congregation wished Newell to resign were explained, and Newell was heard in relation thereto: whereupon the Association, with the exception of two deacons who did not vote, resolved: "That a requisition having been presented, signed by eight trustees, forty-six *members (1), and ten seat-holders, requesting [*323] Mr. Newell to resign his pastoral charge: it is the opinion of this meeting, in order that the cause of the Gospel may no longer suffer injury, that Mr. Newell ought to resign his charge, and that the Association recommend and advise this step only under the influence of Christian motives."

Newell, however, still refused to resign: upon which the trustees brought an ejectment against him, in order to obtain possession of the chapel and dwelling-house. One object of the information and bill was to restrain that action, on the ground that Newell had not been regularly dismissed from his office.

The injunction having been obtained,

Mr. Jacob and *Mr. Elmsley* now shewed cause against dissolving it:

They contended that no resolution was come to, at the first meeting, for dismissing Newell from his office, but that the resolution was, merely, that he should be requested to resign:

(1) The communicants who signed the requisition, were more than two-thirds of the whole number.

A.-G. v. AKED.

that, whatever is to be done by a body, must be done at a meeting of the body duly and properly called, and the party to be judged ought to be cited to attend it: that a majority of the communicants was not present at the meeting, and that Newell had no notice of it: *Attorney-General* v. *Scott* (1); *Attorney-General* v. *Davy* (2).

Mr. Knight and *Mr. Koe* appeared for the defendants.

[324] THE VICE-CHANCELLOR:

In my opinion, the trustees as well as the congregation, have behaved with great forbearance towards Mr. Newell. It is evident that the conduct of that gentleman had created very considerable dissatisfaction among the congregation, for a long period; but no proceedings of a hostile character were taken until December, 1832. The letter written to Mr. Newell, by the desire of a majority of the members of the congregation, suggesting that he should tender his resignation, is, in my opinion, tantamount to a dismissal. That resolution, however, having been communicated to him, and he having refused even to look at it, a meeting, in the nature of an ecumenical council, was subsequently held, composed of ministers and deacons, at which a resolution was passed, with almost unanimous approbation, (two deacons only remaining neuter) that, under the circumstances of the case, Mr. Newell ought to resign his office; which was only a civil confirmation of the request politely made to him by the majority of the communicants. Though it does not precisely appear what the number of persons forming the congregation is, there is no doubt that a majority entertained an opinion that Mr. Newell ought to be removed: for the trustees, in their answer, say that a majority of the communicants concurred in the resolution for his removal, and deny that a majority was desirous that he should remain. They also state that a large majority of those sitting down at the Lord's table, was desirous that he should resign, and that such majority was still desirous that he should resign his office. For my own part, I clearly understand that the desire of the trustees and a majority of the communicants, that Mr. Newell should resign, was expressed by the letter of December,

(1) 1 Ves. Sen. 413. (2) *Ibid.* cited 419.

1832; but, in order to prevent the appearance of dealing harshly *or of relying too much on their own opinion, they procured the ecumenical council to be convened, which confirmed the previous determination. Mr. Newell refusing quietly to acquiesce in that resolution and quit the chapel, an action of ejectment was brought, in January last, to turn him out; and I have heard no reasonable ground stated why that action should not be suffered to proceed.

A.-G. v. AKED. [*325]

Injunction dissolved.

EDWARDS *v.* JONES.

(7 Simons, 325—336; S. C. 4 L. J. (N. S.) Ch. 163.)

[AFFIRMED on appeal as reported in 1 My. & Cr. 226.]

EDWARDS *v.* THE GRAND JUNCTION RAILWAY COMPANY.

1836. *June* 22, 25.

SHADWELL V.-C.

(7 Simons, 337—343; S. C. 6 L. J. (N. S.) Ch. 47.)

[337]

[AFFIRMED on appeal as reported in 1 My. & Cr. 650.]

ARNOLD *v.* HARDWICK.

1835. *March* 14.

SHADWELL, V.-C.

(7 Simons, 343—344; S. C. 4 L. J. (N. S.) Ch. 152.)

[343]

Appointment.

If the donee of a power appoints the fund to one of the objects of the power, under an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad.

SAMUEL JAMES ARNOLD, the father of the plaintiffs, being, under the will of Walter Pye, Esq., entitled to a sum of stock for his life, and having power to appoint it, subject to his life interest, amongst his children, made an appointment of part of the fund, and assigned his life interest therein, to two of his sons. The defendants (who were the trustees of the stock) having reason to think that the appointment had been made under an understanding, between the father and his sons, that the latter should lend the proceeds of the sum appointed, to the

ARNOLD v. HARDWICK.

former, but on good security, refused to transfer that sum to the plaintiffs; upon which the bill was filed, by the appointees, praying that the defendants might be decreed to make the transfer.

[344] The answer stated the grounds upon which the suspicions of the defendants as to the intended loan, were founded.

Mr. Barber and *Mr. Ayrton*, for the plaintiffs.

Mr. Turner, for the defendants.

The VICE-CHANCELLOR said that, if there was any antecedent bargain between the father and his sons, that, if the appointment were made, the fund should be lent to the father, the appointment would not be good; and that the question was whether, in consequence of what was stated in the answer, the trustees ought to be directed to transfer the fund without further inquiry.

Mr. Turner then said that the persons entitled to the fund in default of appointment, ought to be made parties to the suit: and his Honour being of that opinion, the cause was ordered to stand over in order that they might be made parties.

In the course of the argument *M'Queen* v. *Farquhar* (1) and *Farmer* v. *Martin* (2) were referred to.

1835. *March* 23.

SHADWELL, V.-C.

[352]

ELLIS *v.* SELBY.

(7 Simons, 352—364; S. C. 4 L. J. (N. S.) Ch. 69.)

[AFFIRMED on appeal as reported in 1 My. & Cr. 286.]

(1) 8 R. R. 212 (11 Ves. 467). (2) 29 R. R. 151 (2 Sim. 502).

CLAY *v.* PENNINGTON.

(7 Simons, 370—372; S. C. 6 L. J. (N. S.) Ch. 183.)

1835.
March 26.

SHADWELL, V.-C.

[370]

Will—Construction.

A testator bequeathed his residuary estate to his grandchildren, and in case they should all die without leaving issue, then to the children of A. and their issue, in equal shares, or unto such of them as should prove their right within two years after the death of his grandchildren without issue. A. had five children, two of whom were living at the date of the will and survived the testator; the others died before the date of the will, but two of them left issue: Held that all A.'s descendants who were living at the death of all the testator's grandchildren without issue, or who should be born within the two years, would be entitled to participate in the residue.

JOHN DIXON, by his will dated the 21st of May, 1800, gave the residue of his personal estate to trustees, in trust to pay the interest to his daughter, Elizabeth Goff, widow, during her life, and, after her death, in case she should leave any children by any future marriage, in trust to pay the capital amongst such children and his granddaughter, Ann Goff, in equal shares; but, if his daughter should leave no children by a future marriage, then to his granddaughter, Ann Goff: and in case his said granddaughter or any of his grandchildren thereafter to be born, should happen to die before the monies thereinbefore directed to be paid to her, him, or them, should be actually paid, due or payable, leaving lawful issue, such issue was to take and be entitled to his, her or their deceased father or mother's shares, in equal shares and proportions if more than one, and, in default of such issue, the share or shares of him, her, or them so dying, was and were to go and survive to the other or others of them, his said grandchildren, in equal shares and proportions, and to the issue of such of them as should be then dead leaving lawful issue: and in case all his said grandchildren should happen to die without leaving issue before the bequests thereinbefore mentioned should respectively become due, then he gave and bequeathed all his said surplus monies unto the children of his brother, Benjamin Dixon, and their lawful issue, in *equal shares [*371] and proportions, or unto such of them as should make and prove their right, to the satisfaction of his trustees, within two years next after the first notice thereof to be given in the *London Gazette*, and which notice he directed his trustees to insert once each month for the first six months next after failure of issue of his said daughter.

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The testator died shortly after the date of his will. Ann Goff died, without issue, in 1821. Elizabeth Goff died in May, 1832, without having been married after the date of the will. Benjamin Dixon, the testator's brother, had five children, three of whom were dead at the date of the will: the other two survived the testator and died, in the lifetime of Elizabeth Goff, leaving issue: and two of Benjamin Dixon's other children who died in the testator's lifetime, left issue living at the death of Elizabeth Goff.

The bill was filed by the issue of the two children of Benjamin Dixon who survived the testator, against the surviving trustee of the will and the issue of the two other children of Benjamin Dixon, praying that the rights and interests of the plaintiffs in the testator's residuary estate, might be ascertained, and that their shares might be transferred to them.

Mr. Knight and *Mr. Turner*, for the plaintiffs, said that the question was whether, under the bequest to the children of Benjamin Dixon and their lawful issue, the two children who were living at the date of the will, did not take absolute interests; inasmuch as those words would have created an estate tail in real estate: but, if the word "issue" was to be considered as a word
[*372] of purchase, then the testator could not have *intended to give to the issue of a child, which child could not take; and, consequently, that the issue of the two children who survived the testator, were alone entitled to the fund.

Mr. Kindersley appeared for the defendants.

The VICE-CHANCELLOR said that it appeared, from the context of the will, that the testator, by the word "issue," meant "children:" and that he intended that all the children and the issue of all the children of Benjamin Dixon, who should prove their right within two years and one month after the death of his grandchildren without issue, should participate in the fund; and that, in the events that had happened, all the descendants of Benjamin Dixon who were living at the death of Elizabeth Goff or who should be born within two years and one month after that event, would be entitled to participate in the fund.

WHITE *v.* WAKEFIELD (1).

(7 Simons, 401—418; S. C. 4 L. J. (N. S.) Ch. 195.)

1835. *May* 9, 11.

SHADWELL, V.-C.

Vendor and purchaser—Lien—Notice.

If a vendor who knows that the purchase-money is trust money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the cestuis que trust, he has no lien on the estate for the part so retained.

Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser; his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained.

[401]

THE facts of the case are sufficiently stated in the judgment.]

The *Solicitor-General* and *Mr. Wood*, for the plaintiff who as unpaid vendor claimed a lien on an estate for part of the purchase-money remaining unpaid, and who remained in occupation of the estate as tenant, cited *Mackreth* v. *Symmons* (2); *Hughes* v. *Kearney* (3), *Daniels* v. *Davison* (4), *Allen* v. *Anthony* (5)]. [407]

Mr. Jacob and *Mr. John Romilly* for the defendant Lord Western [one of the trustees who purchased the property with trust money available for that purpose]. [411]

Mr. Tennant for Lord Berwick [another of the purchasing trustees]. [413]

Mr. Koe, *Mr. Wakefield* and *Mr. Bellasis* [for persons beneficially interested under the trust for purchase].

Mr. Kindersley and *Mr. K. Parker* [for certain annuitants claiming as incumbrancers upon the life interest of the tenant for life of the purchased property].

Mr. Knight and *Mr. Hayter* for Few [who had acted as solicitor and trustee for the annuitants]. [415]

(1) *Bickerton* v. *Walker* (1885) 31 Ch. Div. 151, 55 L. J. Ch. 227, 53 L. T. 731.

(2) 10 R. R. 85 (15 Ves. 329).

(3) 9 R. R. 30 (1 Sch. & Lef. 132).

(4) 10 R. R. 171 (16 Ves. 249; 17 Ves. 433).

(5) 15 R. R. 113 (1 Mer. 282).

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The *Solicitor-General*, in reply. * * *

THE VICE-CHANCELLOR:

This case has been very fully and ably argued; and the simple circumstances of it are that Lord Western, Lord Berwick and Mr. Edward Wakefield, being trustees of a fund in this Court, which, under the settlement on the marriage of Mr. Edward Gibbon Wakefield, was to be laid out in land. Mr. Edward Wakefield, on behalf of himself and his co-trustees, entered into a contract with Mr. White, the plaintiff's father, for the purchase of an estate in Gloucestershire for 11,000*l.* It is in evidence, by the correspondence that took [*416] place between the solicitors of the parties, *that Mr. White knew that the money was trust-money. Mr. Edward Wakefield, on behalf of his son, Mr. E. G. Wakefield, the tenant for life under the settlement, made an arrangement with Mr. White, by which the plaintiff was to become tenant of the estate to Mr. E. G. Wakefield, at the rent of 400*l.* a year. In August, 1820, the purchase-money was raised by sale of part of the stock; but, owing to some delay on the part of the vendor, the purchase was not completed until 1821. In the month of August in that year, the estate was conveyed to the trustees upon the trusts of the settlement, and Mr. White signed a receipt, in the usual form, for the 11,000*l.* He did not, however, receive the whole of that sum; for 2,000*l.*, part of it, was retained by Mr. E. Wakefield. On the 18th of August, 1821, an account was settled between Mr. Edward Wakefield and Mr. White, which, after noticing certain sums paid to White and a deduction for the loss that had been sustained by selling out the stock at the time when the purchase was not ready to be completed, concludes thus: "By amount retained until the remaining signatures are obtained, and until certain attested copies of deeds are delivered and lease executed, and other legal matters are completed, but which it is understood, by all parties, can be done very soon; and which balance it is agreed between William White and Edward Wakefield, shall carry interest at and after the rate of 4*l.* per cent., provided Mr. White gives two months' notice for the payment of the same."

Now, if any doubt existed as to the nature of the transaction upon the face of this account, the subsequent correspondence shews that it was a transaction by which White agreed that the 2,000*l.* should remain in the hands of E. Wakefield, who should himself pay *interest for it at four per cent., and should not be called upon to pay the principal until after two months' notice given to him by White. [*417]

This mode of dealing was one which makes this case differ, essentially, from the common case between vendor and purchaser, where, from mistake, or for the convenience of the purchaser, it happens that the estate is conveyed without payment of the purchase-money in full: for, as White knew that the estate was to be purchased with trust-money, he ought to have taken care that such an arrangement was made as that the purchase-money might be safe and forthcoming. But this transaction is totally different; for the money was left under the absolute control of E. Wakefield: and, as White did so deal with one of the trustees without the concurrence of the co-trustees or their cestuis que trust, he cannot be permitted, as against them or the annuitants and their trustee, to say that he has a right to consider the estate as virtually mortgaged to him for the unpaid part of the purchase-money. Therefore the essence of the claim which the plaintiff makes against the estate, totally fails.

Suppose however that it were otherwise, and that there had been a lien; then the question would be whether, if there were no actual notice to the annuitants, they would be bound by the lien, because their attorney had notice that the plaintiff was in possession of the estate. The only fact of which they could have had notice, was that the money was not paid. But as White had declared by the conveyance, in the most solemn manner, that he had received all the money, no man could be expected to inquire whether the purchase-money had been paid: and, therefore, if there had been *any lien, the case must have totally failed as against the annuitants. [*418]

My opinion is that this is not a case in which the Court ought to recognize that there was any lien on the estate for the purchase-money unpaid.

Bill dismissed with costs.

1835.
May 29, 30.

SHADWELL, V.-C.

[421]

LEWIS *v.* LANGDON.

(7 Simons, 421—426; S. C. 4 L. J. (N. S.) Ch. 258.)

Partners—Injunction.

A. and B. carried on the business of a pencil-maker, under the firm of A. and L. A. died, and B. carried on the business, under the firm of B. & Co., successors to A. and L. A.'s executor, having commenced the same business, under the firm of A. and L., an injunction was granted to restrain him from using that firm, until the right should have been tried at law.

In and before 1788, Stephen Brookman and Joshua Langdon carried on the business of making and selling lead pencils, at No. 28, Great Russell Street, Bloomsbury, under the firm of Brookman and Langdon. In 1788 Stephen Brookman died. In 1798 Joshua Langdon died, having, by his will, appointed William Langdon his executor and made him his residuary legatee. In May, 1828, William Langdon died intestate, and administration of his effects was granted to Fruzan Langdon, his widow. After the deaths of Stephen Brookman, Joshua

[*422] Langdon and William Langdon, *the business was carried on under the same firm and at the same place, by Joshua Langdon, William Langdon and Fruzan Langdon in succession. In June, 1828, Fruzan Langdon took into partnership with her the plaintiff, James Lewis, (who was the half-brother of the intestate, and was then considered to be his sole next of kin), and they carried on the business under the same firm and at the same place. During that partnership William Tobias Langdon claimed to be the son and sole next of kin of the intestate, and divers legal proceedings were had, with respect to such claim, between William Tobias Langdon and Fruzan Langdon and James Lewis. In July, 1832, they came to an agreement in writing for the settlement of their disputes, whereby it was agreed that the business of William Langdon and the profits arisen from the same since his decease, should belong to Fruzan Langdon and James Lewis. In November, 1834, Fruzan Langdon died, having, by her will, appointed the defendant, Augustus Langdon, and two other persons, her executors. After the death of Fruzan Langdon, James Lewis took the plaintiff, G. E. Warren, into partnership with him, and they carried on the business at No. 58, Great Russell Street, under the firm of James Lewis

& Co., successors to Brookman and Langdon (1). In January, 1835, the defendant, Augustus Langdon, commenced carrying on the business of making and selling lead pencils, under the firm of Brookman and Langdon, at No. 27, Great Russell Street.

In May, 1835, the bill was filed, praying that the defendant might be restrained from marking any pencils with the name or firm of Brookman and Langdon, and from using the same name or firm in carrying on his business, and that he might account for and pay, to the *plaintiffs, the profits made by him by using that name or firm. [*423]

The plaintiffs now moved for the injunction.

Mr. Knight and *Mr. Duckworth*, in support of the motion:

The right to use the designation of a partnership, ranges itself under the head of goodwill. Goodwill survives, and the personal representative of the late partner has nothing to do with it. Consequently, on the death of Fruzan Langdon, the right to use the name of the late partnership, vested in Lewis, the surviving partner. We do not, however, disclaim any aid that may be derived from the agreement of July, 1832, whereby the business of William Langdon became the property of Fruzan Langdon and James Lewis. If Augustus Langdon chooses to deal in pencils, he must deal in his own name.

Sir William Horne, *Mr. Wakefield*, and *Mr. Lovat*, for the defendant:

The law as to goodwill has been mis-stated by the counsel for the plaintiffs. But we deny that the right in question is goodwill: it is stock in trade; and, on the death of one partner, it does not belong to the survivor, but the whole must be sold, and the proceeds divided between the surviving partner and the personal representative of the deceased partner. The plaintiffs, although they insist that we ought not to use the name of Brookman and Langdon, do not use it themselves: they call

(1) There appears to have been some clause in this agreement under which a surviving partner might claim to continue the partnership business in the name of the firm (see the judgment, *post*, p. 169, and the present M. R.'s observations on the case, Lindley on Partnership, 448, 6th ed.); but the clause is not stated either in this report or in the Law Journal Report.—O. A. S.

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themselves, "Successors to Brookman and Langdon." On the death of Fruzan Langdon, there being no longer either of the names in the firm, Lewis did not think himself at liberty to continue to use the style of Brookman *and Langdon, and, therefore, he abandoned it. It is a fraud on the public to use a false firm.

[*424]

(THE VICE-CHANCELLOR: The Legislature has never thought fit to interfere; and I cannot allow it to be a fraud. If Lewis, after the death of Mrs. Langdon, had carried on business and sold pencils under the name of Brookman and Langdon, and a stranger had sold pencils under that name, he would have had a right of action against the stranger. Will not the question in this case be, what is the meaning of the expression, in the agreement, that the business of William Langdon shall belong to Fruzan Langdon and James Lewis?)

The agreement gives nothing but the liberty to carry on the business and to retain the profits.

THE VICE-CHANCELLOR:

The question in this case depends on the right, in the surviving partner, to carry on the business under the name of the partnership.

Lord ELDON, certainly, has expressed a doubt in the case of *Crawshay* v. *Collins* (1), upon what has been understood to be the proposition laid down by Lord ROSSLYN, in the case of *Hammond* v. *Douglas* (2). It is true that the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party rather than to another: and it is, also, observable that Lord ELDON might have been throwing out his observations with reference to a supposed connexion between the place where the business was carried on, and the goodwill. But it occurs to me that, if the goodwill is to be considered as a saleable article which belongs to *the partnership, then this consequence

[*425]

(1) 10 R. R. 61 (15 Ves. 218, 227).

(2) 5 Ves. 539, where it was held that the goodwill of a partnership business on the death of a partner belonged exclusively to the surviving partner, a proposition quite inconsistent with modern authorities. —O. A. S.

must follow, namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in order that the thing which is said to be saleable, may be preserved until it can be sold.

If a partnership were carried on between A. and B. under the name of Smith & Co., and the surviving partner chose to discontinue the business and to write to the customers and say that his partner was dead, and that the business was at an end, the effect would be that that which is said to be saleable would cease to exist. Now what power is there in a court of equity, to compel a partner to carry on a trade after the death of his co-partner, merely that, at a future time, the goodwill, as it is called, may be sold? It is plain that, unless there is such a power in this Court, it must be in the discretion of the surviving partner to determine what shall be done with the goodwill; and, if that is the case, it must be his property.

I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that, upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor (1).

My opinion, therefore, is that Mr. Lewis, by becoming the surviving partner of Mrs. Langdon, had, in himself, the right to use, either simply or in a modified way, the firm of Brookman and Langdon under which the partnership business was agreed to be carried on by virtue of a clause which I find in the agreement: *and he cannot be said to have abandoned that right; [*426] for he has made use of the firm as subsidiary to the new partnership which he is now carrying on under the name of James Lewis & Co., successors to Brookman and Langdon, and thereby he connects himself with the former partnership of Brookman and Langdon. As, therefore, Mr. Lewis has never abandoned the right which accrued to him on the death of Mrs. Langdon, the consequence is, that Mr. A. Langdon, who is the executor only of Mrs. Langdon, has no right to use the

(1) This *dictum* was apparently based on *Hammond* v. *Douglas*, since overruled; see note on preceding page.—O. A. S.

LEWIS v. LANGDON.

partnership firm for his own benefit; and, therefore, I shall immediately grant an injunction to restrain him from using that firm in carrying on his business. But, if the parties wish to have the question decided in a court of law, I will direct an action to be brought by Mr. Lewis against Mr. A. Langdon for that purpose (1).

1835. *June* 2.

SHADWELL, V.-C.

[427]

BATES *v.* BONNOR.

(7 Simons, 427.)

Vendor and purchaser—Mortgagee.

A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th of March, exceeded the purchase-money. He was let into possession from the preceding Christmas.

A MORTGAGEE purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th of March, exceeded the purchase-money; and he now petitioned to be let into possession of the purchased premises, from Christmas preceding.

Mr. Knight, in support of the petition.

Mr. Temple, contrà.

The VICE-CHANCELLOR held that the mortgagee was entitled to be let into possession from Christmas, and made an order accordingly.

1835. *June* 9.

SHADWELL, V.-C.

[427]

CRAWLEY *v.* CRAWLEY (2).

(7 Simons, 427—429; S. C. 4 L. J. (N. S.) Ch. 265.)

Administration—Annuity—Residue—Tenant for life.

Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue.

Where sums are set apart to answer contingent legacies, the interest

(1) The parties afterwards came to a compromise, and the action was not tried.

(2) *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295, 36 L. J. Ch. 929, 16 L. T. 695; *In re Whitehead*, '94, 1 Ch. 678, 63 L. J. Ch. 229, 70 L. T. 122, but the concluding paragraph of the head-note is open to the observation that if and so far as it may involve a continuance of the accumulation beyond the statutory period, it is contrary to the provisions of the Thellusson Act.—O. A. S.

of them, until the contingency happens, is part of the income of the residue.

Where the interest of a legacy is directed to be accumulated beyond the legal period, the interest of the legacy and accumulations, after that period and until the time of payment, is part of the capital of the residue.

CRAWLEY v. CRAWLEY.

SUSANNA KEET, by her will dated the 3rd of June, 1829, gave to such of her four great nephews John, Henry, Arthur and Philip Crawley as should live to attain the age of 21 years, the sum of 2,000*l.* *each, to be paid to them respectively if and when [*428] they should respectively attain that age: and, after devising certain real estates and giving a legacy of 8,000*l.* in trust for her great nephew, Arthur Crawley, in case he should live to attain 25, with directions for the accumulation of the interest thereof in the meantime, she gave to trustees the further sum of 8,000*l.*, upon trust to invest the same in the Funds, and to receive the dividends thereof and to invest the same in the Funds, so as the same might accumulate, by way of compound interest, until her great nephew, Philip Crawley, should attain 25, and, when he should have attained that age, in trust to transfer the 8,000*l.* and the accumulations thereof to him: and she declared that, in case Philip Crawley should die under that age, the 8,000*l.* and accumulations should fall into her residuary personal estate; and she gave the residue of her personal estate to the trustees in trust, as to one moiety, for the plaintiff for life, with remainder to his children, and, as to the other moiety, in trust for the defendant, Sarah Moore Halsey for life, with remainder to her daughters.

The testatrix died in July, 1830.

The suit was instituted for the administration of the testatrix's estate. One question in the cause was, in what manner a redeemable annuity of 400*l.* granted to the testatrix for 60 years, in 1824, and which the executors had been unable to sell, was to be dealt with. The other questions were whether, until the four legacies of 2,000*l.* each should become payable, the interest of the sums set apart to answer those legacies would belong to the tenants for life of the residue, or would form part of the capital of the residue: and whether, as *Philip Crawley would not attain 25 until the [*429] 25th of November, 1852, which would be more than 21 years after the testatrix's decease, the interest to accrue, on the 8,000*l.* and

CRAWLEY v. CRAWLEY.

its accumulations, between the expiration of the 21 years and the time when that legacy would be payable, would belong to the tenants for life of the residue, or would form part of the capital of it.

Mr. Knight and *Mr. F. Moore* appeared for the plaintiff.

Mr. Kindersley, *Mr. Wigram*, *Mr. Jacob*, *Mr. Simons*, *Mr. Walker* and *Mr. G. Richards*, for the defendants.

The VICE-CHANCELLOR said that the executors, until they could sell the annuity, must invest the payments of it, and that the interest of the investments would be payable to the tenants for life of the residue, and the capital would form part of the capital of it: that the interest to accrue on the four legacies of 2,000*l.* each, until those legacies should become payable, formed part of the income of the residue and was payable to the persons entitled to receive the interest of the residue under the trusts of the will; and that the trusts for accumulating the interest of the 8,000*l.* given to Philip Crawley, was good for 21 years after the testatrix's death, but was void for the excess beyond that period; that such interest ought to be accumulated until the expiration of the 21 years, or until the 8,000*l.* should fall into the residue under the trusts of the will; and that the interest to accrue from the expiration of the 21 years until the 8,000*l.* should become payable or fall into the residue, and also the interest to accrue, during the same period, from the accumulations which, at the end of the 21 years, should have been made of the interest of the 8,000*l.*, would form part of the capital of the residue.

1835.
June 9, 10.
July 7.

SHADWELL. V.-C.

[438]

BROCKLEHURST *v.* JESSOP.

(7 Simons, 438—443.)

Equitable mortgage.

An equitable mortgagee, if the mortgagor is dead, is entitled to have the estate sold, and the proceeds applied in payment of his debt, and to stand as a creditor, for the balance (if any) on the general assets of the mortgagor.

ON the 22nd of June, 1816, E. Dickens, a trader, being indebted to the plaintiffs, who were bankers and co-partners, deposited

with them the title deeds of an estate, of which he was seised in fee, as a security for the debt. The debt having increased, Dickens, on *the 9th of May, 1820, deposited with the plaintiffs the title deeds of another estate, and, on each occasion, he delivered to them a memorandum signed by him, and declaring the purposes for which the deposit was made. In December, 1822, he died intestate. The defendants were his co-heirs: one of them was an infant; and another of them took out administration to him. In 1824 the plaintiffs entered into the receipt of the rents of part of the estates to which the deeds related.

[*439]

In March, 1832, the bill was filed, alleging, amongst other things, that the plaintiffs had placed the amount of the rents received by them to the credit of the intestate's estate, but that the same had not been nearly sufficient to keep down the interest on the debt; and praying that the plaintiffs might be declared to have a specific lien, for their debt, on the estates; that those estates might be sold and the produce applied in payment of their debt and costs; and that the deficiency, if any, might be raised and paid to the plaintiffs out of the other real estates and the personal estate of the intestate, rateably with his other creditors, if any, and that his real and personal assets might be duly administered.

One question was whether the suit was not barred by the Statute of Limitations (9 Geo. IV. c. 14) so far, at least, as it sought to make the intestate's general assets liable to the plaintiffs' demand.

Another question was whether the plaintiffs were entitled to a decree for sale of the estates covered by their lien.

[440]

Mr. Knight and *Mr. Koe*, for the plaintiffs, contended, first, that the receipt of rent by the plaintiffs was equivalent to part payment of what was due to them; and, therefore, that the case came within the proviso in the first section of the statute, which provides that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.

Secondly: that an equitable mortgagee is entitled, where the mortgagor is dead, to have the estate covered by his lien sold, and

BROCKLEHURST v. JESSOP.

the proceeds applied, as far as they will extend, in payment of his debt, and to be paid the balance out of the general assets of the mortgagor, rateably with his other creditors: *Harris* v. *Harris* (1), *Daniel* v. *Skipwith* (2). * * *

[441] *Mr. Jacob*, *Mr. Parker*, *Mr. E. Montagu* and *Mr. Webster*, for the defendants:

[442] * * Where a mortgagee has no security for his debt except a deposit of deeds, he has no right to stand as a creditor upon the general assets of the depositor, but must rely, solely, on his remedy as mortgagee. Besides, in this case, the bill is not filed, by the plaintiffs, on behalf of themselves and the other creditors of the intestate.

THE VICE-CHANCELLOR:

* * I cannot but think that, where the mortgagor is dead, the equitable mortgagee has a right to have the estate affected by his lien, sold, and the proceeds applied in payment of his debt, and, if there is any balance remaining due to him, to stand in the place of a general creditor in respect of it.

In this case it has been said that the remedy of the plaintiffs, as general creditors, if they ever had any, has been barred by the Statute of Limitations, and that the receipt of rent by them is not a payment within the meaning of the proviso in that statute. But my opinion is that, if an equitable mortgagee enters into possession of an estate and receives the rents of it, such receipt ought, *primâ facie*, to be taken as payment either of the principal or interest of his debt, as the case may be (3).

In order then to determine whether the plaintiffs are entitled [*443] to stand in the situation of creditors, independently *of their right as mortgagees, it is necessary that the circumstances under which they took possession, should be ascertained, and, more especially, as one of the defendants is an infant, and some of the other defendants do not explicitly admit the fact. The proper course,

(1) 3 Atk. 722.

(2) 2 Br. C. C. 155.

(3) This proposition cannot now be maintained. To take a case out of the statute 3 & 4 Will. IV. c. 27, the payment must be made by the party chargeable or his agent: see *Cockburn* v. *Edwards* (1881) 18 Ch. D. 429, 51 L. J. Ch. 46, 45 L. T. 500.—O. A. S.

therefore, is to direct an inquiry as to the taking possession and receipt of rents; and, if it should turn out that the plaintiffs' debt is preserved, so as to make them creditors on the general assets of the intestate, they may apply to amend their bill by making it a bill on behalf of themselves and the other creditors of the intestate. * * *

UPPERTON *v.* HARRISON.

(7 Simons, 444—445.)

1835. *June* 12.

SHADWELL, V.-C.

[444]

Mortgagee—Costs.

A first mortgagee filed a bill against the mortgagor and subsequent mortgagees for a foreclosure, but, at the hearing, he consented to a sale. The proceeds being insufficient to pay the plaintiff his principal and interest, the Court refused to give the defendants their costs, and directed the whole fund to be transferred to the plaintiff.

THE plaintiff was the first mortgagee of certain leasehold houses at Worthing in Sussex. The bill was filed against the mortgagor and the subsequent mortgagees, for a foreclosure. At the hearing, the plaintiff consented to a decree for sale of the mortgaged premises. The proceeds being insufficient to pay the principal and interest due to the plaintiff, the question on the hearing for further directions, was whether the whole fund ought to be paid to the plaintiff, or, whether the costs of the plaintiff and defendants ought, in the first place, to be paid out of it.

Mr. Treslove and *Mr. Alfrey*, for the plaintiff. * * *

Mr. Knight, *Mr. James Russell* and *Mr. Addis* appeared for the defendants. [445]

The VICE-CHANCELLOR ordered the whole of the fund to be transferred to the plaintiff.

1835.
July 23.

SHADWELL, V.-C.

[501]

MILLS *v.* MILLS (1).

(7 Simons, 501—509; S. C. 4 L. J. (N. S.) Ch. 266.)

Will—Construction—Residuary gift.

Where residuary personal estate is left in trust for persons in succession, without any express trust for conversion, the specific enumeration of different classes of property comprised in the bequest does not entitle the tenant for life to the enjoyment in specie of the income.

JOHN MERRIS, by his will dated the 10th of April, 1819, after giving a legacy of 10*l.* and an annuity of 50*l.* to Hannah Stevens, gave all his freehold and leasehold messuages, tenements, farms, lands and hereditaments, and all his ready money, securities for
[*502] *money, stocks in the public Funds, goods, chattels and effects, and all other his real and personal estate and effects, whatsoever and wheresoever, to J. Tanner, since deceased, and the defendants Budd and Blackmore, absolutely, in trust to pay the rents, issues and profits of his freehold and leasehold estates, and the dividends, interest and proceeds of his money in the Funds and other his said personal estate, unto his daughter, the plaintiff, Eliza Mills, for her separate use, for her life, and, after her decease, in trust, out of the rents and profits of his said freehold and leasehold estates and the dividends, interest and proceeds of his said money in the Funds and all other his said real and personal estate and effects thereinbefore given and devised as aforesaid, to pay unto any husband of his daughter that should be living at her decease, an annuity of 500*l.*, for his life, and, subject thereto, in trust to stand possessed of his said freehold and leasehold estates, money in the Funds and all other his said real and personal estate, for all the children of his daughter who should be living at her decease, and who, being sons, should attain 21, or, being daughters, should attain that age or marry: provided that, if any of his daughter's children should marry in her lifetime and die under 21 leaving a child or children, then such grandchild or grandchildren of his daughter should receive the share or shares of his said estate and effects on attaining 21 being a son or sons, or, being a daughter or daughters, on attaining that age or marrying, which his, her or their parent or parents

(1) *Lichfield* v. *Baker* (1840) 13 Beav. 447; *Blann* v. *Bell* (1852) 5 De G. & Sm. 658.

would, if living, have been entitled to: and the testator empowered his trustees, after his daughter's death, to apply the rents and profits, interest, dividends and yearly proceeds of the shares of the infant children or grandchildren, of his daughter, of and in his said estates and effects, for *their maintenance and education, [*503] or to apply their shares of and in his said estates and effects, for their advancement: and, in case no child or grandchild of his daughter should live to have a vested interest in his said freehold and leasehold estates, and his said ready money and other his said personal estate, then upon trust to stand possessed of 5,000*l.*, part of his said stock in the Funds, and other his said personal estate and effects, in trust for such persons as his daughter should, by her will, appoint, and, in default of appointment, the testator directed that the 5,000*l.* should be considered part of his residuary personal estate thereinafter bequeathed. And he directed that his trustees should stand possessed of 500*l.*, further part of his said money in the Funds and other his said personal estate and effects, in trust for Martha Lewis, and of 2,000*l.*, further part of his said stock in the Funds and other his said personal estate and effects, in trust to pay the dividends, interest and proceeds thereof to the two daughters of Martha Lewis for their lives, and, after their deaths, to pay the principal to their children, at the usual times; and in case no child should live to have a vested interest therein, then that the principal should sink into the residuum of his said estate and effects thereinafter bequeathed. And, in case of failure of issue of his daughter Eliza Mills as aforesaid, he directed that the trustees should pay the rents, issues and profits of his said freehold and leasehold estates and the dividends, interest and proceeds of his said stock in the Funds and all other the residue of his said personal estate, to his nephews therein named, for their lives, and to the survivor of them, for his life; and that, after the death of the survivor, the trustees should stand possessed of his said freehold and leasehold estates, money in the Funds and all other the *residue [*504] and remainder of his said real and personal estate, in trust for the children of his nephews who should be living at the decease of such survivor, as tenants in common absolutely; and if there should be no such child, then that his trustees should stand

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possessed of 3,000*l.*, part of the residue and remainder of his said estate and effects, for their own use, and of 1,000*l.* further part thereof, in trust to pay the same to the treasurer of the Salisbury Infirmary: and, subject to the above payments, and in the event of there being no child of either of his nephews, who should be living at the death of the survivor of them, he gave all the residue and remainder of his said freehold and leasehold estates, stock in the public Funds, and all other his said real and personal estate, to the Corporation of Salisbury, in trust, as soon as conveniently might be after they should come into possession thereof, to sell and dispose of his said freehold and leasehold estates, and convert the same, also to sell, call in and convert into money, his said stocks in the public Funds and all other his said personal estate, and to lend the same to the persons, in the sums, and upon the terms, therein mentioned.

The testator died in March, 1824.

The bill was filed by the infant children of Mr. and Mrs. Mills, against their father and mother and the trustees, who were also the executors of the will, praying that the residue of the testator's estate might be ascertained and secured for the benefit of the parties interested therein, and that the leasehold estates, Bank stock and turnpike securities, of which the testator died possessed, might be sold, and the proceeds invested in the Three per cents.

[505] It appeared, by the Master's report made in pursuance of the decree on the hearing of the cause, that the stock of which the testator was possessed at the date of his will, consisted of the reversion of 3,648*l.* Consols, expectant on the decease of one Shergold, and of 13,000*l.* Bank stock; and that, at his death, the reversion had fallen into possession, and his Bank stock amounted to 14,800*l.* The testator's leasehold estates, turnpike securities, Consols and Bank stock, remained unsold, and Mrs. Mills had received the income thereof from the testator's death.

The cause now came on for further directions: the question was, whether the leaseholds and Bank stock [ought to have been converted in accordance with the rule in *Howe* v. *Lord Dartmouth* (1)].

(1) 6 R. R. 96 (7 Ves. 137).

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Mr. Jacob and *Mr. James Russell*, for the plaintiffs, contended that the bequest to the trustees was a general residuary bequest, containing an enumeration of some of the particulars of which the residue consisted: that Bank stock was nothing more than a share in the stock of a trading company, and passed to the trustees under the words: "Goods, chattels and effects," and not as, "stock in the public Funds:" that the trustees ought to have sold the Bank stock and the leaseholds, and invested the proceeds in the Three per cents.; and that, as the rents and dividends which had been received by Mrs. Mills, exceeded, in amount, the dividends of the stock in which the proceeds ought to have been invested, the excess ought to be refunded by her: *Stirling* v. *Lydiard* (1), *Gibson* v. *Bott* (2), *Howe* v. *Lord Dartmouth* (3).

[*506]

Sir C. Wetherell, *Mr. Beames* and *Mr. O. Anderdon*, for the defendants, Mills and wife:

The words used by the testator, in speaking of his stock, are not, "Stock in the Government Funds," but "Stock in the public Funds:" these latter words will pass the Bank stock, which was the bulk of the testator's property. He had a sum in the Three per cents.; but it was, comparatively, of small amount; and, at the date of his will, his interest in it was reversionary only.

It is clear, from the language of the will, that the testator intended that his property should be enjoyed by his daughter, as it existed at the date of his will. There is no direction to sell any part of it during the continuance of the trusts. When the bequest to the Corporation of Salisbury takes effect, then and not before, the property is to be converted into money. When the testator directs the trustees to stand possessed of the 5,000*l.*, he adds, "Part of my said stock in the Funds;" and, throughout his will, he uses the expressions "my said stock," or, "my said money in the public Funds;" and, after giving the legacies, he gives the residue of his said stock in the Funds to the Corporation. It is clear, therefore, that he intended his Bank stock to remain in specie, so long as the trusts continued.

(1) 3 Atk. 199.
(2) 6 R. R. 87 (7 Ves. 89).
(3) 6 R. R. 96 (7 Ves. 137).

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THE VICE-CHANCELLOR:

When the testator provides for the raising of the 5,000*l.*, in the event of his daughter having no child who should attain a
[*507] vested interest, he does not say, *merely: "Part of my said stock in the Funds," but adds, "and other my said personal estate and effects."

The cases cited differ essentially from the present. In *Stirling* v. *Lydiard*, the question was whether the bequest of the leasehold estate was revoked by the renewal of the lease. In *Gibson* v. *Bott*, the bequest was of all the rest, residue and remainder of the testator's goods, chattels, &c. to the executors, upon trust, as soon as conveniently might be after the testator's death, to sell and convert into money all such parts thereof as should not consist of money. In *Howe* v. *Lord Dartmouth*, the testator bequeathed all his personal estate whatsoever; and, consequently, there was no ground for contending that anything was specifically given.

Mr. Wray appeared for the trustees of the will.

THE VICE-CHANCELLOR:

The testator has first given, to his trustees, all and every his freehold and leasehold messuages, tenements, farms, lands and hereditaments whatsoever and wheresoever situated, and all and singular his ready money and securities for money, stocks in the public Funds, goods, chattels and effects, and all other his real and personal estate and effects whatsoever and wheresoever situate, lying and being, to hold unto and to the use of the trustees, their heirs, executors, administrators and assigns, according to the nature of his estate and interest therein, in trust to pay the rents, issues and profits of his said freehold and leasehold estates, and the dividends, interest, and proceeds
[*508] of his money in the Funds and other his said *personal estate, unto his daughter Eliza, for and during the term of her natural life. It is plain that he has, in this clause, merely made a partial enumeration of the particulars of his general residuary estate; and there is no intention apparent in any other part of the will, to give any portion of his personal estate specifically. The

words: "stocks in the public Funds," would not have passed the Bank stock; and, but for the general words, it would not have passed at all.

When the testator comes to speak of children of his daughter dying under 21 leaving children, he says that such grandchildren of his daughter shall receive a share of "his said estate and effects;" and, he uses this phrase several times afterwards. Where he speaks of no child or grandchild of his daughter living to attain a vested interest, he uses the expression, "my said ready money and other my said personal estate." Is it not obvious that, when he uses these expressions, he is speaking of one and the same thing? And it does not appear that you can infer any intention that there should not be a sale and conversion into Three per cents. according to the rule of the Court, merely because, when he speaks of the period when, of necessity, there must be a conversion into money for the purpose of making the loans, he declares that the Corporation, when it comes into possession of the residue of his freehold and leasehold estates, stock in the public Funds, and all other his said real and personal estate, shall sell and convert the same.

My opinion is that you must, from looking at all the phrases, conclude that he meant that there should be an enjoyment of the proceeds of his personal estate generally. And, unless the bequest is construed as a *general bequest, the consequence [*50] would be that, if he had surrendered the leaseholds and taken renewals, they would not have passed; and, in like manner, if he had sold his Bank stock and purchased other Bank stock, it would not have passed.

The leaseholds must be sold, and the Bank stock also; and that, not because it is not a permanent fund, but because it depends on the will of the directors of the Bank, whether the casual profits (which are full as valuable as the ordinary profits) shall go to tenants for life, or shall form part of the capital of the stock; and this Court will not allow the interests of tenants for life and of remainder-men to depend on the directions that the Bank may think proper to give respecting bonuses.

The tenant for life must refund what she has received more than she would have received, if the leaseholds and Bank stock

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had been sold and the proceeds invested in the Three per cents.: and there must be an inquiry whether the turnpike securities are real and permanent securities, that is, whether they permanently yield the interest that is payable on them.

1835. *Aug.* 21.

SHADWELL, V.-C.

[512]

WATKINS *v.* BRENT.

(7 Simons, 512—518.)

[SEE the report of this case on appeal taken from 1 My. & Cr. 97, to be contained in a later volume of the Revised Reports.]

1835. *Nov.* 18. *Dec.* 8.

SHADWELL, V.-C.

[529]

RIDDELL *v.* RIDDELL.

(7 Simons, 529—535; S. C. 5 L. J. (N. S.) Ch. 102.)

Vendor and purchaser—Covenants—Copyholds.

A. sold and covenanted to surrender copyholds to B. and covenanted for the title in the usual manner. On the next day the surrender was made. Some time afterwards B. sold and covenanted to surrender the copyholds to C. and covenanted for the title as against his own acts only; and B. afterwards, surrendered to C.: Held that the original covenants were capable of being enforced against A. for that either they ran with the land, or C. was entitled to sue on them in B.'s name.

BY an order in this cause, it was referred to the Master to inquire and state whether, upon the occasion of the sale of certain freehold and copyhold estates by John Riddell, the testator in the cause, to Robert Morris, the former had executed to the latter any and what indemnity or indemnities, either by bond, covenant or otherwise, in respect of the claims of the defendant, Rose Riddell, the testator's widow, for dower in the estates aliened and surrendered by him during his lifetime; and in case the Master should find that the testator had executed any such indemnities, then he was to inquire whether such bonds, covenants or indemnities had descended to or become vested in any and what person or persons other than the original purchaser or purchasers from the testator of the hereditaments in respect of which such indemnities were executed, and whether such indemnities were or not then a subsisting charge or claim capable of being enforced by any and what person or persons against the testator's estate and effects.

The Master reported (amongst other things) that, by an indenture of the 15th of July, 1825, the testator, in consideration of 1,500*l.* paid to him by Morris, covenanted to surrender a piece of land into the hands of the lord of the manor of Cheltenham, to the use of Morris, his heirs and assigns; and that he also covenanted *with Morris, his heirs and assigns, [*530] that, notwithstanding any act done by him, he had good right &c., to surrender the piece of land, and that Morris, his heirs and assigns should peaceably hold and enjoy the same, without any let, suit, &c. by the testator or his heirs or any person claiming under him or them, and that freely and clearly acquitted, &c. or otherwise by the testator, his heirs, executors or administrators saved harmless and indemnified from all former and other gifts, grants, jointures, dowers, &c. and from all other estates, rights, troubles, charges, and incumbrances had, made, occasioned or suffered by the testator or any person claiming or to claim by, from, through or under him. The Master further reported that, on the 16th of July, 1825, the testator surrendered the land according to his covenant, and Morris was admitted tenant thereof: that, in November following, Morris agreed to sell and covenanted to surrender part of the land to one Billings in fee, and covenanted for the title, as against his own acts and the acts of persons claiming under him, with Billings, his heirs and assigns, and, shortly afterwards, Morris surrendered the land pursuant to his covenant, and Billings was admitted tenant of it; and that, in 1828, Morris became bankrupt. The Master certified that the covenants contained in the indenture of the 15th of July, 1825, were an indemnity to Morris, his heirs, executors, administrators and assigns against the dower or freebench of the testator's widow in respect of the land thereby covenanted to be surrendered, and that such indemnity was a subsisting charge and capable of being enforced by Billings against the estate and effects of the testator.

Two petitions now came on to be heard, one presented by the defendants, praying that the report might *be confirmed, and the [*531] other, by the plaintiffs, praying that it might be referred back to the Master to review his report.

RIDDELL v. RIDDELL.

Mr. Kindersley, *Mr. Watson* and *Mr. Coulson*, for the plaintiffs:

The question is whether Billings, who claims under Morris, is entitled to the benefit of the covenants entered into by Riddell with Morris, or, in other words, whether those covenants run with the land. Now, in order to make a covenant run with the land, there must be a privity of estate between the covenantor and covenantee at the time of entering into the covenant: *Webb* v. *Russell* (1). But, at the time when the covenants in question were made, there was no privity of estate between Riddell and Morris. The covenant to surrender gave Morris no interest in the estate at law: he had merely a right of action on the covenant, and, until the surrender was made, he was a stranger to the land. On the next day the land was surrendered to him: but a subsequent surrender cannot make that which was a covenant in gross, a covenant running with the land. Where the same deed conveys the estate and contains the covenants, there is a privity of estate: but where the covenantee has no interest in the estate at the time when the covenants are entered into, there is no privity of estate between him and the covenantor. * * *

[532] *Mr. Jacob*, *Mr. Hodgson*, *Mr. Hayter* and *Mr. Lewis*, in support of the report:

If the covenants entered into by Riddell do not run with the [*533] land, still it is quite clear that the original *covenantee or his representatives may enforce them: *Stokes* v. *Russell* (2). * * *

(THE VICE-CHANCELLOR: In my opinion, a court of equity would compel Morris to permit the sub-purchasers to bring actions on the covenants in his name, as he could not, honestly, refuse the permission.)

[534] * * In the argument for the plaintiffs, the distinction between the benefit of a covenant and the burden of a covenant, has not been sufficiently attended to. * * In order to make covenants run with the land, it is not necessary that the

(1) 1 R. R. 725 (3 T. R. 393). (2) 1 R. R. 732 (3 T. R. 678).

covenantee should have an interest in the land: it is sufficient, if, at the time when the covenants are entered into, it is contemplated that he should have an interest in the land. * * The covenant to surrender, was not a mere personal covenant; it was a real covenant; and the right to enforce it would have descended to the heir, or passed to the assignee of Morris (1). As he had a descendible right to call for a surrender, he was not a stranger to *the land, but had a sufficient right or interest in it to make the covenants run with the land. [*535]

Mr. Knight appeared for Riddell's executors.

THE VICE-CHANCELLOR:

Where a deed containing a covenant to surrender copyholds and covenants for title, is executed on one day, and the surrender is made on a subsequent day, the whole, in my opinion, must be taken as one assurance; as is the case where a deed of feoffment is executed on one day, and the livery of seizin is not made until a subsequent day. If that be so, the covenants in question will run with the land, and the persons who are the owners of the land, can enforce them. But, if they do not run with the land, then they are covenants in gross, and Morris must be considered as holding them for the benefit of the parties who claim by assignment under him. For it is evident, from the form of the transaction, that the intention of the parties was that the original covenants should either run with the land, or, if not, that they should remain with Morris for the benefit of his assignees.

In my opinion, therefore, the finding of the Master is right; for the covenants are capable of being enforced, against Riddell's estate, by the purchasers from Morris, either in their own names or in the name of their vendor.

(1) Vin. Abr. tit. Covenant (H. I. K.).

1835.
Nov. 24.

SHADWELL V.-C.

[536]

SANDERS *v.* KIDDELL(1).

(7 Simons, 536—538; S. C. 5 L. J. (N. S.) Ch. 29.)

Legacy duty.

Testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the Funds, would produce the clear yearly sum of 500*l.*, and she declared trusts of the fund for some of her relations and other persons, in succession, some of them not being ascertained at her death: Held that the fund was not exempted from legacy duty.

CATHERINE CASTLE bequeathed to the plaintiffs such a sum of money as that the annual produce thereof when invested would produce the clear yearly sum of 500*l.*, upon trust to invest the same, in the names or name of the said trustees or trustee for the time being thereof, in the Parliamentary stocks or other public Funds, or at interest on Government or real securities, and upon trust to pay the annual produce of two equal fifth parts of the trust premises to the testatrix's uncle, Henry Castle, during his life, and the annual produce of two other equal fifth parts to the testatrix's aunt, Rosanna Castle, during her life, and, subject to the trusts aforesaid, to pay the annual produce of the same four equal fifth parts to Elizabeth Dunsford, for her life: and the testatrix directed that, after the decease of Elizabeth Dunsford, the same four equal fifth parts should be in trust for all the children of Elizabeth Dunsford who, being sons, should attain 21, or, being daughters, should attain that age or marry under it with the consent of their parents or guardians, in equal shares, absolutely, and, if there should be no such child, then that the said trust monies should sink into the testatrix's residuary estate: and upon further trust to pay the annual produce of the remaining fifth part of the same trust premises to Michael Castle Gascoigne during his life, and, after his decease to any wife who might survive him, during her life; and, after the decease of the survivor of them, the same remaining fifth part should be upon the like trusts for the benefit of the children

[*537] of Michael *Castle Gascoigne, as were therein declared in favour of the children of Elizabeth Dunsford, concerning the four fifth parts of the same trust premises the trusts whereof were first thereinbefore declared: and, if there should be no child of Michael

(1) *In re Saunders*, '98, 1 Ch. 17, 67 L. J. Ch. 55, 77 L. T. 450, C. A.

Castle Gascoigne in whom the same remaining fifth part should become absolutely vested, the same should, immediately upon the decease of the survivor of Michael Castle Gascoigne and his wife and such failure of his issue as aforesaid, be in trust for Ann Kiddell Gascoigne, sister of Michael Castle Gascoigne, absolutely: and the testatrix bequeathed all the residue of her personal estate to her aunt, Ann Kiddell, absolutely.

The testatrix left all the persons named in her will her surviving. Elizabeth Dunsford had several children. Michael Castle Gascoigne was still a bachelor.

The bill alleged that the persons beneficially interested in the legacy of 500*l.* a year, insisted that, besides purchasing 16,666*l.* 13*s.* 4*d.* Three per cents. for satisfying that legacy, the plaintiffs ought, out of the testatrix's general personal estate, to pay the legacy duty thereupon so far as the same was then payable, and to reserve a sufficient sum to pay the legacy duty so far as it could not then be paid: but the plaintiffs were not only unable to determine whether the duty was to be paid out of the legacy itself or out of the general personal estate, but, in case it was to be paid out of the latter, the plaintiffs did not know what sum they ought to retain to pay the duty on the one-fifth part bequeathed to M. C. Gascoigne for life with remainder over; because it could not be ascertained, during his life, what duty might ultimately become payable thereon. The bill prayed that proper directions might *be given with respect to the legacy duty [*538] in case the Court should be of opinion that it ought to be paid out of the testatrix's general personal estate.

Mr. Garratt, for the plaintiffs.

The *Solicitor-General* and *Mr. Toller*, for the defendant, Ann Kiddell, the residuary legatee, said that the word "clear" was not sufficient, of itself, to exempt the legacy from duty; and, moreover, that the legacy could not be free from duty, as some of the parties who were to take in succession, were related in different degrees to the testatrix, and some of them were not related to her at all, and, therefore, they would have to pay different rates of duty.

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Mr. Jacob, *Mr. Osborne* and *Mr. Everett*, for the defendants, the cestui que trusts of the legacy, cited *Barksdale* v. *Gilliat* (1) and *Louch* v. *Peters* (2).

The VICE-CHANCELLOR said that it appeared, from the language of the will, that the testatrix meant that what she had directed to be done, should be done at once: that Michael Castle Gascoigne might or might not marry a relation of the testatrix, and his children might be related, in some degree, to the testatrix, or they might not; and therefore, the word, "clear," must be taken to refer not to the legacy duty, but to the expenses of investment, and so on.

1835. *Nov.* 19, 25, 30. *Dec.* 1.

SHADWELL, V.-C.

DENT *v.* BENNETT.

(7 Simons, 539—546; S. C. 5 L. J. (N. S.) Ch. 58.)

[SEE the report of this case on appeal taken from 4 My. & Cr. 269, to be contained in a later volume of the Revised Reports.]

1835. *Dec.* 15.

SHADWELL, V.-C.

[549]

BRINE *v.* FERRIER.

(7 Simons, 549—554.)

Will—Construction—Revocation—Cumulative legacies.

Testator, by his will, gave all his property to his wife, absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife and two other persons, in trust to sell and pay the interest of the proceeds to his wife for her life, and, after her decease, to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons: Held that the three papers formed, together, the testator's will: that the bequest to the wife in the first paper, was not revoked except so far as was necessary to provide for the legacies and annuities: and that the legacies given by the second and third papers, were single and not cumulative.

ANDREW GRAM, Esq. by his will duly executed and attested, dated the 20th of May, 1802, gave all and singular his messuages,

(1) 18 R. R. 139 (1 Swanst. 562). (2) 36 R. R. 357 (1 My. & K. 489).

lands, tenements, hereditaments and real estate whatsoever and wheresoever, and also all and singular his leasehold estate and personal estate whatsoever, unto his wife Eleanor, her heirs, executors, administrators and assigns respectively, according to the several natures of the said estates, to and for her and their own proper use and benefit absolutely; and he appointed her sole executrix of his will. Some time afterwards, the testator wrote, upon three sheets of paper, the following instruments, which were neither dated nor attested:

"Memorandum of will intended to be made by A. G., and, if he dies ere it can be completed, he relies on his faithful wife to have it instantly executed by Mr. Thomas Pearse. My body I wish to be interred at Walmer without expensive parade, provided I die there, if in London, it is immaterial where I am buried. All my lands, tenements, messuages and property of what kind or nature soever, lying at Walmer or elsewhere *and all my [*550] funded property in the different stocks in the Bank of England, and all my other property and effects of what kind and nature soever and wheresoever, I leave to my dearest wife Eleanor, David Bristow Baker, and Thomas Pearse, in trust to sell, transfer over, or dispose of, and the proceeds of such sale and transfer to be invested in the Funds, and the interest or dividends of all such stocks to be paid to my said dear wife, Eleanor, during her life, and, after her decease, to pay and apply the principal money and interest to the several purposes hereinafter mentioned: to Sarah Thomas, my wife's sister, I give an annuity of 150*l.*, payable half-yearly: my valuable friend, Mrs. Hynam, I give 250*l.*, fully assured that she will accept this merely as a token of the very great gratitude and esteem I feel towards her: to Charles Shrimpton, my late book-keeper, I give (1) 300*l.*: to Peter Alsing, my clerk, also 300*l.*: to Mrs. Bergetha Maria Carstenson of Drontheim in Norway, I give an annuity for life of 100*l.*: the like to my sister, Elizabeth Ratcliff of 150*l.*: also to my niece, Sophia Thode, 50*l.*: to my adopted child, Gramina, I give an annuity of 300*l.*, and, at her decease, to her lawful children; in defect of issue to be paid to my residuary legatees: to my god-children as they become of age, I leave as

(1) The first sheet ended here.

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follows, or on the day of marriage: Emma Potts 500*l.*: Eleanor Hage 500*l.*: Charles G. Dunning 500*l.*: Charles Whiting, 500*l.*" (1).

"Elizabeth Ratcliff of Drontheim aforesaid 150*l.* for her life: to my adopted child, Gramina Juliana Petronia Clauson, I leave an annuity of 300*l.*, and, at her decease, to her lawful children:
[*551] in defect of issue, *the principal and interest to be paid to my residuary legatees: to my god-children, as they become of age, Eleanor Hage, daughter of J. F. Hage, Esq. of Copash, I leave 500*l.*: Emma Potts, daughter of James Potts, Esq. of Hackney, 500*l.*: Charles Gram Dunning, son of Charles Dunning, surgeon of Wapping Wall, 500*l.*: Charles Whiting, son of John Whiting, Esq. of Ratcliff Cross, 500*l.*: to my present servants, Pagets, Wright, Daniel, Fanny, Kemp, Mary and Maria, I give each of them 100*l.*, provided they remain in my service at my decease: to my other servant or servants who shall have lived in my service one year and upwards at my decease, 10*l.* each: to my dearest Maria Sophia Hage, wife of J. F. Hage, Esq. of Copenhagen, I leave 150*l.* for life in trust as aforesaid, for her sole use, without being liable to her husband's debts or subject to his control: to each of my above-named trustees and executors I leave the sum of 500*l.*"

The testator died in April, 1806: and probate of the will and testamentary papers, as containing, together, the testator's will,
[*552] was granted to his widow. She *died in 1829. The plaintiffs and some of the defendants were interested in her personal estate, under her will.

The questions in the cause were, first, to what extent the testator's will was revoked by his subsequent testamentary papers: secondly, whether the legacies given by those papers were single or cumulative legacies.

Mr. Knight, *Mr. Jacob*, *Mr. Wigram*, *Mr. James Russell* and *Mr. Paynter*, for the plaintiffs and the defendants in the same interest:

[*553] * * The disposition made by the will, *remains unaltered, except that the legacies are to be provided for. * * *

(1) The second sheet ended here.

Mr. Kindersley, *Mr. Keene* and *Mr. Monteith*, for the defendants the next of kin of the testator:

* * By the first instrument, the testator gives the whole of his property, in specie, to his wife; by the second, he gives it to his wife and two other persons; but they are not to hold it in specie, as the wife would have held it, but are to convert it into money; and then he gives, to his wife, a life-interest and not an absolute interest; and a life-interest, not in the property in specie, but in the money to arise from the conversion of his property. The bequest in the first instrument is, therefore, revoked.

[None of the cases cited by counsel were noticed in the judgment.]

THE VICE-CHANCELLOR: [554]

As all these papers have been proved as one instrument, they must all be construed together.

The rule of law is that a prior part of a will may be revoked by a subsequent part of it. In this case, the testator, in the prior part of his will, has given the whole legal and beneficial interest in his property to his wife: and, in a subsequent part of it, he disposes of the whole legal interest to his wife and two other persons; but he does not dispose of the whole beneficial interest. The consequence is that what is not given away from the wife, remains to her.

With respect to the other question in the cause, the Ecclesiastical Court has considered all the papers as forming but one testamentary instrument; and, therefore, the legacies are not cumulative but single.

RAWES *v.* RAWES.

1836. *Jan.* 14.

(7 Simons, 624—626; S. C. 5 L. J. (N. S.) Ch. 114.)

SHADWELL, V.-C. [624]

Practice—Jurisdiction—Steward of a manor.

The steward of a manor who was also a solicitor; ordered, on the petition of the lord, in a summary manner, to deliver up the court-rolls to the receiver in the cause.

THE plaintiffs were, under the will of John Woodward, their grandfather, seised in fee, as tenants in common, of certain

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manors and other real estates in Norfolk. One Charrington, an attorney and solicitor, had been employed, by the testator, as steward of the manors, and continued to hold that office after the testator's death.

The plaintiffs presented a petition (which was intituled both in the cause and in the matter of Charrington) alleging that Charrington had been guilty of negligence in collecting the fines and quit rents of the manors, and in performing the other duties of his office; that he had been a bankrupt, and had been confined in Norwich gaol, at the suit of the Crown, for non-payment of legacy-duty; and praying that he might be ordered to deliver, to the receiver in the cause, all the court-rolls and other documents relating to the manors, which were in his possession.

[625] *Mr. Knight* and *Mr. Walker*, for the petitioners, said that the court-rolls of a manor belonged to the lord, and that he was entitled to the custody of them: and, in order to shew that the Court had jurisdiction to order them to be delivered up on petition, they cited *Hughes* v. *Mayre* (1) and *Ex parte Grubb* (2).

Mr. Lovat, for Charrington:

The duty of the receiver is merely to receive the rents: neither he nor the lord is entitled to the custody of the court-rolls. In every manor there are two courts: the court of the freeholders and the customary court. The steward is the judge of the customary court, and he is also the depositary of the rolls for the freeholders: *Holroyd* v. *Breare* (3). The tenants of the manor are as much interested in the court-rolls as the lord is: they are, in fact, the title-deeds of the copyholders; and, if they are taken out of the custody of the steward and delivered to the lord, the lord may destroy them or alter the fines to the prejudice of the copyholders. In *Hughes* v. *Mayre*, the grounds on which the steward refused to deliver up the documents, were, merely, that he had a demand upon Sir Richard Hughes, and that another person had a claim upon

(1) 3 T. R. 275. See 8 R. R. 505.
(2) 14 R. R. 743 (5 Taunt. 206).
(3) 21 R. R. 361 (2 B. & Ald. 473).

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some part of the estates, and he had not received any authority from that person to deliver up the muniments to Sir Richard Hughes. That case applies only to the jurisdiction of the Court of King's Bench over attornies of the Court. The case in Strange (1), on which Lord KENYON relied, related to title deeds only, and not to court-rolls. In *Ex parte Grubb* no cause was shewn against the rule being made absolute; and the application *was that the court-rolls might be delivered to the lord or to his steward.

[*626]

THE VICE-CHANCELLOR:

Nothing in the nature of decision has been cited to me to shew that the right to hold the court-rolls is in the steward as against the lord. In the cases referred to in support of the petition, the only doubt that the Judges entertained, was whether they had jurisdiction to order, in a summary way, an attorney to deliver deeds to his client: and, finding that they had that jurisdiction, they take it for granted that they had authority to compel the steward, as an attorney, to deliver up the court-rolls to the lord.

The lord has, as of right, the custody of the court-rolls; and though they ordinarily remain in the custody of the steward, he holds them only as servant or agent to the lord.

I shall, therefore, make an order according to the prayer of the petition.

RUSSEL *v.* BUCHANAN.

1836. *Jan.* 20.

(7 Simons, 628—633; S. C. 5 L. J. (N. S.) Ch. 122.)

SHADWELL, V.-C.

Will—Construction—Contingent remainder.

[628]

A testator devised a freehold estate to his wife for her widowhood, remainder to his nephew for life, remainder to the children of his nephew in fee as tenants in common, and, if there should be no child of his nephew living at his wife's death or second marriage, then over; and, by a codicil of even date with the will, he directed that neither his nephew nor any issue of his nephew should take a vested interest by virtue of his will, unless they should respectively attain 21; and that, in case of the death of any of such children under 21, their shares should go to the survivors, on their attaining 21. The nephew attained 21, and had five infant children living at the widow's death: Held, that their interests were contingent on their attaining 21.

ROBERT BROWN, Esq., by his will dated the 12th of March, 1814, devised all his capital and other messuages, lands,

(1) *Strong* v. *Howe*, 1 Str. 621.

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tenements, and hereditaments at Streatham in Surrey, to his wife, Susanna Brown, for her life or until she married again; and, after her decease or marrying again, to his nephew, Robert Brown Russel, for life; and, after the decease of his nephew, to the children of his nephew, their heirs and assigns, as tenants in common; but in case there should be no child of his nephew living at the decease or marrying again of his wife, then he devised the premises at Streatham, unto his executors, in trust and for the separate use of his niece, Mary Russel, exclusive of any husband she might happen to marry; and, after her decease, in trust for her children, their heirs and assigns, as tenants in common; and, in case of the respective deceases of R. B. Russel and Mary Russel without leaving any child who should be living at the decease or marrying again of his wife, then he devised the premises at Streatham, to Robert Coster, John Coster, and Mary Ann Squarrey, the children of Robert Coster and Hannah Coster, their heirs and assigns, as tenants in common. And he gave the residue of his estate and effects,

[*629]

of what nature or kind soever, after the decease *or marrying again of his wife, to Robert Brown Russel and Mary Russel, share and share alike, with divers gifts over, upon certain events which did not happen, for the benefit of the children of Robert Brown Russel and Mary Russel, and of Robert Coster, John Coster, and Mary Ann Squarrey.

The testator, on the same 12th of March, 1814, made a codicil in the following words:

"This is a codicil to my foregoing will. It is my will and mind, and I do hereby direct that neither the said Robert Brown Russel, nor Mary Russel, nor any or either of their issue respectively, nor the said Robert Coster, John Coster, or Mary Ann Squarrey, nor any or either of their issue respectively, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of 21 years; and in case of the death of any one or more of such children under such age, then the share of such child or children so dying, shall go to the surviving brothers and sisters, or brother or sister, as the case may be, of such child or children so dying, their, his, or her heirs and

assigns respectively, upon their respectively attaining the age of 21 years."

The testator died shortly after the date of his will, leaving his wife, and Robert William Brown, his only son and heir-at-law, and Robert Brown Russel and Mary Russel, surviving. The testator was not seised of any real estates except the premises at Streatham and certain other hereditaments which were specifically disposed of by his will. His widow did not marry again. Robert William Brown died in her lifetime without *issue and intestate, leaving Robert Brown Russel, his cousin [*630] and heir, who thereupon became the heir of the testator. The testator's widow died in September, 1829. Robert Brown Russel, in her life-time, attained 21, married and had issue five daughters, who were defendants in the cause.

Robert Brown Russel, by his will dated the 13th of April, 1832, gave all his freehold and copyhold estates and all the residue of his personal estate, to his wife, the plaintiff, Elizabeth Sheriff Russel, and to the defendants, Robertson Buchanan and Nathaniel Nicholls, their heirs, executors and administrators, upon certain trusts therein mentioned. Robert Brown Russel died on the 26th of April, 1832, leaving his five daughters (all of whom were infants) his co-heirs.

At the hearing of the cause, the VICE-CHANCELLOR directed a case to be made for the opinion of the Barons of the Court of Exchequer upon the following questions:

First: whether Robert Brown Russel took any and what interest in the premises at Streatham or in the rents and profits thereof, under the will and codicil of Robert Brown, or as the heir of Robert William Brown, or as the heir of Robert Brown.

Secondly: whether the infant defendants took any and what interest in the same premises or in the rents and profits thereof, under the will and codicil of Robert Brown, or as the heiresses-at-law of Robert William Brown or Robert Brown Russel.

Thirdly: whether Elizabeth Sheriff Russel, R. Buchanan and N. Nicholls took any and what interest *in the same premises [*631] or in the rents and profits thereof, under the will of Robert Brown Russel.

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The case having been argued, the following Certificate was returned:

"This case has been argued before us by counsel: we have considered it, and are of opinion:

"In answer to the first question, that Robert Brown Russel took a fee in the property in question as the heir-at-law of the testator Robert Brown.

"In answer to the second question, that the defendants Frances Russel, Mary Russel, Elizabeth Russel, Ellen Russel and Jane Russel, the infants, take no interest in the property in question, either under the will and codicil of Robert Brown, or as the heiresses-at-law of Robert Wm. Brown or Robert Brown Russel.

"In answer to the third question, that Elizabeth Sheriff Russel, R. Buchanan and N. Nicholls take a fee in the property in question under the will of Robert Brown Russel (1).

(Signed) "LYNDHURST.
"W. BOLLAND.
"J. VAUGHAN.
"J. WILLIAMS."

The children of Robert Brown Russel, being dissatisfied with the Certificate, now applied that the opinion of the Judges of another court of law might be taken on the case.

[632] *Mr. Barber* and *Mr. Rudall*, in support of the application:

It is not disputed that the shares of the children were vested under the will. The codicil bears the same date as the will and the testator calls it his will; therefore they must be construed as one instrument. The testator had made no provision, in his will, for the event of children dying under 21: his object, in making the codicil, was to supply that omission, by divesting the shares of the children, on their dying under 21. The Barons of the Exchequer considered that the testator intended to postpone the vesting of the shares, and not (as we contend) to point out the time at which the interests of the children were to become absolute and indefeasible. According to their construction, the survivorship clause would be superfluous; for, if

(1) See 2 Cr. & M. 561; 4 Tyr. 384; 3 L. J. (N. S.) Ex. 194.

the shares did not vest in the children until they attained 21, there could be nothing to go over in the event of the children dying under 21: *Wadley* v. *North* (1).

The observations of the MASTER OF THE ROLLS, in that case, apply most strongly to this. The word "vested," is frequently used to mean, "until interests which are, in fact, vested, become indefeasible." We submit that the children took vested interests, subject to be divested on their dying under 21: *Montgomerie* v. *Woodley* (2), *Bromfield* v. *Crowder* (3), *Doe* v. *Moore* (4), *Phipps* v. *Williams* (5).

THE VICE-CHANCELLOR:

The rule in construing instruments is to give to the words their natural, legal import, although, thereby, other words may be rendered useless.

[633]

The primary intention of the testator, in making this supplement to his will, was that none of the children should take except in the event of their attaining 21: and then, I admit, it was superfluous to say: "and in case of the death of any one or more of such children under such age, then the share of such child or children so dying shall go to the surviving brothers and sisters or brother or sister, as the case may be, of such child or children so dying." He however ends the sentence in these words: "upon their respectively attaining the age of 21 years." Therefore he concludes with words which manifest his intention to be the same at the end as at the beginning of the instrument: and, as he had said that none of the devisees, nor any of their issue should take vested interests unless and until they attained 21, my opinion is that the interests of the children were contingent on their attaining that age, and, consequently, that the certificate is right.

(1) 4 R. R. 16 (3 Ves. 364).

(2) 5 Ves. 522. A case where the postponement of the possession was directed under a disposition which was clearly vested by the terms of the gift.—O. A. S.

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

(4) 13 R. R. 329 (14 East, 601).

(5) 5 Simons, 44. Subsequently affirmed upon this point in 1842, as reported in 9 Cl. & Fin. 583, under the title of *Phipps* v. *Ackers*.—O. A. S.

1836.
Jan. 30.

SHADWELL, V.-C.

[634]

WARD *v.* COMBE (1).

(7 Simons, 634—638.)

Bonus—Tenant for life and remainderman.

By a marriage settlement some shares in the London Assurance Company, were settled on the husband and wife for their lives, and after their deaths, on their children; and it was provided that, if any bonus should be given by way of increase of capital of the trust-funds, it should be added to the capital: but, if it should be given by way of interest or dividend, it should be paid to the person entitled to receive the dividends of the trust-funds for the time being. At a meeting of the Company, the usual dividend of 1*l.* per share was voted; and it was resolved that a certain sum (at the rate of 12*l.* per share) should be taken out of the accumulated profits of the Company and divided amongst the proprietors in proportion to their shares: Held that the addition made in pursuance of the resolution, was to be considered as part of the capital of the trust-fund.

By Mr. and Mrs. Ward's marriage settlement, 167 shares in the London Assurance Company, which had been purchased with money advanced by Mr. Ward's father, were settled on Mrs. Ward for life, and, after her death, on Mr. Ward for life, and, after the death of the survivor, on the children of the marriage: and it was provided that, in case any bonus, addition or increase should be given or made by way of increase of capital of the stock wherein the trust-money or funds, or any part thereof, was or should be invested, the same should be added to and form part of the capital of the trust-stock; but, in case the same should be given by way of interest or dividend, the same should be paid to the person or persons entitled to receive the dividend thereof for the time being.

The Company had been, for many years, in the habit of reserving some part of their profits, whereby a large accumulation had been made. At a court held on the 25th of October, 1835, the ordinary dividend of 1*l.* per share was voted; and, it was resolved that a sum of 430,344*l.*, being at the rate of 12*l.* per share, should be taken out of the profits of the Company, and divided *amongst the proprietors in proportion to their shares. On the 7th of October, 1835, the secretary to the Company wrote a circular letter to the proprietors, which, after setting forth the resolution, proceeded thus: "I am also desired

[*635]

(1) *Bouch* v. *Sproule* (1887) 12 App. Cas. 385, 56 L. J. Ch. 1037, 57 L. T. 345; *In re Armitage*, '93, 3 Ch. 337, 63 L. J. Ch. 110, 69 L. T. 619, C. A.

to inform you that warrants will be ready for the payment of the 12*l.* per share on Wednesday the 14th inst. I am further desired to acquaint you that the corporation are advised that powers of attorney granted to bankers and others for receiving dividends, will not enable the holders thereof to receive the warrants for this distribution; and that, in the case of executors and trustees or joint accounts, the distribution cannot be paid except all the parties attend to sign the warrants, or a power of attorney be granted, which powers are to be obtained at this office."

The bill was filed, by the children, against their father and mother and the trustees of the settlement, praying that the distribution of 12*l.* per share might be declared to be a bonus and addition to the capital of the trust-fund.

Mr. and Mrs. Ward, in their answer, said that, by the charter of the Company, the directors were empowered, as their affairs might require it, to call, from the members, in proportion to their shares in the capital stock, such sums as they should deem necessary; and that it was declared that the money so called and paid in, should be deemed capital stock; but that the directors had not, since the date of the settlement, made any such call: and they submitted that, under the circumstances of the said extraordinary distribution amongst the proprietors, the same ought not to be considered as capital, but as interest or dividend; and that, according to the true intent and meaning of the proviso in the *settlement, Mrs. Ward, being entitled to receive the dividends of the shares, was entitled to receive the amount of the distribution. [*636]

The cause now came on to be heard as a short cause.

Mr. James, for the plaintiff:

If it were not for the proviso in the settlement, there could be no doubt that the increase of 12*l.* per share must be dealt with as capital: *Brander* v. *Brander* (1), *Irvine* v. *Houston* (2), *Paris* v. *Paris* (3), *Hooper* v. *Rossiter* (4). The question then is: Does

(1) 4 R. R. 348 (4 Ves. 800).
(2) Cited 7 R. R. 380.
(3) 7 R. R. 379 (10 Ves. 185).
(4) 13 Price, 774; M'Clel. 527.

WARD v. COMBE.

the proviso make any difference? I submit that it does not. The second part of the proviso means nothing more than that, if the ordinary dividends are increased, the tenant for life shall have the benefit. It is clear that the distribution in question, was intended to be a bonus or addition to the capital of the shares, for, otherwise, the Company would not have made it the subject of a separate resolution, but would have included both the dividend and the bonus in one and the same resolution, and the circumstance of its not being *ejusdem generis* as the capital, is of no importance. This case falls within the principle of *Paris* v. *Paris*.

Mr. Knight and *Mr. Fisher*, for Mr. and Mrs. Ward:

The thing to be divided in this case was profit, not capital, as appears by the resolution. The word "bonus" is not used. Reserved profit does not become capital unless a further act be done, that is, unless it be expressly added to the capital. The [*637] proviso in the settlement, *distinguishes this case from those that have been cited. The Company have the power of increasing their capital; and the meaning of the proviso is that, unless the addition is made, expressly, by way of increase of capital, it shall go to the tenant for life. The resolution does not call the increase, "capital;" but, on the contrary, says that the 430,344*l.* is to be taken out of the profits of the Company and divided among the proprietors.

Mr. Addis appeared for the trustees.

THE VICE-CHANCELLOR:

The sum to be divided in pursuance of the resolution in question, must be considered as part of the capital of the shares.

The proviso in the settlement is that, in case it should happen, at any time thereafter, that any bonus, addition or increase should be given or made by way of increase of the capital of the stock wherein the said trust money or funds, or any part thereof, was or should be invested or laid out, the same bonus, addition or increase should be added to and form part of the capital of the trust stock in respect to which the same should be given or made;

but, in case the same should be given by way of interest or dividend, the same should be paid to the person or persons entitled to receive the dividend thereof for the time being.

Now, two resolutions were passed on the same day: one by which the dividend was declared, and the other is that which is now in discussion. The fact that there were two resolutions, shews that the Company did *intend, by the second, something [*638] different from the first; otherwise, they would have incorporated both of them in one. There is nothing to shew at what time the profits, out of which the sum to be divided was to be taken, arose: they might have been profits that had lain dormant for a series of years.

The cases amount to this: that if the increase is given by way of dividend, it must be taken as such. But, here, the increase was not given as dividend, but in contradistinction to what was given as dividend: and the consequence is that the 2,004*l.* the amount of the increase of 12*l.* per share on the 167 shares, must be considered as capital and be invested in the manner directed by the settlement.

ASHFORD *v.* CAFE.

1836. *Feb.* 19.

SHADWELL, V.-C.

[641]

(7 Simons, 641—643; S. C. 5 L. J. (N. S.) Ch. 109.)

Will—Construction—Power.

A general testamentary power annexed to an indefeasibly vested gift may be exercised before the gift takes effect in possession, although the power is expressed to be given in case the donee is "then married."

CHARLES HOUSLAMB WALLER, by his will dated the 6th of March, 1819, directed his executors to invest his residuary personal estate in Government securities, and to pay the dividends thereof to his sister, Mary Ashford, for her life, for her separate use, and, after her decease, to stand possessed of the capital upon trust, in case the testator's niece, Sarah Ashford, should be then unmarried, to transfer the same to her, her executors, administrators or assigns; but in case she should be then married, upon trust to transfer the same to such person or persons, &c. as she, notwithstanding her then or any future coverture, and whether she should be sole or married, should, by any deed or writing, or by

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her last will and testament in writing, or any writing in the nature of such last will and testament, appoint: and, in default of such appointment, in trust to pay the dividends thereof into her proper hands, or to the hands of such persons as she should, from time to time, but not by way of anticipation, appoint, during her life, to the intent that the same might be for her separate use, and might not be subject to the debts, control, disposition or engagements of her then or any future husband: and the testator directed that, subject to the trusts aforesaid, the

[*642] capital should be in *trust for Sarah Ashford, her executors, administrators and assigns.

The testator died in 1822. In 1826 Sarah Ashford married John Aldridge; and, in 1829 she disposed of the trust fund in favour of the plaintiffs, by a will or writing in nature of a will, which purported to be made in exercise of the power given to her by the will of the testator.

In 1833 John Aldridge died. In 1834 Mary Ashford died.

The defendant, Cafe, was the surviving executor and trustee of the testator's will: the other defendant was the personal representative of John Aldridge.

The bill prayed that Cafe might be decreed to transfer the securities in which the testator's residuary personal estate was invested, to the plaintiffs Ashford and Briginshaw, to be held by them upon the trusts of the will or testamentary appointment of Sarah Aldridge.

The question was whether, as Mrs. Aldridge died in the life-time of her mother, Mrs. Ashford, the power of appointment given to her by the testator's will, took effect.

Mr. Jacob and *Mr. Rudall*, for the plaintiffs, said that the power was not contingent on Mrs. Aldridge surviving her mother, but that the object of the testator was to give her an absolute interest in the trust fund, and, at the same time, to exclude any husband that she might marry from having any control over it:

[*643] **Baker* v. *Hanbury* (1), *Dalby* v. *Pullen* (2), *Pearsall* v. *Simpson* (3), *Massey* v. *Hudson* (4).

(1) 27 R. R. 85 (3 Russ. 340).
(2) 2 Bing. 144.
(3) 10 R. R. 1 (15 Ves. 29).
(4) 16 R. R. 158 (2 Mer. 130).

Mr. Koe, for the personal representative of John Aldridge, contended that, as Mrs. Aldridge did not survive her mother, the power never arose. ASHFORD v. CAFE.

Mr. Knight and *Mr. Evans* for the defendant Cafe.

THE VICE-CHANCELLOR:

In my opinion the testator intended that his niece should be absolutely entitled to the fund, if single, but, if married, that she should have a power of appointment over it. The last words in the will shew that a gift to her was intended in all events.

Declare that the trust fund passed by the will or testamentary appointment of Mrs. Aldridge.

PODMORE *v.* GUNNING (1).

1836. *Feb.* 20, 22, 26. *May* 7.

(7 Simons, 644—665; S. C. 5 L. J. (N. S.) Ch. 266.)

SHADWELL V.-C. [644]

Secret trust—Fraud.

A testator gave his real and personal estate to his wife, absolutely, "having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease." After the death of the wife intestate, a bill was filed by two natural children of the testator, against his heir and next of kin, and also against his wife's heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his property, after her death, to the plaintiffs, and that she promised and undertook so to do: Held that, if the plaintiffs had proved that allegation, a trust would have been created, as to the whole of the property, in favour of the plaintiffs.

THE plaintiffs were Arthur Podmore and Mary his wife, and George Podmore and Margaret Thomasine his wife: they claimed to be entitled, under the circumstances after mentioned, to the real estates and the residuary personal estate of the late Sir Thomas Staines. The defendants were George Gunning, who had married Sir Thomas Staines's widow, and, on her death, took out administration to her, William Bridger and Christian Tournay his wife, who was the sister and heir of Lady Staines, William Wye, the administrator *de bonis non* of Sir Thomas Staines, and George Harris Staines the brother and heir and

(1) See the note upon this point in *Smith* v. *Attersoll*, 25 R. R. 41.—O. A. S.

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also one of the next of kin of Sir Thomas, and Ann Willement and Margaret Stewart, his sisters and other next of kin.

The bill stated that Sir Thomas, previous to and at the time of making his will, was desirous of making some provision for the female plaintiffs, who were generally understood to be, and were recognized and considered by him and by Lady Staines as being his natural daughters; and that Sir Thomas had, at the time of

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making his will, determined to give to *or in trust for them or for their benefit, after the decease of Lady Staines, the residue of his property, of every nature and kind, after payment of his funeral and testamentary expenses, debts and legacies; that Sir Thomas, previously to and at the time of making his will, communicated to Lady Staines such his desire and determination, and that, upon being apprised thereof, she proposed to Sir Thomas that he should leave the residue of his property to her, and undertook and promised that, if he would do so, she would carry into effect his desire and determination in favour of the female plaintiffs; and that, upon the faith of such undertaking and promise, Sir Thomas made his will, dated the 5th of July, 1830, and which, after giving two legacies to be paid after the decease of Lady Staines, concluded thus: "and, as to all the rest, residue and remainder of my estate, of every nature and kind, and all the property I have, I give, devise and bequeath the same to my said dear wife, her heirs, administrators and assigns, for her own separate use and enjoyment, having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease: and I do hereby appoint my dear wife and Thomas Hodgkinson, Esq. executrix and executor of this my will."

The bill further stated that Sir Thomas died on the 13th of July, 1830, and, on the 27th of September following, Lady Staines, alone, proved his will: that, in November, 1831, Lady Staines married the defendant Gunning, and died, intestate, in January, 1832: that the defendants alleged that Sir Thomas never expressed any desire or determination to dispose of any part of his property in favour of the female plaintiffs; but the

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plaintiffs charged that Sir Thomas repeatedly expressed, *to divers persons, that his wishes and intentions as to the ultimate

disposal of his property after Lady Staines's death, were such as before mentioned: that, on the 30th of June, 1830, Sir Thomas made a will, which was, in all respects, similar to the will before mentioned, except as to the legacies, which were not contained therein: that the will of the 5th of July, 1830, was made for the purpose of the legacies being introduced therein; and that, upon the same being made, the prior will was destroyed; and, at the time of making the last-mentioned will, Sir Thomas stated and explained to Lady Staines such his aforesaid wishes and intentions, and she undertook to perform the same; that Lady Staines repeatedly admitted, to divers persons, that Sir Thomas had expressed to her such wishes and intentions and had enjoined her to fulfil the same, and that she had undertaken so to do; and, as evidence thereof, the plaintiffs charged that, within a few days after the death of Sir Thomas, Lady Staines made a will, whereby, after giving two or three legacies, she gave the residue of her estate, both real and personal, to the female plaintiffs, by the description of her late husband's natural daughters, and that, afterwards, about the 5th of August, 1831, Lady Staines made another will (1), by which she gave to the same persons some considerable legacies; and that Lady Staines repeatedly admitted, to divers persons, that the wills so made by her, were made in consequence of the intentions and desire so expressed by Sir Thomas as aforesaid; and that Gunning and Lady Staines, some time after their marriage, burnt or destroyed the wills so made by Lady Staines.

The bill prayed that the will of Sir Thomas Staines might be established, and the trusts thereof performed; *and that an account might be taken of his personal estate, and that it might be declared that the plaintiffs were entitled to the residue thereof, and that such residue might be paid to them; and that it might be declared that the female plaintiffs were also entitled to the real estates devised by Sir Thomas Staines. [*647]

The answers either positively denied or did not admit the allegations in the bill upon which the claim of the plaintiffs was founded: and the defendant Gunning, in his answer, said he believed that the views and intentions alluded to in Sir Thomas

(1) See *post*, p. 209.

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Staines's will, were that the Bridgers (who were Lady Staines's nearest relations, but who, he thought, had behaved ill to himself and to her) should be excluded from any share in his property; and that, subject thereto, the same should be at Lady Staines's absolute disposal: that Lady Staines had informed the defendant that she had made a will a few days after Sir Thomas's death, but that he was entirely ignorant of the purport thereof: and he admitted that Lady Staines made another will, dated the 5th of August, 1831, and thereby gave, to each of the female plaintiffs, a legacy of 500*l.*; and that she made a third will, dated the 9th of November, 1831, and, about that time, destroyed her two former wills; and that, on the 18th of November, 1831, the third will was, by her desire, delivered up to and destroyed by the defendant; and he denied, to the best of his knowledge and belief, that Lady Staines had made any such admissions as stated in the bill; but, on the contrary, he said that she always declared that the whole of Sir Thomas's residuary property, was at her disposal, except that he did not wish her to give any part of it to the Bridgers.

[648] Several witnesses were examined on both sides, and, amongst them, all the persons who made affidavits on the motion for a receiver, except the plaintiffs and the defendant Gunning. The cause now came on to be heard.

The *Solicitor-General*, *Mr. Jacob* and *Mr. Turner*, for the plaintiffs:

The case of the plaintiffs is that the testator, Sir Thomas Staines, standing in the situation of natural father to them, had obtained, from Lady Staines, a promise that, if he would give her all his residuary property, she, at her death, would leave it to his natural children; and that, upon the faith of that promise,

[649] the testator made his will. * * The statute says that every will must be in writing: but, if a person obtains property under a will upon a parol assurance that he will dispose of it in a particular way, this Court will not allow him to keep the property. [*Stickland* v. *Aldridge* (1), *Muckleston* v. *Brown* (2),

(1) 7 R. R. 292 (9 Ves. 516). (2) 5 R. R. 211 (6 Ves. 52).

Sellack v. *Harris* (1), *Bulkley* v. *Wilford* (2), *Walker* v. *Walker* (3), *Mestaer* v. *Gillespie* (4), and other cases, were cited on this point (5).

It will be said that, though the plaintiffs have made *out a case against Lady Staines, they have made out no case against the next of kin and heir of Sir Thomas Staines: but, if Lady Staines took the property on a trust, the heir and next of kin of Sir Thomas must be affected with the same trust. * * * [*650]

Mr. Wigram and *Mr. Duckworth*, for the defendant Gunning:

Mr. Gunning claims to be entitled to the personal estate, as administrator to Lady Staines, and to be interested in the real estates, as tenant by the curtesy.

* * The cases cited for the plaintiffs shew that the Court has never relieved unless where there was an intention to make a will or do some other act, and the party was fraudulently prevented from doing what he intended by the person claiming the benefit of the fraud. You must shew that the party intended to comply with the Statute of Frauds and was fraudulently prevented, otherwise you repeal the statute. Lady Staines was not guilty of any active fraud: she was no party to the making of the will. [651]

The next question is whether Sir Thomas Staines required Lady Staines to leave all his property to the Podmores: for, in order to create a trust, the property as well as the person must be certain. If Sir Thomas intended that the whole of his property should go to the Podmores, he would not have desired his wife not to give any part of it to the Bridgers. What could be his motive for suppressing the names of the parties to take? Secresy could not be his object; for he told Dr. Jarvis and another of the witnesses that his property was to go to the Podmores after Lady Staines's death. If that was an imperative

(1) 5 Vin. Ab. 521.
(2) 37 R. R. 39 (2 Cl. & Fin. 102).
(3) 2 Atk. 98.
(4) 8 R. R. 261 (11 Ves. 621).
(5) But not *Crook* v. *Brooking* (1688), *Pring* v. *Pring* (1689), or *Smith* v. *Attersoll* (1826) 25 R. R. 41, which cases are mentioned by V.-C. HALL in his judgment in *Sidgreaves* v. *Brewer* (1880) 15 Ch. D. 602—603.—O. A. S.

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obligation extending to the whole of the property, why did Lady Staines, almost immediately after her husband's death, propose to Jarvis to dispose of part of the property in legacies; and why did Jarvis make a will for her and allow her to *give the legacies? The case is inconsistent with any other supposition than that Lady Staines had a discretion as to what portion of the property she should leave to the Podmores.

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We submit, first, that Lady Staines did not prevent Sir Thomas from leaving his property to the plaintiffs; and, secondly, that she had a discretion as to what share she should give to them: and, consequently, that the case of the plaintiffs has wholly failed.

Mr. Knight and *Mr. Teed*, for the heir-at-law, and *Sir W. Horne* and *Mr. Elderton* for the next of kin of Sir Thomas Staines:

If parol evidence is admitted, where fraud is not an ingredient in the case, the Statute of Frauds is gone. Here the testator declares, on the face of his will, that his wife is not to take his property, beneficially, for a longer period than her own life; but who is to take it after her death, he does not mention: and the omission cannot be supplied by parol, without violating the Statute of Frauds. This case is distinguishable from all the cases that have been cited; for, in none of those cases, was there any indication of a trust on the face of the will. A testator cannot, by a will duly attested, enable himself to dispose of his real estate by an instrument not duly attested. Suppose a testator gives his property to A. B. in trust to dispose of it as he should afterwards direct by parol: evidence of the subsequent directions cannot be given; for the Statute of Frauds requires all declarations of trust to be in writing. We do not say that the plaintiffs may not have a claim against the assets of Lady Staines: but we contend that the property is not fixed with a trust in consequence of the fraud of Lady Staines. Neither the *heir nor the next of kin can be affected by a fraud committed by a third party. * * *

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Mr. Girdlestone, jun., for the heir of Lady Staines.

Mr. Richards, for the administrator of Sir Thomas Staines.

PODMORE v. GUNNING. *May 7.*

THE VICE-CHANCELLOR:

This case was argued very elaborately. It arose in this way. The plaintiffs represent that Sir Thomas Staines, previously to and at the time of making his will, communicated, to Lady Staines, his desire and determination to give the whole of his property, real and personal, to the female plaintiffs after her death; and that, upon being apprised of that desire, she proposed to Sir Thomas Staines, that he should leave the residue of his property to her, and she undertook and promised that, if Sir Thomas would do so, she would carry into effect his desire and determination in favour of the female plaintiffs, and that, upon the faith of such undertaking and promise, he made his will, which was to this effect. [His Honour here read the will.] This instrument *was dated on the 5th of July, 1830, and it is [*654] observable that the words, upon which so much stress was laid in the argument: "Having a perfect confidence she will act up to those views, which I have communicated to her, in the ultimate disposal of my property after her decease," do not necessarily imply that some absolute direction was given to her as to the disposition of the property; but are consistent with the testator having given, to his wife, either some absolute direction, or some general recommendation, leaving it to her discretion to act upon it or not, and in such manner as she might think fit. The plaintiffs insist that those words have a necessary relation to that communication which they represent Sir Thomas Staines made to his wife, and upon which she made the proposal and gave the undertaking which they state in their bill. Sir Thomas Staines died on the 13th of July, 1830, and was buried on the 22nd of that month. Lady Staines made a will on the 24th of July, 1830; and, on the 5th of August, 1831, she made another will: and, in November of the same year, she married the defendant Mr. Gunning, which, at law, would be a revocation of her will; and, in January, 1832, she died: and, after her death, the plaintiffs filed their bill, in which they pray: [His Honour here stated the prayer of the bill].

In this case two questions arise: one is a question of law and

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the other is a question of fact, both of which it will be necessary for me to notice in disposing of this case.

Upon looking into the authorities, my opinion is that, if it were perfectly clear that that state of circumstances took place which the plaintiffs represent upon their bill, they would be [*655] entitled to the relief that they *ask; because, independently of some of the earlier cases, which it is hardly worth while to notice, the decision in *Sellack* v. *Harris*, provided the point were new, would of itself be decisive. That was a case where the father purchased lands for himself and his heirs; and, when he was upon his death-bed, sent for his eldest son, and told him that the lands were bought with his second son's money, and that he intended to give them to him: whereupon the eldest son promised that the second son should enjoy them accordingly. The father died; and the MASTER OF THE ROLLS held that the eldest son ought to have the lands, because, by the Statute of Frauds, there ought to have been a declaration of the uses or trusts in writing: but Lord Chancellor COWPER was of another opinion, because of the fraud in this case; in that the eldest son promised the father, upon his death-bed, that the other son should enjoy the lands: so he took this to be a case out of the statute. And, in my opinion, the very worst method of construing the Statute of Frauds, would be that which would give rise to frauds instead of preventing them.

In the case of *Walker* v. *Walker* (1) (which was one of the cases mentioned at the Bar), the question arose upon these circumstances. [His Honour here stated the facts of the case.] The agreement between the brothers was not reduced into writing; and Lord HARDWICKE said: "The question is whether the plaintiff is entitled to have the aid of a court of equity, to recover the annuity. I am of opinion that the plaintiff is not entitled to have the aid of a court of equity, and that it would be contrary to the rules of justice: for it appears to me plain that John Walker [*656] intended to grant these annuities conditionally only. The *defendant insists that he ought not to have the aid of a court of equity to supply this defect, unless he will do equity in performing his part of the agreement, by which he drew in John Walker to

(1) 2 Atk. 98.

surrender his copyhold estate charged with the annuities. I am not at all clear whether, if the defendant had brought his cross bill to have this agreement established, the Court would not have done it, upon considering this in the light of those cases, where, one part of the agreement being performed by one side, it is but common justice it should be carried into execution on the other. The allowing any other construction on the Statute of Frauds and Perjuries, would be to make it a guard and protection to fraud instead of a security against it, as was the design and intention of it."

The subject again came before the Court in the case of *Dixon* v. *Olmius* (1), and there the same view was taken of it.

I shall next advert to what Lord ELDON said in the cases of *Muckleston* v. *Brown* (2) and *Stickland* v. *Aldridge* (3). In the former of those cases his Lordship, alluding to the case of *Adlington* v. *Cann* (4), says (5): "There was no trust upon the face of the will: but a paper was written afterwards which clearly demonstrates that the testator's intention was to devote the benefit to charitable purposes. If it rested there, it is clear a man cannot, by an unexecuted instrument, attach a trust upon real estate. But they pleaded the statute. That must have been allowed to be a good plea; unless the LORD CHANCELLOR could have said, though they plead the statute, yet, if they answer, admitting the trust, it would be fit to discuss, at the *hearing, whether he would not give the heir the benefit of the resulting trust." The case seems to be very imperfectly reported in Atkyns, and is principally reported on the argument that took place on the plea, when the matter came before Lord Hardwicke on the plea and the answer. But Lord ELDON goes on to say: "In a subsequent case (*The Attorney-General* v. *Duplessis*,) Sir THOMAS PARKER, who must have known *Adlington* v. *Cann*, took upon himself to examine it; and when it was very material to be accurate upon it; and he says, expressly, Lord HARDWICKE compelled the defendants to answer. If so, we see, in a subsequent case, how Sir THOMAS SEWELL, no mean authority, a Judge very able and conversant in equity cases, understood

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(1) See 9 R. R. 286, *n.* (1 Cox, 414).
(2) 5 R. R. 211 (6 Ves. 52).
(3) 7 R. R. 292 (9 Ves. 516).
(4) 3 Atk. 141.
(5) 5 R. R. 220 (6 Ves. 67).

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it; and this appears, also, to be the history of *Adlington* v. *Cann* by a note of Serjeant Hill. In the case before Sir THOMAS SEWELL, the original answer, simply, stated the will. A farther answer was required; and, by the farther answer, the defendants stated that there was a memorandum not duly executed according to the Statute of Frauds; and that memorandum did, certainly, point to a disposition of the real estate to charitable purposes." And then Lord ELDON expresses a doubt upon the correctness of the judgment exercised by Sir T. SEWELL in acting upon the principle. But Lord ELDON seems to consider that, so far as the principle was adopted, Sir THOMAS SEWELL had acted rightly, and only doubted how far what he did after he had assumed the principle, was correct. Afterwards, Lord ELDON says: "Then, as to the principle: why should it not be so? Surely the law will not permit secret agreements to evade what, upon grounds of public policy, is established." This was a case which related to a supposed trust in favour of a charity. And then his Lordship adds: "Is the Court to feel for individuals, and to oblige persons [*658] to discover, in *particular cases, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the roots of its whole system." So that, there, Lord ELDON appears to assume it as quite clear that, in the case of a dispute between individuals, whether or not a trust was undertaken either by the devisee who was to take by the devise, or by the heir who would take in default of a devise, that, if the undertaking were proved, the party who gave the undertaking would be bound to fulfil it. He says: "Suppose the trust was to pay 100*l.* out of the estate; and the devisee undertakes to pay it if it is not inserted in the will; this Court would have compelled an answer on the ground that the testator would not have devised the estate to him unless he had undertaken to pay that sum. The principle is that the statute shall not be used to cover a fraud. If that is so between individuals and upon an individual claim, there is, surely, a stronger call upon the justice of the Court to say, upon a private bargain between the testator and those who are to take apparently under his will, which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes."

Then, in *Stickland* v. *Aldridge*, where the bill was filed by the heir against the devisee, alleging that the devise was upon a secret trust for a charitable purpose, Lord ELDON says (1): "It would be a strong proposition that the providence of the Legislature having attempted, expressly, to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill. The statute was never permitted to be a cover for fraud upon the private rights of individuals; and, though within the intention, *it cannot be [*659] said a trust is declared under these circumstances, it is clear a trust would be created upon the principle on which this Court acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed, by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife or other person, there is no doubt this Court would compel the heir to discover whether he did make such promise." Now Lord ELDON speaks of that being the ordinary case; and it shews, therefore, what was the view his mind took of the subject: and then he says: "So, if a father devises to his youngest son, who promises that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, this Court would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*: and then why, upon a similar principle, should not a trust be raised as to the whole?" And, afterwards, his Lordship says: "In *Adlington* v. *Cann*, Lord HARDWICKE was clearly of opinion that, there being nothing in the will attaching a trust, if the testator, afterwards, by an unattested paper expressing his own intention not communicated, said the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed, and the subsequent paper was not well executed. But that is perfectly different from the case of a devisor expressing, in the paper, a trust which, by contract with the devisee, led to that devise; and Lord Chief Baron PARKER, accordingly, said Lord HARDWICKE's opinion was that such a bill must be answered; and Sir THOMAS SEWELL meant to follow it. I formerly expressed doubt,"—that is, in

(1) 7 R. R. 294 (9 Ves. 519).

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the case of *Muckleston* v. *Brown*,—"whether he *rightly decided upon the principle; but the principle he took to be clear law, and that is sufficient."

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Sellack v. *Harris* was a case in which the heir, by his representation to the testator, intercepted the devise: but Lord COWPER was of opinion that, though he did so intercept the devise, and the land, at law, descended to him, yet the second son was entitled to have it. Lord ELDON does not allude to that particular case; but speaks of the ordinary case of a father devising to the younger son, who promises to pay the eldest son 10,000*l.*; and he says that, in that case, the younger son would be a trustee to the value of 10,000*l.*: and I only point it out because it was attempted to be said, with reference to the case of *Thynn* v. *Thynn* (1 Vern. 296), that no trust would attach to the property itself; but that the party might be personally liable, that is, answerable in value. But it is obvious that such an argument cannot apply to a case where the trust was that the party should have the property: and I cannot but think, supposing it should appear, on examining the evidence, that it supports the case made by the plaintiffs in their bill, that then they have made out that Lady Staines, in the first instance, and those persons who claim under her, take the real and personal estate of the testator clothed with a trust for the benefit of the plaintiffs.

So that the question is reduced to a question of fact: and that requires some critical examination of what is stated by the plaintiffs, and of what is given in evidence on both sides. But I must observe that the plaintiffs have, in the most distinct terms, put forward their case in this manner, namely, that, before the will was made, a communication was made by

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Sir Thomas Staines to *Lady Staines, in pursuance of which she proposed and undertook to do a given thing, and then he made his will in the manner stated. Now I must say that there is not a particle of evidence to sustain that case:

[Having gone minutely into the evidence upon this point his Honour continued his judgment as follows:]

[664]

The inference which I have drawn from the evidence is this,

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that some expressions were used by Sir Thomas *Staines by which the Podmores were pointed out as proper objects of

bounty, but that he did not mean that, at all events, they should have his property, but intended to leave Lady Staines at liberty to exercise her discretion, not only as to whether the Podmores should have his property or not; but also as to what part they should have, if they took anything. The contemporaneous act (as I may call it) of the will of the 24th of July, and the evidence of Dr. Jarvis, who twice refers to the use of the expression: "If you find them respectable," prove to my mind that that discretion was vested in Lady Staines; and the will of the 5th of August, 1831, which the plaintiffs themselves state, is a confirmation of the inference which I have drawn.

My opinion is that the plaintiffs, if they had proved their case, would have been entitled to the relief which they ask: but they have so completely failed in proving it, that I must

Dismiss their bill with costs.

SCHOLEFIELD *v.* HEAFIELD.

1836.
Feb. 27.

SHADWELL, V.-C.

[667]

(7 Simons, 667—670; S. C. 5 L. J. (N. S.) Ch. 218; further proceedings, 8 Simons, 470; S. C. 7 L. J. (N. S.) Ch. 4.)

Parties—Partners.

A. and B. deposited with a firm, of which A. was a member, the title-deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm. A. died intestate. The surviving partners in the firm filed a bill against his heir and B. for a sale of the estate: Held that A.'s personal representative ought to have been made a party to the suit.

THE plaintiffs and Richard Rotton were co-partners, as bankers, at Birmingham. Richard Rotton engaged in a joint speculation with one Mole, to buy land and build upon it. In order to pay for the land and buildings, they borrowed money of the bankers, and deposited with them the title-deeds of the land purchased, as a security for the money borrowed. Richard Rotton died leaving an infant heir. After his death the surviving partners in the Bank, filed a bill against his heir and Mole (without making his personal representative a party) for a sale of the land to which the title-deeds related.

Mr. Jacob and *Mr. G. Richards*, for the defendants, objected that the personal representative of R. Rotton ought to have been

SCHOLEFIELD v. HEAFIELD.

made a party to the bill: for that the surviving partners had no right to sue without having the representative of the deceased partner before the Court: *Pierson* v. *Robinson* (1): and as it might turn out, on taking the accounts of the partnership, that nothing was due, to the firm, from Richard Rotton's estate.

Mr. Knight and *Mr. Sharpe*, for the plaintiffs, said that the surviving partners in a firm, might sue for a debt due to the firm, without making the personal representative of a deceased
[*668] partner, a party to the *suit: that a person who has a demand on real estate, might, if he pleased, make his demand effectual against the real estate, and the heir and executor must be left to settle the matter between themselves: that, as between the heir and the creditor, the latter had a right to enforce his demand against the real estate: that the heir might resort to every species of evidence in order to shew that there was no debt; but he had no right, nor indeed would it be of any use to him, to add a party to the record for that purpose: that it was universally the practice of the Court, where two firms are dealing together and one of the members is a partner in both firms, to treat them, altogether, as distinct firms; otherwise, no demand could be established by one of the firms against the other, without going through the accounts of both: that there could be no set-off in this case; for a separate debt could not be set off against a joint debt; and the joint creditors of the Bank had a right to have the whole of the sum due from Richard Rotton and Mole, applied in satisfaction of their demands.

THE VICE-CHANCELLOR:

I can understand, in a general case, that there may be a suit by the surviving partners in a firm which comprehended A., against the surviving partners in another firm, which also comprehended A., without making the personal representative of A. a party. But this case is in this singular position: the real estate was meant to be a security for the debt: the case however cannot be stated, without its appearing, from the

(1) 3 Swanst. 139, *n*.

relative situation of the parties, that there might be circumstances to shew, at once, that the debt had been satisfied. If, for instance, R. Rotton had contrived to have the accounts so kept between himself and his *partners, that, at all times, they should have, in their hands, a sufficient balance to satisfy the debt, ought the partners who have, in their hands, that balance, to sue Mole and the heir of R. Rotton, without making the personal representative a party; the heir being, in equity, entitled to make the personal estate of R. Rotton pay the debt, and to have his own estate exonerated from it. If the heir suggests that the debt has been satisfied as between R. Rotton and his surviving partners in the Bank, he suggests a case that must be investigated; and how can it be investigated in the absence of the personal representative of R. Rotton? There might be the most unjust circuity of suit unless the personal representative were made a party.

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The cause must, therefore, stand over in order that R. Rotton's personal representative may be made a party.

On the hearing of this cause, the estate to which the title deeds related, was ordered to be sold, it appearing to the Court that a sale was more beneficial to the infant than a foreclosure. In the minutes of the decree, as prepared by the Registrar, the infant was allowed six months after coming of age, to shew cause against the decree.

1837. *Nov.* 17.

* * * * *

The VICE-CHANCELLOR said that he would consult the LORD CHANCELLOR on the point.

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His Honour, on this day, said that he had conferred with the LORD CHANCELLOR, and that his Lordship was of opinion that, as the decree directed the estate to be sold, the infant ought not to be allowed the six months: but that if the decree had been for a foreclosure, the infant ought to have been allowed the six months.

1837. *Nov.* 18.

Under the decree * * the estate was sold, and the mortgagee, who had obtained permission to bid at the sale, became the purchaser. He then presented a petition, in the cause,

1838. *Nov.* 15.

[8 Sim. 470]

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praying that the infant heir might be ordered to convey the estate to him (1).

Mr. Knight Bruce and *Mr. Sharpe*, in support of the petition, said that, by the decree, the estate was to be directed to be sold forthwith, notwithstanding the infancy of the heir, and, therefore, it followed, as of course, that the Court had jurisdiction, under 11 Geo. IV. & 1 Will. IV. c. 47, s. 11, to direct the infant heir to convey the estate to the purchaser.

Mr. Jacob, for the heir, said that this case was not within the 11 Geo. IV. & 1 Will. IV. c. 47, as the suit was instituted by an equitable mortgagee to compel payment of his own debt only, and that the Act did not apply except where the object of the suit was to compel payment of the debts due to the general creditors of the deceased: *Price* v. *Carver* (2).

The VICE-CHANCELLOR said that the statement of what had passed between the LORD CHANCELLOR and himself (3) was correct: that the 11th section of the Act provided for the case of an estate being decreed to be sold for the satisfaction of any debt, in the singular number, as well as of debts: that, in this case, the estate had been sold for the satisfaction of a debt, and, therefore, the case was within the Act, and, consequently, an order must be made according to the prayer of the petition.

1836.
March 5, 7.

SHADWELL, V.-C.
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BROOKE *v.* TURNER (4).

(7 Simons, 671—682; S. C. 5 L. J. (N. S.) Ch. 175.)

Will—Construction.

Money and Bank of England notes may pass under the description of "property in and about my dwelling-house," but not country bank or promissory notes, or mortgages.

FRANCES BROOKE [made her will dated the 29th of September, 1830, and thereby devised part of her real estates to trustees, in trust for the benefit of her niece Catharine Dorothy Jones, and

(1) See 11 Geo. IV. & 1 Will. IV. c. 47, s. 11.
(2) 3 My. & Cr. 157.
(3) *Ante*, p. 217.
(4) *In re Prater* (1888) 37 Ch. D. 481; *In re Robson*, '91, 2 Ch. 559.

her children. The will then proceeded as follows: "I give and bequeath unto my grandson, Fitzherbert, the miniature pictures of Mr. Brooke and myself: and I give and bequeath all other my pictures, and also all my paintings in and about my dwelling-house at Chipping Sodbury and at Horton, and also my collection of foreign and other coins of gold, silver and copper (except those of the two last and present Kings) unto my said niece, Catharine Dorothy Jones, together also with my marble figures, also my telescope with the brass stand, my china jars and ornaments, my two parrots, my books, furniture, plate, china, linen, clothes, pearls, *trinkets, carriage and horses, and all other similar moveable articles and things in and about my dwelling-house at Chipping Sodbury and at Horton, except my minerals and fossils: I also give and bequeath unto my said niece, Catharine Dorothy Jones, for her use and benefit, the sum of 500*l.* out of the rents and arrears of rent of all or any of my farms, lands, hereditaments and premises that may be due and owing to me at the time of my decease. With respect to all and singular my minerals and fossils, I give and bequeath the same unto Henry, the son of my nephew the Rev. John Turner."

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The testatrix then gave several pecuniary legacies, and continued thus: "All the rest, residue and remainder of my estate and effects, both real and personal (except as after otherwise disposed of) I give, devise and bequeath unto all my said grandchildren, equally between them, and their several heirs, executors and admistrators, as tenants in common. I hereby nominate and appoint the said Rev. John Turner, my sister Elizabeth Jones, and my said niece, Catharine Dorothy Jones, the executor and executrixes of this my will: and I do direct that, from and after the day of my interment, all the property of every sort and kind, over which I have any disposing power, in and about my said dwelling-house (except what I have otherwise given) shall exclusively belong to my said niece, Catharine Dorothy Jones, and not be subject to diminution, except by her own personal act and authority."

The testatrix, by a codicil dated the 1st of November, 1830, gave to her niece, Catharine Dorothy Jones, the sum of 500*l.* in addition to all the legacies and bequests given to her by the will.

BROOKE v. TURNER.

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The bill was filed by one of the devisees and residuary legatees under the will, against the executor and executrixes and the other devisees and residuary legatees, alleging that, at the testatrix's death and on the day of her interment, there were, in her dwelling-house, cash, bank notes, bankers' notes payable to bearer, and bankers' deposit notes, and also a mortgage for 500*l.*; and that Catharine Dorothy Jones claimed to be entitled thereto under the bequest to her, of all the property, of every sort and kind, over which the testatrix had any disposing power, in and about her dwelling-house; but the plaintiff charged that the testatrix did not mean, by the terms of such bequest, to give to Catharine Dorothy Jones, the cash and other articles, but intended that the same should form part of her residuary personal estate. The bill prayed that the will might be established and the trusts performed, and that the cash and other articles might be declared to form part of the testatrix's residuary estate.

By the decree at the hearing, the Master was ordered to inquire and state whether any and what cash, bank notes, bankers' notes payable to bearer, bankers' deposit notes and mortgages, and to what amount, and other and what articles were in the testatrix's dwelling-house on the day of her interment.

It appeared, by the report, that, two or three days after the testatrix's interment, there were found concealed in different parts of her house, guineas, sovereigns, seven-shilling pieces, silver coin, Bank of England notes, country bank notes, promissory notes of various individuals, an accountable memorandum, and a banker's deposit note, amounting together to between

[*675]

9,000*l.* and 10,000*l.* and also an indenture of mortgage *for 500*l.*, and the title-deeds relating to the mortgaged premises.

The cause now came on for further directions.

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

* * The country bank-notes, promissory notes, accountable memorandum, deposit note and mortgage, are not property; they are merely securities for money or evidences of debts; and, like other choses in action, have no locality. Nor will the guineas, sovereigns, seven-shilling pieces and silver, pass by general words

descriptive of locality. Besides, the testatrix, in enumerating the articles which she intended to give to her niece, excepted her coins of the two last and present Kings, by which, it is clear that she *meant every thing in the nature of money. * * There [*676] are some *dicta* that Bank of England notes must be considered as cash: but, in *Stuart* v. *The Marquis of Bute* (1), Lord ELDON says: "I have seen *Lady Aylesbury's* case (2); which is also mentioned by Lord MANSFIELD, in *Miller* v. *Race;* but has never been cited accurately. It was a bequest of 'my house and all that shall be in it at my death.' Lord HARDWICKE held that cash passed, and bank-notes; which Lord HARDWICKE there, I do not know why, considered as cash; but not promissory notes and securities; as they were the evidence of title to things out of the house, and not things in it. Bank-notes I think just in the same situation."

Mr. Barber and *Mr. Dixon*, for some of the defendants in the same interest as the plaintiff:

The question in this case is a question of intention. By the word "property," the testatrix meant things *ejusdem generis* as those which she had mentioned in the preceding part of her will. As she had, by her will, given her niece an annuity and a legacy of 500*l.*, she could not intend, by the subsequent clause, to give her anything of a pecuniary nature to a large amount.

(THE VICE-CHANCELLOR: It is clear that the testatrix kept [677] alive in her recollection the existence of cash in her house, as she excepted the coins of the two last and present Kings: and, therefore, they must pass either under the general residuary clause, or under the next clause.)

It is impossible to hold that the cash can pass to the niece by the latter clause; for, if the testatrix had intended her niece to have it, she would not have excepted it in the clause in which she gives her pictures, &c. to her niece. However comprehensive the words of a bequest may be, they will not pass property

(1) 8 R. R. at p. 269 (11 Ves. 662). Amb. 68; Reg. Lib. 1748, B. fo. 151.
(2) *Popham* v. *Lady Aylesbury*, 1

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which it appears, from other parts of the will, the testator did not intend that they should pass: *Sutton* v. *Sharpe* (1), *Hastings* v. *Hane* (2). Bank of England notes cannot be considered as cash. They never were, in strictness, a legal tender; although a party could not be held to bail for a debt, if he tendered the amount in them.

The *Solicitor-General*, *Mr. Swanston*, *Mr. Cooper*, and *Mr. Winterbottom* appeared for the other defendants in the same interest as the plaintiff, and referred to *Stuart* v. *The Marquis of Bute* as reported on the appeal (3), *Fleming* v. *Brook* (4), *Hotham* v. *Sutton* (5), and *Chapman* v. *Hart* (6).

THE VICE-CHANCELLOR:

My opinion is that the legatee is entitled to the money; for it stands in quite a different situation from any of the other articles mentioned in the Master's report. It has been stated by *Mr. Wakefield* that, where there has been a gift of money and then a bequest to the same legatee, in general words, of things [*678] in a *house, the legatee is not entitled, under the general words, to any cash that may be found in the house; because the testator has shewn, expressly, what quantity of money he intended the legatee to take: and many cases were cited in support of that proposition: but none of them bear any resemblance to the present. It must be conceded that, when the testatrix, in the clause in which she disposed of her general residuary estate, made the exception: "except as after otherwise disposed of," she meant that exception to comprehend something which she intended to bequeath afterwards: and we find that, in the following clause, she does dispose of all the property in or about her dwelling-house, except what she had otherwise given. Now, in the former part of the will, she had said: "I give and bequeath all other my pictures, and also all my paintings in and about my dwelling-house at Chipping Sodbury and at Horton, and also my collection of foreign and other coins of gold,

(1) 25 R. R. 19 (1 Russ. 146).
(2) 38 R. R. 79 (6 Sim. 67).
(3) 14 R. R. 14 (1 Dow, 73).
(4) 9 R. R. 35 (1 Sch. & Lef. 318).
(5) 10 R. R. 83 (15 Ves. 319).
(6) 1 Ves. sen. 271.

silver and copper (except those of the two last and present Kings) unto my said niece, Catharine Dorothy Jones, together also with my marble figures, &c. and all similar moveable articles and things in and about my dwelling-house at Chipping Sodbury and at Horton." So that, in this clause, she disposes of the coins in and about her dwelling-house, except those of the two last and present Kings. And then she makes a general disposition of all the rest, residue and remainder of her estate and effects, both real and personal, except as after otherwise disposed of: and the only property which she afterwards disposes of, is the property in and about her dwelling-house which she had not otherwise given. Therefore, by referring from one clause to another, it appears to be perfectly plain that the testatrix has given her coins of the two last and present Kings, under the description of property in and about *her [*679] dwelling-house, which she had not otherwise given. The consequence is that her niece is entitled to the guineas, sovereigns, seven-shilling pieces and silver money mentioned in the report.

Mr. Knight, *Mr. Jacob*, and *Mr. Parry*, for the defendant, Catharine Dorothy Jones:

We contend that not only the money, but also the Bank of England notes, country bank notes, promissory notes, accountable memorandum, banker's deposit note and mortgage, passed to the testatrix's niece, as property in the testatrix's dwelling-house, over which she had a disposing power.

There is no case, not even *Fleming* v. *Brook* (1), in which the words were so comprehensive as they are here: and, in that case Lord REDESDALE held that Bank notes would pass. The words: "over which I have any disposing power," include everything that can be made the subject of testamentary disposition. There is considerable peculiarity in the language of this bequest. The testatrix directs that, from and after the day of her interment, all the property over which she had any disposing power in and about her dwelling-house, should belong to her niece. In putting a construction on this bequest, regard must be had to the habits of the testatrix. She was fond of

(1) 9 R. R. 35 (1 Sch. & Lef. 318).

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hoarding and hiding money, and made her house a receptacle for all her property. She mentions the day of her interment as the time at which her niece was to become entitled to her property, as that is the day on which wills are commonly opened; and she intended her to sweep away all the property that, on a search, should be found in and about her house, and that neither her executors nor the Stamp Office should know anything about it.

[*680] The testatrix, *in the preceding part of her will, had given to her niece all the ordinary contents of a house; and, by the clause now in discussion, she intended to give her all her hoards. * * *

Mr. Wigram appeared for the trustees and executors of the will.

[681] THE VICE-CHANCELLOR:

It struck me that that portion of the property which was not coin, stood in a very different situation from the coins of the two last and present reigns; because the testatrix had used the expression "property in and about my dwelling-house:" and the question is whether, whatever may be the meaning of those words in common parlance, securities for money can, in a court of law, be said to be property in a particular place. I cannot but conjecture, from the whole tenor of this will, that, if the testatrix had been informed that there was any doubt as to the effect of those words, she would have used such language as would have passed all the property which is now the subject of discussion. But I am bound to construe the words according to the sense which the law puts upon them. If a person were to give all the property in his house, and certain title deeds happened to be in it, it never could be contended that the land to which those title deeds related, would pass to the legatee, nor could it be contended that the title-deeds of land devised to another person, or allowed to descend to the heir, would pass; for they are accessary to the land, and would belong either to the heir or to the devisee; as the case might be. Therefore I am not at liberty to say that either the country bank-notes, promissory notes, accountable memorandum, deposit note or mortgage,

passed to the testatrix's niece: but as it appears that Lord HARDWICKE held that Bank of England notes passed under the bequest in *Lady Aylesbury's* case (1), and as Lord ELDON, though he expressed a doubt as to the principle of that decision, did not expressly over-rule it (2), I am of opinion that, in this *case, the Bank of England notes, as well as the coins, passed under the clause in question to the testatrix's niece. [*682]

(1) The registrar's book containing the decree in *Popham* v. *Lady Aylesbury*, was produced to his Honour.

(2) 8 R. R. 269 (see 11 Ves. 662).

KING'S BENCH REPORTS.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

1834.

[3]

WRIGHT *v.* DOE D. TATHAM.

(1 Adol. & Ellis, 3—23; S. C. 3 N. & M. 268; 3 L. J. (N. S.) Ex. 366.)

A bill was filed in Chancery against several defendants, whereupon an issue of *devisavit vel non* was ordered, in which the defendants in Chancery were plaintiffs, and the plaintiff in Chancery defendant, respecting a will of M., mentioned in the proceedings, devising real property. The issue was found in the affirmative, and the bill dismissed. At the trial of the issue, one of the three attesting witnesses to the will swore to its execution. The plaintiff in Chancery afterwards brought ejectment on his own demise, as heir-at-law of M., against one of the defendants, who claimed, as devisee of M., for the premises which had been the subject of the issue. After the action of ejectment was commenced, judgment was entered up on the issue from Chancery, in the Court of law in which it had been tried. An order of Court was made in the action of ejectment, that the short-hand writer's and Judge's notes of the evidence of such witnesses on the trial of the issue, as should be dead before the trial of the ejectment, should be read at the latter trial.

On the trial of the ejectment, the defendant gave evidence of these several proceedings, and proved the former testimony of the above-mentioned witness, who was dead, from the short-hand writer's notes; and he produced a will, which was identified with that proved on the trial of the issue out of Chancery: Held, that this was sufficient proof of the execution of the will, though another attesting witness was present at the trial of the ejectment; but that without proof of the evidence of the deceased witness, such proceedings would not have been proof of the execution.

A question having arisen as to the sanity of the devisor, letters were tendered in evidence, which had been found among his papers shortly after his death, written to him by persons of his acquaintance, of whom all but one were dead; one of the letters purporting to be an answer to a letter written by the devisor. *Quære*, whether such letters were admissible, as shewing that the devisor was treated by his acquaintance as a person of sound mind (1).

THE defendant in error declared in ejectment against the plaintiff in error in the Court of King's Bench. At the trial

(1) This point was contested on the subsequent trial, and decided in the negative. This decision was affirmed in the Exchequer Chamber on an equal division of opinion (7 Ad. & El. 336); and was ultimately affirmed by the House of Lords, where the case is reported in 5 Cl. & Fin. 670, and will be reported in the corresponding place in these Reports.—R. C.

before Gurney, B., at the Lancaster Spring Assizes, 1833, the jury found a verdict for the plaintiff below, and the counsel for the defendant below tendered a bill of exceptions.

By the bill of exceptions it appeared, that the plaintiff below claimed as heir-at-law of John Marsden deceased, who was admitted to have died seised, leaving the plaintiff below his heir-at-law; but Wright claimed *under a will of Marsden. It [*4] appeared further, that the counsel for the defendant below were allowed to state and prove their case first.

The first exception stated, that at the trial it became a matter in issue between the parties, whether or not Marsden had been, from his attaining to competent age, and down to the time of executing the will, a person of sane mind and memory, and capable of making a will. Shortly after Marsden's death, there were found among his papers several letters appearing to be addressed to him by different individuals, and one of them purporting to be an answer to a letter received by the writer from Marsden. The hand-writing of these letters was proved; and it was proved that all the writers, except one, were dead, and had been in habits of acquaintance, more or less intimate, with Marsden. These letters being offered at the trial to prove the affirmative of the above issue, and being objected to as inadmissible, "the said Baron stated his opinion to be that the said letters respectively, and each of them, were and was not by law admissible as evidence, and refused to admit the same respectively as such. Whereupon the counsel for the said defendant made his several and respective exceptions to the said opinions of the said Baron."

The second exception stated, that at the trial it further became a matter in issue between the parties, whether or not Marsden devised the premises mentioned in the declaration, so as to bar the title of the lessor of the plaintiff below. The counsel for the defendant below proved that the lessor of the plaintiff had filed a bill in Chancery against the defendant below and three other persons, in respect of the said premises, praying that a will therein mentioned, relating to the same premises, *purporting [*5] to be a will of John Marsden, might be set aside. It was proved, that the defendants in Chancery having, in their answer, set forth

WRIGHT v. DOE d. TATHAM.

the last-mentioned will, the MASTER OF THE ROLLS thereupon ordered an issue of *devisavit vel non*, in which the defendants in Chancery (including the defendant below) should be plaintiffs, and the plaintiff in Chancery (the lessor of the plaintiff below) should be defendant. The counsel for the defendant below produced the Nisi Prius record in the Court of King's Bench, of the trial of the issue, with the *postea* indorsed, whereby it appeared that the jury found that Marsden did devise, &c., in the words of the issue. The counsel for the defendant below further proved, that the will which had been in question on the trial of the issue was a will which he then tendered in evidence, and that one Giles Bleasdale, a subscribing witness to it, had sworn to the execution of it at the trial of the issue, and had since died. It appeared, on cross-examination of one of the witnesses produced by the defendant below, that Proctor, another subscribing witness to the will, was still alive, and was then present in Court under a *subpœna*, as a witness on behalf of the defendant below. The counsel for the defendant below further proved, that the MASTER OF THE ROLLS by a decree, reciting, among other things, the trial of the issue, dismissed the bill in Chancery; and they also produced an examined copy of a judgment entered up in that issue in the Court of King's Bench, signed after the commencement of this action of ejectment (1). They then proved *a rule of the Court of King's Bench, made in the present cause, ordering that the Judge's notes, and the short-hand writer's notes, of the evidence, given at the trial of the issue, of witnesses who should since be dead, should be read at the trial of this ejectment. Bleasdale's evidence at the trial of the ejectment, was accordingly read from the notes of the short-hand writer. The counsel for the defendant below then tendered the will in evidence; but it

[*6]

(1) In Easter Term, 1834, *Sir James Scarlett* moved for a rule to shew cause why this judgment should not be set aside, as being improperly entered up on a feigned issue out of Chancery. The rule was made absolute in the same Term, no cause being shewn.

The roll having been carried into the Treasury, the clerk of the Treasury intimated that he did not know in what way the judgment was to be set aside, and the Judges directed that he should attend in Court to receive their directions. Upon his doing so, he was directed by the Court to make an entry on the margin of the roll, that the judgment had been set aside by rule of the Court, and that the entry was made by their order.

was objected that this could not be read until the execution had been proved by the attesting witness then present in Court. "And the said Baron thereupon stated his opinion to be, that the said will could not be read in evidence, and refused to admit the same, unless the said living attesting witness was called by the said defendant to prove the execution thereof. Whereupon the counsel for the said defendant made his exceptions to the said opinion of the said Baron, that the said will could not be read in evidence, unless the surviving witness was called."

The third exception was as follows: "And thereupon the said Baron stated his opinion to be, that the evidence, so as aforesaid given by the said defendant, did not sustain the affirmative of the said matter in controversy and at issue as last aforesaid, as to the said will as aforesaid, and directed the said jury to find a verdict for the plaintiff. Whereupon the said counsel for the said defendant made his exception thereto."

The exceptions concluded with the prayer of the counsel for the defendant below, "that the said Baron *would set his hand [*7] and seal to this bill of exceptions, containing the several matters as aforesaid, according to the form," &c.

The jury found for the plaintiff. Judgment having been entered in the Court below for the plaintiff, the defendant brought his writ of error. The assignment of errors specified the three points raised respectively by the three exceptions as above mentioned (1).

The case was argued in Hilary Term, 1834 (January 18th), before Tindal, Ch. J., Park, J., Gaselee, J., Bosanquet, J., Bayley, B., Vaughan, B., and Gurney, B.

F. Pollock for the plaintiff in error:

As to the first exception, the letters are evidence as written declarations made to the testator, shewing how he was treated

(1) When this case came on to be argued, a question arose, whether the points disputed were all sufficiently raised on the bill of exceptions, the Court intimating some doubt whether they should not have been all distinctly specified at the conclusion of the bill; and BOSANQUET, J. referred to a case of *Lewis* v. *Armstrong*, argued in the Exchequer Chamber in the preceding Term, in which the same difficulty had arisen. The COURT, however, ultimately decided that the bill, in its present form, sufficiently brought the several points under its cognizance.

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by the persons who corresponded with him. They are admissible, just as evidence of a conversation held with him would be.

(BAYLEY, B.: Could you make part of that conversation evidence, without including the answer of the party with whom it was held?)

If such party were shewn to have made no answer, that would be matter of remark; but it would be no more. Suppose the letters contained discussions, involving difficult questions in science or in art, and were addressed to Marsden by persons eminent in those departments: the fact of their being so addressed would be, by itself, evidence directly affecting the matter in controversy. There can be no doubt that letters of a different import, [*8] *found as these were, would have been evidence to prove the non-sanity of Marsden. In a case of *Butlin* v. *Barry*, heard on the 16th of January in this year in one of the Ecclesiastical Courts, a memorial written by an illiterate person for the deceased, and adopted by him, and remaining amongst his papers after his decease, was allowed as evidence to shew his incapacity. In *Wheeler* and *Batsford* v. *Alderson* (1), a question arose as to the capacity of a person who died in 1830, a widow, leaving a will dated in 1822. Sir JOHN NICHOLL, in his judgment, which was in favour of the will, referred to a letter written by the deceased person's husband in 1802, as bearing every mark of being addressed to a wife who conducted herself with propriety, and treated this letter as evidence confirming other proofs of the deceased's capacity. The same point arose in *Waters* v. *Howlett* (2). The printed report of that case refers entirely to another point: but the manuscript notes of the reporter contain the following statement. A letter written by a brother of the half blood to the deceased, from France, was offered in evidence to shew the way in which the deceased was treated by his friends and relations, and that the writer did not consider the deceased insane or incompetent. There was no reply, nor did the letter refer to any communication received from the deceased, but it was a letter of condolence on the death of his wife, and requesting a reconcilia-

(1) 3 Hag. Ecc. Rep. 609. (2) 3 Hag. Ecc. Rep. 790.

tion between him and the writer. This evidence was objected to, but admitted after argument.

As to the second exception. The bill of exceptions identifies the property now in question with that which was the subject of the proceedings in Chancery: the first question then is, whether a verdict on a specific issue between the same parties, coupled with the *adoption of such verdict by the MASTER OF THE ROLLS [*9] as the foundation of his decree, be not at least *primâ facie* evidence of the truth of the fact found, as between the same parties contesting the same fact, so as to make farther evidence unnecessary. For the lessor of the plaintiff in ejectment, and the tenant in possession, are the substantial parties to an action of ejectment: *Aslin* v. *Parkin* (1). It is true, that the defendant in this action of ejectment was joined with others in the former proceedings; but that does not destroy the admissibility of the records as evidence, whatever might have been its effect, if it had been sought to use them by way of estoppel: *Kinnersley* v. *Orpe* (2). There a record was held admissible as evidence in an action by the same plaintiff against another defendant, on the ground that the defendants, in the two causes, claimed to act under the same authority, the sufficiency of the authority being the question in dispute. A similar principle prevailed in *Strutt* v. *Bovingdon* and others (3), where Lord ELLENBOROUGH said that, although the record produced was not an estoppel, he should think himself bound to tell the jury to consider it as conclusive of the rights of the parties. In *Hitchin* v. *Campbell* (4), the former record was admitted, though the form of action was different. Then, if the former records be admissible evidence, they constitute at least *primâ facie* evidence of the fact found by the verdict: Bac. Abr. Evidence, F. (5). In *Outram* v. *Morewood* (6), the question arose upon the record being replied as an estoppel, and the replication was held good. If not pleaded, it cannot be less than *primâ [*10] *facie* evidence: *Vooght* v. *Winch* (7), *Hancock* v. *Welsh* and another (8). With respect to any objection arising from the

(1) 2 Burr. 665.
(2) 2 Doug. 517.
(3) 8 R. R. 834 (5 Esp. 56).
(4) 2 W. Bl. 779, 827. See 1 Stark. Ev. 219 (edit. 1833); Com. Dig. Evidence, A. 5.
(5) Vol. iii., p. 255 (edit. 1832).
(6) 7 R. R. 473 (3 East, 346).
(7) 21 R. R. 446 (2 B. & Ald. 662).
(8) 1 Stark. 347.

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proceedings having originated in equity, *Whately* v. *Menheim* and *Levy* (1) shews that they are not on that account inadmissible. The decree of the Court of Chancery takes the place of a judgment at law: *Montgomerie* v. *Clarke* (2). If it be said that there is a technical and absolute rule that a will of lands must be produced, attested according to the requisites of the statute, the answer is, that the rule does not go that length.

(BAYLEY, B.: The attesting witness must have been called on the former occasion.)

At any rate, some satisfactory proof must have been given. In *Burnett* v. *Lynch* (3), the testimony of the subscribing witness to a lease was dispensed with.

(BAYLEY, B.: It had been thought that, where a party producing a deed upon notice took an interest under it, the opposite party might, in all cases, treat it as proved to be executed. That rule was considered a hard one, and has been qualified since. The language of the CHIEF JUSTICE in *Burnett* v. *Lynch* (3), shews that that case was an exception from the general rule.)

In *Scott* v. *Waithman* (4), the testimony of the subscribing witness to a bond was dispensed with in an action against the sheriff on that bond, the defendant having produced it. So the acknowledgment of the bargainee was held to be proof of a bargain and sale which was enrolled, without proof of the sealing and delivery: [*11] *Smartle* d. *Newport* v. *Williams* (5). No admission by a *party, though made on record, can be stronger evidence than the verdict of a jury adopted by the Court which has directed the issue. Therefore, it was not necessary to produce the will at all; but, if it was necessary, then it was sufficient to produce, as has been done, the previous records, and to identify the will which actually was produced as the subject-matter of those records: and the bill of exception shews that this identification has been made. The second question raised upon the second exception is, whether,

(1) 2 Esp. 608.
(2) Bul. N. P. 234.
(3) 29 R. R. 343 (5 B. & C. 589).
(4) 3 Stark. 168.
(5) 1 Salk. 280.

if it be necessary that the subscribing witness should be called, that rule has not been complied with by the evidence given, under the order of Court, of Bleasdale's testimony on the former occasion. In *Rex* v. *Jolliffe* (1), Lord KENYON said that evidence which a witness gave on a former trial might be used on a subsequent one, if he had died in the interim. The same point was ruled in *Strutt* v. *Bovingdon* and others (2), *Mayor of Doncaster* v. *Day* (3), *Pyke* v. *Crouch* (4). Nor is it material that another witness to the will was alive; for, in the cases cited, the evidence would not have been rejected upon proof that other witnesses were alive, capable of proving the fact in question.

Sir James Scarlett for the defendant in error:

As to the first exception, the question respecting the admissibility of the letters is rendered immaterial by the second exception. But the rejection of the letters was correct. Evidence was admitted to shew their character; and then the question arose, whether their contents could be read. Now the contents could be produced only as, first, a statement of facts, or secondly, a statement of the *opinions of the writers: in neither character [*12] were they admissible. To receive the opinion of a deceased person, as to the sanity of another, would be to admit evidence without an oath. The argument on the other side proceeds upon an assumption that the criterion of the admissibility of such evidence is the effect which it would produce if received; whereas objectionable evidence is rejected, precisely because it is capable of producing an effect, if received: the question is, whether the law will allow the effect to be produced by such evidence. If a jury might be told that many living men of science had expressed an opinion in favour of Marsden's sanity, it would probably produce an effect on them; but it would not be receivable evidence. The evidence in *Butlin* v. *Barry* (5) was admissible on the ground that the adoption of the memorial was an act of the deceased person. The report of *Wheeler* and *Batsford* v. *Alderson* (6) does not shew in what way the letter

(1) 2 R. R. 383 (4 T. R. 285).
(2) 8 R. R. 834 (5 Esp. 56).
(3) 12 R. R. 650 (3 Taunt. 262).
(4) 1 Ld. Ray. 730 (5th resolution).
(5) P. 230, *ante*.
(6) 3 Hag. Ecc. Rep. 609.

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there referred to was found. As to the case of *Waters* v. *Howlett* (1), it is a decision contrary to the principles of the common law Courts, and probably depended upon some rule connected with the peculiar process of the Ecclesiastical Courts respecting evidence.

As to the second exception, and the first question raised by it; the general rule is, that when an attesting witness to a document is alive he must be called. The Statute of Frauds having prescribed peculiar solemnities for the devising of lands, the Court will be less willing to admit an exception in this case than in any other. The strictness of the rule is relaxed in the case of a will, under circumstances only of extreme necessity: *Hands* v. *James* (2) is an instance. Here the existence of a [*13] *living witness does away with the necessity. The records of the previous proceedings are not evidence to prove the will. In the first place, the bill is not evidence, even against the party filing it, except for the purpose of proving the prayer and explaining the decree. The answer cannot be read here, except as connected with the decree; for it is the evidence of the party who now seeks to use it: it cannot be used to prove the facts asserted in it. The decree was for the dismissal of the bill; that can have no greater effect than a nonsuit at common law. Besides, a bill may be dismissed on the facts stated in the defendant's answer. This is not a decree binding the parties; if it had been so, its effect might have been different. With respect to the feigned issue, it is true that the bill of exceptions shews that a judgment on the verdict was signed in the Court of King's Bench after the present action of ejectment was brought. Such a judgment, if pleaded, must be pleaded *puis darrein continuance*. It is, however, not usual to sign judgments on feigned issues. The issues are tried under the direction of the Court of Chancery, and do not bind that Court. Admitting that, for the purpose of using these proceedings in evidence, it was competent to shew that the subject-matter of them related to the will, that would carry the proof of the will no further in the present action. If a landlord brought covenant against his tenant for non-repair, and the lease were read at the trial, and a verdict were recovered,

(1) 3 Hag. Ecc. Rep. 790. (2) 2 Comyns's Rep. 531.

and afterwards the landlord brought a second action against his tenant for arrears of rent, the former record would have been between the same parties, yet the plaintiff would not be permitted to put it in and connect it with the lease, for the purpose of proving the execution of *the lease. Even the answer in equity of the obligor of a bond, admitting its execution, is merely secondary evidence of the execution, *Call* v. *Dunning* (1), and no foundation has been laid here for the admission of secondary evidence. Secondly, as to the sufficiency of the evidence of Bleasdale's former testimony. The best evidence of the execution of the will must be given. Bleasdale's former evidence is not the best, another witness being alive. It cannot supersede the necessity of giving the best evidence, although it may be adduced in confirmation.

[*14]

(BAYLEY, B.: The question is, whether this production of Bleasdale's evidence has not the same effect as if the evidence had been given by him in the witness-box on the present trial.)

The Judge and jury ought to have the same means of examining his evidence as were afforded on the first trial. As for the order of Court, that cannot make his former testimony evidence in this case, more than it would have done if that testimony had not been given before a jury. Now had it been given, for instance, by way of deposition in an equity suit, it would have been no proof of the execution of a will. And the contents of the will are not proved at all, unless Bleasdale's evidence be admitted to connect it with the record of the former issue.

F. Pollock, in reply:

The letters are not offered as shewing either facts or opinions by their contents, but as constituting in themselves a fact, namely, the treatment of Marsden by the writers. No argument can be drawn from the nature of the second exception, against the validity of the first. If the letters were improperly rejected, there is error on the record, whatever *may be decided on the second exception. Had the defendant closed his case at that

[*15]

(1) 4 East, 53.

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rejection, he would never have been called upon to prove the will. In *Lucas* v. *Nockells* (1), in the House of Lords, Lord TENTERDEN would not allow counsel to use a matter appearing on a bill of exceptions, not being distinctly excepted to, for the purpose of reversing the judgment, saying, that the court of error had jurisdiction, on a bill of exceptions, only to decide on the matter excepted to. On the same principle, nothing which appears here from the second exception only can be made use of in the discussion of the former. The case suggested, of successive actions for non-repair and for rent in arrear, on the same lease, is not analogous; for, in the present case, there was a specific issue on the first record of *devisavit vel non*, which is now coupled with evidence of the subject-matter being the same. As to the alleged insufficiency of the several parts of the proceedings in equity taken singly, they are used as introductory only to the issue and verdict, and the decree which adopts this last. The answer is offered, not to prove the facts alleged in it, but to explain the subject-matter of the issue, *devisavit vel non*. Besides, the dismissal of the bill did not take place upon the allegations of the answer, as suggested, but upon the trial of a material traverse. It is an adoption of the verdict by the Court. If a formal judgment of the Court of King's Bench be necessary, that has been entered up here. With respect to the objections to Bleasdale's evidence, there is no authority for saying that the testimony of a dead witness, provided it can

[*16] be given at all, is not evidence, *even as to the execution of a will, of as high a nature as that of a living one. The Statute of Frauds does not specify how the attestation, which it requires, is to be proved. The argument on this point would go the length of shewing that all the three witnesses must be called.

Cur. adv. vult.

TINDAL, Ch. J. delivered judgment in the same Term:

Upon the argument of this writ of error, the two exceptions which were taken by the defendant below to the direction of the learned Judge at the trial of the cause, and which are specially assigned as errors upon this record, have been fully discussed

(1) Reported, but not on this point, 10 Bing. 157.

before us. The first exception is taken upon the refusal by the learned Judge to admit in evidence certain letters which were offered by the defendant. These letters were proved to have been written by different persons well acquainted with the late John Marsden at different periods of his life, to have been addressed to him in his lifetime, and to have been found amongst his papers shortly after his death, the writers of such letters being dead at the time of the trial. Upon this exception there exists a difference of opinion in the Court, on the point whether such letters were admissible in evidence or not. But, as all the Judges agree that the second exception ought to be allowed, and as the consequence of such allowance is that a *renire de novo* must be awarded, it becomes unnecessary, on the present occasion, to enter into any discussion of the particular views taken by the Judges as to the first exception.

The second exception was taken to the opinion delivered by the learned Judge at the trial, as to the admissibility in evidence of the will and codicil of the *said John Marsden. It was ruled [*17] by him, that the will and codicil could not be read in evidence until the surviving attesting witness to such will and codicil, who was proved to be within the jurisdiction of the Court, was called and examined as to the execution of the will; and that the necessity of calling such surviving witness was not dispensed with by the producing and reading in evidence the examination and cross-examination of another of the attesting witnesses to the will and codicil, since deceased, taken upon a former trial at law, upon an issue between the same parties, and upon the same question now in controversy. And upon this point, we are all of opinion, that the will and codicil, after the production of the evidence above stated, were admissible, and ought to have been received in evidence without further proof; and, consequently, that the second exception must be allowed.

In order to explain the reasons upon which our opinion is formed upon this second point, it will be proper to consider, in the first place, the ground upon which we hold the examination and cross-examination of the attesting witness to the will, to be admissible in evidence after the death of such witness, for any purpose as between the parties to the present suit; and,

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secondly, the degree and character of such evidence, and the effect and weight to which it is entitled, when once admitted, with reference to the subject-matter in dispute.

In the course of the argument, indeed, on the part of the plaintiff in error, it was strongly pressed upon us, that the proceedings in the courts of equity and law, which are set forth in the bill of exceptions, formed such a *primâ facie* case in favour of the will as, if not to dispense with the necessity of [*18] giving any *further evidence whatever on the part of the defendant below, at all events to let in the reading of the will. Upon this point it will be sufficient to say, that we are all agreed that such proceedings had no such effect. For, unless they could be held to go the length of creating an estoppel against the plaintiff below, we see no ground for holding them to constitute a *primâ facie* case in his favour. And that they could not constitute an estoppel appears sufficiently clear from the nature of the proceedings themselves, as set out on the record.

As to the second ground of exception, the facts are, that Mr. Tatham, the lessor of the plaintiff in this action, filed his bill in Chancery against Mr. Wright, the defendant in the present action, and three other persons. And, upon the answers of the defendants coming in, the MASTER OF THE ROLLS directed an issue at law upon the question, whether the said John Marsden did devise his estates or not by the very identical will which is now in dispute.

It was further proved, that a trial of such issue, in which Mr. Wright and the other defendants in the Chancery suit were the plaintiffs, and Mr. Tatham was the defendant, afterwards took place; and that, on the trial of that issue, Mr. Giles Bleasdale, one of the attesting witnesses to the will, was called and examined on the part of Mr. Wright, and was cross-examined on the part of Mr. Tatham. Now, if the former trial had taken place in a suit between Mr. Wright and Mr. Tatham, and those persons alone, no doubt could have been raised that, after the death of this witness, the evidence which he gave upon the former trial would have been admissible upon the second. For, in that case, it would have been evidence given in a suit between [*19] the *very same parties, upon the same subject-matter, at a trial

on which Mr. Tatham had the right to object to the competency of the witness, to cross-examine him at the trial, and to contradict him by other testimony. Upon such a state of facts, therefore, it is unnecessary to cite cases to the point, that the evidence of this witness, given on the former occasion, would, after his death, be admissible at the second trial.

But the only distinction between the case above supposed and the present is, that Mr. Wright was not the only party, but was joined with other plaintiffs in the former action; and that Mr. Tatham, instead of being the plaintiff in the present action, is only the lessor of the plaintiff.

But we think neither of these circumstances will make any difference as to the admissibility of the evidence in question. For the result of the authorities is, that the lessor of the plaintiff is the real party in an ejectment, that the nominal plaintiff has no interest, and that, in an ejectment between Doe on the demise of J. S. against B., J. S. is bound by a verdict for the defendant. Neither can there be any real difference from the circumstance that, in the former action, the present defendant, Mr. Wright, was joined with other persons as plaintiffs; for Mr. Tatham, the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of Bleasdale, the same right of cross-examination and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had if Mr. Wright had been the sole plaintiff in that suit, or as he would have had now if Bleasdale had been alive and subpœnaed as a witness. It is manifest, therefore, that the verdict on the former *trial, and the examination of [*20] witnesses on each side, did not take place in a suit between third parties, or strangers, but virtually and substantially between the very same parties who are parties to the present suit, and upon the very same subject-matter of dispute. Nor can there, as it appears to us, be any objection to the admissibility of this evidence, on the ground of the plaintiff in equity having thought proper, since the trial, to dismiss his own bill. For, whether the bill is dismissed or not, the evidence was given in the course of the trial of an action in a court of common law under the obligation of an oath. The witnesses upon that

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trial are equally liable to the penalties of perjury if they have wilfully forsworn themselves, whether the bill in equity is dismissed or not; and the evidence given at the trial cannot be affected in its weight or character by the voluntary act of the plaintiff in equity dismissing his own bill: the effect of which, as to the consequences above adverted to, can be no other or different than if the plaintiff, in an action at law, had elected to be nonsuited rather than have a verdict against him.

But upon another, and that a perfectly distinct ground from the former, we think the examination of Bleasdale was admissible in evidence on the present trial. For a rule of Court was made by consent in the present cause, which contains an express agreement between the plaintiff and the defendant in this cause, that the short-hand writer's notes, and the Judge's notes, of the evidence on the former trial, should be read in evidence on this, as to such witnesses who should be dead or beyond sea. After this agreement between the parties, we think it was not open [*21] to the *plaintiff to dispute that the evidence given by Mr. Bleasdale on the former trial should be read in evidence on the present, his death having been first proved.

If, therefore, such evidence be, as we think it is, producible, the only question that remains is, what is the character and degree of that evidence, and for what purpose it can be produced; and it seems to us, that such evidence is direct and immediate evidence in the cause, and is producible in evidence in the cause for the same purpose and to the same extent as if the witness himself had been alive and sworn, and had given the same evidence in the witness-box in the present cause.

For unless the evidence is carried to this extent, it is impossible to define any line or limit to which it shall be held to extend.

It is objected on the part of the plaintiff below, first, that the admitting of this evidence is in contravention of the rule of law, by which the best evidence is required to be given in every case; for it is contended that the *vivâ voce* evidence of Proctor, the surviving witness, is better evidence than the examination of Bleasdale, who is dead.

But we think this argument assumes the very point in dispute. If the evidence which had been offered of the execution of the

will, had consisted simply in proving the hand-writing of Bleasdale, one of the attesting witnesses, which would have been the legitimate mode of proving the attestation by him, after his death, it might indeed have been objected with some ground of reason, that such evidence could not be the best, whilst another of the attesting witnesses was still alive, and within the jurisdiction of the Court. For, in that case, the proof of the hand-writing only would *have done no more than raise the presumption, that he witnessed all that the law requires for the due execution of a will; whereas the surviving witness would have been able to give direct proof, whether all the requisites of the statute had been observed or not. Such direct testimony, therefore, might fairly be considered as evidence of a better and higher nature than mere presumption arising from the proof of the witness's hand-writing. *Stabitur præsumptioni, donec probetur in contrarium.* The effect, however, of Bleasdale's examination is not merely to raise a presumption; it is evidence as direct to the point in issue, and as precise in its nature and quality, as that of Proctor when called in person: it is direct evidence of the complete execution of the will, by the statement upon oath of the observance of every requisite made necessary by the Statute of Frauds. If Proctor had been examined in the present action by the plaintiff below, there can be no doubt but the examination of Bleasdale on the last trial might have been put in, to contradict him. But on what principle could such contradiction have been admissible, unless the evidence obtained by means of the examination was of as high a character and degree as that of the *vivâ voce* examination of the surviving witness? If the parol examination of Proctor was the better evidence, as contended for, how could it be opposed by the inferior evidence of Bleasdale's examination?

[*22]

It was objected, secondly, that to allow this testimony, that is, to dispense with the necessity of calling the surviving attesting witness, is, in effect, to destroy the security intended to be given by the Statute of Frauds. For it is said that, as that statute requires the attestation *of three witnesses, so, to allow the will to be proved upon a trial at law without calling an attesting witness, so long as one of the three remains in life, is to give up the full benefit of having three witnesses to the will. It may be

[*23]

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observed, however, that the Statute of Frauds did not look primarily to the mode of proving the will when contested, but to the security of the testator at the time of the execution of the will; the statute intending that three witnesses should be in the nature of guards or securities, to protect him in the execution of his will against force, or fraud, or undue influence. The proof of the will by the three witnesses, supposing it should afterwards come in contest, is only an incidental and secondary benefit, derived from that mode of attestation. Indeed the principle of this objection, if carried to its full extent, would require the will to be proved in every case by the three witnesses. It is well settled, however, that, in an action at law, it is sufficient to call one only of the subscribing witnesses, if he can speak to the observance of all that is required by the statute; and the objection itself is obviously open to the same answer which has been given to the first, viz. that the evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the *vivâ voce* examination of one of the witnesses remaining alive, and actually examined in the cause.

Upon the whole, we think that, after the proof given in this case of the examination of Bleasdale and his subsequent death, the will and codicil were receivable in evidence without further proof, and consequently that a *venire de novo* must be awarded.

Venire de novo awarded.

1834. *April* 16.

[25]

MOORE AND ANOTHER *v.* TAYLOR.

(1 Adol. & Ellis, 25—30; S. C. 3 N. & M. 406; 3 L. J. (N. S.) K. B. 132.)

An insurance was made on a ship at and from St. Vincent, Barbadoes, and all or any of the West India islands, to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbadoes, and all or any of the West India colonies, until the ship should have arrived at her final port as aforesaid: Held, that the adventure terminated at the place in the West India colonies where she substantially discharged her cargo from the United Kingdom.

The ship discharged all the cargo, except some coals and bricks, at

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Barbadoes, and was proceeding elsewhere for a fresh cargo. It became a question, on the evidence, whether the coals and bricks were retained for the mere purpose of ballast. The jury having found that the cargo was substantially discharged, the Court refused to disturb the verdict.

ASSUMPSIT on a policy of insurance on the ship *Decagon*, at and from St. Vincent, Barbadoes, and all or any of the West India islands (Jamaica and St. Domingo excepted) to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbadoes and all or any of the West India colonies (Jamaica and St. Domingo excepted), until the ship should be arrived at her final port as aforesaid; with liberty for the ship, in that voyage, to proceed to, and touch and stay at any ports or places whatsoever, and to load and unload goods at all places she might call at. On the trial before Denman, Ch. J., at Guildhall, at the sittings after last Hilary Term, the only question was, whether the adventure had or had not terminated before the loss of the vessel. It appeared that the plaintiffs were owners of *the ship, residing at Barbadoes. [*26] The vessel sailed from Barbadoes on the 10th of May, 1831, and arrived at Liverpool in June, 1831. At Liverpool she took on board an assorted cargo, of which a part consisted of fifty tons of coals in bulk, and 15,000 common bricks. The coals and bricks, with other articles of the cargo, were expressly ordered by letter from the owners to their correspondent at Liverpool; and they were mentioned in the invoice and in the bill of lading as part of the cargo shipped there. The value of the bricks and coals together was between one seventeenth and one eighteenth of the value of the whole cargo: the weight of the two was about eighty tons, and the burthen of the vessel 200 tons. She sailed from Liverpool on the 1st of July, 1831, and arrived at Barbadoes on the 2nd of August, 1831. The whole cargo, with the exception of the coals and bricks, was discharged at Barbadoes; and 330 empty molasses casks were there taken on board by the same boats which took the cargo ashore. The vessel was about to sail from Barbadoes to Berbice, for the purpose of procuring a cargo, on the 11th of August, but was totally lost in a hurricane on the night of the 10th. On the 31st of July, two days before the arrival of the *Decagon* at Barbadoes, the plaintiffs sent to their

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correspondent at Berbice a letter containing the following passage: "We have determined on sending over the *Decagon* with as many rum puncheons as she can carry besides the coals and bricks that she is ballasted with; and we request that you will engage as much molasses as will load her, say 330 puncheons." It was shewn that both coals and bricks were at a higher price at Berbice than at Barbadoes. It was also shewn that some ballast was [*27] necessary for the voyage from Barbadoes *to Berbice; and one witness stated that the coals and bricks were more than was required for that purpose. The counsel for the defendant contended, that the adventure was determined at Barbadoes, the ship having discharged all but the coals and bricks, which, he suggested, were retained merely as ballast. The learned Judge directed the jury to find for the defendant, if they thought that the cargo had been substantially discharged at Barbadoes. The verdict was for the defendant.

Sir James Scarlett now moved for a new trial:

First, assuming that the cargo was discharged at Barbadoes, the jury should have been directed to consider, whether the vessel had arrived at her final resting-place from the voyage which commenced at Liverpool. The ship was covered by the policy so long as she was proceeding to any West India colony not excepted, in pursuance only of the purpose of that voyage. The owner could not decide, before her arrival at Barbadoes, at what place she should terminate the voyage, and commence a new adventure; and accordingly the words inserted in the policy are, "arrived at her final port," not "her final port of discharge." It could not be contended that, if she had sailed from Liverpool without any cargo at all, she would not have been protected by the policy to Barbadoes: it cannot, therefore, be held that the duration of the protection, in the present case, is to be measured by the time the cargo remains on board; for, as the policy is on the ship alone, its construction cannot be altered by the circumstance of her having, or not having, a cargo. In *Inglis* v. *Vaux* (1), [*28] the insurance was at and from Liverpool to Martinique, *and all or any of the Windward and Leeward Islands, with liberty to

(1) 14 R. R. 778 (3 Camp. 437).

touch at any ports or places whatsoever; and Lord ELLENBOROUGH held, that the risk of the underwriters ceased as soon as the disposal of the cargo from Liverpool had ceased to be the sole object of the ship. But, in the present case, the ship had never been employed on any purpose besides the disposal of the cargo from Liverpool; and she was therefore protected till her arrival at the port at which it was proposed that she should take in a fresh cargo. Secondly, admitting that the jury were rightly directed, their verdict is contrary to the evidence. The cargo was not finally discharged till the coals and bricks were unshipped. They were originally shipped as part of the cargo.

(PARKE, J.: They might have been retained on board for ballast merely, though a part of the cargo at first.)

They would not cease to be a part of the cargo. A vessel might contain no ballast whatever which was not of the same kind as the cargo itself. She might be laden, for instance, with pig iron exclusively; but she could not be said to be without a cargo because the pig iron served for ballast. Besides, the proportion which the weight of the coals and bricks bore to the tonnage of the vessel was beyond the ordinary rate of ballast.

LITTLEDALE, J.:

I should probably have arrived at a conclusion different from that of the jury; for the proportion of the bricks and coals to the rest of the cargo does appear to me to be very large for articles which were to serve as mere ballast, and there is no doubt of their having been originally taken out as merchandise. That, however, was entirely a question for the jury, *who were [*29] to determine what was substantially the port of discharge. I cannot say that they have determined improperly. Then the only question for us is the construction of the policy. Now the first expression used in it, relatively to the duration of the adventure, is "port or ports of discharge and loading in the United Kingdom;" the words "final port" do not occur till a later part of the instrument, and they must be interpreted by the aid of the earlier words. I am of opinion, therefore, that the risk was meant to end as soon as the substantial purpose of

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the voyage, that is, the delivery of the cargo, was completed; and I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo.

PARKE, J.:

I am entirely of the same opinion. It is contended that the adventure continued, not only till the cargo was discharged, but during all the time for which the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. "Final port" must mean the port which is final with reference to the goods to be taken on board in the United Kingdom. The case is not distinguishable from *Inglis* v. *Vaux* (1). Then as to the question of the discharge of the cargo, that was entirely for the jury. They were to decide whether that which remained on board was there as cargo or as ballast. Some ballast would be required while the ship was seeking a cargo, and the letter of the 31st of July treats the coals and bricks as ballast. I cannot, however, say that I should have decided the question
[*30] as they have done; *but they are, probably, better judges of such matters than I am.

PATTESON, J.:

I think the words, "final port as aforesaid," must be construed with reference to the voyage insured. That voyage was to the ship's port or ports of discharge and loading in the United Kingdom, and thence back to Barbadoes, and all or any of the West India colonies. The voyage must be concluded on the discharge of the cargo in Barbadoes, or any of the West India colonies. The other question was altogether for the jury. I was certainly struck with the evidence of the intention to send the coals and bricks to Berbice. On the other hand, the letter of the 31st of July directs that the puncheons sent from Barbadoes should be filled at Berbice; and speaks of the coals and bricks as ballasting the vessel. I cannot say that the jury were wrong; they are more competent judges on such a question than I am.

LORD DENMAN, Ch. J. concurred.

Rule refused.

(1) 14 R. R. 778 (3 Camp. 437).

KNIGHT *v.* GIBBS (1).

1834. *April* 18.

(1 Adol. & Ellis, 43—47; S. C. 3 N. & M. 467; 3 L. J. (N. S.) K. B. 135.)

[43]

In case for slanderous words, by reason of which the plaintiff was turned out of her lodging and employment, it appeared that the defendant complained to E., the mistress of the house, who was his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows; and he added that no moral person would like to have such people in his house. E. stated in her evidence that she dismissed the plaintiff in consequence of the words, not because she believed them, but because she was afraid it would offend her landlord if the plaintiff remained:

Held, that the action was maintainable, the special damage being the consequence of slanderous words used by the defendant.

Semble, that a communication from a landlord to a tenant may be privileged if made *bonâ fide*.

THE declaration stated that the defendant, intending to cause it to be believed that the plaintiff was an unchaste and vicious person, uttered certain words of her (which were set out) to one Hannah Enock. Special damage that, by means of the committing of the said grievances, the plaintiff, who had been and was in the service and employ of one Samuel Enock, as a finisher of straw and leghorn hats, which said Samuel Enock would, but for the premises, have continued her in such his service and employ, was obliged to quit the same. Plea, general issue. At the trial before Patteson, J. at the last Worcester Assizes, it appeared that the plaintiff and another young woman lodged in the house of Enock, whose wife was a straw-bonnet maker, and employed them in the way of her business. The defendant, who was the landlord of the house, and lived at the next door but one, came to Mrs. Enock, and spoke to her of the plaintiff and her fellow lodger as follows: "I am ashamed of their conduct; they were singing and making a noise, and tabouring the windows," (*i.e.* tapping them with their fingers); "it is no use their denying it; their conduct is shameful and disgraceful, more like a bawdy-house than anything else, and no moral person would like to have such people in his house." Mrs. Enock, after this communication, dismissed the plaintiff and her companion; and she gave the following evidence as to her motives. "I dismissed her" (the plaintiff) "because I thought it *would offend the defendant to keep her longer; it was in [*44]

(1) Cp. *Lynch* v. *Knight* (1861) 9 H. L. C. 577.

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consequence of what he had said. It was not because I believed the words, but because I was afraid that it would offend the defendant to keep her; he was my landlord, and came to complain of the conduct of my lodgers." It was contended that the plaintiff ought to be nonsuited, inasmuch as the witness acknowledged that she did not believe the defendant's words; and, therefore, the alleged special damage was not properly the result of the imputation complained of. The learned Judge refused to stop the case, but gave leave to move to enter a nonsuit. The jury found for the plaintiff.

Talfourd, Serjt. now moved to enter a nonsuit, or for a new trial:

To support such an action as this, the damage ought to flow, not merely from the words in which an imputation is conveyed, but from the slanderous imputation as such. Here it was proved that the damage did not flow from the slander, as such. The dismissal of the plaintiff resulted from an implied wish of the landlord, which would have had the same effect, although the intimation of it had not been accompanied by the accusations complained of. *Vicars* v. *Wilcocks* (1) bears some resemblance to this case; but there, it is true, in addition to the words spoken, there was an act done by a third person, from which the special damage might have resulted. It was further contended at the trial of the present cause, that the communication might be considered as a privileged one, if made *bonâ fide* by the defendant, as a landlord to his tenant; but the learned Judge was of
[*45] opinion that the words proved *were not such as could be protected by the relation of landlord.

(PATTESON, J.: I have no recollection of having left it so to the jury; and the point was not put to me as a ground of nonsuit (2).)

LORD DENMAN, Ch. J.:

As to the latter point, if there was ground for supposing this a *bonâ fide* communication from a landlord to his tenant, that was,

(1) 9 R. R. 361 (8 East, 1).

(2) It did not appear by the learned Judge's minutes, or from the notes or recollection of counsel, how this point was left to the jury in summing up, nor whether the learned Judge was requested to put it to them in any particular manner.

no doubt, a proper consideration to be submitted to the jury: but it is not shewn, in support of the present application, that the learned Judge's attention was called to this point, or that he misdirected the jury upon it. As to the other question: the witness says that she did not dismiss the plaintiff from believing the defendant's words, but because she was afraid it would offend him to keep her; he was her landlord, and came to complain of the conduct of her lodgers. I think, on consideration, that we ought not to allow this statement to defeat the action. It would be speculating too finely on motives; and such a disposition in the Court would too often put it in the power of an unwilling witness to determine a cause against the plaintiff. The proper question is, whether the injury was sustained in consequence of slanderous words having been used by the defendant. And supposing we were at liberty to speculate on the motives of parties in the manner contended for, I am still not sure that we should be right in saying, in such a case as this, that the injury sustained was not the consequence of the slander; because it may often happen that a person *may not believe what is told, and yet [*46] not have courage to keep the individual who labours under the imputation.

PARKE, J. (1):

If the learned Judge had stated to the jury that the defendant was not protected by the relation of landlord, in which he stood, I should have thought that a ground of motion for a new trial; for I am not satisfied that that relation might not have justified him, if it had appeared that such conduct was pursued on his premises as would have exposed him to danger for keeping a disorderly house. At the same time, the jury might have been induced, by the nature of the words used, to think that the communication was not made on this account, but from improper motives. It does not appear that the learned Judge's attention was called to the point, and probably it was felt that, if that question had gone to the jury, the result would have been the same as in fact it ultimately was. At all events, no misdirection appears. Then the remaining question is, whether the special

(1) Littledale, J. had left the Court.

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damage so resulted from the words used as to afford ground for this action. It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated, although no slanderous words had been used. But it is clear that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient for this action, to shew that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different words were not used, and

[*47] *she was sent away in consequence of these. In *Vicars* v. *Wilcocks* (1), supposing the point there to have been rightly decided, there were two distinct causes of the special damage; the words used, and an act done by a third person; and the damage might have resulted from either.

PATTESON, J.:

As to the first point, I have no recollection of the manner in which the case went to the jury; but, supposing it to have been put to them in the proper manner, namely, upon the question whether or not the words were used by the defendant *bonâ fide* in his character of landlord, I think the jury would have found the same verdict as they have; for the words were stronger than the defendant's character of landlord could have warranted him in using. With respect to the other point, I was unwilling to nonsuit, because the case was different from any I was acquainted with. It was not like *Vicars* v. *Wilcocks* (1), because here the whole cause of the special damage proceeds from the defendant himself; nothing is done by any other person. The effect of his words is, that the witness treats the plaintiff as a person whose character is impeached by those words, and at the same time acts upon the wish of the defendant intimated in them, by dismissing the plaintiff from her house.

Rule refused.

(1) 9 R. R. 361 (8 East, 1).

PERRY *v.* GIBSON.

1834. *April* 18.

(1 Adol. & Ellis, 48—49; S. C. 3 N. & M. 462; 3 L. J. (N. S.) K. B. 158.)

[48]

A person producing documents under a *subpœna duces tecum* need not be sworn, if the party by whom he is called does not wish to examine him.

[THE question in this case was admitted by counsel to be the same as that decided by the Court of Exchequer in *Summers* v. *Moseley* (39 R. R. 818; 2 Cr. & M. 477.)]

LORD DENMAN, Ch. J.:

It is best not to disturb a question which has been fully considered and decided.

PARKE, J.: [49]

I am of the same opinion. I always thought that a *subpœna duces tecum* had two distinct objects, and that one might be enforced without the other.

PATTESON, J. concurred.

Rule refused.

DOE D. HORNBY *v.* GLENN.

1834. *April* 19.

(1 Adol. & Ellis, 49—51; S. C. 3 N. & M. 837; 3 L. J. (N. S.) K. B. 161.)

[49]

Lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother became executor *de son tort*. B., his brother, agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration:

Held, that the agreement of B., as executor *de son tort*, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease.

EJECTMENT for a messuage, &c. At the trial before Taunton, J., at the York Lent Assizes, 1834, it appeared that the premises were demised by the defendant to Preston Hornby, his executors, administrators, &c., for fourteen years from the 6th of April, 1829. The lease contained a proviso for re-entry in case the rent should be behind and unpaid twenty-eight days after any of

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the specified times of payment; and that, in that case, the lease, and every thing therein contained, should cease, determine, and be utterly void. Preston Hornby died on the 5th of November, 1833; and on the 25th of the same month, his brother Benjamin Hornby, the lessor of the plaintiff, took out administration of his effects, on the renunciation of the widow and of other parties
[*50] entitled. The intestate died in bad *circumstances. On the 19th of November the defendant went to the house to ask for half a year's rent, which had been due more than twenty-eight days. He there found the lessor of the plaintiff, who was about to remove the effects of the deceased: and a verbal agreement was made between them, in the presence of the widow, that the defendant should abandon the rent, and should thereupon have possession of the premises, and the lease be cancelled. Upon this agreement the defendant obtained possession; but, on the 25th of November, the lessor of the plaintiff, having then taken out administration, tendered the rent, and demanded to have the premises given up to him. The lease had not been cancelled or surrendered otherwise than as above stated.

The learned Judge was of opinion, that the defendant was not entitled to possession by virtue of the clause of re-entry, inasmuch he had made no formal demand of possession: and that he could not avail himself of the specific agreement with the lessor of the plaintiff; first, because it was not a valid surrender within the Statute of Frauds, and, secondly, because, if it had been so, the lessor of the plaintiff had no right to make it before he had taken out administration. A verdict was therefore taken for the plaintiff; but leave given to move that a verdict might be entered for the defendant.

F. Pollock now moved to enter a verdict, or that a new trial might be had:

There was a valid bargain for giving up the premises, in consideration that the defendant would waive the right of re-entry which had accrued to him.

(DENMAN, Ch. J.: The lessor of the plaintiff had no power to make it.

PARKE, J.: He was *nobody at that time.)

In *Curtis* v. *Vernon* (1), Lord KENYON (citing *Vaughan* v. *Browne* (2)) fully recognizes the doctrine, that a party who has acted as executor *de son tort* may legalize his acts done in that capacity, by taking out letters of administration. So here, when the lessor of the plaintiff had administered, his bargain with the defendant became valid and binding. If his own act was then legalized, so was that of another whom he had induced to concur with him in it.

(PARKE, J.: You seek to conclude him as rightful administrator, by an act done before he had any right.)

LORD DENMAN, Ch. J.:

It would be very strong to hold that the lessor of the plaintiff was bound after he became rightful administrator, by an act of this kind done by him while he was an executor *de son tort*. There is no ground for a rule.

LITTLEDALE, J. concurred.

PARKE, J.:

The forfeiture upon the condition of re-entry did not give the defendant a right to enter without demand made: and that being so, his title solely depends on a supposed arrangement with parties who had no right to make it.

PATTESON, J. concurred.

Rule refused.

RICHARDSON AND ANOTHER *v.* GIFFORD.

1834. *April* 19.

(1 Adol. & Ellis, 52—57; S. C. 3 N. & M. 325; 3 L. J. (N. S.) K. B. 122.)

[52]

Declaration stated, that in consideration that the defendant had become tenant to the plaintiffs of premises, upon the terms that he should, during his said tenancy, keep the premises in tenantable repair, the defendant agreed to keep the same in tenantable repair during the said tenancy. It was proved that he took the premises, by written agreement, for three years and a quarter, and engaged to keep them in good repair during

(1) 1 R. R. 774 (3 T. R. 587). (2) 2 Str. 1106.

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the time they should be in his occupation; but the agreement was neither stamped as a lease, nor signed by both parties:

Held, that the defendant was bound by the agreement to repair, though the agreement was void, as to the duration of the term, by the Statute of Frauds: and that the count was applicable.

ASSUMPSIT for non-repair of premises held by the defendant as tenant to the plaintiffs. The first two counts stated an agreement by the defendant to repair, &c. in consideration of a demise. The third count alleged, "That, in consideration that the defendant, at his request, had become and was tenant to the plaintiffs, as executors as aforesaid, of certain other premises with the appurtenances, of the plaintiffs as executors as aforesaid, upon and subject to the terms that the defendant should, as such tenant, during his last-mentioned tenancy, keep the last-mentioned tenements in tenantable repair, order, and condition, the defendant then and there promised the plaintiffs, as such executors, to keep the last-mentioned tenements in tenantable repair, order, and condition, during his last-mentioned tenancy. And although such tenancy continued from thence hitherto, to wit, &c., yet the defendant did not nor would during such tenancy keep the last-mentioned tenements in tenantable repair, order, or condition," &c. Plea, the general issue. At the trial before Denman, Ch. J., at the sittings in London after last Hilary Term, the following instrument was offered in evidence. It was dated the 18th of February, 1829, was stamped as an agreement, signed by the defendant, and addressed to Mrs. *Richardson, the testator's widow, who, according to the case for the plaintiffs, acted in this behalf for the executors.

[*53]

"MADAM,—I engage to take the premises (say dwelling-house, grounds, garden, &c., together with the field), late in your possession at Layton, from the present half-quarter for the term of three years, at the rent of 140*l.* per annum, payable quarterly on the four most usual days, including in the first payment the amount due from the present time to Lady Day next. I further engage to keep the said premises in good repair during the whole of the time they shall be in my occupation, and to insure the house, &c. for the same sum of money as is expressed in the lease from Mr. Copeland," (the head landlord) "as well as to

pay all taxes, rates, &c. for which you would have been liable if still occupying the said house."

The defendant's counsel contended that this document was inadmissible as a lease, because not properly stamped; and that it could not operate as an agreement for a term of more than three years, because it was not signed by both parties, according to 29 Car. II. c. 3, ss. 1, 2. The LORD CHIEF JUSTICE received the evidence, subject to a motion to enter a nonsuit. It was proved that the defendant held the premises for something more than three years; and evidence was given as to the non-repair. The LORD CHIEF JUSTICE left it to the jury, in the first place, whether the alleged contract was made with the executors or the widow (as to which there was much dispute on the trial); secondly, whether the defendant had broken his contract, which, his Lordship was of opinion, bound the defendant to keep the premises in good and tenantable repair; and, thirdly, what *was the amount of damage. The jury found a verdict for the plaintiffs for 100*l.* [*54]

Bompas, Serjt. now moved to enter a nonsuit, according to the leave reserved:

The document put in was void both as a lease and as an agreement for a term exceeding three years, and therefore the contract declared upon cannot be supported.

(PARKE, J.: The first two counts state a demise, but the third only alleges that, in consideration of the defendant having become tenant to the plaintiffs on certain terms, he undertook to keep the premises in tenantable repair. By the agreement he became tenant from year to year, subject to such of the conditions as were applicable to that species of tenancy.)

A mere tenancy from year to year is not a consideration for undertaking such a liability: *Doe* d. *Rigge* v. *Bell* (1) does not go to this extent. The contract there was held binding as to the time of quitting, and the Court said that it was so as to the rent; but not that the tenant was bound by it to repairs,

(1) 2 R. R. 642 (5 T. R. 471).

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for which a tenure from year to year only might afford no compensation.

(LORD DENMAN, Ch. J.: The defendant here meant to bargain for a term exceeding three years; it turns out that this part of the contract is invalid, but that does not excuse him from performing his own engagements under other parts of the agreement.)

The same might be said if he had entered under such an agreement as this, with a contract to build, and yet he might have been turned out at the end of two years. But if the contract fails on one side, it should also on the other.

(PARKE, J.: Probably, if he had been let in under an agreement
[*55] of *that kind, and incurred expense in pursuance of it, a court of equity would have interfered: a contract to build a house would be inapplicable to this uncertain kind of agreement.)

So is a contract to repair: and a court of equity could not enforce an agreement, in the tenant's favour, against the Statute of Frauds.

LITTLEDALE, J.:

It was properly left to the jury, whether or not this contract was made with the widow, as agent of the executors; and they having found that it was, the only remaining question is, whether he was bound by the contract to keep the premises in tenantable repair. If this had been a valid agreement for a term of three years or more, it is clear such a term would be a sufficient consideration for the promise on his part, upon which the count in question is founded. But, it is said, he took no legal estate for that term, and could therefore be liable only to such repairs as a tenant from year to year may be charged with. It appears to me, however, that in a case of this kind (and it is not like one in which there has been a concealment practised as to the plaintiff's title), if a party chooses to rely on being merely let into possession, to waive a lease, and at the same time to engage that he will keep the premises in tenantable repair during the

whole time they shall be in his occupation, he is bound by that agreement.

PARKE, J.:

In the first two counts the case is shaped as upon a demise for a term; and I agree that those counts are not supported, there being no contract signed by both parties, and no lease duly stamped. But the third count is free from this objection, and is sustained by the evidence. It appears that the defendant *made [*56] a contract with Mrs. Richardson, by which he engaged to keep the premises in good repair during all the time they should be in his occupation: he did not, by that contract, legally agree for a term of three years; but, in point of law, he was tenant at will for the first year, subject to the terms of the agreement on his own part; and afterwards tenant from year to year, subject still to that agreement, which bound him to keep the premises in good repair so long as he should occupy. Possibly, if an attempt had been made to remove him after he had incurred expense under the agreement, he might have been entitled to call upon a court of equity; but, at all events, he had contracted by an express undertaking to keep the premises in repair, and by that he was bound. It was competent to the executors to shew, that the contract made by Mrs. Richardson was entered into for their benefit; that point was properly left to the jury, and they have found for the plaintiffs.

PATTESON, J.:

I am of opinion that the third count was supported. The defendant became tenant from year to year on condition of keeping these premises in good repair. It is said, such an engagement must be looked upon as made in consideration of the length of time the defendant was to occupy; and that, if that consideration fails, the defendant's agreement must fail also. But it is too much to say here that the consideration has failed. I do not put this on the ground that a court of equity would give a remedy in the case suggested: but that there is no proof that the defendant might not have had the term of more than three years secured to him if he had applied for it.

RICHARDSON v. GIFFORD. [57]

LORD DENMAN, Ch. J.:

As to the state of repair, I only put it to the jury, whether the premises had been kept in good and tenantable repair. I think there is no reason to disturb their verdict.

Rule refused.

1834. *April* 21.

[57]

SHORTREDE *v.* CHEEK (1).

(1 Adol. & Ellis, 57—61; S. C. 3 N. & M. 866; 3 L. J. (N. S.) K. B. 125.)

Assumpsit on the following guaranty: "You will be so good as to withdraw the promissory note; and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" A promissory note for 35*l.*, made by the defendant's son, and payable to the plaintiff, was proved at the trial; but not the memorandum. The guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45*l.* due from his son:

Held, first, that the plaintiff was not bound to produce the memorandum; secondly, that the consideration, viz. the withdrawing of the note, was sufficiently stated to satisfy the Statute of Frauds, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply.

ASSUMPSIT. The declaration stated that one Henry Cheek, before the making of the promise, &c. by the defendant, made and delivered to the plaintiff his promissory note for 35*l.* at three months, payable to the plaintiff, and the said H. C. at the time of the promise, &c. of the defendant, was indebted to the plaintiff in that amount: and that H. C. was then and there further indebted to him in the sum of 10*l.*, for which he had delivered to the plaintiff a written memorandum, dated January 28th, 1832, whereby he, H. C., acknowledged to have received of the plaintiff on that day the said sum of 10*l.*, which he promised to return that day month: and thereupon, in consideration of the premises, and that the plaintiff at the request of the defendant would withdraw the said promissory note, he the defendant undertook and promised the plaintiff to see him at Christmas then next, when the plaintiff should receive from the defendant the amount of the said note, together with the amount of the said memorandum, making in the whole the sum of 45*l.* It was then stated that

(1) On a similar point see the later cases of *Baumann* v. *James* (1868) L. R. 3 Ch. 508, 512, 18 L. T. 424; *Buxton* v. *Rust* (1872) L. R. 7 Ex. 279, 280, 41 L. J. Ex. 173, 27 L. T. 210; *Stanley* v. *Dowdeswell* (1874) L. R. 10 C. P. 102, 106.—R. C.

the plaintiff confiding, &c., withdrew the note, and forbore and gave *time to H. C., but that H. C. did not pay; and the declaration went on in the usual way to state a breach of the guarantee by the defendant. There was a second special count to the same effect, only omitting any mention of the written memorandum, and merely stating that the said H. C. was indebted to the plaintiff on a promissory note for 35*l.*, and also in the sum of 10*l.* Plea, *non assumpsit*. At the trial before Denman, Ch. J., at the sittings in Middlesex after last Hilary Term, the plaintiff gave in evidence the promissory note for 35*l.*, dated January 28th, 1832, and signed by H. C. the defendant's son, and the following letter from the defendant to the plaintiff, dated May 11th, 1832: [*58]

"SIR,—You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*

"Your very obedient servant," &c.

Another letter from the defendant to the plaintiff was also put in, dated January 10th, 1833, in which he acknowledged himself under obligation to discharge the 45*l.* due from his son, with interest, without delay. The memorandum referred to in the declaration, and in the first letter, was not produced. The jury, in answer to a question put by the LORD CHIEF JUSTICE, found that the letter of May 11th referred to the promissory note above mentioned, and they gave a verdict for the plaintiff for 47*l.* 10*s.*, subject to two objections, upon which the defendant had leave to move to enter a nonsuit.

G. T. White now moved accordingly:

First, the memorandum referred to ought to have been produced. The letter of May 11th mentioned the sum of 45*l.*, but *it did not shew the amount of the note, or the specific sum referred to by the memorandum, or the subject-matter to which it related. Even in the case of judgment by default on a promissory note, the note is always produced; the object being to see whether there is any indorsement of part having been paid: *Bevis* v. *Lindsell* (1), *Green* v. *Hearne* (2). [*59]

(1) 2 Str. 1149.

(2) 3 T. R. 301.

SHORTREDE v. CHEEK.

(PARKE, J.: That applies to bills of exchange and notes, because the practice is to indorse part payments on bills and notes; but the observation does not apply to other written agreements.)

Then, secondly, the letter of May 11th, which is relied upon as a guarantee, does not state any consideration with certainty, and is therefore not binding (1): *Wain* v. *Warlters* (2), *Saunders* v. *Wakefield* (3), *Jenkins* v. *Reynolds* (4). The consideration should be expressed with sufficient certainty to exclude the necessity of parol evidence. The defendant in this letter says, "You will be so good as to withdraw the promissory note," but he does not say what note.

(LITTLEDALE, J.: Do you say the amount of the note must be stated? If so, should the date also be specified?

PARKE, J.: It appears by the letter to be a promissory note held by the plaintiff. If that is not sufficient, how far would you carry the objection?)

It does not even appear that the note was a note given by the son.

(PARKE, J.: A guarantee is to receive its application from the state of facts, as shewn in evidence. Here there was no proof of any promissory note but one.)

There might be no doubt in point of fact; but the question is, whether enough was expressed in writing to satisfy the Statute
[*60] of *Frauds. The objection arises before the evidence in explanation can be received. On production of the document, it does not appear in writing what the consideration for the promise is.

(PARKE, J.: Suppose, instead of "the promissory note," it had been "the hogshead of tobacco in your possession," must it have been described by marks and numbers?

LORD DENMAN, Ch. J.: Or "the corn you sold my son;" must it have been shewn what corn it was?

(1) See now the Mercantile Law Amendment Act, 1856, s. 3.
(2) 7 R. R. 645 (5 East, 10).
(3) 23 R. R. 409 (4 B. & Ald. 595).
(4) 3 Brod. & B. 14; 6 Moore, 86.

PARKE, J.: Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shewn.)

LORD DENMAN, Ch. J.:

There would be no end to such a course of objection. It might be said that the plaintiff perhaps had another son, and that the letter did not shew what son was meant.

LITTLEDALE, J.:

I think there was a sufficient consideration stated, within the statute. It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to shew which was meant. So if there had been two notes in question for the same sum, but of different dates. But when upon the evidence only one note appears to be in question, no such explanation is necessary, and the statement in writing is quite sufficient.

PARKE, J.:

I am also of opinion that there is in this case a sufficient statement of the consideration. The defendant, by his letter, requests the plaintiff to withdraw *some promissory note which [*61] is in his possession, and promises, on his doing so, to pay the amount, together with that of a memorandum given by his son, at Christmas. There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration. Then, the consideration being executory, the plaintiff is to shew that he has fulfilled it, and, for that purpose, must of necessity prove by parol evidence that the note withdrawn by him was the thing meant by the agreement. If it had appeared in proof, that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony. But when the evidence given is of one note only, it becomes perfectly clear that the plaintiff has complied with his part of the agreement (1).

Rule refused.

(1) Patteson, J. was at Guildhall.

1834.
April 23.

[77]

BOTCHERBY and Another *v.* LANCASTER.

(1 Adol. & Ellis, 77—79; S. C. 3 N. & M. 383; 3 L. J. (N. S.) K. B. 157.)

Held, by Lord Denman, Ch. J., Parke, and Patteson, JJ. and *semble* per Littledale, J., that the execution of a deed by which a party conveys his whole property to the use of some of his creditors, is a sufficient act of bankruptcy to sustain a commission, though the deed was executed by the bankrupt only, and is not proved to have been acted upon, or to have passed out of the bankrupt's hands.

Trover. At the trial before Gurney, B., at the Lancaster Spring Assizes, 1833, a deed was produced by the plaintiffs, which they relied upon as an act of bankruptcy. It was made between the bankrupts of the first part, Brown, a banker, of the second part, and several creditors of the bankrupts of the third part, and purported to be an assignment by the bankrupts to Brown of all their property for the benefit of the above-mentioned creditors. The attesting witness proved that it was executed on the day on which it bore date, but he did not recollect under what circumstances, nor did he at the time know the contents of the instrument. The date was April 17th, and the commission issued on the 22nd. The deed was executed by the bankrupts, but not by any of the creditors. It appeared (by a note upon it) to have been exhibited before the commissioners, but there was no evidence of its having been otherwise acted upon. The plaintiffs had a verdict. In Easter Term, 1833, *F. Pollock* obtained a rule *nisi* for a new trial, on the ground that certain evidence had been improperly received; but on the learned Judge's report being now read, it appeared that the objectionable evidence had not gone to the jury.

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Wightman shewed cause:

As the case now stands, the only ground upon which the rule could be supported (if the defendant were at liberty to raise that point), is, that the assignment was not an act of bankruptcy. And as to that the only question is, whether the bankrupts in fact executed a deed conveying all their property; for if they did, as such a deed is clearly valid as against them, and divests them of all their property: it is an act of bankruptcy, unless collusion with the petitioning creditor be shewn, as in *Marshall* v.

Barkworth (1). Collusion, however, is not even suggested in this case, nor is there any evidence to shew that the deed was kept secret; on the contrary, in five days the commission is issued, and the deed appears to have been produced to the commissioners. There remains, therefore, no ground for the rule.

F. Pollock (with whom was *Hoggins*), *contrà*:

This was a deed produced by the assignees without evidence that it was ever in the custody of any person for the benefit of the creditors, or even out of the bankrupt's possession. It might be a mere pocket act of bankruptcy, to be brought into operation or not, according to circumstances.

(PARKE, J.: Is there any authority to shew that such a conveyance by a bankrupt must have passed into the hands of other persons to constitute an act of bankruptcy? In *Pulling* v. *Tucker* (2), the conveyance relied upon was found among the bankrupt's papers, and yet it was held a good act of bankruptcy.)

It would be a double fraud if such a conveyance as this could be executed, and then reserved, to operate *as an act of bankruptcy [*79]
or not as occasion might require.

LORD DENMAN, Ch. J.:

From the manner in which this case was first moved, I do not think it is open to the Court to go into the question now raised, but I have no doubt that the assignment was an act of bankruptcy.

LITTLEDALE, J.:

My impression also is that it was an act of bankruptcy, though it is a point capable of being argued.

PARKE, J.:

I have no doubt that the conveyance was an act of bankruptcy. The defendant's counsel appears, from the learned Judge's report, to have felt a difficulty in contesting it at the trial. I feel none upon the point.

(1) 4 B. & Ad. 508. (2) 4 B. & Ald. 382.

BOTCHERBY v. LANCASTER.

PATTESON, J.:

I have no doubt that this was an act of bankruptcy. To hold otherwise we must import into the case a great deal which was not in evidence; that the transaction was collusive, and that the deed was not to be acted upon, which we have no right to assume. *Pulling* v. *Tucker* (1) is a strong authority on the point. At the same time I doubt whether the question was open to the Court upon this motion.

Rule discharged.

1834. *April* 24.

WOOLWAY *v.* ROWE.

(1 Adol. & Ellis, 114—118; S. C. 3 N. & M. 849; 3 L. J. (N. S.) K. B. 121.)

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Declarations respecting the subject-matter of a cause, by a person who, at the time of making them, had the same interest in the matter as one of the parties now has, are admissible in evidence against that party, though the maker of them is alive, and might be called as a witness.

On the question whether certain land be part of the plaintiff's estate, or waste of the manor, a perambulation of the manor, by the lord, including the land in question, is evidence, as shewing an act of ownership by the lord, though it be not proved that any person on behalf of the plaintiff was present at the perambulation, or knew of it.

TRESPASS for breaking and entering the plaintiff's close called Scorhill and spoiling the herbage, &c. Plea, the general issue. At the trial before Bosanquet, J., at the last Spring Assizes for Devonshire, it appeared that the plaintiff claimed the close in question as part of his estate; but the defendant alleged that it was part of the waste of a manor, and that the plaintiff had no interest in it but a right of turning on cattle. In support of his case the defendant called the son of a person who had formerly been proprietor of the estate now held by the plaintiff,

[*115]

to prove that his father, while *possessed of the property, had a right of common on Scorhill down, the close in question, but never claimed any interest in it beyond that right, which was equally enjoyed by his fellow-parishioners; and that the witness had heard him say that he had no right to inclose the down. The father was alive (and in Court); and it was objected that, as he himself might have been called, evidence of his declarations

(1) 4 B. & Ald. 382.

was inadmissible. The learned Judge received the evidence. The defendant also called the lord of the manor, who stated that, about sixteen years back, shortly after he became lord, he made a perambulation of the manor and included in it the close in question. Upon this occasion he caused notice to be given, by a paper fixed on the church-door of the adjoining parish, that he intended, on a certain day, to perambulate Gidleigh parish and common, Gidleigh common being the waste of which the close in question was alleged to be part. Some neighbouring farmers and others, to the number of twenty or thirty, were present at the perambulation, and a discussion took place, in one part of it, with the parishioners of the adjoining parish; but it did not appear that the perambulation was attended by the owner of the estate now held by the plaintiff, or any person on his behalf. A similar proceeding took place about four years back. It was objected that the lord's perambulations of his own manor, under such circumstances as these, could not be received as evidence against the plaintiff. The learned Judge held the evidence admissible, though of little weight. The defendant had a verdict.

Follett, on a former day of this Term, moved for a new trial, on the ground that, in each of the above *instances, the evidence was improperly received: [*116]

As to the first; declarations of a former owner of the same property, made against his interest at the time, are admissible in evidence if he be dead; but there is no authority for their being held so while he is living. Again, declarations of a person identified in interest with a particular party are admissible as evidence against such party, though the person making them be alive, if he be still so identified in interest at the time when the evidence is offered; but not otherwise. In *Barough* v. *White* (1), which was an action by the indorsee of a promissory note against the maker, the defendant offered evidence of declarations made by the payee while he was holder, he being alive and present at the trial: but the evidence was rejected at Nisi Prius, and this Court approved of the ruling.

(1) 4 B. & C. 325.

WOOLWAY v. ROWE.

(PARKE, J.: There the interest of the plaintiff was not the same as that of the payee had been. Declarations of a person who held a negotiable security under the same circumstances with a party to the action, have been considered admissible against such party; but the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title. In the case cited, the then holder had a better title than the party whose declarations were referred to. In the present case I should have had no doubt about receiving the evidence. It does not follow that it was inadmissible because the party himself might have been called.)

The testimony of the person himself would have been the best evidence. In *Spargo* v. *Brown* (1), BAYLEY, J. says, "The general [*117] rule is, that every material fact must be proved by *testimony on oath. There is an exception to that rule, viz. that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. But, generally speaking, mere declarations not upon oath are not evidence." And LITTLEDALE, J. expresses himself in the same manner. Where the party is identified in interest at the time, the declarations are those of a person for whose benefit the action is brought or defended. The declarations of a privy in estate are only receivable when he is dead.

(PATTESON, J.: Have you looked into the cases on this subject, and found that the statement of a person identified in interest with a party to the cause has never been held admissible but where the person making such statement was dead? I have never heard the point so presented before. I always thought the party's interest at the time of the declaration was the ground on which the evidence was admitted. In one instance, I remember an attempt on the circuit to introduce the declaration of a very old person, still living, which was rejected; but that was offered as evidence of reputation.

PARKE, J.: The point taken here is quite new to me.)

(2) 9 B. & C. 938.

As to the second objection; a perambulation by the lord of what he considered to be his manor is no evidence unless some person had been present on behalf of the party whose interest was to be affected by it. This is not the perambulation of a parish but of a private estate.

(PARKE, J.: Treading down the grass under a claim of right would be an act done, of which evidence might be given.

PATTESON, J.: If he had gone upon the land and dug a hole, it would have been admissible evidence, though it would, in reality, have proved nothing.)

Here the act was not upon the land. *And, although it proved nothing, the formality with which it was done might have an undue effect upon the jury. [*118]

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The first question raised in this case was, whether the declarations of a person formerly interested in the estate now the plaintiff's, were admissible in evidence, when the party himself might have been called. We think they were receivable, on the ground of identity of interest. The fact of his being alive at the time of the trial, when perhaps his memory of facts was impaired, and when his interest was not the same, does not, in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights. The second point was, whether evidence ought to have been received of perambulations made by the lord, when no person on behalf of the plaintiff was present. We think the evidence was receivable, though of slight importance. The land now in question was included in the perambulation, and the lord thereby claimed it and dealt with it as his own. The evidence shewed an act of ownership; and though slight in its effect, it might properly go to the jury. There will therefore be no rule.

Rule refused.

1834. *April* 21.

[119]

DOE ON THE SEVERAL DEMISES OF SMITH AND PAYNE *v.* WEBBER.

(1 Adol. & Ellis, 119—121; S. C. 3 N. & M. 746; 3 L. J. (N. S.) K. B. 148.)

In ejectment on the several demises of a mortgagor and mortgagee, the defendant offered to prove that, seven or eight years back, and after the execution of the mortgage, he brought ejectment against the mortgagor (at that time in possession); that the cause was referred to arbitration; and that the award was in favour of the now defendant, who thereupon entered under a writ of possession, and had occupied the premises ever since: Held, that these proceedings were not admissible evidence for the defendant against the mortgagee, although he was present at one meeting before the arbitrator; it not appearing that he took any part in the proceedings.

The mortgage was executed in 1815. From that time, till the defendant obtained possession as above stated, the mortgagor had occupied the premises: Held, that this, though a possession of less than twenty years, entitled the mortgagee to recover against the defendant, the latter having adduced no admissible evidence in support of his own claim.

EJECTMENT. At the trial before Bosanquet, J. at the last Spring Assizes at Exeter, the lessor of the plaintiff relied on the title of Smith, as mortgagee of Payne, under a mortgage executed in 1815; some slight evidence was also given to shew a possession by Payne many years before. The defendant claimed under the will of Simon Webber, who had devised the premises to another Simon Webber for life, remainder to the defendant in fee. Simon Webber, the devisee, died in 1817. Some evidence was adduced by the defendant to shew that Simon Webber, the devisor, and also a prior devisor, under whose will the subsequent one took, had formerly had possession of the premises. The defendant then proposed to prove the following facts. In 1825 the present defendant brought ejectment (on his own demise), for the premises now in question, against Payne, who, after the mortgage in 1815, had been allowed to remain in possession. The cause was finally referred to arbitration. Smith, who was a lessor of the plaintiff in the present action, was at one of the meetings; the witnesses examined before the arbitrator were since dead. The award was in favour of the now defendant Webber, who obtained possession under a writ of *habere facias possessionem*, recovered mesne profits for six years, and had held the premises from the time *of the

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award till the commencement of the present action. The learned Judge was of opinion that, as between the now defendant and Smith, this award and the proceedings thereupon were not admissible evidence, and he refused to receive them. The plaintiff had a verdict.

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Erle in this Term (1) moved for a new trial, on the ground that the evidence ought to have been admitted:

The question in this case was between two parties, neither of whom had had possession for twenty years. As against the present defendant, there was no adverse possession till 1817. In answer to the supposed adverse possession which commenced then, the defendant shewed a possession by him for several years next preceding the commencement of the present action. The question being, which possession was rightful, the defendant, to shew that his was legitimate, offered evidence of the award and the proceedings taken by him upon it. These would have been admissible, even if Smith alone had been lessor of the plaintiff. Acts done against Payne, the mortgagor, would be acts done against Smith, the mortgagee, by whose allowance Payne was holding. And Smith, though not a party to the former action of ejectment, was present at the arbitration; he therefore had notice of the action, and of the title being then in question. The mortgagor might be considered as his agent on that occasion. The present action is in effect that of the mortgagor; and, if so, *Doe* d. *Morris* v. *Rosser* (2) shews that he cannot maintain it after submitting to a reference, in which the decision was against him and in favour of the now defendant. *Doe* d. **Harding* v. *Cooke* (3) was cited for the plaintiff at the trial, but cannot govern this case. There the plaintiff proved twenty-three years' possession, and the defendant eleven years following the twenty-three; and this was held to be no answer. But there the whole case on each side appears to have consisted in the duration of each party's possession; no other facts appeared; and the lessor of the plaintiff had held the premises more than twenty years. It was never settled, however, before that case, that even twenty years'

[*121]

(1) April 21st.
(2) 3 East, 11.
(3) 33 R. R. 503 (7 Bing. 346).

DOE d. SMITH AND PAYNE v. WEBBER.

possession, of itself, afforded a presumption against a defendant who had held for several years subsequently.

(PARKE, J.: It is *primâ facie* evidence.)

In the present case there were two possessions of less than twenty years; and the evidence in question was properly offered in support of the last, to prove that it was not that of a wrong doer, but that the defendant held it under circumstances that shewed a probability of his being entitled.

LORD DENMAN, Ch. J.:

The facts offered in proof were no evidence against Smith. At the time of the arbitration he knew that such an inquiry was going on, but he was not bound to interfere in it. It is true that on one occasion he was present at it, but not as taking a part. There is no ground for a rule.

LITTLEDALE, J. concurred.

PARKE, J.:

The arbitration was *res inter alios*. The whole may be considered as passing behind the back of Smith. It could not be evidence against a person dating his title as far back as 1815.

Rule refused.

1834. *April* 26.

[145]

REX *v.* THE CHURCHWARDENS AND OVERSEERS OF GREAT HAMBLETON (1).

(1 Adol. & Ellis, 145—152.)

An Act of Parliament enacted that the tithes of a parish should be held in fee by A., who was owner of part of the lands in the parish, and that all A.'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the Act, was to receive such annuity in lieu of all his vicarial dues: Held, that the vicar was not rateable to the poor in respect of such annuity, for that the tithes were not extinguished.

ON appeal by the Reverend Charles Collier, vicar of Hambleton, in the county of Rutland, against a rate for the relief of the

(1) Cited and followed by COTTON, L. J. in *R.* v. *Christopherson* (1885) 16 Q. B. D. 7, 16, 55 L. J. M. C. 1, 7.—R. C.

poor of the said parish of Hambleton, whereby he was assessed in the sum of 60*l.* "for a composition or money payment in lieu of tithes," the Sessions quashed the rate, subject to the opinion of this Court on the following case:

The parish of Hambleton was enclosed under an Act of Parliament passed in the 4 & 5 W. & M. (c. 31, Private Acts), entitled, "An Act for settling and confirming the Manors and Lands in Hameldon, in the County of Rutland," &c., whereby, after reciting that theretofore the late Duke of Buckingham was entitled to the inheritance of a manor, and several messuages, cottages, demesne lands, and other parcels of arable, meadow, and pasture ground in the said parish, and the Dean and Chapter of Lincoln were then also entitled to the inheritance of another manor, or reputed manor, and of the impropriate rectory, and of the advowson of the vicarage of the church of Hameldon aforesaid, and other lands in the said parish, and Sir Abel Barker, Richard Spell, and Thomas Islip, were then also entitled to other parcels of land within the said parish, and no other person was then entitled to any lands, tenements, or hereditaments within the same, except the vicar thereof for the time being, which vicarage was endowed of all small tithes arising within the parish and titheable *places of Hameldon aforesaid: [*146] And after reciting also that there was an agreement made for enclosing and setting out severally to each person concerned therein, certain allotments of ground, to be by them, their heirs and successors, for ever enjoyed in severalty respectively discharged of all right of common, in lieu of their respective lands and estates that lay before dispersed and intermixed within the precincts of Great Hameldon (1) aforesaid; by which said agreement all the lands and grounds so to be allotted and set out for and in lieu of the old estate of the said Duke in G. H. aforesaid were for ever thereafter to stand charged with the annual rent or sum of 100*l.* yearly, to be paid to the vicar of Hameldon aforesaid for the time being, in lieu and satisfaction of all demands and dues whatsoever which he was to have had and enjoyed in right of his said vicarage within the precincts of G. H. aforesaid; and by the said agreement all tithes whatsoever,

(1) See p. 273, *post*.

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arising or growing from all or any of the said lands and grounds within G. H. aforesaid, other than the tithes arising from the lands allotted to the said Dean and Chapter (which were to be discharged of all tithes) were to be held and enjoyed by those that should have the said Duke's estate there: And reciting further, that in pursuance of such agreement there were allotted and set out several distinct parcels of land to be held in severalty in lieu of the said Duke's old estate, and of the said Sir Abel Barker's, Richard Spell's, and Thomas Islip's old estates respectively, which parcels had respectively been enclosed and enjoyed by the several parties, according to the agreement, and that by [*147] the said agreement the said Dean and Chapter *were to hold and enjoy all their reputed manor, with the demesnes thereof, and the appropriate rectory or parsonage aforesaid, with the parsonage house, and all tithes arising in the other villages to the said rectory belonging, with their appurtenances (other than the tithes of Great Hameldon aforesaid, which were to be held with the said Duke's estate), and the said Dean and Chapter were also to hold and enjoy all other the particular parcels of land hereinafter mentioned; but that the inheritance of the said Dean and Chapter could not be altered, nor their estates exchanged, nor could the vicar be barred of his ancient endowment, or legally estated in the said annual payment, otherwise than by authority of Parliament, it was enacted as follows:

That all and every the lands, tenements, tithes, and hereditaments, which upon the said enclosure were set out and allotted for and in lieu of the said Duke's ancient estate in Great Hameldon aforesaid, should be held and enjoyed in severalty, together with all the messuages, and all tithes whatsoever arising from his own or any other lands whatsoever in G. H. aforesaid (except the lands allotted to the said Dean and Chapter), subject and charged nevertheless to and with the payment of the yearly sum of 100*l.* to the vicar of G. H. for the time being, to be paid by quarterly payments, with power of distress upon all or any of the said Duke's lands in case of nonpayment after twenty-one days' demand thereof. And it was further enacted that all the messuages, lands, &c., which the said late Duke held in G. H. since the enclosure, as his own proper inheritance, by virtue of

the said enclosure or otherwise, together with all tithes arising from the same, and all tithes arising from any *other lands, &c., in G. H. aforesaid, other than those that belonged to the said Dean and Chapter, should be vested, and the same were thereby vested, in the trustees of the said late Duke, and their heirs, subject to the said yearly rent of 100*l.* as aforesaid, and to the same trusts and estates as the late Duke's manor of G. H. and other the said late Duke's estate of inheritance in G. H. aforesaid were then subject or liable to; and that all the lands, &c., allotted and set out to Sir Abel Barker, Richard Spell, and Thomas Islip, as aforesaid, should be held and enjoyed by the respective persons who had any estate or interest therein, either by descent or purchase from them respectively, or their respective heirs; with the proviso that the tithes arising from all those lands were to be answered and paid to the said Duke and his heirs. [*148]

Mr. Finch was the successor, by purchase, to the late Duke of Buckingham, and was entitled to all his estates, and to the receipt of the tithes, or composition for tithes, to which the Duke was entitled in the parish of Hambleton. Mr. Finch and the smaller proprietors let their estates to tenants at rack-rent, without reference to tithes; but the tithes and all other properties are included in the said rack-rent. Mr. Finch, for the other lands in Great Hambleton not belonging to him, receives certain sums of money in lieu of tithes. The 100*l.* per annum, mentioned in the Act, is paid to the vicar of Hambleton, pursuant to the said Act. The parishes of Great Hameldon and Little Hameldon are consolidated for the maintenance of the poor, and for other parochial purposes, and are now called by the name of Hambleton.

On the part of the respondents, it was contended that the 100*l.* rent-charge was expressly given to the vicar *in lieu and satisfaction of the vicarial tithes of Great Hameldon, the proprietors of the smaller estates there contributing, as they had always done, before and since the passing of the Act, a proportionate part of the rent-charge, according to the *quantum* of their estates, to the proprietor of the Duke's estate, in the nature of a composition real; and that the tithes were in effect extinguished, and were by the Act intended to be so, and not again to be resumed. [*149]

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The appellant insisted that the tithes were still *in esse*, and that the rent-charge could not be regarded as a substitution for them, and therefore that it was exempt from assessment, upon the principle of double rating: That the 100*l.* per annum charged upon Mr. Finch's estate, and received by the vicar in lieu of the tithes, was in the nature of a perpetual fee-farm rent, Finch taking the tithes instead of the vicar; and therefore that the rate should have been laid upon Finch, or the parties compounding with him.

Sir James Scarlett and *Amos*, in support of the order of Sessions:

The tithes here are not extinguished; and therefore the vicar cannot be said to receive a composition for them, but a rent-charge payable in lieu of the tithes, which are taken by another person. The vicar here cannot even, as in the case of a temporary composition, take the tithes again in kind: he has only the perpetual rent-charge, and occupies nothing which is rateable. The Act, instead of extinguishing the tithes, has transferred them to the Duke of Buckingham, who is now represented by Mr. Finch; and Mr. Finch, in this character, takes the tithes, not only on the lands which belonged to the Duke, but on all the lands in the [*150] *parish, excepting those of the Dean and Chapter, who were rectors, and therefore were protected from the payment by the Act. Now, the party to whom tithes are demised is the occupier liable to be rated for them; *Chanter* v. *Glubb* (1); where BAYLEY, J. gives the following definition: "Where the owner of the tithe grants out and conveys any of the tithe to another, that other is the occupier. Where the right continues in himself, he is the occupier." But it cannot make any difference whether the right to the tithe be transferred by the owner of the tithe, or, as in this case, by an Act of Parliament. The annuity paid to the vicar is merely the consideration for which that transfer was made. In *Rex* v. *Boldero* (2), it was held, that where the tithes were extinguished by statute, and an annual rent, payable to the vicar, was substituted, the vicar was liable to be rated for that annual rent, inasmuch as the rent represented the tithes; and

(1) 9 B. & C. 479. (2) 28 R. R. 330 (4 B. & C. 467).

HOLROYD, J. there said, that the tenants of the land were not occupiers of the tithes, for that the tithes were expressly extinguished. There are other cases to the same effect. But here the rent cannot be said to represent the tithes, for they exist in other hands; and, instead of being expressly extinguished, they are expressly continued.

Thesiger, contrà:

If the tithes be extinguished, the vicar is rateable for this rent, according to *Rex* v. *Boldero* (1), and *Lowndes* v. *Horne* and others (2). On the other hand, it has been held, that where an Act expressly exempts from all rates, taxes, and deductions a rent to be paid the vicar in lieu of tithes which are *extinguished, [*151] the vicar is not rateable for such rent: *Chatfield* v. *Ruston* (3), *Mitchell* v. *Fordham* (4). But there is no such exemption here: and, so far as regards the lands comprehended in the Duke of Buckingham's estate, the Act annexes the tithes to them, which is a virtual extinguishment; for no one can take tithes from himself. And the payment made from these lands is, in fact, an exception from the grant to the Duke; and if the parish cannot rate that payment, this excepted part of the profits of the estate will escape the rate altogether. So far as regards the other lands, the rate certainly cannot be supported.

(PATTESON, J.: It does not follow that, because the tithes and land are in the same hands, the tithes are extinguished. The occupier takes the tithes, and is owner of them. He would take the tithes, if he were to let the lands without mention of them. The owner of a glebe, who lets it without the tithes, takes tithes from it while in the lessee's hands.)

The tithes are, at any rate, suspended during the union.

(PARKE, J.: The Act does not annex the tithes to the lands.

PATTESON, J.: According to your argument, if a parson let his tithes to an occupier of land within the parish, he will be rateable

(1) 28 R. R. 330 (4 B. & C. 467).
(2) 2 W. Bl. 1252.
(3) 3 B. & C. 863.
(4) 6 B. & C. 274.

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for the tithes of lands in the hands of the lessee, and not for those of other lands.)

LITTLEDALE, J. (1):

It is plain that these tithes are not extinguished. No distinction can be taken between the lands belonging to Mr. Finch and those in the rest of the parish. If the tithes were extinguished, [*152] and a rent were paid in lieu of them, it would be difficult to *say that the vicar was not rateable for the rent. But here there is no extinguishment.

PARKE, J. concurred.

PATTESON, J.:

There is no difficulty or doubt in the question.

Order of Sessions confirmed.

1834. *April* 26.

[162]

HAYSLEP *v.* GYMER.

(1 Adol. & Ellis, 162—166; S. C. 3 N. & M. 479; 3 L. J. (N. S.) K. B. 149.)

In an action brought to recover bank notes delivered to the defendant by the plaintiff, the plaintiff proved that the defendant, who was executor of W., having questioned the plaintiff as to her having possession of some property belonging to W., the plaintiff handed the notes over to the defendant, stating that W. had given them to her, the plaintiff, before her death. The defendant did not deny the statement, but had no means of knowing its truth or falsehood. There was contradictory evidence as to whether the defendant said that he would keep the notes, or that he would keep them to be returned to the plaintiff on request. The notes had been seen in the plaintiff's possession before W.'s death. Other evidence was given, as to the fairness of the conduct of the plaintiff respecting W.'s property in general:

Held, that the declaration made by the plaintiff might go to the jury as evidence in her favour, on the ground (though very slight) of acquiescence in its truth by the defendant, and also as being a part of the *res gestæ* on the occasion of the defendant's obtaining the notes, and as giving a character to the whole conduct of the plaintiff.

DEBT for money had and received to the use of the plaintiff. Plea, *nil debet*. At the trial before Denman, Ch. J., at the London sittings after last Hilary Term, the following facts were

(1) Lord Denman, Ch. J., had left the Court.

proved on the part of the plaintiff: The defendant was executor of a Mrs. Wilkinson, and the plaintiff lived in Mrs. Wilkinson's house till the time of her death. On the reading of *Mrs. Wilkinson's will, the defendant asked the plaintiff whether she had not possession of something given to her by Mrs. Wilkinson, and how she had obtained it. She produced a parcel, which contained Bank notes of the value of 220*l.*, and said that Mrs. Wilkinson had given them to her a fortnight before her death, telling her they would be useful to her, after her (Mrs. Wilkinson's) death; and that no one was present at the time. According to one witness, the defendant then said that he should keep the parcel till the plaintiff required it; according to another, simply that he should keep it. The plaintiff had Mrs. Wilkinson's keys during her illness, and superintended the economy of the house. Other property of Mrs. Wilkinson's to a considerable amount was shewn to have been in the power of the plaintiff, which was found by the executors undisturbed. Mrs. Wilkinson did not take to her bed more than a week before her death. During that week the plaintiff shewed the notes in her own possession to a witness. The action was brought to recover back these notes. The defendant's counsel objected that there was not evidence to go to the jury, of the property of the notes being in the plaintiff. His Lordship having left the whole evidence to the jury, they found a verdict for the plaintiff. [*163]

Sir James Scarlett, in this Term, moved for a rule to shew cause why a nonsuit should not be entered:

There was no evidence at all of property in these notes, except the plaintiff's own account of the matter. Now, although it be true, that where a party to a cause endeavours to establish his case by an admission of the adverse party, the whole of that admission, and of the circumstances *under which it is made, and of the conversation of which it forms a part, becomes evidence; yet it is not allowable for a party to use as evidence a declaration made by himself, on the ground of its accompanying some act of which the same party gives evidence as proof of his own case. Here the plaintiff, being entitled to shew the delivery of the Bank notes to the defendant, seeks to prove her title to [*164]

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them by a declaration of her own at the time of such delivery. Even on her own declaration, it may be doubted whether the alleged gift amount to more than a *donatio mortis causâ*.

(PARKE, J.: Would there be any difference, as to the present case, between a *donatio mortis causâ* and an absolute gift?)

A *donatio mortis causâ* approaches nearly to a nuncupative will; it is distinguished from it only by the circumstance of delivery. The Legislature having been very strict as to the proof required of a nuncupative will (1), the Courts will also require strict evidence of a *donatio mortis causâ*; otherwise the inmates of a deceased person's house would have great facilities for appropriating the property.

Cur. adv. vult.

On this day the judgment of the COURT was delivered:

LITTLEDALE, J.:

I think it makes no difference in this case whether the delivery of the notes to Mrs. Hayslep was a gift absolutely, or a *donatio mortis causâ*. In my opinion there was evidence to go to the jury as to the way in which she became possessed of the money: it was for them to say whether the account given by her to
[*165] the defendant was correct. There was *(independently of that account) evidence that she had possession of the notes while Mrs. Wilkinson was alive and might have asked for them, which the jury might consider as adding to the probability of the plaintiff's statement.

PARKE, J.:

I also think that there was some evidence to go to the jury, though slight. A declaration made in the presence of a party to a cause, becomes evidence, as shewing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little, where the party hearing has no means of personally knowing the truth or falsehood of the

(1) See 29 Car. II. c. 3, s. 19.

statement. But the verdict appears to me to have been consistent with the justice of the case, and I am not disposed to set it aside. If, as one witness stated, the property was delivered to the defendant to be returned on request, the defendant was undoubtedly bound to redeliver, unless he could establish a *jus tertii*. If, as another witness deposed, the defendant merely said that he would keep it, it would present a very different case. The jury have, probably, taken into consideration the facts of Mrs. Hayslep's previous possession of this property, of her having had access to other property which was found undisturbed, and of her having produced the notes, when asked for, to the defendant, and immediately told him the manner in which she became possessed of them, which statement was not denied.

PATTESON, J.:

As to the question whether the declaration was evidence, I allow that there is a difference between cases where a party to the cause, by proving an admission of the opposite party, lets in the latter to *shew the whole that took place, and cases where [*166] the party attempts to make his own declaration evidence in the first instance. But here Mrs. Hayslep was obliged to shew how the defendant had obtained possession of the money, and she might give evidence of what she herself said at the time, as a part of the transaction; and that being before the jury, it cannot be said that they were not entitled to give it consideration. The defendant, having asked her how she obtained the money, did not, in terms, deny the truth of her answer; but he retained the money, and thereby perhaps shewed that he did not acquiesce in her account. There was, however, upon the whole transaction, evidence, though of very trifling weight, to go to the jury, and there were circumstances which supported the plaintiff's statement. I think the verdict should not be disturbed.

LORD DENMAN, Ch. J.:

I think the acquiescence of the defendant amounts to very little indeed. But the question is, whether or not the evidence of what passed ought to have gone to the jury. The whole

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conduct of Mrs. Hayslep was evidence, among other facts in the case, to shew whether or not she had obtained the money fairly, and under what circumstances the defendant got possession of it. The verdict seems to me to have been quite proper.

Rule refused.

1834. *April* 29.

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SAFFERY AND OTHERS *v.* ELGOOD AND ANOTHER.

(1 Adol. & Ellis, 191—195; S. C. 3 N. & M. 346; 3 L. J. (N. S.) K. B. 151.)

A rent-charge granted for life by a tenant for years, is not void, but is good as a chattel interest.

And the goods of a stranger not shewn to hold the premises by title paramount to the rent-charge, (as by a prior demise,) may be distrained for the arrears (1).

REPLEVIN. The declaration charged the defendants with taking the goods of the plaintiffs, as assignees of Thomas Dean Alderson, in a certain warehouse, buildings, &c. The defendants made cognizance, stating that before and at the time of the demise after mentioned, Lord Rodney and Hugh Powell, Esq., were seised in fee of a certain piece of ground situate, &c., on part of which ground the places in which, &c., were built; and that being so seised, they, in 1805, demised the said ground, by indenture, to John Hunter and Joseph Bramah for sixty-six years: that Hunter and Bramah entered, and that Hunter afterwards assigned all his interest to Bramah: that Bramah, in 1809, by indenture, demised the ground, with the buildings then standing and being thereon, to George Alderson for sixty-two years, by virtue of which demise George Alderson entered,

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and was possessed: *that afterwards, by indenture made on the 6th of June in the same year, George Alderson granted, bargained, sold, and confirmed to Josiah Henry Stracey, for his life and those of John Stracey, Henry Fauntleroy, and James Wittit Lyon, and the lives of the survivors and survivor of them, an annuity or clear yearly rent-charge or annual sum of 300*l.* charged upon and payable out of the said ground and premises, by equal quarterly payments on, &c.; with power to Stracey to enter upon the premises and distrain, if the said annuity or

(1) On this point the case was cited and admitted to be conclusive in *Johnson* v. *Falkner* (1842) 2 Q. B. 928, 931.—R. C.

rent-charge should at any time be in arrear fourteen days: that J. H. Stracey, John Stracey, and Lyon were still living; and that because 75*l.* of the said annuity or rent-charge was due and in arrear fourteen days, the defendants, as bailiffs of the said J. H. Stracey, acknowledged the taking, &c. (the places in which, &c. being on the said ground), as a distress for the said arrears. General demurrer and joinder. The demurrer was now argued by

Platt, for the plaintiffs:

First, the grant of this rent-charge was void. George Alderson, who only held for a term of years, could not charge the premises with a life annuity, which is a freehold interest. Such a charge might be good by estoppel, as against the grantor or his privies; but it does not appear that the plaintiffs claim in privity with George Alderson.

(PATTESON, J.: In *Butt's* case (1), where such a grant was held to be good, it was not put upon the ground of estoppel. It is expressly said there that the grantee takes a chattel interest.)

Then, secondly, as it does not appear that Thomas Alderson claimed under George, his goods were *those of a stranger, and [*193] the goods of a stranger are not distrainable for a rent-charge: Com. Dig. Distress, B. 2. Thus, as it is there laid down, if one joint tenant grant a rent-charge, the cattle of his companion cannot be distrained: if a man lease, and afterwards grant a rent-charge out of the land, the lessee's cattle are not distrainable: nor are the cattle of copyholders, if a rent-charge be granted out of a manor.

(PATTESON, J.: Do you go so far as to say that the goods of a stranger can in no case be distrained for a rent-charge? The authorities cited in Com. Dig. do not bear out that proposition; and the contrary is laid down in *Kimp* v. *Crawes* (2), and stated to be the law in 2 Wms. Saund. 290, note 7. As to the case of a copyholder, he is in by an independent right, and therefore his cattle cannot be distrained for a rent-charge granted by the lord.

(1) 7 Co. Rep. 23 a. (2) 2 Lutw. 1573.

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Where the grantor has leased previously, the grantee of the rent-charge cannot distrain for such rent-charge at all on the demised premises, for the grantor had no right so to charge them during the term.)

It is not shewn by the cognizance that Thomas Alderson came in subsequently to the grant of this rent-charge, and we are entitled to assume the contrary.

(PATTESON, J.: There is nothing to shew that when George Alderson granted the rent-charge, any other person had a superior interest. If you had pleaded that, before the grant, G. A. had demised to you, it would have been different.

LITTLEDALE, J.: The whole history of the premises is given in the cognizance, and nothing of that kind appears.)

Joseph Addison, contrà, was stopped by the COURT.

[194] LORD DENMAN, Ch. J.:

On the first question raised by the demurrer there is no doubt, and it is unnecessary to say any thing. On the second point no authority is cited but those in Com. Dig. Distress, B. 2. Nothing can be less satisfactory than the references there given for the general proposition, that a stranger's goods cannot be distrained for a rent-charge. It would be very difficult to determine, among those authorities, how the law really stood. As to the particular instances which are given, the cattle of a joint-tenant cannot be distrained, because they are lawfully on the land by an independent right, nor those of a lessee under a demise antecedent to the grant of the rent-charge, because he has an interest paramount to the charge. A copyholder, also, from the nature of his interest, cannot be distrained upon for a rent-charge imposed by the lord. The next instance, where a rent-charge is claimed out of a manor by prescription, is given as doubtful. Then it is laid down, that "where a stranger claims under the grantor after the grant of a rent-charge, his cattle are liable to distress: as, the cattle of a lessee, where the demise was after the grant." The plaintiffs argue from this, that, where a stranger does not claim under the grantor, his cattle or goods are not liable. But it does not follow

from the proposition cited, that, if a stranger has rashly put his goods into a place where the grantee of a rent-charge is entitled to distrain, those goods are exempt from distress because the owner does not claim the place under the grantor. I am of opinion that they were liable in this case, and that the cognizance is sufficient.

LITTLEDALE, J.:

I am of the same opinion. It would require very strong authority to support the general *proposition that a stranger's [*195] goods are not distrainable for a rent-charge. The remedy given by law for the recovery of these rents (and extended by 4 Geo. II. c. 28, to rents-seck), namely, by distress, would be of little use if the power of distraining ceased as soon as the premises got into other hands than those of the grantor. A stranger, to exempt himself, ought to shew that he holds by some paramount title; but there is no reason for intending that in the present case. Some authorities referred to in Com. Dig., Distress, have been relied upon, but they cannot be said to support the proposition advanced by the plaintiffs. In Viner's Abridgment, Distress (I.) pl. 27, it is stated that the grantee of a rent-charge may distrain the cattle of a stranger that come upon the land; and the Year Book 11 Hen. VI. (1), and Bro. Abr. Distress, pl. 69 (68) are cited; but a *quære* is added. In the margin, however, it is observed that Brooke, in citing the case from the Year Book, says, "it seems they may be distrained." At all events, therefore, the opinion of Brooke is in favour of that doctrine; and *Kimp* v. *Cruwes* (2), cited in 2 Wms. Saund. 290, note 7, is to the same effect. I think the authority of that case must be considered as having settled the law upon the subject.

PATTESON, J. (3):

Butt's case (4) disposes of the first point, and the second is decided by *Kimp* v. *Cruwes* (2).

Judgment for the defendants.

(1) 23 a, 28 a, 33 a. *S. C.* (*Perot* v. *Hayward*) cited Bro. Abr. Charge, pl. 39, with "*videtur quod potest.*"

(2) 2 Lutw. 1573.

(3) Parke, J. did not sit in this Court after April 28th. Williams, J. had not taken his seat when this case was decided.

(4) 7 Co. Rep. 23 a.

1834.
May 1.

[196]

REW AND BAGGALLAY, EXECUTORS OF JAMES NEWTON *v.* PETTET, WANGER, AND FREEMAN (1).

(1 Adol. & Ellis, 196—201; S. C. nom. *Crew* v. *Petit*, 3 N. & M. 456.)

A parish vestry resolved to borrow money from H. N., who advanced it, and took promissory notes for the amount, made by P., W., and F., who were churchwardens and overseer, and who added to their signatures the titles of their respective offices. Interest was paid on the notes, from the parochial funds, and the accounts containing the item were allowed by the vestry; and W., with other parishioners, signed the allowance in one instance. P., W., and F. resided constantly in the parish. To an action brought on the notes, against P., W., and F., within six years from W.'s signature of the allowance, (but not from the making of the note,) the Statute of Limitations was pleaded; the jury having found for the plaintiff, the COURT sustained the verdict.

ASSUMPSIT on three promissory notes made by the defendants jointly, dated 4th of May, 1813, payable to Henry Newton or order, two, three, and four years, respectively, from the dates, to which Henry Newton the testator James Newton was executor. The declaration averred that the sums mentioned in the notes were advanced by Henry Newton for the use of the parish of Chingford, and that the notes were given to him by the defendants for securing the repayment thereof. Pleas, the general issue and Statute of Limitations. On the trial before Denman, Ch. J., at the London sittings after Trinity Term, 1833, it appeared that, at a vestry meeting of the parish of Chingford, in 1813, it was resolved that the churchwardens and overseers should borrow 200*l.* of Henry Newton, and should pay him legal interest thereon, and 50*l.* a year of the principal, until the whole should be paid off. Henry Newton advanced the money, and received the three promissory notes mentioned in the declaration, together with another, which had been paid before the action commenced, the four making up the 200*l.* The notes were signed by the defendants in the following form: "Joseph Pettet, George Wanger, churchwardens for the parish of Chingford; James Freeman, overseer." Several payments

[*197] of interest on them had been made within *less than six years before the commencement of the action, by order of the vestry, had been entered in the overseer's book of disbursements, and

(1) See Bills of Exchange Act, 1882, s. 26.—R. C.

had been allowed at the vestry. The account containing one of the payments of interest within the six years was in this form: "Paid James Newton, Esq., two years interest on 150*l.* up to the 25th of December, 1828. 15*l.*" To the allowance of this account, there were the signatures of one of the churchwardens, the overseer, and certain parishioners, among which last was the signature of the defendant Wanger. The defendants had constantly resided in the parish, and the account books were accessible to all the parishioners. The jury, under the LORD CHIEF JUSTICE'S direction, found a verdict for the plaintiffs, leave being reserved to move to enter a nonsuit. *D. Pollock* having obtained a rule accordingly,

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F. Pollock and *Hutchinson* now shewed cause:

The statute 9 Geo. IV. c. 14, s. 1, provides that nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: the question, therefore, of the effect of the payment of interest in the present case, with respect to the Statute of Limitations, must be considered independently of the Act of Geo. IV. Then the payment of interest by Wanger takes the case out of the Statute of Limitations, if Wanger and the other defendants be the principal contractors on these notes in their own right: *Whitcomb* v. *Whiting* (1). That they are such contractors must be assumed from the form of the *notes and [*198] signatures: the lender of the money clearly required the responsibility, not of the parish, which could not be made available, but of the individual makers. But even admitting that the defendants signed the notes only as sureties for the parish, and that the parish are the principal contractors for the debt, there has been payment of interest within the statutable time on that debt, by the parish, and that must keep the notes alive as against sureties. If a banker were to advance money to a customer, and take, as security, a note by a third person for payment of that money with interest, the payment of the interest by the banker's customer would be considered to have the same effect, against the surety, as payment by the surety

(1) 2 Doug. 652.

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himself; on the other hand, it would clearly have been an answer to any claim for interest on the note, made upon the surety. Such a case would be still further strengthened, if, as here, the surety had been present at the payment of interest by the principal contractor.

D. Pollock in support of the rule:

The notes are not given by the defendants in their individual capacity. But if they were personally responsible upon them, they are not bound by the payment made by the parish; and, if they were sureties, they were entitled to notice of non-payment, which notice has not been proved. No recognition of the payment can be inferred from Wanger having signed the allowance of the accounts; he might have supposed the interest to be due upon some other account. At any rate, it is no more than an acknowledgment of the overseer having accounted for the money received by him to the satisfaction of the vestry. With respect
[*199] to the case suggested on the other side, *of a loan by a banker, there is nothing in the situation of these parish officers to bring them within the analogy. Parochial officers have been made personally liable in cases only where the party contracting on the other side knew of no other contractor.

(PATTESON, J.: Then you treat the note as mere waste paper.)

LITTLEDALE, J.:

I think there is no ground for a nonsuit. The question was, whether this payment of interest took the case out of the Statute of Limitations. It was a question for the jury whether the defendants had adopted the payment of the interest as made on their behalf. Had the notes been signed simply with the names of the makers, without any addition, it might have been questionable whether the assent of one of the defendants to the allowance was sufficient. The jury might perhaps in that case have required evidence that Wanger had seen the accounts. But here there is no doubt. By the form of their signatures, the defendants recognize the parish as their agents; the payment of interest must, therefore, be held to be made on their

account. If the actual knowledge by the defendants of the payments came to be a material fact, I think it would be one as to which the jury could hardly have doubted; so that a nonsuit would be out of the question. *Mr. D. Pollock* urges that the defendants, as sureties, were entitled to notice: but they do not appear as sureties on the notes, and cannot expect to be treated as such after signing in the character of principals.

PATTESON, J.:

I am of the same opinion. There is enough to take the case out of the statute. However hard it may be on the defendants, we cannot say that *there is any bar to the legal right of the plaintiffs. I have no doubt whatever upon the evidence. The parish wanted to borrow money from Henry Newton: he would not trust the parish, because they could not bind themselves in that character: and accordingly he takes from the churchwardens and an overseer some promissory notes. If these notes were merely memorandums, why should they have had the stamps and other requisites of promissory notes? Now the makers of the notes could not bind themselves as parish officers; they contract, therefore, as individuals. Hence the addition of their titles to their signatures cannot destroy their individual liability. But that addition does shew that they were entering into the transaction for the parish, and that they therefore intended the parish to manage it. The interest is paid all along by the parish; the defendants are resident all along, and might have known of the payments. One of the defendants actually signs the parish accounts. Now this, though not a recognition, for all, of the joint liability, may be coupled with other facts, as an admission of the right of the parish to pay for him; and if it be a payment for him, it is a payment for all.

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WILLIAMS, J.:

It is not denied by *Mr. D. Pollock* that the payment of interest, if it be treated as a payment by one of the defendants, is enough to bar the Statute of Limitations. Then the only question is, whether there be proof that the payment has been made by the authority of any of the defendants. I think

REW v. PETTET.

there is proof enough, and that the case is taken out of the statute.

LORD DENMAN, Ch. J.:

I always thought this a very clear case. The defendants must [*201] have known that these *payments were made by the parish. It is like the case of a person who accepts a bill for the benefit of another, and employs that other to pay the interest on the bill.

Rule discharged.

1834. *April* 22.

[283]

REX *v.* THE LORD OF THE MANOR OF OUNDLE, AND HIS STEWARD.

(1 Adol. & Ellis, 283—299; S. C. 3 N. & M. 484; 3 L. J. (N. S.) K. B. 117.)

Copyholder in fee, surrenders to such uses as A. shall appoint, and in default of, and until such appointment, to the use of A. in fee. A., without having been admitted, appoints. The appointment is a good execution of the power, and entitles the appointee to be admitted as surrenderee of the copyholder, who continues tenant to the lord till some one is admitted under his surrender.

MANDAMUS. The writ, after reciting that the manor of Oundle in Northamptonshire was and from time whereof, &c., had been an ancient manor wherein copyhold estates had been conveyed by surrender, went on to state, that on, &c., Richard Ragsdell was duly admitted tenant in fee-simple to certain copyhold premises within the manor, and paid his fine and did the services, and thereupon became entitled to convey the said premises to such person or persons as should be willing to become tenants; and that, on the 21st of December, 1830, he surrendered the premises out of Court, according to the custom, "to such uses, upon such trusts, and to and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as Thomas Dawson by any deed or deeds should direct or appoint, and in default of and until such direction or appointment to the use and behoof of the said Thomas Dawson, his heirs and assigns for ever. And that afterwards, to wit, on the 22nd day of the same month, the said Thomas Dawson, in exercise and in execution of the power and authority vested in him under and

by virtue of the said last mentioned surrender, did by a certain deed of appointment duly signed, sealed, and delivered, direct and *appoint that the last mentioned copyhold hereditaments and premises, together with all and singular appurtenances whatsoever to the said premises belonging or in any wise appertaining, should thenceforth remain and be to the only proper use and behoof of one John Pruday, his heirs and assigns for ever, according to the custom of the said manor: and thereupon the said John Pruday became duly entitled to be admitted to the last mentioned copyhold hereditaments and premises as tenant thereof, and is desirous and willing to be admitted thereto as such tenant." The writ then stated that the lord and steward had been applied to to admit J. P. pursuant to such surrender and deed of appointment, but had refused, and it commanded them to admit him, pursuant to the same, on payment of the fine, &c., or to shew cause to the contrary. [*284]

The return stated, that after Ragsdell had been admitted as above, he, on the said 21st of December, 1830, surrendered the premises to the uses and in the manner set forth in an instrument of surrender, which was afterwards, to wit, on the 26th of October, 1831, presented by the homage at a general Court baron and customary Court, and was as follows. The surrender, as presented by the homage, was then set out, bearing date the 21st of December, 1830, signed by Ragsdell, and stating that in consideration of 510*l.* paid to him by Thomas Dawson, the receipt whereof he, the surrenderor, acknowledged, and that the same was in full for the absolute purchase of the copyhold premises after mentioned, he, Ragsdell, did out of Court surrender all that messuage, &c. (describing the premises), and all his estate, &c. therein, to such uses, &c. (in the words before set out in the writ) at the will of *the lord, according to the custom of the said manor. The return then, after stating that the premises mentioned in the surrender were those referred to in the writ, proceeded as follows: "And we further certify, &c., that the said Thomas Dawson in the said surrender named is still living, and hath not as yet been admitted or claimed to be admitted to the same copyhold hereditaments and premises as the tenant thereof, pursuant to the said surrender or otherwise; [*285]

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that the said surrender hath not to our knowledge or belief been in any manner vacated or become void, but that the same still remains in full force and virtue, and that no surrender by the said Richard Ragsdell, or by the said Thomas Dawson, of the said copyhold hereditaments and premises, to or for the use of the said John Pruday, hath ever been presented or made known unto the lord of the said manor or his steward, whereby or by virtue whereof the said John Pruday hath or could become entitled to be admitted to the said copyhold hereditaments and premises as tenant thereof, as in the said writ is mentioned and supposed. And for these reasons," &c. A *concilium* having been moved for, the case came on in the Crown paper in Hilary Term last, and was argued (1) by

W. Hayes, for the prosecutor:

The appointment executed by Dawson conformably to, and immediately after the surrender, gave Pruday a complete title to be admitted: it was not necessary that Dawson should have been admitted to render his appointment valid. It will be contended, [*286] on the other side, that a surrender is a *common law conveyance, and must follow the rules of the common law.

(*Sir J. Campbell, Solicitor-General*, who supported the return, said he should concede that, if Dawson had had a naked power, the prosecutor would have had a right to admittance, though Dawson had not been admitted; but he meant to contend, that inasmuch as Dawson had an estate as well as a power, his admittance was necessary.)

That makes no difference. In the case where a copyholder surrenders to the use of his will, and afterwards by his will directs that his executor shall sell, with power to his executor to appoint in favour of a purchaser, the purchaser would be entitled to admittance on the executor's appointment, though the executor himself had not been admitted. That case is like the present, where the surrender is to such uses as the surrenderee shall by deed appoint; and it makes no difference

(1) Before Lord Denman, Ch. J., Littledale, Taunton, and Patteson, JJ., January 22nd.

whether the use, in default of such appointment, be limited to the surrenderee, or whether no provision be made in case of default. The appointee of the surrenderee is entitled to be admitted, like the appointee of the executor.

(TAUNTON, J.: The executor has a mere power.)

The question which arises is the same. The copyhold, after surrender, must be in some one. The lord is not prejudiced, for the surrenderor continues tenant till some one else is admitted; and while there is a tenant the lord cannot insist on any other person being admitted. The use, also, in default of appointment would continue to the surrenderor, if no provision were made respecting it in the surrender.

(PATTESON, J.: The limitation here to Dawson is not only "in default of," but "until," appointment.)

The words have precisely the same effect. It was a surrender to the use of Dawson in fee, pending the appointment; *the surrenderor continuing tenant till another was admitted. Where there is a limitation to the use of a party, with power to him to appoint, it is immaterial whether the power stand before the limitation, as here, or after. All powers of appointment are powers of revocation; the appointment must defeat some estate; the estate cannot have been in abeyance. In *Boddington* v. *Abernethy* (1), freehold estates were settled to the use of W. R. and to other uses, and copyhold estates were surrendered to the uses of the same settlement. The deed of settlement contained a power to revoke, determine, and make void the uses, estates, trusts, powers, and limitations therein contained, and that power was acted upon by a subsequent deed, revoking the uses to which the copyholds had been surrendered, and limiting and appointing the same to other uses; and these latter uses were held good, although they defeated the prior vested estates. That case goes the whole length of the argument for the present prosecutor, and even farther; at least it shews, that if the appointment in a case like this be well made, the limitation

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(1) 29 R. R. 393 (5 B. & C. 776).

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in default cannot give any right to be admitted. A power is in the nature of an executory limitation: if, therefore, the return in this case be maintainable, it may be contended, that on a limitation of copyhold to A. in fee, and if B. return from Rome, to B. in fee, yet, if B. returned from Rome, A. would be the person to be admitted on B.'s return, if he had not already been so. It makes no difference that the contingency, as in the present case, is something to be done by A. The argument on the other side would be, that wherever there is *a limitation in fee, with a shifting limitation engrafted on it, the person to whom the first limitation is made, must, in the first instance, be admitted.

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(LITTLEDALE, J.: Suppose Dawson had made no appointment, but had come in and been admitted, and had held for several years as tenant. If he had afterwards wished to sell, could he at once have executed the power, or must he have surrendered?)

When he executed the power, the effect of his previous admittance would have been defeated, and the appointee would have had an immediate right to be admitted. *Boddington* v. *Abernethy* (1) decides that.

(TAUNTON, J.: If Dawson had been admitted and not made any appointment, had not he such an interest as would have descended to his heirs, and given them a right to admission? Then he had an interest as well as a power, after the surrender by Ragsdell.)

Whatever might have been the case in the event supposed, the appointment here was made, and gave the use a different direction; the question, therefore, does not arise. Here are a valid power and a valid execution: as soon as the appointment was made, the original surrender became a surrender to the use of the appointee in fee; as in the case of a freehold estate, where the fee is conveyed by deed subject to a power of appointment, on the execution of such power the freehold vests by relation back to the deed. Here, upon the appointment made

(1) 29 R. R. 393 (5 B. & C. 776).

to Pruday in conformity to Ragsdell's surrender, the intermediate interest of Dawson was struck out, and the whole right vested in the appointee. Either the appointment is not good at all, or it is good for this purpose. The use, to which a *copyhold is surrendered, is rather an equitable than a legal interest; the lord is, indeed, compellable to admit, but the person to whose use the surrender is has no legal estate, though he has a legal remedy; and the function performed by the lord in admitting, is directed by the will of the surrenderor. "The lord is only as an instrument to convey the estate, and as it were put in trust to make such an admittance as he who surrenders would have him to make": *Brook's* case (1).

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Sir J. Campbell, Solicitor-General, contrà:

The claim now insisted upon would, if it prevailed, make an entire change in the law as to admittances, for by surrendering to such uses as purchasers might appoint, a copyhold might be transmitted from one to another indefinitely, without any of the parties being admitted.

(PATTESON, J.: It has been held that where a copyholder sells to A., and A., before any surrender, conveys his interest to B., the original vendor may at once surrender to B., and he may claim admittance, though A., the intermediate party, was not admitted: *Rex* v. *The Lord of the Manor of Hendon* (2).)

A., there, never had a right to be admitted. The question here is, whether Dawson had a mere power, or an interest also. In the former case it may be conceded, for argument's sake, that he might appoint without being admitted, though *Lord Kensington* v. *Mansell* (3), which may be cited as to this point, is perhaps no authority in a case where the power is to be executed not by the surrenderor himself, but by a stranger. But the principle here relied upon on behalf of the lord is, that *there can be no alienation, or substitution of the tenancy, of copyhold, but by surrender: and a surrenderee cannot surrender again till he has been admitted. Dawson in this case purchased, and Ragsdell

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(1) Poph. 125.
(2) 1 R. R. 527 (2 T. R. 484).
(3) 13 Ves. 240.

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surrendered to him, for a valuable consideration, to such uses and upon such trusts as he should appoint; and, in default of appointment, to his own use in fee. It is the same as if the surrender had been to him in fee, with power to appoint uses and trusts. But the surrender to him in fee of itself implied such a power; he became by that the absolute owner; he might have brought ejectment without being admitted till the trial: *Holdfast* d. *Woollams* v. *Clapham* (1), *Doe*, lessee of Bennington, v. *Hall* (2). If the surrender had been made without any express power, he would not have taken any greater interest. It is not controlled or limited by the additional mention of the power.

(TAUNTON, J.: You mean by interest, not a vested interest *in præsenti*, but that which results from the right to be admitted at any time.)

It is a peculiar interest, but it is recognised as one by law, and sufficiently distinguishes the person to whose use a surrender is made, as in this case, from the mere donee of a power. A devise to executors to sell, carries an interest, and they must be admitted; not so if they have merely a power to appoint. In *Beal* v. *Shepherd* (3), where the question was, whether the party having, by devise, a power to sell, must previously be admitted and surrender, it was held that she need not, because she had an authority only, and not an interest; and *Holder* d. *Sulyard* v. *Preston* (4) was decided on *the same ground. *Doe* d. *Woodcock* v. *Barthrop* (5) is no authority for the prosecutor. There, copyhold was devised to A. and B. and their heirs, in trust to permit M. to enjoy the same during her life; and subject to such estate, the premises were devised to such persons as M. should by will appoint, and in default of appointment, to M.'s right heirs. The trustees were admitted, but M. was not; and it was held that the appointee under M.'s will took a legal estate, though the trustees had never surrendered to the use of the will. But there the Court considered that the trustees were

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(1) 1 R. R. 309 (1 T. R. 600).
(2) 16 East, 208.
(3) Cro. Jac. 199.
(4) 2 Wils. 400.
(5) 15 R. R. 530 (5 Taunt. 382).

tenants for the life of M.; that her appointee was entitled in remainder, and that he, as remainder-man, was already admitted by the admission of the tenants for life.

(LITTLEDALE, J.: In the present case, Dawson, if once admitted, could only be got out again by surrendering; you say that he must do that as well as appoint.)

When once in, he would be tenant in fee; the mere appointment would be nugatory.

(TAUNTON, J.: You say that he has no more control with the power of appointment than without it.

LITTLEDALE, J.: If so, there could be no good power of appointment under circumstances like these.

TAUNTON, J.: In the case of freehold, it was made a question some years ago, whether the person who was owner of the fee could at the same time have a power of appointment over the whole estate, and it was held that he might: *Maundrell* v. *Maundrell* (1).

PATTESON, J.: The same doctrine was acted upon in *Roach* v. *Wadham* (2), *where an estate was conveyed to a trustee in fee to the use of such person and for such estate as W. should appoint, and, in default of such appointment, to W. in fee, and it was held that an appointment made by W. was an execution of the power, and that the appointee came in paramount to, and not under, W. That is the point made here by the prosecutor.) [*292]

Such a mode of passing copyhold would be new, and destructive to the rights of the lord; for, as was said in *Rex* v. *The Lord of the Manor of Hendon* (3), a private agreement between parties, not followed up by a surrender, could not give the lord any right to a fine. Every purchaser, by means of such an instrument as this, might obtain the dominion of the copyhold. In *Boddington*

(1) 7 R. R. 393 (7 Ves. 567; 10 Ves. 246).

(2) 6 East, 289.

(3) 1 R. R. 527 (2 T. R. 484).

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v. *Abernethy* (1), the question discussed was, whether springing uses, to defeat vested estates, could be limited in a surrender of copyhold. The rights of the lord were not in discussion there, for in that case the first party who took the copyhold in pursuance of the deed of settlement was admitted, and upon every subsequent transfer there was a surrender and admittance.

W. Hayes, in reply:

As to the supposed novelty of the conveyance of copyhold by surrender to such uses as shall afterwards be appointed, the contrary is shewn in Sanders's Treatise on Surrenders of Copyhold Property, p. 35, where it is said, "In fact, on every surrender to such uses, as the surrenderor shall appoint, either by deed or will, and which in practice is of frequent occurrence, the use to arise under the surrender is an use commencing *in futuro*." And it is not there considered *material whether the use in the meantime be in the surrenderor, or in a donee of the power, or in a stranger. The party to whom the use is limited in default of (or in default of and until) appointment, is entitled to admittance, but if admitted he is in subject to the power. *Maundrell* v. *Maundrell* (2) shews that the power is not merged in the fee, where they unite in the same person. And the execution of the power so entirely overreaches the intermediate use, that where an estate was conveyed to such uses as A. should appoint, and in the meantime to A. for life, after which a judgment was recovered against A., who subsequently appointed, it was held that the creditor could not take the lands under an *elegit*, his lien being defeated by the execution of the power: *Doe* d. *Wigan* v. *Jones* (3).

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(PATTESON, J.: The judgment was not the act of the appointor, but a proceeding *in invitum*.)

And, therefore, it was held to fall within the rule, that when a power is executed, the person taking under it takes under him who created the power, not under him who executes it: the only

(1) 29 R. R. 393 (5 B. & C. 776).
(2) 7 R. R. 393 (7 Ves. 567; 10 Ves. 246).
(3) 34 R. R. 485 (10 B. & C. 459).

exceptions being, where the person executing the power has granted a lease or other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. And that would have been so here, if Dawson had been admitted and had surrendered to a purchaser.

(LITTLEDALE, J.: If Dawson had been admitted, and had not previously appointed, do you say that he could have executed the power?)

He could; the use would continue directory to the lord till the execution of an appointment; it receives no application till then.

(PATTESON, J.: If Dawson were now to be admitted, he must be admitted to some estate: *then what would there be to prevent his surrendering to some other person than the prosecutor?)

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If he were now to be admitted, and not the prosecutor, it would be difficult to say how the legal estate could be got from him, and to the prosecutor, so that there should be an execution of the power. As to the objection that Dawson, according to the present argument, would have had the entire dominion of the copyhold without being admitted, he could have no legal dominion till admittance; he would only have the use as limited for the purpose pointed out in the surrender to him, and the right of compelling the lord to admit. *Beal* v. *Shepherd* (1) is in favour of the prosecutor, for it was held there that, on the execution of the authority by the wife's attornies, the vendee was in by the will, to the uses of which the husband had surrendered, and that no further surrender was necessary, notwithstanding the intermediate life estate which had vested in the wife.

(The *Solicitor-General:* Suppose Dawson had been admitted in fee before appointment, and he had then executed the power in favour of the prosecutor: it must be contended that in that case the prosecutor would have been in under the original surrender. Then all that had been done in the meantime is to be considered as avoided; which appears an absurdity.)

(1) Cro. Jac. 199.

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The same difficulty might be put in cases of freehold limitations. But when it is said that the execution of the power relates back to its creation, it is not meant that the party who comes in under it is in, in point of time, from that period, but that he is so in point of legal effect: there is a change of title as from that time.

Cur. adv. vult.

[295] LORD DENMAN, Ch. J., in this Term (April 22nd) delivered the judgment of the COURT:

The case of *Rex* v. *The Lord of the Manor of Oundle* arose on the return to a writ of *mandamus* issued at the instance of John Pruday, to compel his admission to certain copyhold hereditaments. The writ set forth that one Ragsdell, being seised of them in fee, surrendered them to such uses as one Dawson should by deed direct and appoint; and in default of and until such direction and appointment, to the use of Dawson in fee; and that Dawson did afterwards, by deed, direct and appoint that the said premises should remain to the use of Pruday, who thereupon became entitled to be admitted. The return introduced no additional fact, but stated, by way of observation, that Dawson had never been admitted, nor had he or Ragsdell ever surrendered the premises to the use of Pruday.

And whether such admittance and surrender was necessary, was the question argued before us; Pruday claiming to be admitted as the person to whose use the surrender by Ragsdell enured by virtue of the deed of appointment executed by Dawson, while the lord contended that, as Dawson took not only a power of appointment, but also an interest in the mean time under the surrender by Ragsdell, he ought to have been admitted and paid his fine, before he could by deed appoint to Pruday.

The application to copyhold property of the general doctrine, that an appointee under a power takes by the instrument creating the power, and not under that by which the power is executed, was not disputed; nor was it denied that trustees with a mere power to sell were not compellable to come in as tenants, in conformity

[*296] *with *Beal* v. *Shepherd* (1), *Holder* d. *Sulyard* v. *Preston* (2).

(1) Cro. Jac. 199. (2) 2 Wils. 400.

But a distinction between those cases and the present was strongly insisted upon; for, here, Dawson was not a mere trustee to sell, but was surrenderee in fee for his own benefit, until and unless he should make an appointment: that event might never have happened, and, at any rate, without his being admitted, his interest could not be transferred to Pruday.

But it appears to us that these premises may be correct, without leading to the conclusion. The lord never is nor can be for one moment deprived of a tenant, for the estate must always be in some person.

In the two cases above cited of trustees to sell, without an interest, the estate was not in abeyance till sale, but remained in the heir of the devisor, which heir the lord might have compelled to be admitted, if the sale was not made in reasonable time: but when such sale was made, the purchaser was entitled to be admitted under the surrender to the uses of the will, just as if he had been a devisee named in it.

So, here, Ragsdell remains tenant to the lord until some person is admitted under his surrender. No doubt Dawson might have declined to execute any deed of appointment; and if he had declined, he could not, without admittance and surrender, have passed his interest to another; but as he has chosen to execute a deed of appointment under the power, his appointee, the present applicant, takes nothing from him, but becomes the surrenderee of Ragsdell, just as if he had been named in the surrender.

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It follows that he is entitled to be admitted without Dawson's having been admitted, and that a peremptory *mandamus* must issue.

What the effect of Dawson's being admitted might have been, is a question which we are not required to determine.

Peremptory mandamus awarded.

* * * * *

1834.
May 6.

REEVE *v.* DAVIS AND OTHERS.

(1 Adol. & Ellis, 312—317; S. C. 3 N. & M. 873.)

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A steam-vessel was let by charter-party for twelve months, the registered owners engaging to keep the engine in repair, but the charterer binding himself to do all other repairs, to pay all wages, and charges of navigating, &c. and to indemnify the owners against all debts, costs, damages, expenses, &c. incurred in respect of the charter-party and employment of the vessel. The owners were to appoint the engineers. The charterer, who acted as captain, had repairs done to the vessel by persons unacquainted with the above contract:

Held, that no action lay, in respect of those repairs, against the registered owners.

ASSUMPSIT for goods sold, work, &c. Plea, the general issue. At the trial before Denman, Ch. J. at the London sittings after last Trinity Term, it appeared that the action was for stores furnished, and repairs done, to a steam-vessel. The defendants were the registered owners of the vessel, but the goods were supplied and the work done chiefly upon orders given by one Thompson, who was the captain: some were also given by the ship's husband and the engineers. The vessel was let to Thompson by a charter-party under seal, executed by himself and Annabella Davis, acting for herself and the other owners. By this charter-party A. Davis hired and let to freight, and Thompson engaged and took to freight the said vessel for twelve months, to be employed in carrying passengers and goods between London and Topsham in Devonshire. The owners contracted to deliver the vessel within three days into the hands, possession, or power of Thompson, with perfect engines, machinery, and engineers, and to keep the engine in repair during the twelve months; and Thompson agreed to pay the wages of all persons employed on board during the term, all the expenses of coals, oil, tallow, and incidental charges attending upon the working and sailing of the vessel, and pilotage and port charges; to indemnify the owners against all debts, costs, damages, charges, and expenses occasioned, contracted, or incurred by the vessel or any person employed on board,

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or by him the said Thompson, for or in respect of the *said charter-party and employment of the vessel; to pay the hire of the vessel monthly; to insure in the names of the owners; to keep all the vessel in repair, except the engine; and to

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deliver her up in good repair at the end of the term. The owners were to appoint the engineers, though they were to be paid by Thompson. The defendants paid 16*l.* into Court on account of work done to the engines, but contended that the contract by which they had let the vessel to Thompson exempted them from further liability. The plaintiff's case was, that he had given credit to the owners, and not to Thompson, knowing nothing of the charter-party; he therefore contended that his claim was not affected by it. The LORD CHIEF JUSTICE was of this opinion; and the jury, under his direction, found a verdict for the plaintiff. In Michaelmas Term, 1833, a rule *nisi* was obtained for a new trial, on the ground of misdirection.

Follett and *Busby* now shewed cause:

The owners are *primâ facie* liable; it is for them to shew that the charter-party exempts them from responsibility. The mere letting to hire is not sufficient for that purpose; and there are other parts of the contract in this case, the clauses, namely, as to the engines and engineers, and the engagement by the charterer to indemnify the owners against debts, costs, and charges, which prove that the owners were not wholly divested of liability in respect of the vessel during the year of letting. *Christie* v. *Lewis* (1) shews that words of letting do not of themselves indicate a parting with the possession and disposition of the ship by the owners, where there are *circumstances to raise [314] a different presumption. In *Frazer* v. *Marsh* (2), indeed, the charterer of a ship was considered liable for the stores, and the owners exempted; but in that case there appears to have been a general demise of the whole vessel, and there was nothing to shew that the owners retained any control over her. Another point for the plaintiffs is, that no sufficient proof was given of any authority in Mrs. Davis to execute a charter-party for the other owners.

Kelly, contrà:

The mere fact of ownership is not conclusive of liability for the captain's contracts: *Briggs* v. *Wilkinson* (3). As soon as it

(1) 23 R. R. 483 (2 Brod. & B. 410).
(2) 12 R. R. 336 (13 East, 238).
(3) 7 B. & C. 30.

REEVE v. DAVIS.

appears that he had no express authority from the person charged as owner, and that an implied authority is not borne out by the facts, the question comes to be, to whom the credit was actually given? In this case the goods were not ordered by the owners, or by any person having their authority, but by Thompson; and the question is, for whom he acted in giving the orders. By reference to the charter-party, it appears that Thompson had become the charterer; the owners had given up their legal interest for the time; they retained no control over the vessel, and had not even a right to go on board; and Thompson was bound to do the repairs, with an exception which is not material. The orders, therefore, for repairs and stores were given by Thompson for his own benefit, and that leaves no doubt as to his liability. In *Young* v. *Brander* and another (1), the [*315] defendants were the legal owners of the ship; but it *was shewn, by evidence, that the party who ordered the repairs was not their agent, but a stranger; and they were held not liable. The situation of Thompson, with respect to the present defendants, is the same as that of a stranger. The observations of Lord ELLENBOROUGH in *Frazer* v. *Marsh* (2) are all applicable to this case. Thompson had the control and possession and the use and benefit of the vessel; and there is no pretence for saying that he was the servant or agent of the defendants. They themselves have done no act which can subject them to liability for these expenses. And as to the other point made, it is not supported in fact; and if it were so, does not affect the case in point of law.

LORD DENMAN, Ch. J.:

I am of opinion that this verdict cannot be supported. The question is, who were the contracting parties? The mere circumstance of ownership may be sufficient to create a liability where the vessel has been left under the control of a party who has given orders, if no intervening ownership has been created. But if a ship is let out to hire, I do not see how the owners are liable for work done upon it by order of the party hiring, more than the landlord who lets a house.

(1) 8 East, 10. (2) 12 R. R. 336 (13 East, 238).

LITTLEDALE, J.:

The rule is, that upon a general order for repairs given by the captain, the party executing them has the security of the ship, of the captain, and of the owners; but in an action against parties as owners, the question is, who are so for this purpose? The persons registered are not necessarily so; the *Register Acts were not passed for this purpose; and the question of ownership, as it regards the liability for repairs, must be considered as it would have been before those Acts passed. Nor is there, on this view of the subject, any hardship thrown upon the tradesman; he has always the means of knowing who are substantially the owners, by asking the captain to shew the charter-party: if this is refused, he may decline dealing. In this case the benefit of what was done enured to Thompson. The party for whose profit the ship is in reality employed at the time has the benefit of the work done on board, and is liable to the tradesman who does it. Here, if the charterer had been a different person from the captain, the charterer would have been liable.

[*316]

PATTESON, J.:

Briggs v. *Wilkinson* (1) shews that the question of liability in this case is not affected by the Register Acts; the point to be looked to is, who were the real contracting parties? Here the captain was the charterer, and had undertaken that he would do all the repairs, except to the engine: he was not, therefore, the agent of the owners in fact. Then was he so in law? *Young* v. *Brander* (2) shews that, if he entered into the contract for his own benefit, it makes no difference that other persons were the legal owners. *Frazer* v. *Marsh* (3) is on all fours with this case, except that the vessel there was let for several voyages. As to the supposed want of authority in Mrs. Davis, it is clear from *Young* v. *Brander* (2), that the party ordering the repairs need not have a complete title to the ship; it is *sufficient to shew that he did not order them as agent to the registered owners. The rule must be made absolute.

[*317]

WILLIAMS, J. concurred.

Rule absolute.

(1) 7 B. & C. 30.
(2) 8 East, 10.
(3) 13 East, 238 (12 R. R. 336, and see cases mentioned in note there).

1834.
May 6.

[327]

REX *v.* BIERS AND ANOTHER (1).

(1 Adol. & Ellis, 327—331; S. C. 3 N. & M. 475; 3 L. J. (N. S.) M. C. 110.)

A statute passed in a session of Parliament begun in the second, and continued in the third year of a king's reign, must not be pleaded as passed in the second and third years of the reign: although such Act be recited in a later statute as "passed in the second and third years," &c.

On indictment for conspiracy, laying in the inducement that the defendants knew the party conspired against to bear a certain character, and to be liable in that character to the operation of an Act passed in the second and third years, &c. adding the title of the Act correctly, the judgment was arrested for such misrecital.

And this, although there was a general count (to which the objection did not apply,) stating merely that the defendants conspired "by false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish" the prosecutors.

THE defendants were convicted on an indictment, removed into this Court by *certiorari*, which stated: That the defendants, on, &c. in the third year of the reign of our Lord the now King, well knowing that E. W. and T. W. were the proprietors of a certain licensed stage-carriage drawn by two horses, numbered, &c., "and that they, as such proprietors, were liable to the payment of certain penalties in which the driver, whose name was unknown, of the said licensed stage-carriage should be convicted before any one of his Majesty's justices of the peace for the county of Middlesex, of any offence committed by the said driver against a certain Act of Parliament made and passed in the second and third years of the reign of his present Majesty, intituled," &c. (setting out the title), unlawfully did conspire, &c. falsely, wrongfully, and without probable cause, to exhibit a certain information against the said E. W. and
[*328] T. W. as such *proprietors, &c. before one of his Majesty's justices of the peace in and for the said county, therein charging that the said E. W. and T. W., on the 12th day of April in the third year aforesaid, at, &c., were the proprietors of a certain licensed stage-carriage, &c., and that the name of the driver

(1) The Interpretation Act, 1889, s. 35, points out a safe way of citing a statute, by reference to the short title. See also the Short Titles Act, 1896. This case is not unimportant as pointing out the correct mode of citation apart from statutory permission.—R. C.

was unknown; and that, when he drove the same, the said driver did unlawfully carry and convey at one time more than one person on the box of the said carriage besides the said driver, to wit, &c., contrary to the form of the statute in such case made and provided, whereby the said driver had forfeited, &c., to be applied as the law directs. The indictment then stated, that the defendant J. B., in pursuance of the said conspiracy, on, &c. in the third year aforesaid, appeared before a justice in and for the said county, and wrongfully, &c. exhibited to and before him a certain information, in substance, &c. following: County of Middlesex, to wit. Be it remembered, that on, &c. in the year of our Lord 1833, &c. The information was then set out, stating the alleged offence, and charging it to have been committed on, &c. in the year of our Lord aforesaid, and contrary to the form of the statute in such case made and provided. The indictment then stated, that E. W. and T. W. were summoned to answer the information, on, &c., in the year aforesaid; that, on that day, the present defendants, in pursuance of the conspiracy, appeared in support of the information, and deposed on oath to certain matters, which the indictment negatived. There were other counts not differing from the above in any respect which it is material to state; and there was a count not referring to any statute, but only charging the now defendants with conspiring, "by divers false, artful, and subtle stratagems and contrivances, *as much as in them lay to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies."

[*329]

Adolphus, in this Term, moved in arrest of judgment (1):

The indictment is bad, inasmuch as it alleges that the defendants, well knowing that the prosecutors were liable to such penalties as should be incurred by the driver of their carriage, under an Act passed "in the second and third years of the reign of his present Majesty," conspired, &c. A misrecital of the day of passing an Act of Parliament is fatal: Bac. Abr. Statute,

(1) Before Lord Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

REX r. BIERS.

L. 5 (1), citing *Partridge* v. *Strange* (2); and a statute cannot be passed in two years: Bac. Abr. (3) same title, L. 5, citing *Langley* v. *Haynes* (4). So in *Nutt* v. *Stedman* (5), it was held that a statute could not be pleaded as made in the 8th and 9th years of the reign of William the Third; "for in law an Act cannot be made in two years, and though so mentioned in the statute book, it cannot be good." In *Rumsey* v. *Tuffnell* (6), judgment was arrested because the declaration recited a statute as passed at a session begun in the 29th of Elizabeth, whereas the session began in the 28th. Before the statute 33 Geo. III. c. 13, an Act of Parliament (in the absence of any special direction on the subject) was considered as having passed on the first day of the session; since that period the commencement of the Act (except where another commencement is therein provided) dates from the day of its receiving the royal
[*330] assent: *in no case can it be supposed to have passed in two different years. The form of conviction given in the Act now in question, (printed as 2 & 3 Will. IV. c. 120) schedule, No. 8, speaks of it as an Act passed in the third year, &c. The objection applies to all the counts but the last, and that is in too general a form to be supported. A man could not be called upon to answer an indictment consisting merely of such a count.

Sir James Scarlett, contrà:

Supposing the objection as to the date of this Act to be well founded, still the title is correctly set out, and that is sufficient. The year in which the session was holden is surplusage, and there is no reason that it should not be altogether rejected. Besides, the statute 3 & 4 Will. IV. c. 48, for amending the Act in question, speaks of it (in the preamble), as an Act "passed in the second and third years of the reign of his present Majesty," and that is sufficient warrant for the mode of description used in the indictment.

(LITTLEDALE, J.: It is very commonly used now in statutes.

(1) P. 470, ed. 1832.
(2) Plowd. 77, 84; *S. C.* Dyer, 74 b (19).
(3) P. 471.
(4) Moore, 302; Hawk. P. C. b. 2, c. 25, s. 104.
(5) Fortesc. Rep. 372.
(6) 2 Bing. 255; 9 Moore, 425.

PATTESON, J.: A correct mode of statement is followed in the Act for the further amendment of the law, 3 & 4 Will. IV. c. 42, s. 16, which refers to "the statute passed in the session of Parliament held in the eighth and ninth years of the reign of King William the Third, intituled," &c.

LITTLEDALE, J.: There are several authorities in Vin. Abr. Statutes, E. 3 and E. 5 as to the effect of misreciting Acts of Parliament, in respect of the date. *Bryant* v. *Withers* (1) is another.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

We are of opinion, that the objection taken *to the indictment [*331] in this case is good, on the authority of *Langley* v. *Haynes* (2), followed up by the decision in *Nutt* v. *Stedman* (3). The judgment will therefore be arrested.

Judgment arrested (4).

GOODWIN *v.* LORDON (5).

1834. *May* 8.

(1 Adol. & Ellis, 378—380; S. C. 3 N. & M. 879; 2 Dowl. P. C. 504.)

[378]

A defendant who has been in custody on a charge of felony, and is acquitted and discharged, is not privileged from arrest on his return home; and the Court will not relieve him from such arrest, if it does not appear that his apprehension on the criminal charge was a contrivance to get him into custody on the civil suit.

DUNBAR moved (May 7th) (6), that the defendant might be discharged out of the custody of the sheriff of Surrey, under the following circumstances. The defendant was tried at the Surrey

(1) 14 R. R. 609 (2 M. & S. 123).

(2) Moore, 302; Hawk. P. C. b. 2, c. 25, s. 104.

(3) Fortesc. Rep. 372.

(4) It is pointed out in *Sydserff* v. *The Queen* (Ex. Ch. 1847) 11 Q. B. 245, that this decision went wholly upon the special counts; and if it were supposed to decide that the general count could not be supported, it is on this point overruled by the decision of the Exchequer Chamber. See the cases cited in note to *R.* v. *Gill*, 20 R. R. 407; and *Taylor* v. *The Queen*, '95, 1 Q. B. 25, 64 L. J. M. C. 11.—R. C.

(5) Compare the case of a person coming out on bail on remand on a criminal charge: *Gilpin* v. *Cohen* (1869) L. R. 4 Ex. 131, 38 L. J. Ex. 50.—R. C.

(6) Before Lord Denman, Ch. J., Littledale, and Williams, JJ.

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Sessions on two indictments for embezzlement, on the prosecution of the plaintiff. He was acquitted, and discharged the following day by proclamation. On his way home from the gaol, to which he had been committed for trial, he was arrested on mesne process, at the suit of the plaintiff, for 28*l.*, and was afterwards taken back to the same gaol, and there detained in custody on such process. The affidavits in support of the motion alleged, that the defendant had a cross claim against the plaintiff arising out of the same transactions between them as the supposed debt for which the latter had arrested him, and exceeding it in amount; and the defendant stated that he had heard of no charge or claim against him by the plaintiff till he, the defendant, had demanded a settlement of the accounts, and that he believed the arrest to have been made for the purpose of harassing him, and preventing the enforcement of his demand. PATTESON, J., on summons, refused to discharge the defendant.

Dunbar now contended that the defendant, while on his return from the Sessions which he had been obliged to attend on a criminal charge against himself, was privileged from arrest. [*379] A party in attendance directly on *the business of a Court, or even in any matter relative to it, is entitled to freedom from arrest *eundo et redeundo: Meekins* v. *Smith* (1), especially when brought there, as in this case, on compulsory process.

(LITTLEDALE, J.: It has lately been held that a party brought before a Court in custody on criminal process is not within the rule.)

In *Wells* v. *Gurney* (2), a debtor was arrested on Sunday for an alleged assault, in order to gain an opportunity of arresting him upon civil process on the Monday, when he was bailed for the assault: and this Court discharged him out of custody as to the civil arrest.

(LORD DENMAN, Ch. J.: If it appeared here that the arrest of the defendant on a criminal charge was merely a contrivance

(1) 1 H. Bl. 636. (2) 8 B. & C. 769.

to get him into custody on the civil suit, that case would apply; but it does not follow that that was so because the defendant was acquitted. Do your affidavits allege that it was a contrivance? (1))

It may be gathered from the facts. Independently of cases, the privilege ought to be allowed here on principle.

(LORD DENMAN, Ch. J.: The question comes simply to this; whether a person taken into custody on a criminal charge is privileged from arrest *redeundo*, when dismissed from such custody? That is a point of great general importance.)

Cur. adv. vult.

LORD DENMAN, Ch. J., on this day, delivered the judgment of the COURT:

We think the defendant, in this case, was not entitled to the privilege. The only direct *authority we have been able to find upon the point is an *Anonymous* case in Mr. Dowling's Reports of Cases of Practice (2), where an application like this was made before Parke, J., who consulted the other Judges of this Court, and they all held that the privilege could not be claimed.

[*380]

Rule refused.

THE RIGHT HONOURABLE GEORGE LORD VISCOUNT MIDDLETON, SIR GEORGE SHIFFNER, BARONET, AND INIGO THOMAS, ESQUIRE, *v.* WILLIAM LAMBERT.

1834.

[401]

(1 Adol. & Ellis, 401—423; S. C. 3 N. & M. 841.)

Under charters, granting to a Dean and Chapter, "that they and all their men shall be quit of toll, passage, cheminage, &c. in city and borough, fair, and market, in the passage of bridges, and all ports of the sea, in all places throughout England," their lay tenant of lands included in the charters is exempt from market toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance

(1) It was not stated in the affidavits that the alleged debt arose out of the same transactions as the criminal charge.

(2) 1 Dowl. Pr. Cas. 157.

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and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandize.

Quære, whether, in the latter case, the exemption could have been claimed by ecclesiastical persons in general.

Quære, also, whether the exemption from toll claimable at common law by ecclesiastical persons and tenants in ancient demesne, extends to goods bought and sold, or carried, for the mere purpose of trade.

DEBT for the several sums of 3*d.* and 3*d.*, for tolls alleged to be due from the defendant for the passing of carts laden with ale or beer, and drawn by two horses, on the 31st of May, 1830, and the 23rd of June, 1830; and also the full sum of 4*d.* for the toll for the passage of certain sheep on the said 23rd of June. Plea, the general issue. On the trial at York, at the Spring Assizes, 1832, before Alderson, J., a verdict was found for the plaintiffs for the sum of 6*d.*, the amount of the toll for the passage of the carts, and for the defendant as to the other tolls, with leave for the defendant to enter a verdict generally, and for the plaintiffs to increase the verdict by the toll for the sheep, subject to the opinion of this Court upon the following case:

[*402] The plaintiffs derived title from the Crown to the *following tolls at Boroughbridge, payable as tolls traverse, viz. 3*d.* for every loaded cart, and 8*d.* for every score of sheep. They proved, as in the case of *Pelham* v. *Pickersgill* (1) (in which the right to the toll in question was argued and established), that the manor of Boroughbridge was parcel of the possessions of the Crown at the Conquest, and continued to be parcel of the possessions of the Crown of England and of the Duchy of Lancaster respectively, to the reign of King Charles the First, who severed the manor from the tolls, which had been annexed to the Duchy of Lancaster, under which the plaintiffs now claimed as lessees.

The defendant did not deny the general right of the plaintiffs to take the tolls above mentioned, but claimed a special exemption under several grants and confirmations from the Crown, and in support of such claim he gave in evidence various charters; and first a charter of 33 Edw. I. (2), inspecting and confirming a charter of Henry III., inspecting and confirming a charter of

(1) 1 R. R. 348 (1 T. R. 660).

(2) The copy used by the plaintiffs purported to be taken from the original record of Chancery preserved in the Tower.

Henry I., which last charter (as recited) contains the following amongst other clauses.

"Henricus Rex Angliæ, archiepiscopis, episcopis, abbatibus, consulibus, proceribus, et universis fidelibus suis Francis et Anglis totius Angliæ, salutem. Possessiones et dignitates et libertatis consuetudines quas habuit Eboraci Ecclesia, concedo, et regiâ auctoritate præsenti cartâ confirmo, sicut hic subscriptæ sunt. Sub regibus antiquis et archiepiscopis, et, quod plerique meminisse possunt, Edwardo rege et Aldredo archiepiscopo, fuit Ecclesiæ Sancti Petri consuetudo egregiæ *libertatis" (1).— [*403] "Canonici S^ti. Petri in Hird (2) id est domestica vel intrinseca familia appellabantur Terra Canonicorum proprie Mensa S^ti. Petri (3). Denique si quid in ecclesiâ, vel in cimiterio, vel in domibus canonicorum, vel in terris eorum, injuste agerent aut ipsi canonici adversùs se invicem, aut adversùs alios, vel alii adversùs canonicus, vel adversùs alios, forisfactura nulla archiepiscopo sed tota canonicis judicabatur. Archiepiscopus autem in rebus canonicorum hoc tantum juris habebat, quod, defuncto canonico, ipse aliis prælationes, et præbendas præbeat; nec tamen sine consilio et assensu decani et capituli. Si verò archiepiscopus adversùs apostolicum vel regem committeret, ad quod redimendum vel pacificandum pecuniâ opus esset, nihil tamen canonici archiepiscopo, præter suam voluntatem, darent;

(1) The charter proceeds as follows: "Si quis enim quemlibet, cujuscunque facinoris aut flagitii reum et convictum infra atrium ecclesiæ caperet et retineret, universali judicio sex centum emendebat. Si vero infra ecclesiam, duodecem hundreth; infra Eboracum, octodecem. Pœnitentia quoque de singulis, sicut de sacrilegiis injuncta, in hundreth octo libræ continetur. Quod si aliquis, vesano spiritus agitatu, diabolico ausu quemquam capere præsumeret in cathedrâ lapideâ juxta altare, quam Anglici vocant Fridstoll, id est cathedra quietudinis vel pacis, hujus tam flagitiosi sacrilegii emendatio sub nullo judicio erat, sub nullo pecuniæ numero claudebatur; sed apud Anglos, Boteles, hoc est, sine emendâ, vocabatur. Hæ emendæ nihil ad archiepiscopum, sed ad canonicos pertinebant. Canonici Sancti Petri," &c. (as above. The next three lines are printed without punctuation, exactly as they appear in the plaintiffs' copy.) The whole is set out, (but with some slight variations), in Dugdale's Monasticon, vol. vi. p. 1180, (ed. 1828, by Caley, Ellis, and Bandinel), from a register in the possession of the Dean and Chapter of York.

(2) See Spelman's Glossary, 3rd ed. in voc. Hird.

(3) As to land "mensæ unita," see the judgment of Sir W. SCOTT, in *The Duke of Portland* v. *Bingham*, 1 Hagg. Consist. Rep. 164.

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et pecunia canonicorum et hominum eorum pro commisso, vel debito archiepiscopi, nec etiam in namium caperetur. Habebant *canonici in domibus, et in terris suis, soccam, et saccam, tol, et theam, intol et uttol, et infangentheof, et omnes easdem honoris et libertatis consuetudines, quas ipse rex in terris suis habebat, et quas archiepiscopus de Domino Deo et de rege tenebat: hoc etiam ampliùs, quod nemo de terrâ canonicorum S. Petri wapentacmot, nec tridingmot, nec schiresmot sequebatur; sed calumpnians aut calumpniatus, ante ostium monasterii S. Petri rectitudinem et recipiebat, et faciebat. Hoc autem à religiosis principibus, et bonis antecessoribus, sic provisum est, quatenus canonici placitantes, pulsato signo, ad horas canonicas citò possent regredi; archiepiscopo verò per seneschallos, et præfectos, et milites suos, faciliùs erat prædicta placita sequi, et tenere. Si verò aliquis terram aliquam Sancto Petro daret, vel venderet, nemo postea soccam vel saccam, tol, aut theam in illâ clamabat; sed easdem consuetudines, quas et alia terra Sancti Petri, ista habebat; tantum amoris et reverentiæ antecessores nostri huic sanctæ principis apostolorum ecclesiæ deferebant"(1).

[*404]

[*405] The case then set out a part of the charter of Henry *the Third (as recited in that of Edward the First), which, after ratifying and confirming the grant and confirmation in the preceding charters, and the liberties therein contained and used by the said church down to that time, proceeds: "Et

(1) The remaining part of the charter is as follows: "Quando autem rex congregabat exercitum, unus homo tantùm præparabatur, de tota terrâ canonicorum, cum vexillo Sancti Petri, qui, si burgenses in exercitum irent, dux et signifer eos præcederet; sine burgensibus verò nec ipse iret. Hanc etiam consuetudinem sive dignitatem habebant canonici Sancti Petri ab antecessoribus regibus, nominatim quoque à rege Edwardo, concessam, et confirmatam, ut nullus de familiâ regis, vel de exercitu ejus, in propriis domibus canonicorum, nec in civitate, nec extra, hospitetur. Ubicunque fit duellum Eboraci, juramenta debent fieri super textum vel super reliquias ecclesiæ Sancti Petri; et facto duello, victor arma victi ad ecclesiam S. Petri offerat, gratias agens Deo et Sancto Petro pro victoriâ. Si canonici vel homines eorum clamorem fecerint in placitis regis, clamor eorum ante omnem causam terminetur, quantum potest terminari, servatâ ecclesiæ dignitate. Testibus, Archiepiscopo EBORAC. W. GIFFORD, episcopo Wynton. R. BLOET, episcopo Lincoln. R. FLAMBARD, episcopo Dunelm. W., comite de Warennâ. R. BASSET. G. RIDELL. S. filio Sigulfi. Apud Wynton."

ad declarationem quarundam libertatum in eadem cartâ sub quibusdam generalitatibus contentarum, et concessionem libertatum uberiorem, concedimus decano et capitulo ejusdem ecclesiæ, et hac cartâ nostrâ confirmamus pro nobis et hæredibus nostris, quod ipsi decanus et capitulum habeant omnia amerciamenta omnium hominum suorum ad ipsos decanum et capitulum et singulos canonicos pertinentium, et fines pro eisdem amerciamentis."—"Volumus etiam et concedimus pro nobis et hæredibus nostris, quod iidem decanus et capitulum et singuli canonici atque eorum successores et eorum homines universi sint quieti in civitate et burgo, in foris et nundinis, in transitu pontium et maris portuum, et in omnibus locis per totam Angliam, Hiberniam, et Walliam, et omnes terras et aquas nostras, de quolibet theolonio, tallagio, passagio, pedagio, lastagio, stallagio, hydagio, wardagio, operibus et auxiliis castellorum, murorum, pontium et parcorum, walliarum, fossatorum et vivariorum, navigio, domuum regalium ædificatione, et omnimoda operatione et custodia castrorum, et de omni carreio et summagio, nec eorum carri, carrectæ aut equi capiantur ad aliqua carriagia facienda, et quod silvæ eorum ad prædicta opera, vel aliqua alia, nullo modo capiantur. Et quod sint quieti de omnibus geldis, danegeldis, fengeld, horngeld, forgeld, penygeld, tethyngpeny, hundredpeny, miskening, chevagio, cheminagio et herbagio, et de vectigalibus et tributis, et exercitu et equitatu, et de omni terreno servitio *et seculari exactione, salvo servitio unius [*406] signiferi secundum quod continetur in præscriptâ cartâ præfati regis Henrici, proavi nostri" (1). The charter of Edward I. confirmed the preceding charter.

(1) The charter then went on in the following words, which were set out in the case: "Et similiter, quod in perpetuum sint quieti de sectis Comitatuum, Hundredorum, Wapentagiorum, et Trithingorum, et de murdro et latrocinio, escapio et concelamento, et hamsokne, grithbrech, blodwyte, fitwyte, forstall, leyrwite, hengwyte et wardpeny, et bordhalpeny, et de omnibus auxiliis vicecomitum et ministrorum suorum, et de scutagiis et assisis, et recognitionibus inquisitionibus et summonitionibus, nisi pro libertate et negotiis ecclesiæ Eboraci. Et tunc si sit placitum inter homines prædictæ ecclesiæ et canonicos, vel inter canonicos per se vel inter homines per se ex utraque parte, omnes de assisa sint de libertate prædictæ ecclesiæ, vel de libertate beatæ Mariæ Eboraci, si illi non sufficiant. Si vero inter decanum et capitulum vel eorum aliquem, canonicos singulos vel eorum homines, et aliquem qui non sit de

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The defendant next proved certain proceedings in *quo warranto*, before the justices in eyre, in the third Edward III. By those proceedings it appeared that the Dean and Chapter of the church of St. Peter, York, were summoned to answer by what warrant they claimed certain liberties. The defendants, in their plea, set out various clauses of the aforesaid charter of Henry III., with confirmations thereof; and further set out a clause contained in a charter of 10 Edw. II. (which they proffered in Court), and which clause is as follows:

[*407] "Præterea, cum in cartâ domini Edwardi, quondam regis Angliæ, patris domini regis nunc, quam proferunt, *inter cætera contineatur hæc videlicet clausa in hæc verba, &c. Ac quidam voluntarie intentes (1) libertates et quietantias prædictas indebite pro viribus impugnare asserant, et malitiosè prætendant libertates et quietantias illas decano et capitulo pro se et nativis suis tantummodo, et non pro libere tenentibus suis concessas fuisse, et eas ad dictos nativos et non libere tenentes referri debere: Idem dominus rex pater, &c., volens hujusmodi ambiguitatem amovere, et securitati eorundem decani et capituli ac hominum et libere tenentium suorum in hac parte providere, concessit et declaravit pro se et hæredibus suis, quod libertates et quietantiæ prædictæ tam pro libere tenentibus ipsorum decani et capituli quam pro cæteris hominibus suis intelligantur: Et quod iidem decanus et capitulum et successores sui prædicti omnibus et singulis libertatibus et quietantiis prædictis tam pro libere tenentibus suis tam pro cæteris hominibus suis in perpetuum gaudeant et utantur, sine occasione vel impedimento ipsius regis vel hæredum suorum, justiciariorum, escaetorum, vicecomitum, aut aliorum ballivorum seu ministrorum regis quorumcunque."

The record of the above proceedings, after setting out the plea,

libertate, assisa debeat arrainiari et capi, medietas assisæ sit de hominibus libertatis prædictæ ecclesiæ, et alia medietas de forinsecis. Et quod idem decanus et capitulum habeant curiam suam et justitiam, cum socco et saccâ, tol et theam, et infangenethef et utfangenethef, flemensfirth, ordel et orest, infra tempus et extra, cum omnibus aliis immunitatibus, libertatibus, consuetudinibus et quietantiis suis."

For explanations, or notices, of the more unusual words in the above charters, see Cowell's Interpreter, Spelman's Glossary, and 2 Hickes's Thesaurus, p. 284.

(1) *Sic.*

proceeded: "Et super hoc dominus rex mandavit justiciariis suis hic breve suum sub magno sigillo suo in hæc verba. Edwardus, dei gratia, Rex Angliæ, dominus Hiberniæ et dux Aquitaniæ, justiciariis suis itinerantibus in comitatu Nottingham, salutem. Cum diversæ libertates et quietantiæ per cartas progenitorum nostrorum quondam regum Angliæ dilectis nobis in Christo, Decano et capitulo ecclesiæ beati Petri Eboraci sint concessæ, et nos nuper cartas illas per cartam nostram confirmavimus, et concessimus eisdem *quod licet ipsi vel eorum prædecessores [*408] libertatibus et quietantiis prædictis anteà plene usi non fuerint, iidem tamen decanus et capitulum et successores sui eisdem libertatibus et quietantiis extunc gauderent et uterentur, prout in cartis et confirmatione prædictos plenius continetur; vobis mandamus quod prædictos decanum et capitulum ac singulares canonicos ecclesiæ prædictæ libertatibus et quietantiis hujusmodi coram vobis in itinere prædicto uti et gaudere permittatis et eas eis allocetis, juxta tenorem cartarum confirmationis et concessionis prædictarum. Teste me ipso apud Kenilworth, vicesimo die Novembris, anno regni nostri tertio.

"Et petunt quod libertates et quietantiæ prædictæ juxta tenorem mandati domini regis eis allocentur. Ita prædicti decanus et capitulum ad præsens eant inde sine die, salvo jure regis, &c."

The above several charters were further confirmed by charters, 3 and 7 Ric. II.; and the right to the tolls was admitted (for the purpose of this cause only) to have been in the Crown till after the date of the last charter. The said several charters were accepted by the Dean and Chapter, and they have constantly exercised the jurisdiction thereby granted to them within the liberty of St. Peter; and they have been accustomed, for many years back, to grant to the tenants of the liberty what are called charters of exemption, in the following form:

Liberty of St. Peter of York.—Whereas the Dean and Chapter of the cathedral and metropolitical church of St. Peter of York, and their successors, and the men and tenants, and all other the inhabitants within the liberty of the said Dean and Chapter, by custom before the reign of King Edward the Confessor, had and *enjoyed several remarkable liberties and immunities, and were [*409] acquitted of and from payment of all and all manner of tolls,

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tonnage, pontage, murage, pedage, smallage, and stallage whatsoever, in all fairs and markets within the realm of England, Ireland, and the dominion of Wales, which the charter made to the Dean and Chapter of the said church by King Henry the First ratifies and confirms, and the same, as well by several other charters made since as by several Acts of Parliament, have been ratified and confirmed, as by the same charters and statutes doth fully and at large appear: Now know ye, that I Henry John Dickens, Esq., steward of and to the said Dean and Chapter, do by the authority incident to the said office of steward, hereby certify to all whom it may concern, that the bearer hereof, William Lambert of Helperby, common brewer, is an inhabitant within the liberty of the said Dean and Chapter, and is to have and enjoy the benefit of all franchises and privileges within the said charters contained, to the men and tenants of the said liberty appertaining, and is to be toll free in all places in England, Ireland, and Wales. In testimony of which, I have hereunto set the seal of the said office, the 20th day of May, &c. (6 Geo. IV.)

The defendant had one of these charters when the toll in question was demanded. He had resided many years at Helperby in the county of York, in which place the Dean and Chapter had various possessions at the time when Domesday Book was made out. The case then set out the passage of Domesday Book (1) stating the quantity and description of land held by the [*410] church of *St. Peter in Helperby (2). Helperby is a manor within the liberty of St. Peter, and parcel of the possessions of the Dean and Chapter. The inhabitants of Helperby attend at the

(1) See fol. 303 of the copy published by the Record Commission.

(2) It was objected in argument for the plaintiffs, that the case did not shew the lands in question to have been the property of the Dean and Chapter at the time of the grant of Henry the First; that Domesday Book did not specify the particular lands, and that the benefit of the King's grant could not be extended to after-purchased lands; to which point 2 Roll. Abr. 202, Prerogative le Roy, (T.) pl. 1, was cited. But it was answered that even if the description in Domesday were not sufficiently particular, the clause beginning "Si verò aliquis," &c. in the last-mentioned charter, (*ante*, p. 312) extended the privilege to such lands; and further, that the objection was not raised at the trial, when, if suggested, it could have been met. No notice was taken of the point in the judgment of the Court.

Quarter Sessions held for the liberty of St. Peter, to serve on juries there. The constable attends there. The surveyors of highways for Helperby are appointed, and public houses licensed there. All the land in Helperby is copyhold of the manor. The defendant is lessee for twenty-one years of the manor under the Dean and Chapter; he has resided for several years in his own house, which is built on copyhold land held of the manor, and he occupies from 130 to 150 acres of land, his own estate, both arable and pasture, within and held as copyhold of inheritance of the said manor. He also carried on very considerable business as a brewer on the premises so occupied by him, and during such his occupation, two of his carts laden with ale manufactured by him as a common brewer for sale, and half a score of sheep, being a part of his farming stock, passed over the bridge at Boroughbridge, for which toll was demanded as usual, but which he refused to pay. The sheep were in charge of the defendant's servant going to the fair at Boroughbridge. The cart *and horses [*411] were also driven by the defendant's servant and by his orders; one of the carts passed over the bridge on a day which was neither a fair day nor a market day.

The defendant contended, first, that the charters set out exempted his and his servants' cattle and carriages from the payment of any toll for passing over the bridge at Boroughbridge, and that it was immaterial whether the goods conveyed were grown upon his farm or not, or whether the cattle driven over the bridge constituted a part of his farming stock or not; and, secondly, that at any rate the sheep, as part of his farming stock, were exempt.

This case was argued in Michaelmas Term, 1833 (1).

Starkie, for the plaintiffs:

The exemption is not made out; or if it is, it does not extend to ale manufactured by a common brewer, or to sheep under the circumstances here stated. The charters must be construed with reference to the persons to whom, and the exigencies for which, they were granted. Charters of this kind, granted to ecclesiastical bodies, exempt them from toll, so far as it affects

(1) Before Denman, Ch. J., Taunton, and Patteson, JJ. Nov. 19th.

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the use to be made of their lands for their own immediate purposes, but not for trade. It is so laid down in 2 Roll. Abr. p. 202, Prerogative le Roy (T.) pl. 2. "Si Roy graunt al un Abbot qu' il et homines sui sint quieti ab omni theolonio in omni foro, et in omnibus nundinis, et in omni transitu portuum, viarum, et marium per totum regnum nostrum et omnia mercata sua et hominum suorum, &c. l'Abbot et ses nomes serront solment [*412] quieti a præstatione theolonii in venditionibus et *emptionibus per ipsos factis de necessariis suis ut in victu vestitu et similibus: Et hoc ad opus proprium ipsorum Abbatis et hominum suorum, sed si prædictus Abbas aut homines sui emptiones, seu venditiones fecerint ut mercatores communes, et de communibus merchandisis et ratione merchandisarum faciend. debent theolonium sicut et cæteri mercatores communes non obstante chartâ prædicta." The monasteries, like other bodies and individuals, used the markets and great fairs for the purpose of laying in provisions for their own use and to keep hospitality, and to these purposes their exemption from toll is referable. In Com. D. Ecclesiastical persons, (D.) (vol. iii. p. 567), it is said that such persons shall be discharged of tolls, &c. for their ecclesiastical goods, but it is afterwards added, that "toll, &c. may be taken of them if they merchandise; for the writ says, *dum merchandisas non exerceant de eisdem.*" In 2 Inst. 221 a case is cited of *The Abbot of St. Edward's* v. *The Bailiffs of Southampton*, where King Henry the Third had granted to the abbot of L. and his successors "quod ipsi et homines sui sint quieti ab omni theolonio in omni foro et in omnibus nundinis, &c." and it was resolved that the abbot should have the privilege by force of this general grant in this manner; "quod ipsi et homines sui sint quieti à præstatione theolonii in venditionibus et emptionibus pro suis necessariis, ut in victu, vestitu, et similibus, et hoc ad opus proprium ipsius abbatis et hominum suorum." Tenants in ancient demesne also pay no toll for things arising from the lands holden by that tenure; but the same distinction is applied to them, and for a like reason, 2 Inst. 221 (1): and an ancient [*413] record is there cited, which says, "quod hi qui clamant *esse immunes de theolonio præstando, ut tenentes in antiquo dominico,

(1) See the passage cited in the judgment of the Court, *post*, p. 324.

vel per chartas regum, non debent distringi pro aliquo theolonio pro merchandizis ad usus suos proprios emptis; imo pro merchandizis qu' emerint vel vendiderint ut mercatores, debent solvere pro eis." In Bro. Abr. Toll, pl. 1, the exemption of such tenants is said to be "pur les choses provenants de mesmes les tenements pur vendre ou achate pur lour sustenance accordant al quantity de lour tenements:" and 9 Hen. VI. 25, is cited (1). Fitzherbert says (F. N. B. tit. Writ of being quit of Toll, f. 228, A.) that it appears that such tenants "shall be quit of toll for their goods and chattels which they merchandise with, as well as for their other goods; for the writ is general, *pro bonis et rebus suis.*" But however this may be as to such tenants, the reason does not apply to ecclesiastical persons; for the writ set out by Fitzherbert (f. 227, F.) in the case of an ecclesiastical person, contains an express proviso as to the goods exempted, "so that he do not exercise any merchandise with the same." The lands in question clearly belonged to an institution in its nature monastic, for the charter of Henry I. uses these words of the property to which they belong; "terra canonicorum proprie mensa Sancti Petri." Such an institution would not carry on trade; at any rate not that of a common brewer (2); nor can their privilege from toll be extended so far as to exempt the ale of such a trader. As to the sheep, it does not appear that they were bred upon the lands; and at all events, when once removed for sale, they were like any other merchandise.

Coltman, contrà: [414]

The chapter of Fitzherbert, on the writ of being quit of toll, gives the forms of writ applicable to two classes of persons who were exempt at common law, viz. ecclesiastical persons, and tenants in ancient demesne. By the writ relating to ecclesiastical persons, and Fitzherbert's construction of it, their exemption appears to be general. Fitzherbert, after stating that exemption, and setting out the writ, adds (f. 227, F.): "But HERLE, J. said that these words, *dum merchandisas aliquas*, &c., were of no effect,

(1) P. 25, pl. 20. See also Bro. Abr. Auncient demesne, pl. 22 (citing 19 Hen. VI. 66), where a *quære* is put, whether the tenants shall be free from toll of all things which they sell and buy?

(2) See, however, st. 21 Hen. VIII. c. 13, s. 32.

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because, by his opinion, they are quit of all things, although they do merchandise: but now the statute of Hen. VIII. (1) is, that they shall not merchandise." As to tenants in ancient demesne, he states it to be a question whether they are exempt from toll when exercising merchandise, but adds, as his own opinion, "that they shall be quit of toll generally, although they merchandise with their goods," f. 228, E. It is true the contrary has been held as to tenants in ancient demesne: *Ward* and *Knight's* case (2); and in the case of *The Abbot of St. Edward's* (3), and 2 Roll. Abr. p. 202, Prerogative le Roy, (T.) pl. 2, it seems also to be considered that the exemption of ecclesiastical persons does not extend to general merchandise. But those authorities apply to dealings in a fair or market, not to toll demanded for passing a bridge. By the charter of Henry III. the Dean and Chapter and their men are to be "quieti in civitate et burgo, in foris et nundinis, in transitu pontium et maris portuum — de quolibet theolonio, tallagio, passagio," &c., and afterwards, "de cheminagio." Now there is no case in which the exemption from toll thorough or traverse [*415] has been restricted in the manner *contended for on the other side. In Fitzherbert's Abridgment, Toll, pl. 5 (fol. 222 a) toll traverse is distinguished from market toll; it being there said that the King shall be toll free in all markets and fairs for buying things, &c.: but *quære* of toll traverse, if he shall pay that, and *semble*, he shall. In the passage before cited from Fitzh. N. B. 228, E., it is said, that forasmuch as tenants in ancient demesne shall be quit of pontage, murage, and passage, it is conceived that they shall be quit of toll generally, although they merchandise with their goods. Pontage, therefore (and so also toll traverse), is on a distinct footing from market toll. Suppose the exemption claimed by a person travelling on horseback, or on foot, it could not be asked of him if he was going on the necessary business of his farm. There is no authority for narrowing the effect of the general words of exemption in the charter of Henry III.; and if their import is to be cut down, the plaintiffs are to do it. These observations

(1) 21 Hen. VIII. c. 13.
(2) 1 Leon. 231; Cro. Eliz. 227, *S. C.*
(3) 2 Inst. 221.

apply as well to the sheep as to the other goods; but in Fitzh. N. B. 228, note *b*, a case is cited (1), where, in an action for refusing toll, it appeared that the defendant, a tenant in ancient demesne, bought beasts in the market, and used some for manuring his land, and put some to pasture to fatten (2), and sold them the next week in the market: the plaintiff offered to aver that he bought the beasts to resell them, and resold them after convenient time: "the defendant demurs; but the opinion of the Court being against him (the plaintiff), he became nonsuit:" and it is added, "so that it seems for things bought for their *sustenance, or manuring their lands, or concerning husbandry, [*416] they are discharged, but not to merchandise, and the merchandise of these is different from other merchandise." The argument of *Hobart* in *Ward* and *Knight's* case (3), supports the same proposition. Whatever, therefore, might be the decision here as to the ale, the sheep were clearly exempt. They are stated in the case to have been "part of the defendant's farming stock," and that allegation is sufficient, at least in the absence of any suggestion that they were bought for the mere purpose of merchandise: *Savery* v. *Smith* (4). The defendant is clearly within the description of "eorum homines" in the charter of Henry III., being a tenant of the manor, and the grant of Edward II. (set out in the proceedings on *quo warranto*) declaring "quod libertates et quietantiæ prædictæ tam pro liberè tenentibus ipsorum decani et capituli quam pro cæteris hominibus suis intelligantur." That, if an extension of the former grants, was yet valid, being made when the tolls were still in the Crown.

Starkie, in reply:

As to the distinction taken between toll traverse and market toll, all the exemptions given by these charters must be governed by the same principle: it cannot be said that the grant takes effect while the goods are in the market, and ceases to operate when they are out of it. The objection, that trading was not contemplated by the charters, applies under both circumstances.

(1) Year Book, 7 Hen. IV. 44.

(2) See the judgment in the present case, *post*, 325. In the edit. 1794 of Fitzh. N. B. it is printed, "to make grases."

(3) 1 Leon. 232.

(4) 2 Lutw. 1146.

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The words of exemption in the case of *The Abbot of St. Edward's* (1), were as large as those used here, and yet were held not to protect the parties *when trading. The passage, Fitzherbert, N. B. f. 227, F., relied upon on the other side, is loose; and the *dictum* of HERLE, J. is given as the expression of his opinion, not the author's. F. N. B. f. 228, E. refers only to tenants in ancient demesne. As to the question whether persons passing on horseback or on foot could be asked for what purpose they were travelling, it might, perhaps, be answered (if necessary), that the exemption would not attach to such persons if they were travelling for purposes not connected with the use of their lands, according to the intention of the charters. In the case cited from 7 Hen. IV. 44, it appeared, on the pleadings, that the beasts had been put upon the land with the intention of their being fattened. Here that is not shewn. In *Savery* v. *Smith* (2), it lay upon the defendant to shew that the pigs which he had seised for toll were bought by the plaintiff for the purpose of merchandise; he failed to do so, and for that reason the plaintiff had judgment. Here facts are stated which establish the claim to toll, and the defendant does not bring himself within the exemption.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (April 22nd) delivered the judgment of the COURT. After stating the nature of the action, and the circumstances under which the special case was ordered, his Lordship proceeded:

The case stated, that the plaintiffs established their title to the tolls in question, as lessees under the Duchy of Lancaster. They had belonged by prescription to the manor of Boroughbridge, which manor was parcel of the possessions of the Crown at the time of the Conquest, *and had continued vested in the Crown till the reign of Charles the First. By that King they were severed from the manor, and annexed to the Duchy of Lancaster. [*418]

The defendant, to prove an exemption in himself from the liability to pay these tolls, produced several charters, and, among others, a charter of the 33 Edw. I., which inspects and

(1) 2 Inst. 221. (2) 2 Lutw. 1146.

confirms a charter of Henry III., containing a grant to the church of York, in these words; that the Dean and Chapter, and the respective canons, and all their men, (*eorum homines universi,*) should be quit of toll and of other matters, in city and borough, in fairs and markets, in the passage of bridges and ports of the sea, in all places throughout England. And he produced some proceedings in *quo warranto* before the justices in eyre in the 3 Edw. III., wherein was set out a charter of Edw. II., stating that Edw. I., by a certain charter, granted and declared that the liberties and quittances aforesaid should be understood as well for the free tenants (*liberi tenentes*) of the said Dean and Chapter, as for their other men (*cæteris hominibus*), and that the said Dean and Chapter should have and enjoy them for ever for all. This record, after reciting a confirmation by Edw. III. of the aforesaid liberties, concludes with the King's writ for their allowance. Two confirmations of all these charters, by Rich. II., were shewn; and it was admitted that the right to the tolls was in the Crown, *jure coronæ*, till after the date of the last charter. It was then proved, by reference to Domesday, that, at the time that book was compiled, Helperby was parcel of the liberty of St. Peter. The case states that it is a manor, and that all the land therein is copyhold of the manor. The defendant is also stated to be a lessee for twenty-one years under the *Dean and [*419] Chapter, and occupier of a copyhold house held of the manor, and of 150 acres of land his own estate, within and held as copyhold of inheritance of the manor; that he carried on there the business of a common brewer; that two of his carts, laden with ale manufactured by him as a common brewer for sale, and some sheep, part of his farming stock, passed over the bridge, and that toll was demanded for them and refused. The sheep were in the charge of his servant, going to the fair at Boroughbridge: one of the carts passed on a day which was neither a fair nor a market day.

Looking at the mere words of these documents without more, the defendant's claim to exemption should seem to be distinctly made out. King Henry the Third, in whom, at the time, the right to this toll was, and who was therefore competent to discharge it, grants an exemption from this and all other toll, to all

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the men of the Dean and Chapter, of whom the defendant is one. Difficulties, however, and very great ones, occur in the consideration of this subject. We are called on to put a legal construction on charters of great antiquity, upon a question which, in modern times, does not appear to have been discussed, and upon which the authorities, most of them of very remote date, are not consistent. For the defendant it has been contended, that a grant of exemption of this sort, made to ecclesiastical persons, could only enure to their benefit when the articles were conveyed for the necessary sustenance of their houses, or the cultivation of their land, and not for the purpose of the carrying on of trade or merchandise. It also has been endeavoured to be shewn, that these men of the Dean and Chapter must be
[*420] privileged to the same limited *extent and in the same manner as tenants in ancient demesne, of whom Coke (1) declares, that they "shall pay no toll, because at the beginning, by their tenure, they applied themselves to the manurance and husbandry of the King's demesnes, and therefore for those lands so holden, and all that came or renewed thereupon, they had the said privilege; but if such a tenant be a common merchant for buying and selling of wares and merchandises, that rise not upon the manurance or husbandry of those lands, he shall not have the privilege for them, because they are out of the reason of the privilege of ancient demesne, and the tenant in ancient demesne ought rather to be a husbandman than a merchant by his tenure, and so are the books to be intended." And for this he gives the words of an ancient record, which is directly in point (2). To the same effect also is Bro. Abr. tit. Toll, pl. 1, 9 Hen. VI. 25, Bac. Abr. tit. Fairs and Markets (D), 20 Vin. Abr. tit. Toll (E), p. 292, and Com. Dig. tit. Toll (G). On the other hand, Fitzherbert (N. B. 228) is of a contrary opinion, and says, that tenants in ancient demesne shall be quit of toll for their goods and chattels which they merchandise with, as well as for their other goods, for the writ is general, *pro bonis et rebus suis*. For this doctrine he relies on the Year Book, 7 Hen. IV. 44; but this book it is clear that he misunderstood. To a declaration in that case for selling beasts at a market and fair without paying toll,

(1) 2 Inst. 221. (2) *Ante*, p. 318.

the defendant pleaded that he was a tenant in ancient demesne, and that all those have been free to buy and sell beasts for manuring their lands, &c. without toll, time out of mind, and *that he bought at fairs, and some he used for manuring his land, and some he put to pasture to make them fat and more fit for sale (*pur eux faire grass* (1) and *pluis able a vendre*), and some time after sold them at a fair. The plaintiff offered to aver that he bought the beasts to sell them, and that he sold them *ut supra*. The defendant demurred, and the opinion of the Court being against him (the plaintiff), he became nonsuit. Now here there was no claim by the defendant to be quit of toll for all merchandise, but for beasts only, bought and sold for the cultivation of his lands; and the opinion of the Court only was, that the circumstance of the defendant selling the beasts again, after he had fattened them on his land, was not to be deemed merchandising. And this view Lord Hale, in his note to Fitzherbert, appears to have taken, for he adds, "So that it seems for things bought for their sustenance, or manuring their lands, or concerning husbandry, they are discharged, but not for merchandise; and the merchandise of these is different from other merchandise."

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But we are not called upon, in this instance, to decide, in this conflict of authorities, what the privileges of a tenant in ancient demesne may be, because the defendant does not claim in that character. The privileges of a tenant in ancient demesne rest on the custom of the realm, the claim of the present defendant on the King's express grant by charter; and if the words of the grant be plain, there is no occasion to resort to doubtful analogy for explanation. For the same reason, it does not appear to us to be necessary to decide what privileges ecclesiastical persons, in general, have with *respect to toll, upon which judicial opinions have not been unanimous. See Com. Dig. tit. Eccles. Persons (D).

[*422]

There are not wanting authorities that such a grant as the present extends only to buyings and sellings of necessaries, and not of common merchandise: 2 Roll. Abr. 202, 2 Inst. 221, Rot. Parl. 8 Edw. II., No. 12, as to pannage (2). It should seem, however,

(1) *Sic* in Year Book.

(2) *Sic* in the printed Rolls, (Rotuli Parliamentorum, ut et petitiones, &c., vol. i. p. 291). Qu. *paviage?* See Fitzh. N. B. 227 F., note (*a*); 2 Inst. 4.

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from passages in some books, that the grant was considered to be general: Vin. Abr. Toll (E), 4, 8 (p. 293), Fitz. N. B. 227, 228, in which last book are given forms of writs in redress of lay corporations, to which charters of exemption have been granted. These writs recite the privilege to be without qualification. Now though, possibly, if the claim here was made by one of the ecclesiastical body of the church of York, there might be good ground to contend that the exemption belongs only to them for their ecclesiastical goods, or for manuring their land, or for personal necessaries, though we by no means say it would; yet here the claim is by a man of the Dean and Chapter, who, not bearing the clerical character, does not seem to come within any of the reasons which apply to a restriction in the case of an ecclesiastic, to whose calling trading in merchandise was repugnant, and, therefore, not to be encouraged by exemption from toll. This distinction would certainly be liable to the objection, that the subject-matter of the grant, namely, the exemption, would differ according as the party claiming was a member of the body or a tenant, and would be larger in the case of the latter than of the immediate grantee. But as the words of the [*423] charter of Henry III. *are clear and unambiguous, and the exemption is without qualification, there being no necessity for any in the case of a copyhold tenant, we think that we cannot introduce any, from the uncertain *dicta* of even the most distinguished text writers on the ancient common law. It must consequently comprise as well the beer manufactured for sale as the sheep. The verdict must be entered generally for the defendant.

Postea to the defendant.

1834.

[423]

UTTERTON AND OTHERS *v.* ROBINS AND OTHERS (1).

(1 Adol. & Ellis, 423—433.)

A will or codicil containing a devise of real estates, but not duly witnessed, is good if confirmed by a subsequent codicil having the proper attestation, though the latter document be in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one, or the will: *Semble*, however, that

(1) For a discussion of the principles relating to the incorporation of an unattested paper in a subsequent will, see Lord KINGSDOWN'S

the instrument relied upon as confirming a previous one should distinctly refer to it.

Testator by several unwitnessed memoranda subsequent to his will left a freehold house, acquired among other estates since the date of the will, to his daughter; and he afterwards made the following codicil, which was duly attested: "I make this a further codicil to my will; I give and devise all real estates purchased by me since the execution of my said will to the trustees therein named, their heirs, &c. to the uses and upon the trusts therein expressed concerning the residue of my real estates:" Held, that the house passed to the trustees, and not to the daughter.

THE VICE-CHANCELLOR sent the following case for the opinion of this Court:

John Robins, being seised and possessed of divers freehold and leasehold estates, made and published his will duly executed and attested, bearing date the 12th of September, 1823, and thereby, among other things, bequeathed a messuage on Brompton Terrace to certain persons to the use of his daughter Frances Anne Utterton, during the joint lives of herself and her husband, with remainders over. And he gave and devised the residue of his real and personal estate to trustees to certain uses, one fourth part of such residue being *limited to the same uses as [*424] were declared of the above messuage.

By a codicil duly executed and attested, bearing date the 8th of May, 1825, the testator, after reciting that he had purchased certain estates since the execution of his will, devised these last to the trustees therein named as to the residue of his estate therein mentioned, upon the trusts declared as to such residue.

A memorandum in pencil appeared on the margin of the will, bearing date the 6th of August, 1825, written and signed by the testator, but not attested, in the following words: "As the house on Brompton Terrace is sold, I give my daughter, Frances Anne Utterton, my freehold house in Portugal Street, Lincoln's Inn Fields, purchased of Lady Bulkley, in lieu of the house on Brompton Terrace: it is conveyed to my son Joseph, but my desire and will is, that it should be assigned to my daughter in trust as the other property." The devise of the messuage on Brompton Terrace was struck through with a pencil.

judgment in *Allen* v. *Maddock* (1858) 11 Moo. P. C. 427. And see that judgment cited and applied in *In the goods of Heathcote* (1881) 6 P. D. 30, 50 L. J. P. D. & A. 42.—R. C.

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The testator, after the said 8th of May, 1825, wrote and signed the following codicil, or memorandum, which, however, was not attested: "Memorandum for my executors and trustees, 29th of August, 1825. Whereas I purchased a house, freehold, of Lady Bulkley, in Portugal Street, Lincoln's Inn Fields, (per Lightfoot and Robson, and which is conveyed from Lady Bulkley to my son Joseph Robins, the deeds in my possession,) I give the said house, now in the occupation of Mr. Usher, tailor, as tenant at will, to my dear daughter Frances Utterton, wife of Colonel John Utterton, and to go to her family as settled according to the other property in my will: am certain that my son Joseph will [*425] assign it according *to my wish: JOHN ROBINS, Regent Street. I had given my said daughter a house at the west-end of Brompton Terrace, which I since sold; and the above is in lieu of the said house: JOHN ROBINS."

By a codicil of the 17th of December, 1825, duly attested, the testator confirmed his will; and after reciting that he had purchased divers real estates since the execution thereof, he added, "Now I do, by this codicil to my said will, devise the same to the trustees in my said will mentioned, their heirs, &c. to the uses, &c. in my said will expressed of and concerning the residue of my real estates." By another codicil, of the 7th of December, 1827, duly attested, he republished his will, in order that all estates purchased by him since the date and publication thereof might pass under the general devise of his real estates therein contained. By another codicil, of the 27th of January, 1829, duly attested, he devised and bequeathed all lands, tenements, and hereditaments purchased or acquired by him since the date of his will to the uses and on the trusts therein declared as to the residue.

The testator afterwards wrote and signed a memorandum, entitled, "A memorandum, made the 16th of April, 1829, to be observed by my executors (first division), of my desires and intentions after my decease, and according to my will;" and in the said memorandum, after enumerating the property specifically devised to the other branches of his family, he proceeds to enumerate the messuages specifically devised to Mrs. Utterton and her family, which part of the said memorandum

contains a passage in the words and figures following, viz. "A freehold house situate in Portugal Street, Lincoln's Inn Fields, purchased of Lady *Bulkley, let to Mr. Wood, cabinet maker, on lease for twenty-one years from Christmas, 1826, determinable, at a net rent per annum 50*l.*, the house repaired at Mr. Robins's expense. Mr. Wood paid a premium of 50*l.*" This was not attested. [*426]

By a codicil of the 5th of February, 1830, duly attested, the testator devised as follows: "I John Robins do make this a further codicil to my will, which bears date the 12th day of September, 1823: I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The testator died on the 17th of May, 1831. The executors proved the will, codicils, and memorandum: the Prerogative Court, however, did not grant probate of the interlineations, erasures, marginal additions, and alterations in the will; but granted probate of the will as originally executed, reserving, however, to any of the parties power to propound such interlineations, &c. at any future time.

The testator sold the house on Brompton Terrace in August, 1824. Between August, 1823, and the 6th of August, 1825, he purchased the above-mentioned house in Portugal Street (1); and the same was conveyed to the use of the testator and his heirs by deeds of the 20th and 21st of November, 1823.

The present suit in Chancery was instituted for the purpose, among others, of having the will and codicils *of the testator established, and the trusts thereof carried into execution. The question referred by the VICE-CHANCELLOR to this Court was, "Whether the house and premises in Portugal Street, in the pleadings of the cause mentioned, were devised by the will of the testator, or any, and which, of his codicils mentioned in the pleadings; and, if so, to whom the same were so devised, and for [*427]

(1) It was admitted during the argument that the purchase was after the execution of the will.

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what estate and interest?" This case was argued in Trinity Term (June 7th), 1833.

James Russell, for the plaintiffs:

The testamentary papers not witnessed must be considered as republished, together with the will, by the subsequent attested codicils; and the effect, in point of construction, of all these papers taken together, is, that the house in Portugal Street passes, by specific devise, to Colonel and Mrs. Utterton, and does not go as part of the residue. In *Guest* v. *Willasey* (1) the testator added a codicil to his will (which had been duly attested), altering some of the dispositions of property, disposing of an after-acquired estate, and appointing an additional executrix; and by a second codicil (referring to the will, but not to the previous codicil,) he gave new directions as to a part of the property, and substituted new executors for two of those named in the will. Neither of these codicils was properly attested. He afterwards made a third codicil, properly witnessed, appointing a new executor in lieu of one of those named in the second codicil, but not otherwise referring to the previous codicils, or to the will, and not containing any other direction. The Court of Common Pleas held that the third codicil was a republication
[*428] of the other two, and of the will. *It is true, the codicils there were all written on the back of the original will; and it does not appear in this case that any of the writings (except the first memorandum) was on the same paper with any preceding one (2), but that is immaterial: any codicil may operate as a republication of a previous one, or of the will, whether it be on the same paper or not. In *Crosbie* v. *M'Doual* (3) Sir R. P. ARDEN, M. R., lays it down, that "if a man ratifies and confirms his last will, he ratifies and confirms with it every codicil that has been added to it." It was indeed once thought important that the documents should be on one paper, or at least tied up together, or connected in some similar way; but it is now settled, that mere material connection is of no importance. The law upon the subject is

(1) 2 Bing. 429; 3 Bing. 614.
(2) It was afterwards admitted that they were all separate.
(3) 4 R. R. 301 (4 Ves. 610).

thus stated in 1 Powell on Devises, p. 610 (1): "A codicil, if executed according to the Statute of Frauds, will amount to a republication of a will of real estate; and this rule, it is to be observed, applies, whether the codicil be or be not annexed to the will; for every codicil is, in construction of law, part of a man's last will, whether it be so described in such codicil or not, and, as such, furnishes conclusive evidence of the testator's considering his will as existing at that time:" and several authorities on the subject are cited in the text and the editor's notes. Whether or not the instrument so republished was originally attested according to the Statute of Frauds is immaterial to the present question. In *Carleton* v. *Griffin* (2), a testator devised real and personal property by will unattested: *by a subsequent writing, [*429] attested by three witnesses, but relating solely to personal property, he confirmed (except in one instance) the former disposition; and the COURT held that the former writing was authenticated by the attestation, and the whole took effect as one will. Where a testamentary paper is republished, it operates on property acquired in the intermediate time, and is in every respect considered as if made at the period of the republication: but if so, that is by virtue of the last attestation, and not of the former one, supposing it to have been attested before. Where, for instance, the original witnesses had died, it would be absurd to say that the first attestation could be carried down to the latter period. In this case, the attested codicil of the 5th of February, 1830, coupled with the previous unattested one of April 16th, 1829, gives effect to the devise contained in the latter. Then arises the question of construction; namely, whether, reading both codicils as instruments valid to pass real estate, the specific devise in the codicil of 1829 is to take effect, or is to be considered as revoked and annulled by the gift to trustees contained in the last codicil. It cannot be said that the codicil of February 5th contains any revocation of the previous gift to Mrs. Utterton, or that any of the codicils in which the testator makes that gift are revoked by subsequent

(1) 3rd edit. by Jarman. See also the notes to *Duppa* v. *Mayo*, 1 Wms. Saund. 277 c. to 277 f. (5th edit. 1824).

(2) 1 Burr. 549.

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ones. Effect is to be given, if possible, to every part of a will, and an express gift is not done away by subsequent general words. In *Holdfast* v. *Pardoe* (1) the testatrix expressly devised to A. certain premises which comprised a portion of land in Lowlayton Marsh; and afterwards, in the same will, she devised all her lands in Lowlayton Marsh to B.; and it was held that [*430] the first devise of marsh lands was *not thereby revoked. In *Rowley* v. *Eyton* (2) the testator charged all his estates with the payment of his debts, and made his son executor and residuary devisee: subsequently by a codicil he devised certain after-acquired lands to his said son in fee; and Sir W. GRANT held that the codicil, notwithstanding the generality of the words, left the last-mentioned estates subject to the payment of the debts. Here, the intention in favour of Mrs. Utterton is clear: the memorandum of April 16th, 1829, shews that it continued down to that time; and the only subsequent codicil confirms that memorandum.

(PARKE, J.: Do you say that a codicil duly attested would operate as a republication of every document which could be the subject of probate, although not referred to by such codicil?)

The last codicil here does refer to the preceding one, being added to it as "a further codicil;" and the preceding one impliedly refers to those of a like purport which went before it. In *Guest* v. *Willasey* (3) the third codicil contained no reference to the first.

Wright, contrà:

The house in Portugal Street passed to the trustees as part of the residue. No codicil which mentions Mrs. Utterton's name is duly attested, or referred to by any codicil which is so. In *Guest* v. *Willasey* (3) they were all on the same sheet. Even if the attested codicils did refer to the unattested ones, there is no evidence that these last were ever seen by the witnesses who signed the others; and the witnesses, whose signature is to give effect to a document, ought to have seen it. In *Guest* v. *Willasey* (3)

(1) 2 W. Bl. 975.
(2) 16 R. R. 157 (2 Mer. 128).
(3) 2 Bing. 429; 3 Bing. 614.

it must be inferred that this was the case, all the codicils being on *one sheet.

(DENMAN, Ch. J.: Do you mean that this would be an objection where the previous codicil was distinctly recognised by the subsequent one?)

A paper which has not been seen by the attesting witnesses cannot be introduced for the purpose of passing real estate; it never was a testamentary paper for that purpose.

(DENMAN, Ch. J.: Suppose the testator said, "I leave to A. all the property I took under my father's will," must the witnesses see that will?)

The contents of the father's will there would only be explanatory of that of the testator; they would not be part of it.

(PARKE, J.: According to your argument, an attested codicil of itself does not operate as a republication.)

In words it does, but not in point of attestation.

(PATTESON, J.: You admit that if the original codicil had been signed by three witnesses, the subsequent one, attested in the same manner, would be good as a republication, and to pass after-purchased estates. To prove the latter codicil, would it be necessary to call the witnesses who attested the previous one?

DENMAN, Ch. J.: You are taking more burden upon yourself than is necessary. The question here is, whether the last codicil does in fact refer to the preceding unattested ones? We think the point you are now contending for cannot be maintained. Suppose a man having made a devise of real property, not attested, went into a distant country, and there signed a paper which was duly attested in his presence by three witnesses, stating that his will was in a particular place (mentioning the place in which it was left), would not the will in that case pass the property; or would the attestation be insufficient, because the witnesses did not see the original paper?)

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They ought to see the original, in order that they might know that nothing was fraudulently slipped into it. The cases in *which it has been held necessary that the witnesses should sign the will in the testator's presence (*Broderick* v. *Broderick* (1) and many others) shew the importance which has been attached to every circumstance which could insure the indentity of the will attested with that executed by the testator. The rule on this subject, and the grounds of it, appear in Bull. N. P. 263, 264. But, at all events, it is a decisive objection in this case, that none of the attested codicils refer to any of the memorandums relied upon as containing a devise to Mrs. Utterton. In *Carleton* v. *Griffin* (2) the attested memorandum confirmed the previous writing in the most express terms.

J. Russell, in reply:

The cases shewing that the testator must see the witnesses sign do not affect the present argument. The opinion once held, that a codicil must be annexed to the instrument which it republishes, was directly superseded by the decision in *Barnes* v. *Crowe* (3), which over-ruled *The Attorney-General* v. *Downing* (4). The rule as to attestation is, that the witnesses see the paper which contains the republication, and the document republished is considered as part of that, and both together form the body of the will. It is suggested that the republishing codicil should contain a reference to the previous document; but that was not held necessary in *Guest* v. *Willasey* (5).

(PARKE, J.: Suppose every codicil in this case had been duly attested, can it be contended that the property in question would not pass by the words used in that of February 5th, 1830, to the uses declared as to the residue; even admitting that under other [*433] circumstances a codicil could have *that immense effect in republication which you would ascribe to it?)

Holdfast v. *Pardoe* (6) gives the answer to that question.

(1) 1 P. Wms. 239.
(2) 1 Burr. 549.
(3) 2 R. R. 154 (1 Ves. Jr. 486).
(4) Amb. 573.
(5) 2 Bing. 429; 3 Bing. 614.
(6) 2 W. Bl. 975.

(PARKE, J.: There it was held that the testatrix clearly did not intend to dismember a farm which she had already devised under a particular description; and there was no reason to think that she intended to revoke that disposition by the subsequent devise.)

The question here is of intention; and there is no ground for supposing that the testator, by his last codicil, intended to revoke the previous gift to Mrs. Utterton. His purpose was to ratify, not to annul, his prior gifts; and all he further desired was, to dispose of that after-acquired property, as to which he had not before given any specific directions. If it were necessary, the words written on the margin of the will might be insisted upon. Neither this nor any other memorandum, in which the gift to Mrs. Utterton is referred to, can be shewn to have been revoked.

Cur. adv. vult.

The COURT afterwards sent the following Certificate:

"We have heard this case argued by counsel, and are of opinion that the house in Portugal Street in the pleadings mentioned passed by the codicil of the 5th of February, 1830, to the trustees named in the will, their heirs and assigns, to the uses and upon the trusts expressed in the will of and concerning the residue of the testator's real estates.

"T. DENMAN.
"J. LITTLEDALE.
"J. PARKE.
"J. PATTESON."

BAXTER AND ANOTHER, ASSIGNEES OF HILL, *v.* PRITCHARD (1).

1834. *June* 4.

[456]

(1 Adol. & Ellis, 456—464; S. C. 3 N. & M. 638; 3 L. J. (N. S.) K. B. 185.)

An assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase-money, is not an act of bankruptcy, when the purchaser pays a fair price for the goods, and is ignorant of the trader's design.

TROVER for certain articles of furniture and stock in trade. The first count alleged a possession by Hill the bankrupt, and a

(1) There appears to be nothing in the Act of 1883 (46 & 47 Vict. c. 52, s. 4) to supersede this decision. The decision was cited in argument before

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finding by the defendant before the bankruptcy, and charged a conversion after the bankruptcy. The second count laid the possession in the plaintiffs as assignees. Plea, not guilty. The defendant gave notice of disputing the petitioning creditor's debt, the trading, and the act of bankruptcy. On the trial before Denman, Ch. J., at the London sittings after Trinity Term, 1833, the only question ultimately in dispute was, whether an assignment made by Hill to the defendant constituted an act of bankruptcy? as to which the following facts were proved. Hill, being in trade as an oil and colour man, on the 9th of December, 1831, by several deeds, assigned to the defendant the lease of certain premises held by him (Hill), and all his book debts, furniture, fixtures, stock in trade, and effects. The property [*457] sold was taken at a valuation. Hill obtained *the purchase money, and absconded for America. The jury expressly found that Hill had made the assignment with the intention of defrauding his creditors, but that the defendant was no party to the fraud. The LORD CHIEF JUSTICE thought that, on these facts, the assignment was an act of bankruptcy, and he directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit. *Sir James Scarlett* obtained a rule accordingly in Michaelmas Term, 1833. In Easter Term last (April 30th),

Sir John Campbell, Attorney-General, and *Follett,* shewed cause (1):

This is an act of bankruptcy within two clauses of the third section of stat. 6 Geo. IV. c. 16. First, the trader has made a fraudulent grant or conveyance of his goods; secondly, he has made a fraudulent gift, delivery, or transfer of his goods. It is true that the jury have negatived fraud on the part of the defendant; but they have found fraud on the part of Hill. Hill's act, if valid, would have the effect of preventing the rateable distribution of his property under the bankrupt laws;

WRIGHT, J. in *Shears* v. *Goddard* (1895) 65 L. J. Q. B. 151; but his judgment, as well as that of the Court of Appeal, '96, 1 Q. B. 406, 65 L. J. Q. B. 344, turned on the saving clause (s. 49) of the Act of 1883.—R. C.

(1) Before Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

and this being the fraud contemplated by the Legislature, it is complete without any fraud on the part of the defendant. On this principle, any voluntary preference is now an act of bankruptcy; and, even while it was no act of bankruptcy unless made by deed, trover for money had and received would lie in all cases of such preference, against the receiver. Yet a voluntary preference may be given, without any fraud on the part of the person preferred. Not only may there be, as in the case last put, an act of bankruptcy effected by a transfer, where the receiver is not aware that creditors *will be defrauded, but also [*458] there may, on the other hand, be a transfer where the receiver has knowledge of the trader's insolvency, and yet no act of bankruptcy, as in the case of a creditor who obtains a preference by menace or importunity. The privity of the receiver is therefore no test, either way, of the existence of the fraud contemplated by the Legislature. The cases respecting fraudulent assignments, antecedent to the passing of the statute of 6 Geo. IV. c. 16, are applicable to the present question, excepting only that a deed is no longer requisite to perfect the act. Now the cases may be distributed into two classes: first, where there was fraud at common law, or under the statute 13 Eliz. c. 5, in which class of cases there is no fraud unless both parties be privy; secondly, where the fraud consists in evading the bankrupt laws, in which class fraud may exist, though one party be not privy. The cases are collected in Lord Henley's Digest of the Bankrupt Law, ch. 2, s. 2 (1). The second head of fraudulent assignments, there given (2), comprehends assignments which are fraudulent, as being against the policy of the bankrupt law; and it appears, from the authorities there, that it has been held that the assignment of all a trader's property, for the benefit of all the creditors, is an act of bankruptcy, because it incapacitates the person assigning from carrying on trade (3).

(LITTLEDALE, J.: Have you any instance where a sale has

(1) P. 26 (3rd ed. 1832).
(2) P. 27.
(3) P. 28. See Lord MANSFIELD in *Compton* v. *Bedford*, 1 W. Bl. 362; in *Devon* v. *Watts*, 1 Doug. 92; in *Butcher* v. *Easto*, *ib.* 296; and in *Harman* v. *Fishar*, 1 Cowp. 123; and Lord ELLENBOROUGH in *Tappenden*

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been held an act of bankruptcy, if the trader got as much as he parted *with?)

Lord MANSFIELD'S judgment in *Worseley* v. *Demattos* (1) goes that length. The enforcement of this rule may be a hardship upon the purchaser; but this the law will work, rather than permit a fraud upon the bankrupt laws. No man should take such an assignment without satisfying himself that there are no creditors. In *Cooke* v. *Caldecott* (2) it was left to the jury, whether the party receiving the transfer had reason to know that the trader was defrauding his creditors; but there the sale was only of a part of the property, so that the fact of the trader being incapacitated from carrying on trade did not arise. And in *Ward* v. *Clarke* (3) the jury were told to consider whether, from the circumstances of the sale, the purchaser must not have known that it was not in the ordinary course of business; but there the only question was, whether the purchaser was within the protection of the eighty-second section of stat. 6 Geo. IV. c. 16, on the ground of the transaction having been *bonâ fide?* Here there is a sale of all the property, with an intent, on the part of the seller, to abscond with the money, and defraud his creditors.

(PATTESON, J.: In the cases where a deed of assignment has been held to be an act of bankruptcy, the transfer itself, independently of the collateral fact of the seller's intention as to his own future proceedings, has been held to be a fraud on the creditors: you are seeking to incorporate such an intent into the transaction, in order to make out the assignment to be a fraud.)

Sir James Scarlett and *Hutchinson* in support of the rule:

[*460] The question which has been put, whether a sale *has been held to be an act of bankruptcy, if the trader got as much as he parted with, decides this case. It has never been so held.

v. *Burgess*, 4 East, at p. 235. But see Lord ELDON'S remarks, in *Ex parte Bourne*, 16 Ves. at p. 148, on *Kettle* v. *Hammond*, Co. B. L. 89, and his judgment in *Dutton* v. *Morrison*, 11 R. R. 56 (17 Ves. 193).

(1) 1 Burr. 467. See the conclusion of the judgment there.

(2) M. & M. 522.

(3) M. & M. 497.

(*F. Pollock*, *amicus curiæ*, said that the contrary had been decided in a case of *Rose* v. *Haycock* (1).)

It is not, in itself, an act of bankruptcy for a *trader to incapacitate himself from carrying on trade. Lord MANSFIELD certainly appears to have used an expression which might lead to such a doctrine, but he seems to have assumed the principle without much consideration. If a sale be made for full value the

[*461]

(1) ROSE *v.* HAYCOCK.

A sale of the whole of a trader's property is not, of itself, an act of bankruptcy.

The party who seeks to treat the sale as an act of bankruptcy must shew some fact from which fraud may be inferred.

THIS was an action of trover, tried before Mr. Baron Hullock, at Lancaster, at the Spring Assizes in 1827.

The question was, whether a deed, by which a trader sold the whole of his property, was, of itself, an act of bankruptcy, independently of any question of fraud? By the deed in question the bankrupt had assigned all his share in the stock in trade for a sum of money, which was paid to him. Two days before this, the lease of the premises wherein the business was carried on had been sold, so that the bankrupt had incapacitated himself from carrying on his business. The purchaser was the bankrupt's father. There was evidence that a letter had been sent by the father a short time before the purchase, which would indicate that the son was embarrassed. But the plaintiff's counsel did not impute fraud, nor was he able to shew that the purchase-money was improperly distributed. He contended that, in point of law, the sale was an act of bankruptcy. The learned Judge was of opinion that it was not, of itself, an act of bankruptcy; that there must be some evidence to shew fraud, or something from which the jury might fairly conclude that the transaction was not *bonâ fide*. The counsel for the plaintiff declined addressing the jury, and the learned Judge directed the plaintiff to be nonsuited.

F. Pollock, in Easter Term, 1827, moved for a rule *nisi* for a new trial:

This sale cannot be allowed by law. If it is an act of bankruptcy for a trader to assign all his property for the purpose of a just distribution among all his creditors, *à fortiori* it must be such an act to sell all his property, by which he becomes enabled to pay whom he pleases. He thus sells himself up; and the very circumstance is enough to put a buyer on his guard. Here there were debts to the amount of 10,000*l.*, and the purchase-money was not equal to that sum.

LORD TENTERDEN, Ch. J.:

The sale was not in point of law, and of itself only, an act of bankruptcy. The words of the Bankrupt Act, 6 Geo. IV. c. 16, s. 3, are, "If any such trader shall make any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels." The utmost that could be contended for, by a party who sought to impeach it, would be, that it should go to the jury upon the question of fraud; and then, in such a case as the present, it should go to

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creditors are not injured. And this is supported by Lord KENYON'S remarks in *Whitwell* v. *Thompson* (1). A fraudulent conveyance of any part of the property is an act of bankruptcy; but there must be such a transfer as in itself constitutes a fraudulent transaction, as well as an intent on the part of the seller to defraud. If a fraudulent intent on the part of the seller were sufficient, no purchase could be made in a shop with safety. The transfer, as well as the intent, must be fraudulent; and a contract cannot be fraudulent unless both the contracting parties be tainted with the fraud.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term delivered the judgment of the COURT:

The question is, whether an assignment by a trader of his whole stock, with intent to abscond and carry off the purchase-money, is an act of bankruptcy as "a fraudulent transfer and delivery of his property with intent to defeat and delay his [*462] creditors," when the *purchaser pays a fair price for the goods, and is ignorant of the trader's design?

The case being new, I thought myself bound to adhere to the words of the Act; and considering that all acts of bankruptcy are made to depend on the conduct and motives of the bankrupt alone, and that, in one sense, his sale of property to the defendant was clearly fraudulent, I directed the jury to find a verdict for the plaintiff, with leave to move for a nonsuit.

The case has now been fully argued before us, and my first impression was rather fortified than weakened by a scrutiny of the older cases, in which Lord MANSFIELD, and other contemporary Judges of high authority, appear to have held, that the mere assignment of a trader's whole property by deed was an act of bankruptcy, as disabling him from further carrying on his trade, though for a good consideration, and even with the

them with a strong observation on the want of any facts from which fraud could be properly inferred. Even an assignment for the benefit of creditors is not now an act of bankruptcy, except in certain cases mentioned in the fourth section. A fair and *bonâ fide* sale is scarcely within the mischief for which the Bankrupt Act proposes a remedy.

Rule refused.

(1) 1 Esp. 68.

praiseworthy motive of fairly distributing it among his creditors. It is enough to allude generally to *Worseley* v. *Demattos* (1), *Compton* v. *Bedford* (2), *Law* v. *Skinner* (3), *Deron* v. *Watts* (4), *Hassells* v. *Simpson* (5), *Butcher* v. *Easto* (6).

On fuller consideration, I am satisfied that my first impression was wrong; and agree with the opinion which has been formed by the rest of the COURT. If the language of the clause is construed with strictness, it is not the transfer and delivery of the goods that can be called fraudulent, in any sense. The trader is bound to deliver the goods he has sold for valuable consideration, receiving, in return for them, a fund of equal value, *which might be made available for the benefit of his creditors. Possibly the best thing for them would be the conversion of goods into money. It is remarkable that the word "sale" does not occur in this clause; and equally so, that none of the older cases turn on a sale accompanied with payment of the full price. Again, the COURT held in *Hill* v. *Farnell* (7) that where a part of the property had been sold by a trader after an act of bankruptcy, but *bonâ fide* bought, the purchaser could not be compelled to part with the goods unless the assignees, at least, tendered the price paid. It was there justly said, that the protecting words of the eighty-second section could not otherwise receive their full effect. The incongruity would, indeed, be monstrous if the purchaser were to be at liberty to keep goods so obtained, but should be disabled from even recovering a dividend on the price he had *bonâ fide* paid, if no previous act of bankruptcy had been committed.

[*463]

Another great inconvenience was forcibly pointed out: as the transfer and delivery of any part of the property may be by the statute an act of bankruptcy, a trader carrying on business in the ordinary way might be made a bankrupt by a regular sale in his shop, by proof subsequently obtained that he had a scheme for cheating his creditors of the money; and in that case the unfortunate purchaser must both yield up to the assignees the article bought, and lose his right of proving under the commission.

(1) 1 Burr. 467.
(2) 1 W. Bl. 362.
(3) 2 W. Bl. 996.
(4) 1 Doug. 86.
(5) 1 Doug. 89, *n*.
(6) 1 Doug. 295.
(7) 9 B. & C. 45.

BAXTER v. PRITCHARD. [*464]

These startling consequences, which would, perhaps, warrant some degree of violence to the wording of the law, will be avoided by confining the epithet "fraudulent" *to the gift, transfer, or delivery of goods, and not extending it to the projects which possibly the trader may entertain, as to the disposal of the purchase-money.

Whatever authority exists on the subject coincides with this view. *Mr. Pollock* informed us of a case decided at Nisi Prius by Baron HULLOCK in 1827, where the mere fact of selling the whole stock in trade was held to be no act of bankruptcy, without proof of fraud. That learned Judge nonsuited the assignees. And *Mr. Adolphus* has furnished a note of the refusal by this Court to set aside the nonsuit. In *Cook* v. *Caldecott* (1) Lord TENTERDEN left it substantially to the jury to say, whether the purchaser was aware of the trader's intention to defraud his creditors of the money raised by sale of portions of his stock in trade: *Hill* v. *Farnell* (2) points the same way, and supplies the powerful argument to which allusion has been made. And the MASTER OF THE ROLLS recently decided the case of *Robinson* v. *Carrington* (3) on the same principles.

For these reasons we are of opinion that the sale of a tradesman's stock to a *bonâ fide* purchaser who pays the fair price of it, in ignorance of any fraudulent intention of the seller, is no act of bankruptcy. The rule for entering a nonsuit must be

Absolute.

1834. *May* 24.

[491]

WHITEHEAD *v.* TATTERSALL (4).

(1 Adol. & Ellis, 491—493.)

Covenantor and covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator: Held, that in action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached.

COVENANT. The action was for breach of a covenant to repair premises leased by the plaintiff to the defendant. Plea, *non est factum*. On the trial before Lord Denman, Ch. J., at the

(1) M. & M. 522.
(2) 9 B. & C. 45.
(3) 1 Monf. & Ayr. 1.
(4) Cited and followed in *Commings* v. *Heard* (1869) L. R. 4 Q. B. 669, 39 L. J. Q. B. 9.—R. C.

Middlesex sittings after last Easter Term, the execution by the defendant of the counterpart of the lease containing the covenant was admitted. The plaintiff then proved that the defendant *had sent to him a letter in the following words: [*492] "Mr. Tattersall agrees to abide by the determination of Mr. Batson and Mr. Mead as to the dilapidations at No. 33, Bloomsbury Square, and if they cannot agree, to pay a moiety of the expense of any one they may call in." The plaintiff agreed to this, and the arbitrators named, not having agreed, called in an umpire, who signed the following report: "I have surveyed and estimated the several works necessary to be done in repairing the dilapidations to a house, &c., and find the same amount to the sum of 55*l.* 5*s.*" The LORD CHIEF JUSTICE was of opinion that, in default of evidence to impeach this award, the jury must take the damages as found by the umpire; and a verdict was accordingly given for 55*l.* 5*s.* damages.

Platt now moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection:

Had the action been brought upon the award, the finding in it would be conclusive; but this is an action for breach of covenant: therefore the award cannot go further than an admission of the defendant would go, and that would not be conclusive evidence.

(LITTLEDALE, J.: No evidence was offered to impeach the award.)

But proof would have been offered that, in fact, the damages were less than those found by the award.

(TAUNTON, J.: The award of an arbitrator concludes the right, unless you can impeach the award. LAWRENCE, J., at the Hereford Assizes, ruled that an award was conclusive evidence in an action of ejectment.)

LORD DENMAN, Ch. J.:

The award binds the plaintiff; and, that being so, it must bind the defendant. There must be no rule.

LITTLEDALE, TAUNTON, and WILLIAMS, JJ., concurred. [493]

Rule refused.

1834.
May 24.

[493]

ANN AND MARGARET DODD *v.* SAMUEL AND JAMES HOLME (1).

(1 Adol. & Ellis, 493—507; S. C. 3 N. & M. 739.)

Two persons having adjacent lands, the one builds a house at the extremity of his land; the other afterwards excavates his own soil near to, but without touching, the ground so built upon. *Quære*, whether the party making such excavation is bound to see that his neighbour's foundations be not thereby weakened; and whether, if they be so, he is guilty of an actionable negligence in having so used his own soil without protecting that of his neighbour, although no negligence be shewn in the mode of carrying on the work?

Supposing him not liable in the case of a newly built house; *quære*, whether he would be so if the house had stood twenty years before the excavation was made?

But where it is alleged and proved that the defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured, an action lies: and although it be shewn that the house was infirm, and could at all events have stood only a few months, still the plaintiff may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and in determining the question of negligence, the jury ought to consider the state of the plaintiff's house.

CASE. The declaration stated, that before and at the time of the committing, &c. the plaintiffs were possessed of an ancient dwelling-house, and that before, &c. the defendants were employed in digging the foundations of a certain intended building in a certain piece of land next adjoining to the land whereon the said dwelling-house was built, yet defendants, well knowing the premises, but intending, &c., while the plaintiffs were so possessed, &c., so carelessly, negligently, unskilfully, and improperly dug the said foundations in the land next adjoining the said land on which the said dwelling-house was built, that by reason thereof the foundations and walls of the dwelling-house sank and gave way, and became and were greatly weakened, loosened, damaged, and unsafe, and the dwelling-house thereby became untenantable and uninhabitable. The second

(1) This case must be read as qualified by the decision of a court of error in *Chadwick* v. *Trower* (1839) 6 Bing. N. C. 1, 8 L. J. (N. S.) Ex. 286. And so it is observed by WILLIAMS, J. in *Submarine Telegraph Co.* v. *Dickson* (1864) 15 C. B. (N. S.) 759, 33 L. J. C. P. 139, 142. As to the acquirement of a right of support, see *Dalton* v. *Angus* (H. L. 1879) 6 App. Cas. 740, 50 L. J. Q. B. 689, 44 L. T. 844.—R. C.

count was similar, but stated the dwelling-house to have been built for a long *time, viz., twenty years before, &c. The third count stated the dwelling-house to be ancient, and that the defendants wrongfully, carelessly, and unskilfully made an excavation near the foundations of the said dwelling-house, whereby the soil about the said foundations was loosened, and the foundations weakened, &c. The fourth count was similar to the third, only stating the dwelling-house to have been erected twenty years before. The fifth count was similar, except that it merely described the house as a certain dwelling-house. The declaration concluded with various special averments of damage. Plea, not guilty.

At the trial before Bolland, B., at the Lancaster Summer Assizes, 1833, it appeared that the plaintiffs' was an old house; some witnesses remembered it thirty-five years: an old warehouse belonging to the defendants had formerly come close up to it, but was pulled down, and the defendants, at the time referred to by the declaration, excavated ground on the side of the warehouse, for the foundation of a new building. The excavation was six feet deep, and came within about four feet of the plaintiffs' house. The intermediate soil was not touched. After the excavation was made, the gable wall of the house bulged, and the defendants then (but not before) endeavoured to shore it up; but the wall gave way in all directions, and it became necessary to rebuild it. After the excavation began, the weather was very wet, which partly occasioned the fall of the gable. Witnesses for the plaintiffs stated, that if the wall had been shored properly and in time, it would not have given way. The defendants' witnesses said that the wall was in so rotten a state that it could not have been effectually shored; that it had only a slight *foundation, and was pressed upon by a great weight of rubbish [*495] on the plaintiffs' premises, and that, even if undisturbed, it could not have stood six months. For the defendants it was contended that a man could not, by building his house on the extremity of his own land, claim to prevent a neighbour from using his own land lying adjacent: and *Peyton* v. *The Mayor of London* (1), and *Wyatt* v. *Harrison* (2), were cited. The learned

(1) 33 R. R. 311 (9 B. & C. 725). (2) 37 R. R. 566 (3 B. & Ad. 871).

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Judge, after detailing the evidence to the jury, stated the law as follows: "If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent, so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall, so that it had more on it than it could well bear, he would not be liable." And he stated the question for the jury to be, whether the fall was occasioned by the defendants' negligence, in which case the verdict ought to be for the plaintiffs; or by its own infirmity, in which case they should find for the defendants. The jury found a verdict for the plaintiffs. In Michaelmas Term following, a new trial was moved for, on the ground that the learned Judge had misdirected the jury, inasmuch as they might have been led by the summing up to suppose that the mere act of digging near the plaintiffs' land, in consequence of which the wall fell, was the negligence for which an action lay, unless the wall was improperly loaded; whereas the real question was, whether the work had been done by the defendants in a negligent manner, or with as much care as the circumstances allowed. It was also contended, that it should

[*496] have been left to the jury whether *the house was built in such a manner as a man ought to build a house at the extremity of his land, in order to have an action against his neighbour (if any such action would lie) for injury occasioned to the house by the neighbour digging in his own soil. A rule *nisi* having been obtained,

Blackburne and *Roscoe* now shewed cause. * * *

[501] *F. Pollock* and *Wightman*, *contrà*. * * *

[504] LORD DENMAN, Ch. J.:

The case, as presented to the Court, involves some curious points, which, however, it is not necessary to decide. The declaration charges that the plaintiffs were possessed of a house, and that the defendants so negligently and carelessly dug their foundations in the land next adjoining the land on which the said house was built, that the walls thereof sank and gave way. The question is, if those allegations were proved, and if it was properly left to the jury whether they were or were not proved.

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The real point in the case was, the cause of the damage sustained by the plaintiffs. It is impossible not to see that the question, what that cause was, involves the consideration of the state in which the plaintiffs' house was at the time of the act done by the defendants. Upon that subject a great deal of evidence was given, and, no doubt, properly impressed upon the jury; and I think it was substantially left to them in the charge of the learned Judge, whether or not the result complained of was caused by the negligent act of the defendants. It being so left to them, I think, upon the balance of evidence, no other result could have been expected than the verdict *they gave; the damage having occurred so soon after the act complained of. A man has no right to accelerate the fall of his neighbour's house. Without, therefore, entering into the general question of law as to the right of a party building on the edge of his own soil, or the question whether twenty years' occupation is an essential part of such right, on which I give no opinion, I think the question in this case was fairly left to the jury, and the verdict a proper one.

[*505]

LITTLEDALE, J.:

I think that the plaintiffs' house, having stood more than twenty years, might be considered as an ancient house. What difference that might make under other circumstances, it is unnecessary now to say: the plaintiffs had at all events acquired certain rights; and the complaint in this action is, that the defendants, by their negligence, occasioned a loss to the plaintiffs, which was a prejudice to those rights. The learned Judge appears, by his report, to have put the case to the jury in language like that used by this Court in their judgment in *Wyatt* v. *Harrison* (1). I do not find that he left it prominently as a question, what was the state of the building; but that must have been a matter submitted to them; for, in enquiring whether the injury was owing to the neglect of the defendants, the state of the premises must have been a part of the consideration. I am of opinion that there is no ground for a new trial.

(1) 37 R. R. 566 (3 B. & Ad. 871).

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TAUNTON, J.:

The question in the cause was merely one of fact, and I cannot
[*506] see in what respect the jury *have drawn a wrong conclusion. In every count of the declaration it is stated that the defendants did the act complained of negligently, carelessly, and unskilfully, and that by reason thereof, that is, of such negligent and improper conduct, the damage was occasioned. A very long enquiry was gone into at the trial, how far the defendants had acted negligently or cautiously, upon which the jury have formed their conclusion; and they must be taken to have decided, according to the averments in the declaration, not only that there was negligence in the defendants, but that, by reason of such negligence, the damage accrued. It was said that the house, if undisturbed, might not have stood six months; but if that was so, still the defendants had no right to accelerate its fall: six months' enjoyment was of some value, and the defendants had no right to deprive the plaintiffs even of that short-lived existence of their dwelling-house. If the building had fallen down merely in consequence of its infirm condition, that would not have been a damage by the act of the defendants; but the jury have found otherwise, and I think the evidence supports their finding. As to the summing up, the learned Judge has stated it briefly in his report, and may not recollect every observation he made, but, considering the length of time occupied by the cause, and the quantity of evidence gone into, it is impossible, even if the Judge had been silent on the point, that the jury should have omitted to consider whether or not the act of the defendants was done by them negligently; and, without looking narrowly, and, as Lord KENYON used to say, "with eagle's eyes," at the words used by the learned Judge, I think we are justified in saying that the minds of the jury were
[*507] sufficiently directed to *the question how far the damage complained of arose from the improper act of the defendants.

WILLIAMS, J.:

I am of the same opinion, and I think it is clear from the learned Judge's report, that the attention of the jury was drawn to that which was the real subject of enquiry. Much evidence was given to shew that the injury was occasioned by the faulty

state of the house, and not by the negligent proceeding of the defendants; that question must have been fully before the jury, and there was nothing in the summing up to withdraw it from their notice. The bad condition of the house would only affect the amount of damages. If it was true that the premises could have stood only six months, the plaintiffs still had a cause of action against those who accelerated its fall: the state of the house might render more care necessary on the part of the defendants not to hasten its dissolution. There was evidence of an actual neglect in them; and, upon the whole, there is reason to think that the jury drew the proper inference.

Rule discharged.

BYWATER *v.* RICHARDSON.

1834. *May* 24.

[508]

(1 Adol. & Ellis, 508—514; S. C. 3 N. & M. 748; 3 L. J. (N. S.) K. B. 164.)

Plaintiff bought a horse, warranted sound, by private contract, at a repository. At the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was, that a warranty of soundness, there given, should remain in force till twelve on the day after the sale, when the sale should become complete, and the seller's responsibility terminate, unless a notice, and surgeon's certificate, of unsoundness, were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made till after twelve on the following day. The unsoundness was of a nature likely not to be immediately discovered; some evidence was given to shew that the defendant knew of it; and the horse was shewn at the sale under circumstances favourable for concealing it. After verdict for the plaintiff:

Held, that there was sufficient proof of the plaintiff having had notice of the rules at the time of the sale, to render them binding on him.

Also, that the rule in question was such as a seller might reasonably impose, and that the facts did not shew such fraud or artifice in him as would render the condition inoperative.

CASE. The declaration stated that plaintiff, at the special instance, &c. bargained with defendant to buy of him a horse for 40*l.*, and defendant, by falsely warranting the said horse to be sound, sold him to plaintiff for the said sum, which plaintiff paid defendant, whereas the horse at the time, &c. was unsound, and hath so continued, &c., and defendant by means of the premises falsely and fraudulently deceived the plaintiff on the sale of the said horse, and the same became useless to plaintiff,

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and he was put to expense, &c. There were other counts, one of which stated that plaintiff, relying, &c. resold the horse on a like warranty, and was sued thereupon by the purchaser; and that defendant, in order to induce the now plaintiff to resist that action, and not take back the horse, falsely and deceitfully represented to plaintiff that the horse was sound, whereby he was induced to defend the action, and afterwards, on discovering the falsehood of defendant's representation, was obliged to pay 90*l.* to have the proceedings stayed, &c. Plea, not guilty.

At the trial before Bolland, B., at the Lancaster Summer Assizes, 1833, the plaintiff proved that the horse was sold to him by the defendant, with a written warranty of soundness, in [*509] April, 1832; that he resold *him, with a warranty to the same effect, in June, 1832, and was afterwards sued upon that warranty by the purchaser, and obliged to compound the action and take back the horse. The unsoundness in question was what is termed a "navicular disease," which was stated to be an inflammation in a joint on the inside of the hoof, and to be of such a nature that it may be alleviated by proper treatment, so far as to render a horse fit for gentle work, and to make him appear sound for a short time, and on soft ground, but can seldom, if ever, be permanently cured, so as to qualify him for hard work. The horse was sold to the plaintiff on the defendant's account, at a repository for horses, where the ground was covered with a soft material. Some evidence was given to shew that the defendant must have known of the unsoundness at the time of the sale. The defendant, at the trial, admitted the unsoundness, but relied upon the following rule, or condition of sale, which was painted on a board fixed to the wall of the repository:

"A warranty of soundness when given at this repository will remain in force until twelve o'clock at noon on the day next after the day of sale, when it will become complete, and the responsibility of the seller will terminate, unless in the meantime a notice to the contrary, accompanied by a certificate of a veterinary surgeon, be delivered at the office of Robert Lucas, in Great Charlotte Street, such certificate to set forth the cause, nature, or description of any alleged unsoundness. In this case the seller to have the option of procuring the certificate of a second

veterinary surgeon (which he shall be bound to do within twenty-four hours after the delivery of the purchaser's notice and *certificate of unsoundness above mentioned, or the sale to be void), whose opinion, if it should coincide with the first, shall be definitive; but if the opinions should differ, the two veterinary surgeons shall forthwith call in a third, whose certificate shall be final and binding upon both parties, the party in the wrong to pay all expenses." It did not appear that any particular reference was made to this rule at the time of the sale. [*510]

The only proof given by the plaintiff of his having paid the costs in the action brought against him, as stated in the declaration, was a payment of the amount by him to his own attorney, to be paid to the attorney of the plaintiff in that suit. The learned Judge thought this evidence not sufficient; and with respect to the other point made in defence, he stated his opinion to be, that conditions like that above mentioned, only bind when there is something to couple them with the act of sale, as where the conditions of sale are read at an auction; he therefore thought that the rule of the repository here relied upon did not bind the defendant: and he left the case to the jury as upon an ordinary warranty. The jury found a verdict for the plaintiff for 23*l.*, the difference between the price paid by him to the defendant, and the amount for which the plaintiff finally sold the horse. The learned Judge gave leave to the defendant to move to enter a nonsuit; and to the plaintiff to move to increase the damages by the amount of costs paid as above mentioned in the action brought against him (1). The cross rules having been accordingly obtained,

F. Pollock and *Hope* now shewed cause against the rule for a nonsuit:

First, there was no evidence of a *contract subject to the conditions in question. The regulation relied upon cannot be taken to apply to sales by private contract, but must have been meant to govern sales by auction, to which, and not to private sales, conditions of this kind are usually attached. In *Mesnard* v. [*511]

(1) This was afterwards given up on the part of the plaintiff.

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Aldridge (1), where such rules were held to bind the purchaser, the sale was by auction, and the auctioneer drew the attention of the bidders to the conditions of sale. Lord KENYON there referred to the practice of carriers in posting up bills in their coach-offices to limit their responsibility for loss of goods. But in that case, the carrier wishing to divest himself of liability must fix upon his employers a knowledge of the notice intended to have such effect: *Kerr* v. *Willan* (2), *Rowley* v. *Horne* (3); and those cases shew that the evidence given here was not sufficient for the purpose. Secondly, assuming that the notice was sufficient, there was so much fraud in the conduct of the seller, that the condition is not binding. In *Baglehole* v. *Walters* (4), though Lord ELLENBOROUGH over-ruled the doctrine of Lord KENYON in *Mellish* v. *Motteux* (5), that a seller "with all faults" is bound to inform the buyer of such defects as could not, by any attention on his part, be discovered, he nevertheless admitted that the seller would be liable if he used artifice to disguise the faults, and prevent their being discovered by the purchaser. And MANSFIELD, Ch. J. lays it down in *Schneider* v. *Heath* (6), that on a sale "with all faults," the vendor is not protected if he has been guilty of any positive fraud in the sale. Now it is a fraud in law, if a party, [*512] *from whatever motive, knowingly makes a representation which is not true, in a manner calculated to induce another to act upon it, so that he thereby incurs damage: *Polhill* v. *Walter* (7). And in *Aldridge* v. *Mesnard* (8), upon a bill of interpleader, (under which the case of *Mesnard* v. *Aldridge* (1) was tried,) Aldridge, the auctioneer who had sold the horse, applied to the Court of Chancery to have costs allowed him, on the ground that he had been merely a stakeholder: it was, however, contended that Aldridge was not entitled to be so considered, inasmuch as he might have paid over the money to the vendor, who, by the conditions of sale, was entitled to it if the horse was not returned in a given time: but Lord ELDON said, "I have tried actions, more than once, in which it appeared clearly, that the condition to

(1) 3 Esp. 271.
(2) 18 R. R. 337 (6 M. & S. 150).
(3) 28 R. R. 551 (3 Bing. 2).
(4) 13 R. R. 778 (3 Camp. 154).
(5) 1 Peake, 156.
(6) 14 R. R. at p. 827 (3 Camp. 508).
(7) 37 R. R. 344 (3 B. & Ad. 114).
(8) 6 Ves. 418.

return a horse by a certain day was inserted on purpose, because the defect would not appear till a day or two after that day. The justice of the case is, that the plaintiff should have his costs." Lord ELDON's observation applies to the present case. Here the horse was sold with a false representation, and upon terms intended to prevent the buyer from returning the horse, although he should discover the unsoundness within a reasonable time. If any effect is to be given to the condition, it must be applied only to such faults as a purchaser could have detected by twelve o'clock on the day after the sale.

Alexander and *Wightman, contrà :*

This was a sale within the rules of the repository, and there was sufficient evidence of the plaintiff being cognisant of those *rules. [*513] The case is not distinguishable from *Mesnard* v. *Aldridge* (1). There it was held that printed conditions pasted on the auctioneer's box gave a purchaser sufficient notice of the conditions of sale; and the law there laid down applies to a private sale under the circumstances proved here. The repository rules were, therefore, sufficiently connected in proof with the sale of the horse. Then as to the nature of the warranty; the defendant might have sold the horse without any, in which case there would, of course, have been no right of action. So, also, he had a right to sell with a warranty expiring at the end of twenty-four hours; after which time the parties were in the same situation as if no warranty had been given. A man who buys a horse under such a limited warranty buys at his peril, and should be the more on his guard.

LORD DENMAN, Ch. J.:

I think there can be no doubt that the plaintiff, in this case, was aware of the rules of the repository; and, if so, it is the same as if the seller had told him by word of mouth that he would warrant the horse against such defects only as might be pointed out within twenty-four hours. He had a right to give such a limited warranty, and the plaintiff only was to blame if he did not avail himself of the time given to discover and object to the unsoundness. Perhaps it may be very prudent in

(1) 3 Esp. 271.

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a vendor to make such a stipulation; at all events the purchaser, in a case like this, is bound by it. I think the principle of *Baglehole* v. *Walters* (1) applies, and that this was a warranty against such faults only as the purchaser might discover in twenty-four hours.

[514] LITTLEDALE, J.:

I am of the same opinion. The warranty here was as if the vendor had said, "After twenty-four hours I do not warrant." Such a stipulation is not unreasonable.

TAUNTON, J. and WILLIAMS, J. concurred.

Defendant's rule absolute. Plaintiff's rule discharged.

1834. *May* 26.

JONES *v.* TYLER.

[522]

(1 Adol. & Ellis, 522—526; S. C. 3 N. & M. 576; 3 L. J. (N. S.) K. B. 166.)

An innkeeper on a fair day, upon being asked by a traveller, then driving a gig of which he was owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveller with some goods into the inn, and placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence: Held, that the innkeeper was answerable.

CASE. The declaration, after alleging the custom of the realm as to innkeepers, averred, that the defendant being an innkeeper, the plaintiff put up at and was received into the defendant's inn as a traveller by the defendant, and brought into the inn a certain gig containing certain goods and chattels, which said gig and its contents were then and from thence, until and at the time of the loss thereafter mentioned, within the said inn, and that the plaintiff during all that time abided as a traveller therein, yet that defendant did not keep the gig and its contents safely and without diminution or loss, but on the contrary thereof the said defendant and his servants so negligently and carelessly behaved and conducted themselves in that behalf, that the gig and its contents were, by and through the mere carelessness, &c.

(1) 13 R. R. 778 (3 Camp. 154).

of the defendant and his servants in that behalf, wrongfully taken and carried away by some person or persons to the plaintiff unknown, and were thereby wholly lost to the plaintiff. Plea, not guilty. On the trial at the Worcester Summer Assizes, 1833, before Gurney, B., it was proved that the defendant was an innkeeper at Wribbenhall, near Bewdley, and that the plaintiff drove his gig to the defendant's inn on *Bewdley fair day. The plaintiff asked whether there was [*523] room for his horse, upon which the ostler of the defendant took the horse out of the gig, and put him into a stable, and the plaintiff carried his coat and whip from the gig into the house, and took some refreshment there. The ostler placed the gig outside of the inn yard, in a part of the open street, in which the defendant was in the habit of placing the carriages of his guests on fair days. The gig was stolen from thence. The jury, under the direction of the learned Judge, found a verdict for the plaintiff, leave being reserved to move to enter a nonsuit. *Jervis* accordingly obtained a rule in Michaelmas Term last.

R. V. Richards now shewed cause:

The gig having been delivered to the ostler was legally in the custody of the defendant, who was the ostler's master. As against the defendant, the place where the ostler put the gig must be taken to be part of the inn, though without the curtilage. In *Calye's* case (1) it is held, that if the guest ordered the ostler to put his horse to pasture, the innholder shall not be answerable for the horse being stolen from the pasture; but if the innholder of his own head put the horse to grass, then he shall answer for him if he be stolen. The reason is, that the pasture becomes a part of the inn, as against the innkeeper. The case is quoted to establish the same distinction in Roll. Abr. Action sur Case, F. pl. 3, 4 (2).

(LITTLEDALE, J.: There he is liable as a bailee, independently of his character of an innkeeper.)

He receives as an innkeeper. The modern cases are to be explained by this distinction; the question always being, whether

(1) 8 Co. Rep. 32 a. (2) Vol. i. pp. 3, 4.

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the defendant *have custody of the property in the character of an innkeeper: *Burgess* v. *Clements* (1), *Farnworth* v. *Packwood* (2), *Richmond* v. *Smith* (3). There can be no doubt, upon the facts of this case, that the defendant, by his servant, took charge of the gig in the character of an innkeeper: the guest could not be expected to know the local limits of the inn.

[*524]

Jervis, in support of the rule:

The street cannot be considered as a part of the inn; and if the defendant were held liable for a loss occurring there, it might be said that he was liable for goods taken from the pocket of his guest in the open street. To consider the street as part of the inn, for the custody of carriages there, would be giving a legal sanction to a nuisance. In the cases cited, the innkeeper has been held liable only where the property was under his control, whereas, in the present case, the parties must be held to have agreed to place the gig out of the inn, and therefore out of the defendant's protection. The inconveniences of construing the liability so extensively as is contended for on the other side would be very great.

LORD DENMAN, Ch. J.:

The inconveniences of either construction are numerous, and might be strongly put. And this case certainly comes very near to the distinguishing line. But, upon the best consideration, it seems to me that this gig was taken while under the protection of the innkeeper. He took in the horse; he put the guest into a room in the house; and he placed the gig where the carriages of his other guests were *placed. I think, therefore, that he continued liable as innkeeper for its safe custody.

[*525]

LITTLEDALE, J.:

This case is on the extreme limit; but I think the defendant is answerable for the loss. He has the benefit of the guest, and he provides provender for the horse. In the common course of things, the innkeeper is liable for the loss of goods placed

(1) 16 R. R. 473 (4 M. & S. 306).
(2) 1 Stark. 249.
(3) 32 R. R. 326 (8 B. & C. 9).

under his care, in an action upon the case. This was a fair day; so it is reasonable to suppose that the part of the premises usually occupied by carriages was full. On the plaintiff enquiring whether there was room, the defendant finds room for the horse: it is not likely that the parties understood that the gig was to be at the mercy of any one who came by. The place where it is put is the place commonly used for the purpose on fair days by the defendant: it must, therefore, as against the defendant in this case, be taken to be part of the inn. It is suggested that this use of the open street is a nuisance; that may be so, but cannot be insisted upon as between these parties.

TAUNTON, J.:

It does not appear that the gig was put in this place at all at the request or instance of the plaintiff: the place is therefore a part of the inn; for the defendant, by his conduct, treats it as such. If he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. Not having done so, he is bound by the common law liability.

WILLIAMS, J.: [526]

I am of the same opinion. It is true that some question might arise, whether placing the gig in the open street might not create a public impediment. But the defendant cannot set that up as between himself and the plaintiff. The plaintiff could not but consider that the gig was placed in the defendant's custody; he found the defendant acting as an innkeeper, and the latter made no complaint of want of room. No doubt this case goes near to the limit of the law; but I consider the defendant answerable.

Rule discharged.

1834.
May 26.

[526]

SMITH, ASSIGNEE OF COPE, A BANKRUPT, *v.* THE BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY (1).

(1 Adol. & Ellis, 526—531; S. C. 3 N. & M. 771; 3 L. J. (N. S.) K. B. 165.)

A corporation is liable in tort for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service, such as a distress professedly made under a statute, for a debt due to the corporation; and a jury may infer the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure.

TROVER for certain articles of furniture, late the property of the bankrupt, converted by the defendants after the bankruptcy. On the trial before Tindal, Ch. J., at the Summer Assizes for Stafford, 1833, it appeared that the articles had been distrained for money due to the Company for gas supplied to the bankrupt before his bankruptcy. The seizure was made, after the fiat in the bankruptcy, by a person of the name of Lumley. The Company is incorporated by stat. 6 Geo. IV. c. lxxix. (local and personal, public); and Lumley was authorized to distrain, by warrant under the hands of two justices, according to the provisions of the sixty-ninth section (2) of that Act. On the part

(1) The contention that the servant's authority should have been under seal to make the corporation liable does not seem to have been revived. Later cases have mostly turned on the question whether the servant's act was within the scope of his employment, as belonging to a class of acts which he was authorized to do, though in the particular case he committed a wrong, such as assault or false imprisonment, by misapprehension of the facts. See *Bayley* v. *Manchester, Sheffield & Lincs. R. Co.* (1873) L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. 366, Ex. Ch.; *Abrahams* v. *Deakin*, '91, 1 Q. B. 516, 60 L. J. Q. B. 238, 63 L. T. 690, C. A. —F. P.

(2) Which enacts, That in case any person or persons who shall contract with the said Company, or agree to take, or shall use or enjoy the benefit of the said gas, either in their private dwellings, shops, grounds, or premises, or otherwise, shall refuse or neglect, for the space of twenty-one days after demand, to pay the sum or sums of money then due for the same to the said Company, according to the terms and stipulations with the said Company, it shall be lawful for the said Company, or their clerk or superintendent, or any person or persons acting by or under their authority, by warrant under the hand and seal of any two of the justices of the peace for the county wherein the offence shall arise (which warrant such justice is hereby empowered to grant, upon confession, or upon proof of such demand by the oath of one credible witness), to levy the said sum or sums of money in respect whereof such refusal or neglect shall happen, by distress and

of the plaintiff, *evidence was given to shew that Lumley had authority from the Company to seize; it being, however, admitted that there was no authority under seal. Evidence was also given, on the part of the plaintiff, to shew that the proceeds of the sale had been received from Lumley by the Company. The LORD CHIEF JUSTICE left it to the jury to say, whether, if they believed that the proceeds had come to the hands of the Company, the Company had adopted Lumley's act, directing them, if they considered that the Company had so adopted it, to give a verdict for the plaintiff. The jury found a verdict for the plaintiff, but leave was reserved to move to enter a nonsuit, or for a new trial. A rule having been obtained accordingly, [*527]

Jervis (with whom was *F. V. Lee*) now shewed cause:

The jury believed that the Company had adopted the act of Lumley in seizing and selling, and had received the proceeds. The only question is, whether it was necessary, in order to make the Company liable, that the *appointment of Lumley should be under seal? He was then stopped by the COURT. [*528]

R. V. Richards and *Whateley* in support of the rule:

No adoption of the acts of Lumley can render the Company liable as wrongdoers, unless he was constituted their agent in the only way by which the agent of a corporation can be created, and that is by deed. *Yarborough* v. *The Bank of England* (1) did not decide this question; for there the motion was in arrest of judgment, and the COURT held that, after verdict, a proper appointment (under seal, if necessary) must be presumed; and *Tilson* v. *The Warwick Gas Light Company* (2) was decided upon a similar principle, the point being raised upon general demurrer, and the want of an appointment under seal not being expressly put upon the record. But in *Horn* v. *Ivy* (3) it was held that a defendant could not justify, in trespass, a seizure as servant

sale of the goods and chattels of the person or persons so neglecting or refusing to pay the same, rendering the overplus (if any) to such person or persons refusing or neglecting, after the necessary charges of making such distress and sale shall be first deducted.

(1) 14 R. R. 272 (16 East, 6).

(2) 28 R. R. 529 (4 B. & C. 962).

(3) 1 Vent. 47; *S. C.* 2 Keb. 567; 1 Mod. 18.

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of a corporation, without shewing, in his plea, an authority by deed. In *Duncan* v. *The Proprietors of the Surrey Canal* (1) the objection was taken, but not decided upon. In *The East London Water Works Company* v. *Bailey* (2) it was held that a corporation could not be sued upon a contract not under seal (3). The sixty-ninth section points out in what way the authority of the justices is to be obtained by the agent of the Company; but it leaves open the question, how that agent is to be constituted.

[529] LORD DENMAN, Ch. J.:

It cannot be said that there was no evidence to go to the jury. Proof of agency may certainly be required: but how is it made out here? First, by persons acting in a way in which no one would act without authority. It is, indeed, argued as to this, that the authority must be under seal. In *Yarborough* v. *The Bank of England* (4), the COURT seemed rather to think that it was not necessary that an agent of a corporation should, in all cases, have an appointment under seal, in order to render the corporation liable in tort for his acts. In *Carey* v. *Matthews*, mentioned in Salkeld (5), it is said that a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler. Then, in the present case, the LORD CHIEF JUSTICE left it to the jury to consider whether the corporation obtained the proceeds or not; and, if they did, whether it was not reasonable to presume that Lumley had their authority: and this without reference to the 69th section of the Act, which directs that the clerk shall get authority from the justices, but says nothing of his getting it from the corporation. I am of opinion that the rule must be discharged.

LITTLEDALE, J.:

According to the report of the LORD CHIEF JUSTICE of the Common Pleas, it appears that Lumley had, in fact, the authority of the corporation. Then the question arises, whether it was necessary that this should be given by deed. The statute appears

(1) 3 Stark. 50.
(2) 4 Bing. 283.
(3) See also, as to this point, the argument in *Dunstan* v. *The Imperial Gas Light Company*, 37 R. R. 352 (3 B. & Ad. 125).
(4) 14 R. R. 272 (16 East, 6).
(5) 1 Salk. 191.

not to contemplate such a deed, for it directs that a warrant shall issue under the hands of two justices of the peace. *This, however, it is not necessary to consider. The act done is not an extraordinary act, so as to make a seal requisite. In Bacon's Abridgment, Corporations (E), 3 (1), it is said, "So a man may avow the taking cattle *damage feasant*, as bailiff to a corporation, without having any precept in writing;" for which *Manby* v. *Long* (2) is referred to. As to *Horne* v. *Ivy* (3), that was a case in which the defendant justified a seizure under the patent of the Canary Company, as servant to the Company; and it was held, on demurrer, that he should have shewn in his plea that he was authorized by deed. That decision proceeded upon the ground that the service was not an ordinary one; but the appointment of a person to distrain is for a common service, and not an extraordinary one. In *Cary* v. *Matthews* (4) the appointment of a bailiff to distrain is so considered (5).

[*530]

TAUNTON, J.:

It appears to me that there was evidence sufficient to support the finding of the jury. With respect to the question of law, I am clearly of opinion that the seal of the corporation was not necessary for the appointment. As long as I can recollect, it has been the text law, that a corporation may give a warrant to distrain without deed. The distinction is between matters which do, and matters which do not, affect any interest of the corporation. Thus they must appoint a bailiff by deed for entering lands for condition broken, in order to revest their estate; but they need not do so where the bailiff is only to distrain for rent.

WILLIAMS, J.:

[531]

I am of the same opinion. I will advert to one case which has not been cited. In *Roe* d. *Dean and Chapter of Rochester* v. *Pierce* (6), M'DONALD, C. B. held, that a verbal notice to quit, given by the steward of the Dean and Chapter, was sufficient,

(1) Vol. ii. p. 265 (ed. 1832).
(2) 3 Lev. 107.
(3) 1 Vent. 47; *S. C.* 2 Keb. 567; 1 Mod. 18.
(4) 1 Salk. 181.
(5) See Br. Abr. Corporation, pl. 50; Year Book Tr. 18 Edw. IV., pl. 11, f. 8.
(6) 11 R. R. 673 (2 Camp. 96).

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without any other evidence of his authority; and that the Dean and Chapter shewed that they authorized and adopted the act by bringing the ejectment.

Rule discharged.

1834. *May* 28.

[536]

BRIDGES *v.* BLANCHARD.

(1 Adol. & Ellis, 536—551; S. C. 3 N. & M. 691.)

A. having a house, in which he was making alterations, adjoining the grounds of B., his wife wrote to B. as follows: "Before the last coat of paint is put on the side wall, we wish to place a window in it, and it can be finished more neatly with your permission to place the necessary ladder, &c.: the motive for doing this is, that I should gain a more cheerful view." B. answered (by letter), "You are welcome to place a ladder in my grounds near your house, and I shall be obliged if you will caution the workmen not to injure the shrubs." A. placed a ladder, and made a window in the part of his house to which the ladder was applied, overlooking the premises of B., who was absent from home at the time. B. afterwards objected to the window, and wrote as follows: "When you applied to me for permission to place a ladder in my grounds, being without a friend to advise with, and even without knowing exactly the situation in which your window would be placed, I unfortunately complied with your request, without consulting my own comfort:"

Held, that the first two letters did not shew a consent by B. that A. should open a window overlooking B.'s grounds; that the third letter, being written after the whole transaction, could not be resorted to in proof of such consent, and, even if available, did not prove the consent relied upon; and, consequently, that A. could not justify throwing down a wall which B. had built on her own soil after the completion of the window, obstructing the access of light and air to it.

Quære, whether a license to the owner of a house to enjoy an unobstructed access of light and air to his new window from over his neighbour's premises may be given by parol, or is an easement, to be granted under seal?

Supposing that such licence may be given by parol, *quære*, whether it is countermandable?

TRESPASS for breaking plaintiff's close and throwing down part of her wall. The defendant pleaded the general issue, and further (among other pleas) that defendant was possessed of a dwelling-house contiguous to the said close, in which dwelling-house there was and still of right ought to be a window through which the light and air ought to have entered the said dwelling-house, and because plaintiff had wrongfully erected the said wall

[*537] in the said close so as to darken the said window *and prevent the light and air from coming through the same, &c. to defendant's annoyance and damage, defendant entered the close, and,

to a necessary degree, knocked down and prostrated the wall to abate the nuisance, and in so doing, &c. Replication, *de injuriâ*, and new assignment of excess. Issues to the country. On the trial before Alderson, J. at the Hampshire Summer Assizes, 1833, it appeared that the defendant, in 1832, had made a new window, overlooking the plaintiff's premises, under an alleged licence from the plaintiff; and that the plaintiff, in the same year, objected to the window, and requested the defendant to remove it, which being refused, the plaintiff built a wall on her own ground, excluding light and air from the window. The defendant threw down part of the wall to remove the obstruction, whereupon this action was brought. In proof of the alleged licence, the two following letters were put in; the first written by the wife of the defendant, who at that time was altering his premises, to the plaintiff, whose mother was lately dead; the second, from the plaintiff in reply.

"MY DEAR MADAM,—I beg to apologise for trespassing on your attention just now, but before the last coat of paint is put on the side wall we wish to place a window in it; and our workmen say it can be finished off more neatly, with your permission to place the necessary ladder, &c.; the motive for doing this is, that I should gain a little more cheerful view of the common, and passing objects, which to me will be a pleasure, being so much a prisoner to the house from my still delicate state of health. I sincerely hope you are recovering the severe shock your spirits must have *received: we beg to offer you our most sincere [*538] condolence on the occasion," &c.

"MY DEAR MADAM,—A particular engagement this evening prevents my saying more than that you are welcome to place a ladder in my grounds near your house; and I shall be obliged if you will caution the workmen to be careful not to injure the shrubs. With compliments," &c.

It appeared that the plaintiff was absent from home when the window was made. After it had been made, she wrote to the defendant's wife, (in June, 1832,) complaining that a window had been opened in the defendant's house, overlooking her premises, and suggesting that it should be removed. In a

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subsequent letter to the defendant's wife, dated February 23, 1833, the plaintiff stated her intention of shutting out the window in the ensuing spring, but requested first to hear if there was any probability of the defendant's removing it. The letter then proceeded as follows: "Let me appeal to your good feelings, when you reflect on the unhappy period at which you applied to me for permission to place a ladder in my grounds, when my mind was in the utmost state of excitement from the very severe shock it had received, being also quite alone and without a friend to advise with, and even without knowing exactly the situation in which your window would be placed, I unfortunately complied with your request, wishing to oblige you, without consulting in the least degree my own comfort and retirement."

The learned Judge was of opinion that the plaintiff's first letter did not amount to a licence to make a window; or that, [*539] if it did, such licence was revocable, *and had been countermanded: and he therefore directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. In Michaelmas Term, 1833, a rule *nisi* was obtained for entering a nonsuit, or for a new trial, on the ground that the question of licence arising upon the letters and the facts proved in the case, ought to have been left to the jury.

Dampier and *Smirke* now shewed cause:

The question of licence, arising on the construction of the letters, was entirely for the Judge; and the defendant's counsel at the trial acquiesced in his deciding it, on the understanding that leave should be given to move for a nonsuit: there is no ground, therefore, for a new trial. As to the effect of the letters, a licence, in a matter of so much importance to the property of the person granting it, ought to be in very clear terms. The first letter contains no request to be allowed to make or continue a window; the request is of permission to place a ladder. It is said that the letter announces an intention to make a window, but that is not sufficient. The mere notice of such an intention does not raise an implied assent to the thing proposed, and no such assent is expressed here by the plaintiff. Suppose the defendant had requested the loan of a ladder for the purpose

of making a window; or the assistance of a servant of the plaintiff in carrying a ladder for that purpose, and the plaintiff had assented; would that have been a licence to make a window? The letter containing the request, does not say in what side-wall the window is to be opened, or in what part, or of what size and description it is to be. To establish a licence, it should have appeared that leave was given to make a window *in the very [*540] place in which it was made. It cannot be said that the plaintiff saw and acquiesced in what was done, for she was not living at home at the time. Besides, no licence was necessary for merely opening a window in the defendant's own wall; though a licence was necessary to secure the enjoyment of it, unobstructed from the plaintiff's premises; but this was not asked. The plaintiff's letter of the 23rd of February cannot explain the licence which was given and perfected many months before. If a licence can be explained at such a distance of time, at what period is its import to become finally settled? The letter is only the plaintiff's construction of a former writing, which it properly belongs to the Court to construe.

But assuming that the plaintiff did contemplate giving a licence, it ought to have been granted under seal. The effect of the supposed licence is, that there shall be free access of light and air to the window from over the grantor's premises. Now, air is precisely similar to water, whether we consider the nature of the property in them, the kind of use made of them, or the mode of acquiring rights to them, both being originally common to all. And the right to have free access of water from over a neighbour's premises lies in grant, and can only pass by deed; *Fentiman* v. *Smith* (1), *Hewlins* v. *Shippam* (2), *Liggins* v. *Inge* (3), *Wright* v. *Howard* (4). Such access of water, or of light and air, is an easement, and the right to it used to be pleaded by way of prescription, although that form is unnecessary, and not used in these pleas. Now, prescription is only of things that lie in grant. Merely to have windows in *one's own house requires [*541] no grant; but the unobstructed enjoyment of such windows, looking over a neighbour's premises, is an easement in his land

(1) 7 R. R. 533 (4 East, 107).
(2) 31 R. R. 757 (5 B. & C. 221).
(3) 33 R. R. 615 (7 Bing. 682).
(4) 24 R. R. 169 (1 Sim. & St. 190).

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by which he himself is prevented from enjoying it as fully as he otherwise might; and such easements have often been considered to be the subject of grant: *Bland* v. *Moseley*, cited in *Aldred's* case (1), *Lewis* v. *Price* (2), *Darwin* v. *Upton* (3), *Barker* v. *Richardson* (4), *Canham* v. *Fisk* (5), per BAYLEY, J. The same learned Judge, in *Hewlins* v. *Shippam* (6), cites the definition of an easement from Termes de la Ley, where it is said to be a privilege that one neighbour hath of another by charter or prescription without profit; and refers to Shepp. Touchst. 231, where it is laid down that licence or liberty cannot be created and annexed to a freehold without deed. So in *Bryan* v. *Whistler* (7), it is said of the privilege there in question, "if it be not an interest in land it is an easement, or the grant of an incorporeal hereditament; which could only be effectually granted by deed." It would be hard if a party could be held, by a hasty letter, as in this case, to bind himself and his heirs for ever. There are, indeed, cases which appear to decide that a person may, by parol licence, acquire some rights over another's soil; as *Webb* v. *Paternoster* (8), and *Wood* v. *Lake* (9); but the first case cannot be said to determine any thing on the point, and the judgment was against the licensee; the latter case is of doubtful authority, 1 Sugden on Vendors, p. 80, 9th ed.: and, as BAYLEY, J. observes in *Hewlins* v. *Shippam* (10), in neither case was the objection taken that the right lay in grant, and therefore could not pass without deed. In those cases the licence related to an actual user of the neighbour's land; and GIBBS, Ch. J. puts it upon that footing in *Tayler* v. *Waters* (11).

[*542]

The present case is also different from those in which it has been held that a party having, by his neighbour's licence, done something upon his own soil which interfered with the neighbour's enjoyment of air, light, or water, was not a wrongdoer for refusing afterwards to restore things to their former situation at the request of the licensor: *Winter* v. *Brockwell* (12), *Liggins* v.

(1) 9 Co. Rep. 58 a.
(2) 2 Wms. Saund. 175, *n.* (2).
(3) 2 Wms. Saund. 175 a, *n.* (2).
(4) 23 R. R. 400 (4 B. & Ald. 579).
(5) 37 R. R. at p. 657 (2 Cr. & J. 128).
(6) 31 R. R. 757 (5 B. & C. 229).
(7) 32 R. R. 389 (8 B. & C. 288).
(8) Palmer, 71.
(9) Sayer's Rep. 3.
(10) 31 R. R. at p. 765 (5 B. & C. 233).
(11) 18 R. R. 499 (7 Taunt. 374).
(12) 9 R. R. 454 (8 East, 308).

Inge (1). The first of these cases has been much discussed since; and the latter is limited, as to part of the doctrine laid down in it, by the recent case of *Mason* v. *Hill* (2). *Winter* v. *Brockwell* (3), however, only shews that a party, having incurred expense in making an alteration on his own land by his neighbour's licence, shall not be subjected to the cost of altering his premises anew, if the neighbour withdraws his licence. *Liggins* v. *Inge* (1) proceeds partly on the same principle. But here, the neighbour seeks, not to enforce an alteration in the premises of the supposed licensee, but to make a particular use of her own land. In *Liggins* v. *Inge* (1) it was held that the plaintiff, by his parol licence, though not amounting to a transfer of any right or interest, had relinquished and acknowledged that he no longer wanted that portion of water which the defendant thereupon diverted. The water there had flowed to the plaintiff's *mill. The plaintiff here gave [*543] up no corresponding enjoyment of the light and air passing over her soil; the only mode in which she could testify her relinquishment of these, would have been by a grant under seal. This was so put in the argument in *Moore* v. *Rawson* (4), (and is not inconsistent with the decision of the Court): "The right to enjoy in a particular mode a portion of the light which, *primâ facie*, belongs to the owner of the adjoining land, and which he may appropriate to his own use, is an easement annexed to the land, and must be transferred by deed." The licensee, in such a case, who has not obtained a proper grant, must pursue his remedy (if entitled to it) in a court of equity, as in other cases where a party has incurred expense under a licence which is revoked.

Supposing the plaintiff's consent to have been available as a licence, there is no universal rule to be deduced from the cases, that such a licence, though executed, is not countermandable. A licence may not be so where it conveys a certain interest to the licensee; but where it has not that effect, as in the case of a licence for an uncertain time, it may be countermanded: *Fentiman* v. *Smith* (5), *Doe* d. *Foley* v. *Wilson* (6), *Rex* v. *Horndon on the Hill* (7), (where Lord ELLENBOROUGH said that

(1) 33 R. R. 615 (7 Bing. 682).
(2) 39 R. R. 354 (3 B. & Ad. 304; 5 B. & Ad. 1).
(3) 9 R. R. 454 (8 East, 308).
(4) 27 R. R. at p. 377 (3 B. & C. 334).
(5) 7 R. R. 533 (4 East, 107).
(6) 11 East, 56.
(7) 4 M. & S. 562.

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such a licence was not a grant, but might be recalled immediately, and that this Court would not consider what might be determined in the case by a court of equity): *Bryan* v. *Whistler* (1). On the other hand, where it conveys an interest for a time certain, the [*544] licence may be irrevocable, as amounting to a lease: **Regina* v. *Winter* (2), and this may explain *Webb* v. *Paternoster* (3), so far as that case may be thought to bear on the present. Another class of cases, where licences have been held not countermandable, are those (of which *Winter* v. *Brockwell* (4) is one) where licences have been given by way of indemnity against an action which might otherwise have been brought by the granting party against the licensee for the act so permitted. With reference to such cases, it is said in *Thomas* v. *Sorrell* (5) that a licence strictly conveys no interest or property, but only makes an action legitimate, which, without it, had been unlawful. This illustrates *Liggins* v. *Inge* (6), but cannot apply to the present case; because here no action would have lain for merely making the window, and therefore no indemnity was needed. The right to an unobstructed enjoyment of light and air has sometimes been put upon the ground of an implied covenant on the neighbour's part; as by LITTLEDALE, J. in *Moore* v. *Rawson* (7); but no covenant is either proved or to be implied in the present case; and an express parol agreement, even if proved and a sufficient consideration shewn, could at most only be ground of action or of a bill in equity.

Follett and *Sewell, contrà:*

The question in this case is, properly, not whether the plaintiff was precluded from making use of her land, but whether she had a right to build a wall upon it, for the express purpose of obstructing the defendant's window. It is contended that no [*545] licence was granted to the defendant to have *the window unobstructed; but when a person consents to his neighbour's doing an act on his own land, which the party so consenting

(1) 32 R. R. 389 (8 B. & C. 288).
(2) 2 Salk. 588.
(3) Palmer, 71.
(4) 9 R. R. 454 (8 East, 308).
(5) Vaugh. 351.
(6) 33 R. R. 615 (7 Bing. 682).
(7) 27 R. R. at p. 382 (3 B. & C. 340).

might, if he would, have rendered nugatory, and the neighbour consequently incurs an expense, that consent is a licence, and the licensor has no right afterwards to recover at law for the act so done, or to build a wall, or proceed in any other manner to defeat it. He cannot render nugatory the consent which he has given, although it was only by parol. That there was a consent in this case, is clear from the correspondence. There could be no doubt, from the situation of the defendant's premises, relatively to those of the plaintiff, that the window was to be made in a place overlooking her grounds; and unless this had been so, no consent need have been asked for opening the window. It is true, the permission asked is, in terms, only to place a ladder; but the intention is clearly shewn, and the plaintiff, if she objected to the window, might have refused to allow the ladder to be placed. But the letter of the 23rd of February shews that she consented to that proceeding with a full knowledge of its object.

Then it is contended, that the privilege (supposing it to have been given) of having such a window unobstructed, is an easement, because the person allowing it gives up, in part, the use of her own land; and, therefore, that the permission ought to have been granted by deed. But the right to enjoy an unobstructed access of light and air to a window, is not an easement nor the subject of grant. According to the judgment of LITTLEDALE, J. in *Moore* v. *Rawson* (1), "every man on his *own [*546] land has a right to all the light and air which will come to him," and may erect buildings with as many windows as he pleases. "To appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of the light by mere occupancy." The learned Judge then adds, that the neighbour may, within twenty years, obstruct the light by building on his own land; but if he does not do so within that period, the law implies a consent on his part, that the owner of the window shall continue to enjoy the light without obstruction, so long as he shall continue the same specific mode of enjoyment. "It does not, indeed, imply that the consent is given by way of grant; for although a right of common (except

(1) 27 R. R. at p. 382 (3 B. & C. 340).

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as to common appendant), or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air." The judgment, also, of TINDAL, Ch. J. in *Liggins* v. *Inge* (1), favours this view of the subject. The word "covenant" in the judgment of LITTLEDALE, J., does not mean a covenant under seal.

(LITTLEDALE, J.: The consent must be of such a kind as the law deems necessary. I did not mean to lay it down, that a parol consent was sufficient. I only referred to the technical distinction between such *things as common and right of way, which are subjects of grant, properly speaking, and light and air, which are not so. Technically, you can only grant that over which you have an actual power for the purpose of granting; but a covenant not to obstruct the light and air, would come to the same thing. That covenant must be in such form as the law requires.)

[*547]

The question then is, what amounts to a sufficient legal consent? If I grant to another any easement or privilege irrevocably to be exercised on my land, a deed is necessary; not so, if it is merely the privilege of doing something on his land which, otherwise, I might oppose. This distinction is recognized by BAYLEY, J. in *Hewlins* v. *Shippam* (2), and TINDAL, Ch. J. in *Liggins* v. *Inge* (1). And in the latter judgment it is asked, "Suppose A. authorizes B., by express licence, to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light; could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence?" It is the same whether A. attempt to revoke the licence by means of an action, as in *Winter* v. *Brockwell* (3), or by abating what he deems a nuisance: the consent, if acted

(1) 33 R. R. 615 (7 Bing. 690).
(2) 31 R. R. 757 (5 B. & C. 232, 233).
(3) 9 R. R. 454 (8 East, 308).

upon by the licensee, is irrevocable, though given by parol only. The judgment in the second case of *Mason* v. *Hill* (1) does not, so far as it touches on the present point, at all shake the doctrine of *Winter* v. *Brockwell* (2), *Liggins* v. *Inge* (3), or that which may be collected from *Webb* v. *Paternoster* (4), as to an executed licence. It may be hard that a person *should be held to have bound himself and his heirs by a parol consent; but it would also be hard if, after having allowed his neighbour to incur an expense by reason of such consent, he could, at pleasure, render it nugatory.

[*548]

(LITTLEDALE, J.: Suppose he had given a parol licence to a neighbour to put cattle on his premises, and that person had, in consequence, made pens and roads, could not the licence be countermanded ?)

That would be an act done on the licensor's land, in which case the licence is subject to technical difficulties; if it conveys an interest in the land, it must be granted by lease written and signed, or be held merely at will (5); and if it is an easement, it can only pass by deed. Here, the act was done upon the land of the party claiming the licence; and if the letters did not clearly shew a consent by the plaintiff, it is evident that, while the work was carrying on, she must have been aware of the defendant's proceeding: she made no objection to it; and such acquiescence has, in many cases, been held equivalent to a licence: *Neale* d. *Leroux* v. *Parkin* (6), *Doe* d. *Winckley* v. *Pye* (7), *Doe* d. *Foley* v. *Wilson* (8), *Doe* d. *Sheppard* v. *Allen* (9).

LORD DENMAN, Ch. J.:

Great research and ingenuity have been shewn in arguing this case; but it will not be necessary to enter into a consideration of the doctrines which have been discussed, as I think the letters before us do not establish the licence relied upon by the

(1) 39 R. R. at p. 365 (5 B. & Ad. 15).
(2) 9 R. R. 454 (8 East, 308).
(3) 33 R. R. 615 (7 Bing. 690).
(4) Palm. 71.
(5) 29 Car. II. c. 3, s. 1.
(6) 1 Esp. 229.
(7) 1 Esp. 364.
(8) 11 East, 56.
(9) 12 R. R. 597 (3 Taunt. 78).

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defendant. The consent to the making of a window ought to have been express; but no express consent appears *to have
[*549] been given. It might, perhaps, have been a proper question to be submitted to the jury upon the whole case, whether the plaintiff did or did not agree to the making of the window; but the case having been put into such a form at the trial, as brings it before the Court for their opinion upon the construction of the letters, we must decide it upon that. Now on reading the letter of the defendant's wife, it does not appear that a licence is or has been asked for any purpose beyond that of placing a ladder in the plaintiff's grounds. It may be, that if the plaintiff had cautiously spelt the letter, she might have discovered that something more was intended by the request; but if the same words had been used in conversation, she would probably not have discovered that intention; nor does it appear by her answer that she did so here. (His Lordship then read the plaintiff's letter.) The extent of the plaintiff's communication is, that she permits a ladder to be placed, and the caution which she gives, against injuring the shrubs, has reference to that only. Another letter of the plaintiff has been referred to, but that was written after the whole matter had come to a conclusion, and cannot have any weight. I think, therefore, that no such consent was given to the making of this window as authorised the defendant to pull down the wall by which it was obstructed; and that on this short ground the rule must be discharged.

LITTLEDALE, J.:

There might have been some evidence to go to the jury, of a licence to make the window, but I think the letters themselves do not shew such a licence. It is true that, in the first letter of
[*550] the defendant's wife, she points out the object of her asking *leave to place the ladder; and it may have been necessary that, for the purpose of acquiring a right to enjoy the window unobstructed, she should obtain leave to make it: but the plaintiff was not likely to know her own legal rights in this respect; and the consent which she in fact gave, had reference merely to the placing of the ladder. The only observation added in giving it, regards the mischief that may be done to the shrubs. Reliance has been

placed upon the plaintiff's subsequent letter, in which she says, "without knowing exactly the situation in which your window would be placed, I unfortunately complied with your request;" but what was that request? Only to be permitted to place a ladder; and it does not appear that any other request was brought under the plaintiff's consideration. If the defendant's wife, in her letter, had specified where the window was to be, whether it was to be large or small, and how far it was likely to be convenient or inconvenient, the parties would probably have entered into some discussion about it in their subsequent correspondence. But here the only consent asked or given relates to the ladder.

TAUNTON, J.:

It is not necessary to enter into the questions which have been raised on the subject of easements and licences, because I think that the whole of this case depends upon the first two letters; and that the plaintiff's letter did not convey any licence or consent to the throwing out of this window, whether such consent be matter of grant, or whether it be merely a waiver of rights, which is a question of a very refined and technical nature. The whole request, on behalf of the defendant, was only to have the ladder placed, in order *that the work then in progress might be [*551] more neatly finished; the motive stated for the request is an entirely different matter: it is, indeed, implied in that statement that the defendant means to throw out a window, but the request is confined to the placing of the ladder; and the consent is also limited to that. There might be a view to an ulterior object; but it is not to be taken for granted that the plaintiff approved of that object, the nature and extent of which she could not be apprised of; for nothing had been stated to her of the length, breadth, height, or situation of the intended window. Another letter of the plaintiff has been relied upon; but even that seems to prove, that at the time of the defendant's application she did not know precisely where the window was to be: and, at all events, the correspondence which passed at that time did not, in my opinion, amount to the assent contended for. We are not, therefore, called upon to consider the other points of the case,

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and, least of all, the question of countermand; but, upon that subject, the observations of *Mr. Follett* respecting the case of *Liggins* v. *Inge* (1), tend, I think, strongly to shew, that if there was a good licence given in this case, it was not countermanded by what took place afterwards. There, however, a parol licence was expressly stated: if the same fact had been clearly shewn here, it is probable, but I will not say certain, that *Mr. Follett's* argument on this part of the case would have been found applicable.

WILLIAMS, J. concurred.

Rule discharged.

1834.
May 31.

[598]

REX *v.* BROWNELL.

(1 Adol. & Ellis, 598—603; S. C. 3 L. J. (N. S.) M. C. 118.)

In the statute ("The Writ of Subpœna Act, 1805") 45 Geo. III. c. 92, s. 3, for enforcing the appearance of persons served with *subpœna* in one part of the United Kingdom, to give evidence in another, the "parts" signified are England, Scotland, and Ireland.

Where a person has been served with a *subpœna*, not issued from the Crown Office, to appear and give evidence at Quarter Sessions, and makes default, the Court of King's Bench cannot attach him for contempt, either by its general authority, or by virtue of the above statute.

A RULE was obtained in Hilary Term, calling on William Daniel Brownell to shew cause why an attachment should not issue against him for a contempt in not attending, pursuant to *subpœna*, to give evidence before the grand jury of the county of Warwick, at the Quarter Sessions for that county (October, 1833), against Frederick Room, on a bill of indictment for misdemeanor. The rule was drawn up on reading an order of the said Sessions (made on the motion of counsel, supported by affidavit), whereby the clerk of the peace was directed to certify the default of the said W. D. Brownell to this Court; and the certificate of the said clerk, under his hand and seal, stating that, at the said Sessions, it was duly proved, to the satisfaction of the Court, that an indictment was preferred at those Sessions against Room for a misdemeanor; that Brownell, who was the keeper of the prison at the parish of Aston, Warwickshire, was a material and

(1) 33 R. R. 615 (7 Bing. 682).

necessary witness for the Crown, and had been duly served (1) with a *subpœna* under the seal of the Custos Rotulorum, to appear and give evidence before the grand jury at the said Sessions upon the said indictment; that he attended the Sessions at Warwick, and was sworn to give such evidence to the grand jury; that he was called upon his *subpœna* by the bailiff attending the grand jury, but refused to go before them, *and quitted the town [*599] without leave of the Court, in consequence whereof the bill was ignored. The signatures of the clerk of the peace to the order of Sessions and certificate were verified by affidavit.

Dundas now shewed cause:

This application is grounded on the statute 45 Geo. III. c. 92, s. 3 (2). But the authority there given to the Court of King's Bench does not extend to the present case. The statute is entitled "An Act to amend two Acts of the Thirteenth and Forty-fourth years of his present Majesty, for the more effectual execution of the Criminal Laws, and more easy apprehending

(1) It was not expressly sworn where the *subpœna* was served, but it was stated by counsel, in the argument on this rule, and not denied, that the service was within the jurisdiction of the Quarter Sessions.

(2) 45 Geo. III. c. 92, s. 3. "And whereas it is fit to provide for the appearance of persons to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom; be it further enacted, that the service of every writ of *subpœna*, or other process, upon any person, in any one of the parts of the United Kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law, as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the Court out of which the same issued, upon proof made of the service thereof, to the satisfaction of the said Court, to transmit a certificate of such default under the seal of the same Court, or under the hand of one of the Judges or justices of the same, to the Court of King's Bench in England in case such service was had in England, or in case such service was had in Scotland, to the Court of Justiciary in Scotland, or in case such service was had in Ireland, to the Court of King's Bench in Ireland; and the said last-mentioned Courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of *subpœna* or other process issued out of such last-mentioned Courts respectively."

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and bringing to Trial Offenders escaping from one Part of the United Kingdom to the other, and from one County to another." The parts of *the United Kingdom referred to by those recited Acts (13 Geo. III. c. 31 (1), and 44 Geo. III. c. 92 (1)), are Scotland and Ireland: the first statute, passed before the Union with Ireland, was "for the more effectual execution of the Criminal Laws in the Two Parts of the United Kingdom," and refers distinctly to Scotland; the second, which is subsequent to the Union with Ireland, and is "for the more easy apprehending offenders escaping from one part of the United Kingdom to another, and also from one county to another," relates to offenders passing from Ireland to England or Scotland, or from those countries to Ireland, or from one Irish county, &c. to another. It is evident from the whole context of the present statute, and from the third section particularly, that the "parts of the United Kingdom" are there spoken of in the same sense as in the previous Acts. By section 4 it ought to have been proved that the expenses of the witness were tendered to him when he was served with the *subpœna*; but that point need not be insisted upon. The Sessions have sufficient power to check offences of this kind without the aid of the statute: they may fine the party, though absent, for the contempt, *Rex* v. *Clement* (2), and he may be indicted for disobeying the *subpœna*.

M. D. Hill, contrà:

The process of indictment is too tedious to afford any practical remedy for the disobedience of witnesses. It was decided in *Rex* v. *Ring* (3), though at first doubted, that this Court might attach for disobeying a *subpœna* to give evidence in an inferior Court, where the *subpœna* had issued from the Crown *Office; but it does not follow this Court may not, in the exercise of its general jurisdiction, enforce obedience to any *subpœna* issued by competent authority. It is usual (as stated in 2 Nolan's P. L. 541, note 4 (4)) to obtain a Crown Office *subpœna* where the witness lives in a different county from that in which the Sessions are

[*601]

(1) Repealed, S. L. R. Act, 1872. —R. C.

(2) 23 R. R. 260 (4 B. & Ald. 218).

(3) 5 R. R. 478 (8 T. R. 585). See *Rex* v. *Dixon*, 3 Burr. 1687.

(4) 4th ed. 1825.

held; but it is not the practice in other cases; and it would be very inconvenient, especially in remote counties, if a Crown Office *subpœna* were necessary, or if, in default of it, this Court could not enforce the jurisdiction of the Court below in case of disobedience. As to the statute 45 Geo. III. c. 92, s. 3, the main intention there certainly appears to be, to enforce the attendance of witnesses residing in one distinct part of the United Kingdom, on *subpœnas* requiring their appearance in another; but the language used may go beyond the main intention, and the statute is remedial, and to be largely construed. The statute, however, even as interpreted on the other side, seems to recognise the common law power now contended for; since, in giving a summary power of punishment in the cases there mentioned (sect. 3), it professes to make the service of a *subpœna* in one part of the United Kingdom, to give evidence in another, as effectual as if the same had been served in that part of the United Kingdom in which the witness is required to appear. But it would be much more effectual if, in the case of a *subpœna* requiring attendance in the same part of the kingdom in which it is served, the summary power did not generally exist. There is no reason that the law should give such a power where the *subpœna* goes to a distant *place, if it happens to be in another division of the United Kingdom, but withhold it if the *subpœna* be served at a neighbouring place, within the same division.

[*602]

LORD DENMAN, Ch. J.:

Supposing that the practice contended for already existed, *Mr. Hill* has given good reasons in support of it; but I think it has not been shewn that we possess the power which we are called upon to use. It is said that this Court has a general authority; but such an authority must be acted upon within known limits, and we cannot, however convenient it might be, give ourselves powers which have not hitherto been exercised. It was even doubted, in *Rex* v. *Ring* (1), whether this Court could attach for disobedience to a *subpœna* from the Crown Office, where there was no proceeding in this Court. There is, however, a mode of bringing witnesses within the jurisdiction of this Court,

(1) 5 R. R. 478 (8 T. R. 585).

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if it is thought necessary, by applying for a *subpœna* from the Crown Office. The stat. 45 Geo. III. c. 92, s. 3, is clearly confined to the case of witnesses who are in other parts of the United Kingdom, namely, Scotland and Ireland, or required to appear there. [His Lordship here read the section as far as the words, "required to appear."] It is said that this recognises the general power relied upon in making the present application. But, first, I cannot say that I should be willing to infer a power of this kind, even from a supposition in an Act of Parliament that such a power existed; and, secondly, I do not think that any necessary inference of the supposition arises here, from the language of the statute.

[603] LITTLEDALE, J.:

As to the general authority of the Court, if it could have been shewn by any practice hitherto existing, the case might have been different. This Court does not, in practice, interfere by attachment, unless there has been some disobedience of a rule or process of the Court, which is a contempt of the Court itself. Those who wish to have the attendance of witnesses enforced by the authority of this Court, should obtain a *subpœna* from the Crown Office. If a remedy is wanted for the inconveniences which have been pointed out, the Legislature must supply it.

TAUNTON, J.:

Disobedience to a Crown Office *subpœna* is a manifest contempt of the authority of this Court; disobedience to a *subpœna* from Quarter Sessions is not. I am of opinion that we cannot interfere.

WILLIAMS, J. concurred.

Rule discharged.

IN THE MATTER OF ARBITRATION BETWEEN CHARLES WRIGHT AND CHARLES POLE.

1834. *June* 2.

[621]

(1 Adol. & Ellis, 621—624; S. C. nom. *In re Sun Fire Office*, 3 N. & M. 819.)

An innkeeper having insured against fire his "interest in the inn and offices," cannot, upon the inn and offices being partly burnt, recover against the insurers for loss sustained by his hiring other premises while his own were being repaired, and by the refusal of persons to go to the inn while under repair, the insurers having reinstated the premises in proper time.

CHARLES WRIGHT, proprietor of the "Ship Inn" at Dover, effected an insurance, as after-mentioned, with the Sun Fire Office Company. In November, 1832, a fire broke out on the insured premises, and Wright claimed compensation from the Company for the loss thereby occasioned. His claim being objected to, the parties, by deed, (which was afterwards made a rule of Court,) referred the dispute to arbitration. It appeared before the arbitrator that, by the policy of insurance, Wright and another (his partner when the policy was signed) had insured, among other things, "on their interest only in the said 'Ship Inn' and offices, 1,000*l.*" By virtue of this clause, Wright made the following demand before the arbitrator: "Also such damages as he can satisfy the arbitrator he has sustained under the claim delivered to the Sun Fire Office for his loss in his interest in the said 'Ship Inn' and offices; such damages consisting in rent paid by him to his landlord, J. M. Fector, Esq., the hire of other houses or apartments whilst the apartments damaged in such inn by the fire were undergoing the necessary repairs, and the loss or damage sustained by him by reason of various persons refusing or declining to go to the said 'Ship Inn' whilst the apartments so damaged were undergoing such repair." It was objected that this claim was not maintainable, for that the interest insured could be understood only to mean the interest Wright had in the fabric of the inn and offices, by *reason of the improvements and additions proved to have been made thereto by him, and by his father, through whom he derived title to the premises; and that in respect of that interest he had no claim, the inn and offices having been reinstated in pursuance of the policy, as Wright

[*622]

In re WRIGHT AND POLE.

admitted. The arbitrator awarded that 450*l.* was due from Charles Pole, as one of the managers or directors of the Sun Fire Office Company, to the said Charles Wright, "for the loss he has sustained in his business as an innkeeper, by not being able to occupy the said 'Ship Inn' and offices during the time that elapsed between the fire and the rebuilding of the said premises." He also awarded a sum for loss on goods. A rule *nisi* having been obtained for setting aside the award,

R. V. Richards now shewed cause (1):

The insurance was effected on Wright's "interest in the 'Ship Inn,'" and it was for the arbitrator to say what that interest was, and, whether there was a loss in respect of it.

(LORD DENMAN, Ch. J.: Do you contend, that if he had carried on business at another inn while his own premises were rebuilding, and had gone on there so successfully as to be no loser during that period, he would have had no claim now in respect of interest, but that, if less successful, he might have claimed in proportion?)

The question would always have been for the arbitrator, whether there was a loss within the meaning of the policy. The profits of the business were clearly insurable.

[*623] (LORD DENMAN, Ch. J.: The question is, whether *they are covered by the insurance actually effected.)

In *Crowley* v. *Cohen* (2), Lord TENTERDEN said that, in a policy of insurance, "although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large:" LITTLEDALE, J. makes a similar observation; PARKE, J. says, "the particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy;" and PATTESON, J. adds, "it is only necessary to state accurately the subject-matter insured, not the particular interest which the assured has in it." In *Flint*

(1) The award was disputed on more than one ground; but *Kelly* stating, on behalf of the Company, that they were willing the award should stand except as to 450*l.*, no decision was given on any other point.

(2) 37 R. R. 472 (3 B. & Ad. 478).

v. *Flemyng* (1) it was held that a ship-owner, on an insurance of freight, might recover for the profits which he would have made by carrying his own goods.

(TAUNTON, J.: The profits were of the same nature, whether he carried his own goods or those of another.)

Kelly, contrà, on stating that he should not dispute the award on any point but this, was stopped by the COURT.

LORD DENMAN, Ch. J.:

We all think the case quite clear on this point. The interest in question might have been the subject of insurance, but an arbitrator cannot take into consideration the possible profits of an inn, under the shape of an interest in buildings.

LITTLEDALE, J. concurred.

TAUNTON, J.:

If a party would recover such profits as these, he must insure them *quâ* profits. I never heard before of a recovery of profits of a business as an *incidental part of the loss, under an insurance upon a house or ship. [*624]

WILLIAMS, J. concurred.

Rule absolute for setting aside the disputed part of the award.

DOYLE *v.* ANDERSON (2).
DOYLE *v.* STEWART.

1834. *June* 2.

[635]

(1 Adol. & Ellis, 635—638; S. C. 4 N. & M. 873.)

Where a plaintiff brings several actions upon the same policy of assurance, against several underwriters, the Court will not, without the consent of the plaintiff, make a consolidation rule upon the terms of both plaintiff and defendant being bound in all the actions by the event of one.

THESE were actions on the same policy of insurance. Nine other actions had been brought on the same policy, and the

(1) 35 R. R. 205 (1 B. & Ad. 45).

(2) As to the terms which may be made upon an application for consolidation of actions under R. S. C. Ord. XLIX., R. 8, see *Colledge* v. *Pike* (1887) 56 L. T. 124. An application may be made by the plaintiff: *Martin* v. *Martin & Co.*, '97, 1 Q. B. 429.—R. C.

DOYLE v. ANDERSON.

eleven had been consolidated upon the usual terms, that the proceedings in ten should be stayed, the defendants severally undertaking to be bound by the verdict in the eleventh (1). The defendant obtained a verdict in this eleventh, *Doyle* v. *Dallas* (2), and costs were taxed against the plaintiff; but they had not been paid, and the plaintiff was in prison for debt, and had applied for relief under the Insolvent Debtors' Act. The plaintiff proceeded in another of the eleven actions, *Doyle* v. *Douglas*, and obtained a verdict, and the costs were taxed and paid by the defendant in that action. Afterwards the plaintiff proceeded in the other nine actions. *Maule*, in Easter Term last, obtained a rule, on affidavits of the above facts, calling upon the plaintiff to shew cause why the proceedings in *Doyle* v. *Stewart* should not be stayed, upon the submission of the plaintiff and defendant in that action, to be bound and concluded by the verdict which might be obtained in *Doyle* v. *Anderson*. The plaintiff agreed, that if the Court granted such a rule in these two actions, the like rules should be made in the other seven.

[*636] *Kelly* now shewed cause:

The Court has no power to compel the submission of the plaintiff, as required by this rule. The submission of the defendant has always been made a part of the consolidation rule, because he seeks an indulgence, which is granted to him upon his consenting to the terms imposed. Here the plaintiff seeks no indulgence, and refuses his consent. The very terms in which the rule is drawn, shew that the consent of the plaintiff is necessary; but that consent cannot be exacted from him. He obtains no benefit by the consolidation. It cannot be said that the plaintiff's proceedings in these two causes have been vexatious: he may have better evidence for the one cause than for the other; and this is shewn by the results of the two actions of *Doyle* v. *Dallas* and *Doyle* v. *Douglas*. But, even if he had proceeded vexatiously, the Court would not interfere to the extent required by this rule. Supposing the rule to be made absolute, as it is now worded, the object sought would not be attained: for the staying of the proceedings is made to

(1) See *Doyle* v. *Douglas*, 4 B. & Ad. 544. (2) 1 M. & Rob. 48.

depend on the submission of the plaintiff, which he may refuse. The language of the Court in *Doyle* v. *Douglas* (1) shews that the plaintiff is not to be bound by the consolidation rule.

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Maule, in support of the rule:

If the terms of the rule be inaccurate, they may be modified so as to express the real intention, which is, that the proceedings in *Doyle* v. *Stewart* should be stayed, and that both parties in that action should be concluded by the event of *Doyle* v. *Anderson*. The understanding has, certainly, *for a long time [*637] been, that both parties were bound by the consolidation rule, although the rule, as ordinarily drawn, has not so expressed it. Neither is such an exercise of the power of the Court unprecedented in cases of vexatious proceedings. Substantially, there are but two parties to the whole set of actions, the assured on the one side, and the body of assurers on the other: and the object of the consolidation rule has always been, that in this case, as in other actions, a single trial may decide that which is, in fact, only a single question. The rule is the creature of the Court; and therefore the Court has power to determine its conditions and effect. If circumstances require an alteration in its form, the Court is competent to make it; and the alteration in the pleadings in actions on policies, introduced by the new rules, would probably render it necessary to alter the practice as to consolidation rules, since much of what was formerly given in evidence under the general issue, must now be specially pleaded. According to the present practice, the consolidation rule cannot be made till after issue joined: if this practice be adhered to, the costs of the special pleas and other pleadings to issue, which must be included in the action against each underwriter, will cause a great and useless increase in the expense of the proceedings. The defendants do not ask for an indulgence, but only for that which justice requires to be done. If it is just, the only question is, whether the Court has the power of doing it; and the Court has the power, by staying the proceedings, and that without the consent of the parties. In an ordinary consolidation rule, the proceedings are

(1) 4 B. & Ad. 546.

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Cheatle and found expressly that the sale to the plaintiffs by the sheriff was *bonâ fide*. The question for the opinion of the Court was, Whether the plaintiffs, by virtue of that sale, were entitled to the crops, discharged from the landlord's right of distress for rent accrued due subsequently to the sale?

N. R. Clarke, for the plaintiffs:

It has already been decided in *Peacock* v. *Purvis* (1), that growing corn seized under a *fi. fa.* is not liable to the landlord's [*643] distress, *for rent accruing after the execution and sale, unless such corn be left on the premises an unreasonable time after it is ripe. That case has never been questioned; and it overrules a *dictum* of THOMPSON, B. to the contrary effect, in *Gwilliam* v. *Barker* (2).

(TAUNTON, J.: That was an *obiter dictum*, and not necessary to the decision of the case.)

On behalf of the defendants, reliance will probably be placed [*644] upon the statute 56 Geo. III. c. 50 (3); it *may be said that the

(1) 23 R. R. 465 (2 Brod. & B. 362; 5 Moore, 79).

(2) 1 Price, 274, 277.

(3) 56 Geo. III. c. 50, s. 1. "Whereas it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm; be it enacted, &c., that from and after the passing of this Act, no sheriff or other officer in England or Wales, shall, by virtue of any process of any court of law, carry off or sell or dispose of for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder or any turnips, or any manure, compost, ashes or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements, such sheriff or other officer shall have received a written notice before he shall have proceeded to sale."

By sect. 2 it is enacted, that the tenant shall, on knowledge of the process against his goods, give a written notice to the sheriff, &c. of such covenants or agreements known

sheriff, by sect. 1 of that Act, could not lawfully sell the straw of the growing crops, and it will be contended that, by sect. 3, he could only sell the crops or produce to a person who should agree with him in writing to use and expend the same on the lands, according to the custom of the country. But the sheriff, here, had merely conveyed a quantity of growing wheat to a purchaser; it does not appear that it was to be carried off the farm. If he conveyed anything otherwise than the statute requires, there is nothing in either of the sections above referred to, to shew that the purchaser's right is thereby altogether defeated: at least, if the wheat was his property, the action lies. As to the third section, the question is (as PARKE, J. suggested when the rule *nisi* was moved for), whether it be anything more than directory? If this were held to be otherwise, no person would buy crops under an execution. The statute does not say, that every purchase not made as it directs, shall be void. The sheriff is liable in an action for non-compliance with the provisions of the Act; but, by section 9, even that is not so, unless it be proved on the trial that his omission was *wilful. The general principle in the case of sales under execution is, that [*645]

to him, as may relate to and regulate the use and expenditure of the crops or produce of the land, and of the landlord's name and residence, and the sheriff, &c. shall give notice to the landlord and his agent of possession having been taken of any such crops or produce, and, in case of the absence or silence of the landlord or agent, shall postpone the sale till the latest lawful day.

Sect. 3. "Provided always and be it further enacted, that such sheriff or other officer executing such process may dispose of any crops or produce hereinbefore mentioned, to any person or persons who shall agree in writing with such sheriff or other officer, in cases where no covenant or written agreement shall be shewn, to use and expend the same on such lands, in such manner as shall accord with the custom of the country; and in cases where any covenant or written agreement shall be shewn, then according to such covenant or written agreement; and after such sale or disposal so qualified, it shall be lawful for such person or persons to use all such necessary barns, stables, buildings, outhouses, yards and fields, for the purpose of consuming such crops or produce, as such sheriff or other officer shall allot or assign to them for that purpose, and which such tenant or occupier would have been entitled to and ought to have used for the like purpose on such lands."

Sect. 4 requires the sheriff, &c. to permit any landlord aggrieved by breach of such agreement, to sue thereupon in his name, first giving him an indemnity.

The other material sections are sufficiently stated in the argument.

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the purchaser's right is not affected by an irregularity of the officer. It cannot generally be expected, in cases under the present Act, that a purchaser should satisfy himself of all the directions of the statute having been complied with; yet it would be hard if, in consequence of any omission, though involuntary, by the sheriff, he should lose the fruits of his purchase; as, for instance, if the agreement prepared by the sheriff, under sect. 3, does not in all respects accord with the custom of the country, which the purchaser may be unacquainted with. The statute 8 Ann. c. 14, s. 1, is very differently worded from this; it directs that no goods being on premises held by lease, shall be taken under execution on any pretence, unless the rent, as there mentioned, shall be first paid to the landlord. The present Act merely commands and regulates.

Daniel, contrà:

First, the purchaser here could acquire no title if the requisions of the statute in sections 1 and 3 were not complied with. In *Peacock* v. *Purvis* (1), it did not appear that they were not; the case, therefore, decides nothing on this point. The construction now contended for would frustrate the design of the statute in favour of good husbandry; for, in case the provisions there laid down were neglected, the landlord would have no remedy at all against the purchaser, and, according to sect. 9, none against the sheriff, unless he could shew that the omission had been wilful. Yet the Act clearly contemplates that the agreement therein [*646] prescribed shall always be entered into; *for it provides, in sect. 3, that after the sale so qualified, it shall be lawful for the purchaser to use all such necessary barns, &c. for consuming such crops or produce, as the sheriff shall allot; and as the tenant himself might have used for such purpose on the lands. Sect. 6 enacts, that where the purchaser of any crop or produce beforementioned shall have entered into any agreement with the sheriff touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the landlord to distrain for rent on any corn, hay, straw, or other produce thereof, which, at the time of such sale and the execution of such agreement under the Act,

(1) 23 R. R. 465 (2 Brod. & B. 362).

shall have been severed from the soil and sold, subject to such agreement, by the sheriff, nor on any turnips, drawn or growing, if sold according to the Act, &c.; but this provision would be nugatory if such produce vested absolutely in the purchaser by the sale, and the landlord were precluded from distraining, whether the agreement were entered into or not. It is said that the purchaser cannot be expected to know whether or not the sheriff has fulfilled the directions of the Act; but if the Act obliges the one to take an agreement, it equally obliges the other to enter into it: it is not contended that the words are obligatory on one and directory to the other. The purchaser, who stands on the benefit of his contract with the sheriff, as against the landlord, must prove that he has done what the statute requires of him. The rule that purchasers are not affected by an irregularity in the levy does not apply; this is a restricted power given to the sheriff, and it must be shewn that such power has not been exceeded.

Then, secondly, although the statute should not affect the plaintiff's right, yet the defendant, as landlord, was *entitled to [*647] distrain the crops in question for the rent due at Lady Day, 1832. *Peacock* v. *Purvis* (1) is no sufficient authority to the contrary. That case was argued without any reference to the statute 56 Geo. III. c. 50; there, too, the seizure was on the 28th of April, and it was argued, that as the landlord received a year's rent at that time, he must be taken to have received it out of the value of the crop, and ought not to come upon the same crop again for a new half-year's rent due in May. But here the same argument would not apply; for the seizure was in October, when the crop could not have a value.

(TAUNTON, J.: Nothing is more common than for wheat crops to be the subject of valuation in September or October.)

The broad principle, however, upon which the decision in *Peacock* v. *Purvis* (1) proceeded, was, that goods in the custody of law (as the crop there was held to be) are not liable to distress. But what are the authorities on which that assumption rests?

(1) 23 R. R. 465 (2 Brod. & B. 362).

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In *Eaton* v. *Southby* (1), there referred to, reliance is placed on a passage in Co. Litt. 47 a, which begins, "here it is necessary to be seen of what things a distress may be taken for a rent;" and, after enumerating some things which may not be taken, as a horse in a smith's shop, or in a hostry, materials in a weaver's shop for making cloth, and cloth or garments in a tailor's shop, adds, "nor any thing distrained for *damage-fesant*, for it is in custody of law, and the like." But in those cases the interests of third persons, the actual owners of the property, come in question, and the law laid down is for their protection; nothing is said of goods of the tenant himself seized in execution, nor can the [*648] passage *be extended so as to imply an exemption of those. In Finch's Law, fol. 11 a (2), it is merely laid down that goods taken for a distress shall not be put in execution for the debt of their owner. The passage in Co. Litt. is misstated in *Eaton* v. *Southby* (1); and although the Court of Common Pleas there inclined to the opinion that goods taken in execution cannot be distrained for rent, because they are in the custody of the law, that doctrine has not been followed up in analogous cases where, if correct, it might have been expected to prevail. Thus, in *Ex parte Plummer* (3), after a commission of bankrupt had issued, and the messenger was in possession, it was held that the landlord might distrain the goods upon the premises, for the whole rent due to him. No authority appears to support the decision relied upon on the other side: *Parslow* v. *Cripps* (4), so far as it applies, is to the contrary effect.

(TAUNTON, J.: That case only gives the argument on one side, and no decision.)

There, growing corn had been taken in execution, sold, and afterwards cut by the vendee; and then the landlord distrained it. The argument was, that "the corn likewise at the time of the sale was not in the same plight as at the time of the severance, for it received nourishment and increase afterwards from the land; and if the sheriff should be allowed to sell upon an execu-

(1) Willes, 131.
(2) Ed. 1613; citing Bro. Abr. Pledges, pl. 28.
(3) 1 Atk. 103.
(4) 1 Comyns's Rep. 204.

tion immediately after the sowing, he would sell goods which were not then in the defendant, against whom the execution was, but which afterwards received their nourishment and value from the lands of another."

(TAUNTON, J.: That does not destroy the identity. It is as if a cow *and calf were seized, and the calf distrained afterwards.) [*649]

If the calf remained on the demised premises after the execution, till it grew up, it would have acquired a value from the land, for which the landlord would be entitled to repayment; a right would accrue to him in respect of the improvement so gained.

(TAUNTON, J.: Neither the identity nor the former right of property would be destroyed.)

According to the argument for the plaintiffs, the landlord might be in this situation. The crops might be seized before the landlord's Michaelmas rent was due; he could not then claim any portion of the proceeds of the levy under stat. 8 Ann. c. 14, in respect of future rent: *Hoskins* v. *Knight* (1), *Gwilliam* v. *Barker* (2): but the sheriff might remain in possession till the next year's crops were sown, and sell those crops before the return of the writ. As it is now contended, the landlord could not distrain the crops then sown; and, consequently, he would lose his natural security for the rent, for a year and a half, or even for a longer time, if it were a biennial crop. The statute of Anne was meant to give landlords an efficient remedy; it is not so if they have no claim under the statute for rent not due at the time of the taking, and cannot distrain for rent accruing before the removal.

(TAUNTON, J.: Landlords had no right to distrain growing crops till the statute 11 Geo. II. c. 19, s. 8; but an execution might be had against such crops at common law.)

That statute has now given landlords the same rights as to growing crops which they had before with respect to goods and

(1) 14 R. R. 424 (1 M. & S. 245). (2) 1 Price, 274.

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chattels, and if moveable chattels were left on the land for more than a reasonable time, the right of distress would revive.

[*650] (TAUNTON, J.: The crops, by their nature, *cannot be immediately removed.)

While they remain, they acquire a value at the landlord's expense, which moveable goods in general do not; yet the argument is, that the right of distraining revives by time as to such goods but not as to crops. The *dictum* of THOMPSON, B. in *Gwilliam* v. *Barker* (1) was not thrown out merely *obiter*, but was material to the case.

Clarke, in reply:

As to the argument from inconvenience, the statute of Anne places landlords in a better situation than other creditors, but is not calculated to secure them from every possible disadvantage. The circumstance of the crop remaining on the ground till maturity, does not take away its identity, or the rights of any party in it. If, indeed, it were severed from the soil, and left for more than a reasonable time, the landlord might exercise his right of distraining, but that the sixth section of 56 Geo. III. c. 50, forbids such distress in cases where the purchaser shall have entered into the requisite agreement with the sheriff; or again, if the crop were left uncut for an unreasonable time after maturity, the right of distraining might revive. The section just referred to tends, with others, to shew that the statute does not contemplate the agreement with the sheriff as being necessarily entered into in every case of execution against farm produce. The power of selling crops is not given, but only regulated, by the statute. It does not appear on this case, that there was any covenant or agreement between the landlord and tenant, according to which the agreement with the sheriff might be drawn; and it may be that there was no custom of the country on which it could

[*651] be framed: none, at least, *is shewn. If the sheriff has wilfully exercised his authority in an irregular manner, so as to prejudice the landlord, there is a remedy for the landlord by action.

(1) 1 Price, 277.

LORD DENMAN, Ch. J.:

I am of opinion that, in this case, *Peacock* v. *Purvis* (1) is expressly in point: the only distinction suggested is, that the seizure in this case was in September, whereas there it was in April. It is singular that in that case the statute 56 Geo. III. c. 50, should not have been adverted to; but the reason probably was, that counsel did not think it applicable. In the present case also, I think that the provisions of the statute do not apply, and that the plaintiffs are entitled to a verdict.

LITTLEDALE, J.:

I am of the same opinion. The statute 8 Ann. c. 14, s. 1, provides that, when goods are taken in execution, the creditor shall pay the rent then due to the landlord, not exceeding rent for one year; subject to that payment, it protects the creditor's execution against any claim of the landlord. The landlord could not distrain growing crops till the passing of 11 Geo. II. c. 19; but the statute of Anne protects executions against the right of distress given by the later Act, as effectually as against the right previously existing. It is said that the decision in *Peacock* v. *Purvis* (1) does not apply, because of the provisions in 56 Geo. III. c. 50. I agree, however, with my LORD CHIEF JUSTICE, that the statute was probably not relied upon in that case, because it was inapplicable. The facts here are, that the sheriff seized the crops on the 31st of October, and shortly after sold them to the plaintiffs, and that, before the *crops were ripe, the defendants [*652] put in a distress, and afterwards reaped and took the produce. Now, as to the alleged omission of the plaintiffs to fulfil the requisitions of the statute; the only case in which the statute restricts the right of protection to persons who have executed the required agreement is, where the crop or produce, at the time of such sale and the execution of such agreement, shall have been severed from the soil and sold, subject to such agreement, by the sheriff. But here the crop had not been severed when the distress took place. As to the straw, it was not in fact carried off, for it necessarily continued on the soil till the corn could be reaped; the sale could not be considered a removal, nor can it be

(1) 23 R. R. 465 (2 Brod. & B. 362).

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said, under the circumstances, that the sale was for the purpose of removal. I think, therefore, that if the plaintiffs would have had a right as against the landlord's distress before the Act, that right is not touched now.

TAUNTON, J.:

I also think that the sale by the sheriff in this case gave the plaintiffs a title, discharged from the landlord's right of distress. It appears to me, for the reasons which have been given, that the statute 56 Geo. III. c. 50, does not apply; and I think this case is decided by *Peacock* v. *Purvis* (1). It is said there by the COURT, that the point has not been expressly decided; though in *Eaton* v. *Southby* (2) a strong opinion was certainly thrown out, that goods taken in execution could not be distrained for rent. In the first edition (1802) of Mr. Woodfall's Law of Landlord and Tenant (where, however, nineteen propositions in twenty are [*653] stated without reference to authorities), it is said that *goods taken in execution cannot be distrained (3), and that where a tenant's growing corn was seized, and sold under a *fi. fa.*, and the vendee permitted it to remain till it was ripe, and then cut it, after which, and before it was fit to be carried, the landlord distrained it for rent, both the Courts of King's Bench and Common Pleas held that it was not distrainable (4). I cannot trace any such decision; yet the author cannot have invented the proposition, nor can he have meant to state it upon his own

(1) 23 R. R. 465 (2 Brod. & B. 362).

(2) Willes, 136.

(3) The reporters have not been able to meet with the first edition of Mr. Woodfall's Law of Landlord and Tenant. In the last edition (1834), the paragraph apparently referred to by TAUNTON, J. begins as follows: "Goods in the custody of the law are not distrainable; for it is repugnant that it should be lawful to take goods out of the custody of the law; and that cannot be a pledge to me, which I cannot reduce into my actual possession; therefore things distrained *damage-feasant* cannot be taken for rent; nor goods in a bailiff's hands under an execution; nor goods seized by process at the suit of the King." This appears to be taken, very nearly verbatim, from Gilbert's Law of Distresses, p. 44, ed. 1757. [The passage appears in the 16th ed. (1898) p. 476, with some modification.]

(4) This is printed conformably to the passage as it stands in the present (1834) edition, and appears to correspond with that read by TAUNTON, J. in his judgment. The authorities cited for it in the present edition are *Eaton* v. *Southby*, *Peacock* v. *Purvis*, and *Parslow* v. *Cripps*.

authority, because that edition was written when he was young, and had not sufficient opportunity for deliberation. But on the authority of *Peacock* v. *Purvis* (1), I think the plaintiff in this case is entitled to recover.

WILLIAMS, J.:

I am of the same opinion. All the rent which was due to the landlord when the bargain and sale took place, had been paid to him; and the growing crops were necessarily left upon the premises; it would have been ruinous to do otherwise. Upon this state of facts, the case must be governed by *Peacock* v. *Purvis*.

Postea to the plaintiffs.

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(1 Adol. & Ellis, 654—667; S. C. 3 N. & M. 671; 3 L. J. (N. S.) K. B. 170.)

A grant by the King of free warren in land, of which he is seised in fee, is a grant of free warren in gross.

Therefore, where defendant, in trespass, pleaded such a grant of free warren to P., and deduced title from P. to F., and pleaded a conveyance by F. of the said free warren to the defendant; it was held, that the plea was not sustained by proof of a conveyance from F. of a manor, of which the land in question was copyhold, with all and singular fisheries and right of fishing, fowling, hawking, hunting, and shooting; and all profits, royalties, &c. and all other rights, liberties, franchises, jurisdictions, privileges, commodities, advantages, hereditaments, and appurtenances whatsoever to the said manor belonging, or in any wise appertaining thereto, or at any time occupied or enjoyed therewith, or reputed part, parcel, or member thereof, or granted by the King to P. as appurtenant to the manor.

And this, though it was shewn that the King, at the time of the grant to P., was lord of the manor, and held certain demesne lands in fee, and granted the free warren in both the demesne and other lands of the manor.

Quære, whether the words of the conveyance by F. would have conveyed a free warren appurtenant to the manor?

TRESPASS. On the trial before Bayley, B., at the Hertford Summer Assizes, 1833, a verdict was found for the plaintiff upon some of the issues, and for the defendant upon others, subject to the opinion of this Court upon the following case:

The first count of the declaration charged the defendant with

(1) 23 R. R. 465 (2 Brod. & B. 362).

(2) Cited and applied by Lord O'HAGAN in *Beauchamp* v. *Winn* (H. L. 1873) L. R. 6 H. L. 223, 256; and by CLEASBY, B. in *Sowerby* v. *Smith* (1874) L. R. 9 C. P. 524, 545, 43 L. J. C. P. 290, 301.—R. C.

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breaking and entering a close of the plaintiff, called Great Wood Field, (describing the boundaries), situate in the parish of Rickmansworth, in the county of Hertford, and five other closes, not named, of the plaintiff, in the parish and county aforesaid, and hunting, searching for, and killing game therein, and seizing, and carrying away the same, and converting it to his own use. The second count charged similar trespasses in another close of the plaintiff, describing the boundaries. The third count was for seizing and taking away dead game, the property of the plaintiff.

By first plea, after describing and naming the five unnamed closes in the first count mentioned, the defendant pleaded, as to the whole of the trespasses complained of, that King Charles the First was seized in fee of the closes in which, &c., and that, being
[*655] so seized, *he, by letters patent, of the 5th of July, 1628, granted to William Earl of Pembroke, Thomas Morgan, and John Thorogood, and the heirs and assigns of the said Earl, that they and the heirs of the said Earl might have, hold, and enjoy, on the said several closes, free warren, fowling, and hunting; and that the said Earl was seized of the said free warren by virtue of that grant. The plea then deduced title to the said free warren down to the year 1818, when it alleged a devise of the same by Henry Fotherley Whitfield to John Forster and Thomas Deacon, by virtue whereof they became seised of the said free warren; and that they, on the 16th of June, 1818, bargained and sold, and on the 17th of June, by a certain indenture of that date, released, the free warren over the close in which, &c., to Robert Williams, William Williams, and Thomas Lane, and their heirs. The plea then deduced title from the three last-named parties to the defendant, who, under his right of free warren, justified the trespasses complained of. The second plea was in all respects like the first, except that it throughout alleged the free warren to have been "granted" by the several deeds and assurances therein mentioned, instead of stating the same to have been "released," as in the former plea. The defendant pleaded seven other pleas to different parts of the declaration, alleging a prescriptive right of free warren.

To the first and second pleas, the plaintiff, after protesting

the seisin of King Charles the First, replied, that Forster and Deacon did not, by the indenture in the first plea in that behalf mentioned, release to R. Williams, W. Williams, and T. Lane the said free warren in and over the said closes in which, &c., in manner and form as in the first plea was alleged, and that they did *not, by the said indenture in the second plea in that behalf mentioned, grant unto the said R. W., W. W., and T. L. the said free warren in and over, &c., in manner and form, &c.; and upon these traverses issue was joined. The plaintiff also traversed the prescriptive right claimed by the other pleas, upon which traverses the defendant also joined issue.

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At the trial of the cause, the defendant, to support his case on the first and second issues, proved a conveyance by lease and release of the 16th and 17th of June, 1818, by which John Forster and Thomas Deacon, by the direction of the Court of Chancery, granted, bargained, sold, aliened, released, and confirmed to Robert Williams, William Williams, and Thomas Lane, their heirs and assigns, all that the said manor or lordship, or reputed manor or lordship, of Rickmansworth, and all that the market-house in the town of Rickmansworth, with all the market ground there, or in and about the same place, and such of the tolls, stallage, and profits of the market as might from time to time arise and accrue to the lord of the said manor; and also the right and privilege of nominating the occupiers of five alms-houses therein mentioned; together with all and singular heaths, moors, marshes, woods, underwoods, timber trees, and all other trees, mines, delfs, minerals (except mines of lead and tin, and all mines royal, and all prerogatives to such mines belonging, as the same were excepted out of the said deed of grant or letters patent), quarries, pits of chalk, stone, lime, and gravel, lime-kilns, brick-kilns, fisheries, and right of fishing, fowling, hawking, hunting, and shooting; ways, waters, watercourses, ponds, pools, rivers, brooks, currents, and streams of water; commons, common of pasture and turbary, folds, fold-*courses, and liberty of foldage, waste, waste grounds, profits, royalties, courts of leet, courts baron, and customary courts, views of frankpledge; and all other court and courts; and all profits and perquisites of courts and leets, and all that to courts

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and leets and view of frankpledge did belong; and all waifs, estrays, treasure-trove, goods and chattels, debts, right and credits of felons and fugitives, felons of themselves, and persons put in outlaw, deodands, wards, reliefs, escheats, heriots, fines, amerciaments, chief rents, quit rents, and other rents, reversions, services, fairs, markets, tolls, and all other rights, liberties, franchises, jurisdictions, privileges, profits, commodities, advantages, hereditaments, and appurtenances whatsoever to the said manor or lordship, market-house, lands, tenements, hereditaments, and premises therein-before described or intended to be thereby granted and released, belonging, or in any wise appertaining, or to or with the same or any part thereof then or at any time theretofore usually had, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or as were in and by the said deed of grant or letters patent granted and assigned by the Crown to the said William Earl of Pembroke, and his heirs, as appurtenant to the said manor or lordship, or any part thereof.

The defendant, also, gave in evidence the said letters patent of King Charles I., by which free warren was granted in the following terms: "Moreover, we have granted, and by these presents for us, our heirs and successors, &c., do grant, to the aforesaid William Earl of Pembroke, Thomas Morgan, and John Thorogood, and the heirs and assigns of the aforesaid William Earl of Pembroke, that they and the heirs and assigns of the

[*658] *aforesaid William Earl of Pembroke may have free chase and free warren in all the demesne lands, and the lands holden by copy of Court-roll of the aforesaid manor at the will of the lord according to the custom of the manor, and in other the demesne lands and the lands holden by copy of Court-roll of the manor of Moor aforesaid, at the will of the lords according to the custom of the said manor, and in all woods and tenements being or hereafter happening to be within or upon the said lands, and all that which to free chase and free warren doth belong, any statute, Act, ordinance, or proviso to the contrary thereof notwithstanding. Wherefore we will, and by these presents for us, our heirs and successors, we do grant to the aforesaid William Earl of Pembroke, that they and the heirs and assigns of the

aforesaid William Earl of Pembroke, may freely, lawfully, and quietly have and hold, and may and shall be able to have, hold, use, and enjoy the aforesaid free chase and free warren for ever, together with all and singular liberties, privileges, and commodities which to chase and warren do belong, or may in any manner belong; we will also, and by these presents for us, our heirs and successors, do order and command, that no one do enter or presume to enter the aforesaid lands, woods, or tenements, or any parcel thereof, to hunt in them, or to take any thing there which to chase or warren doth belong, under the pain of forfeiting 10*l.*"

The defendant also gave in evidence a survey of the manor of Rickmansworth, made by the King's surveyors and a jury, in the third year of the reign of James I., by which the jurors found, among other things, that the free fishing, fowling, and hunting, throughout the whole manor, belong to the King as lord of the manor. It *was also shewn by the Court-rolls, that [*659] the five closes mentioned, but not named, in the first count of the declaration, were copyhold of the manor. The defendant also gave evidence that former game-keepers had sported over the manor. The close called Great Wood Field was enfranchised from the manor previously to the time of the before-mentioned devise by Henry Fotherley Whitfield, and since the letters patent of Charles I.

The plaintiff, upon this evidence, contended, first, that the grant of free warren by Charles I. over lands not held in demesne, if in fact made, was not valid in point of law; and that such right, if it could have been granted by the Crown, must be presumed to have been released at some subsequent period, before the alleged devise to Forster and Deacon. Secondly, that, supposing the free warren claimed by the first and second pleas did vest in Forster and Deacon, the same was a free warren in gross, and did not pass by the words of the release of the 17th of June, 1818. Thirdly, that, at all events, that release could only pass a right of free warren over such of the closes mentioned in the declaration as were then part and parcel of the manor of Rickmansworth. The defendant contended, that all the objections were invalid; and, further, that the

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plaintiff was estopped from raising them by the form of the issues taken on the first and second pleas, he having merely traversed one particular conveyance in the deduction of title. A verdict was taken for the plaintiff, with 40*s.* damages, on the last seven issues, and for the defendant upon the first and second issues, subject to a case. If, upon any of the objections taken, the Court should think the plaintiff entitled to recover on either of the last-mentioned issues, a verdict for him was to be entered on such issue, with 40*s.* damages.

[660] The ultimate decision having been founded on the second objection only, the arguments, and observations of the Court, as to the two others, are omitted.

Channell, for the plaintiff:

The allegation that the King was seised in fee of the closes, and that he granted free warren in them, is an allegation of a grant of a free warren in gross. The letters patent also contain a grant of free warren in gross merely. Now, there are no words in the release of 1828 which will pass a free warren in gross. The privileges and jurisdictions granted are those only which belong or appertain to the hereditaments released, or which have been enjoyed with them, or held as a part or parcel of them. A free warren is realty, but it is not part or parcel of the land in which it is granted. In the Year Book, East. 35 Hen. VI. f. 55 (1), the plaintiff sued the defendant for chasing in his warren. The defendant pleaded, in abatement of the writ, that the plaintiff had nothing in the land in which he had warren, except jointly with J. N., who was alive and not named in the writ; but the plea was held bad, because the plaintiff might have only a joint estate in the land, and yet might have the warren alone; as, if he has warren by prescription, and after purchases the land to him and another, yet the warren remains, and is not extinct as rent or common shall be. So if a man have a warren in a manor, it will not pass by grant of the manor; but if he have a warren in other land, appurtenant to his own manor, the warren will pass by a grant of the manor

(1) Cited in Vin. Abr. Warren, (H) 7; and Br. Abr. Warren, pl. 3.

and its appurtenances: Year Book, Trin. 8 Hen. VII. f. 4 (1). So a warren may perhaps become extinct, if the person entitled to it be also entitled to the land, and grant the land without reservation (*ib.*); but where it exists simply in a manor, it cannot pass by a grant of the manor with its appurtenances, though the owner of the manor be also owner of the warren: Br. Abr. Warren, pl. 7, Vin. Abr. Warren, (F.) 3, citing the *Anonymous* case in Dyer, 30 b, pl. 209, and Treby's notes there. It may be contended, here, that the release contains words sufficient in themselves to describe a right of free warren, whereas in the instances cited there was nothing mentioned besides the land and its appurtenances. But in *Bowlston* v. *Hardy* (2), warren was claimed in land which was parcel of a manor; the manor had been granted, and warren in the manor, and afterwards the grantee bargained and sold, to the party claiming the warren in that cause, the manor and all warrens thereto appertaining, or accepted and reputed as part of the manor; and the claim was holden to be unsupported, because the claimant had shewn a warren in gross in the patentee, which did not pass by the bargain and sale of the manor.

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S. B. Harrison, for the defendant:

The Court will effectuate the intention of the parties, if possible. And, by the words used in the release, it is evident that the releasors intended to part with every thing relating to the manor, including privileges of every kind, and specifically those relating to sporting. In Sheppard's Touchstone, p. 92, it is said, "This word [manor] is a word of large extent, and may comprehend many things. And therefore by the grant of a manor, without the words of *cum pertinentiis*, do pass demesnes, rents, and services, *lands, meadows, pastures, woods, commons, advowsons appendant, villains regardant, courts baron, and perquisites thereof, that are in truth at the time of the grant parcel of the manor. But nothing that in truth is not parcel of the manor, albeit it be so reputed, will pass by the grant of the manor; and, therefore, if one have a manor, and after purchase the law day, or a warren to it, and then he grant away the

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(1) Per VAVASOR, J.

(2) Cro. Eliz. 547.

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manor, hereby the law day, or the warren, will not pass. And yet if by union time out of mind, they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may pass." The warren, therefore, though it have only the character of appendancy or appurtenancy, without coming under the strict definition of an appendance or appurtenance, will pass; and the evidence of the intention of the parties distinguishes the case from those cited. If the words "fishing, fowling, hawking, hunting, and shooting, royalties, liberties, franchises, privileges, commodities, advantages," be none of them sufficient to raise the presumption of intention, when taken alone, they clearly will do so when taken in connection with the subsequent words in the release, referring expressly to the grant made by the Crown to the Earl of Pembroke. It is possible that the parties did not know whether the warren were in gross or appurtenant: the words "reputed, deemed, or taken," will sufficiently describe the warren as generally reputed to be connected with the ownership of the manor. If so, these words will not be controlled by the other words of the deed; as if a man grant all he had by J. S., nothing will pass except what he had by J. S.; but if he grant all he has in Dale which he had by J. S., all in Dale will pass, though [*663] he had it not *by J. S. (1). The Courts will construe the description largely: thus a nominal manor will pass under the words "messuages, lands, tenements, and hereditaments:" *Norris* v. *Le Neve* (2); which shews that the strict legal term need not be used. In the earlier cases, a difficulty might possibly be created by the conveyance being by feoffment; but here it is by lease and release.

Channell, in reply:

In the instance suggested in Trin. 8 Hen. VII. f. 4, the conveyance is supposed to be by grant. And the Court will construe the grant of a subject-matter such as warren strictly, as has been done, even where the question has been merely what animals were comprehended in such grants.

(1) See cases cited in *Doe* d. *Smith* v. *Galloway*, 39 R. R. 381 (5 B. & Ad. 43); Com. Dig. Fait (E. 4).

(2) 3 Atk. 82.

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The defendant justifies by reason of a free warren granted by the Crown to the Earl of Pembroke and others, and conveyed by the lease and release of 1818. The question then arises, whether, supposing a warren to be conveyed by the lease and release, it be the warren granted to the Earl of Pembroke. On that question *Bowlston* v. *Hardy* (1) is precisely in point. There the Crown granted a manor to Sir William Peto, and granted to him to have warren in the same manor; and the Court held this to be a warren in gross, which would not pass by a grant of the manor, and all warrens thereto appertaining, or accepted and reputed as part of that manor. So, here, the warren granted by the letters patent does not pass by the terms of the release.

LITTLEDALE, J.: [664]

I do not decide on the ground that no free warren could pass by the words of the release of 1818, though perhaps it could not. The plea alleges, that the Crown granted to the Earl of Pembroke and others that they should have and enjoy free warren in closes of which the King was seised in fee; and that Forster and Deacon, by lease and release, granted the said free warren to the parties through whom the defendant claims. The plaintiff takes issue on the grant of Forster and Deacon. The defendant has pleaded a warren in gross: he does not make it appendant or appurtenant. He shews merely that Charles I. granted a free warren, as he might do. In *The Attorney-General* v. *Parsons* (2) a question seems to have arisen as to the effect of the King's grant of free warren: here nothing can be plainer than the allegation in the plea. To shew the existence of the free warren, the defendant produced the letters patent of Charles I. The words there are, "we do grant, &c., that they and the heirs and assigns of the aforesaid William Earl of Pembroke may have free chase and free warren in all the demesne lands, and the lands holden by copy of Court-roll of the aforesaid manor." Taking that alone, it is certainly a grant of a warren in gross; I presume that there was a grant of the

(1) Cro. Eliz. 547. (2) 37 R. R. 702 (2 Cr. & J. 279).

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manor itself to the Earl of Pembroke; for it appears that the King was lord of the manor, and, being so, probably he granted the manor. Had he, by the same deed, made the warren appurtenant to the manor, and granted the manor, it might have raised a question, whether that was a good grant of a warren appurtenant. But here the King, being seised of demesne lands,

[*665] *grants free warren in these demesne lands. I dare say there may have been a grant of the manor by a separate deed, but whether that was so or not, this is a grant of a warren in gross. Then the title is deduced to Forster and Deacon. Now, let us see what Forster and Deacon do, and whether the defendant, who claims under Robert Williams, William Williams, and Thomas Lane, can say that the warren in question was granted to them. The indentures of lease and release convey "all that the market-house," &c. [His Lordship here read the words of the release of 1818.] Whether these words be sufficient to include a free warren, I will not enquire; the grant is only of things belonging to the manor, and the warren was distinct from the manor; and, therefore, it will not pass by the release. It is immaterial to consider the other questions which have been raised.

TAUNTON, J.:

It appears to me that the only material point lies in a narrow compass, and is not difficult. Charles I. made a grant of free warren to the Earl of Pembroke and other persons, from whom title is derived to Forster and Deacon; and they are stated to have granted the free warren by lease and release to Williams and two others, through whom the defendant claims. The plaintiff replies, that Forster did not release the said free warren; and the question is, whether or not the free warren granted by Charles I. passed by the release. I am of opinion that it did not. The grant by Charles I. is a grant of a warren in gross; that is, of a naked bare right, not annexed, nor appendant or appurtenant to any thing else. It is in these words. [His Lordship here read the words of the letters

[*666] patent.] *This was a grant of nothing more than a free warren and chase in gross. Now, let us see what Forster and

Deacon conveyed: nothing more than the manor, and all things belonging to the manor. I may even say, that there seems no intention shewn to convey the free warren, but only the manor and its appurtenances. The general words which occur are no more than such as are found in all conveyances of manors. Even the word "warren" does not occur, although it often does occur when there is no pretence that a warren legally exists. And the grant is not general, but of things to the said manor belonging or in any wise appertaining, or to or with the same or any part thereof had, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof. These words cannot comprehend the warren in question. On this mere comparison of the premises described in the conveyance of 1818, with the grant to the Earl of Pembroke, it is clear that it was not intended to pass, by the deed of 1818, a free warren, or, at any rate, not that granted to the Earl of Pembroke. This is amply confirmed by *Bowlston* v. *Hardy* (1). And I may observe, here, that the law respecting free warren was more frequently discussed, and better understood (at any rate, the former), in the reign of Queen Elizabeth than now. In that case the word "warren" occurred in the conveyance; yet it was held, that nothing passed except what appertained to the manor. Warren is not parcel of a manor; but it may be appurtenant to it by prescription. *A warren [*667] appendant or appurtenant can exist only by prescription. This warren seems never to have been heard of before the grant of Charles I. It is not said to have even been a parcel of the manor. The defendant, therefore, cannot make out the right claimed by his first plea; and his second plea is, in effect, the same.

WILLIAMS, J.:

With respect to one of the questions raised by the case, if it had been necessary to come to a conclusion that, when a distinct issue is taken, a party is entitled to travel back to matter upon which another issue might have been taken, I should have wished for more time to consider before giving my assent. But,

(1) Cro. Eliz. 547.

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agreeing as I do with the rest of the Court in the construction which they put upon the deed of 1818, and that this deed does not sustain that which certainly is put in issue, I will not enquire how much is put in issue besides. I shall content myself with saying, that this deed conveys a manor only with its accompaniments (not even mentioning free warren, supposing that that would have been enough); and that as a manor may, and generally does, exist without free warren, I think the defendant has not made out his issues.

Judgment for the plaintiff.

1834.
June 5.

[706]

REX *v.* SEWARD AND OTHERS.

(1 Adol. & Ellis, 706—716; S. C. 3 N. & M. 557; 3 L. J. (N. S.) M. C. 103.)

An indictment does not lie for conspiring merely to exonerate one parish from the charge of a pauper, and to throw it on another.

Nor for conspiring to cause a male pauper to marry a female pauper, for that purpose; it not being stated that the conspiracy was to effect such marriage by force, threat, or fraud, or that it was so effected in pursuance of the conspiracy.

It is unnecessary to allege overt acts, if the indictment charge what is in itself an unlawful conspiracy; but if not, the indictment must shew some illegal act done in pursuance of the conspiracy.

Persuading a male pauper settled in one parish to marry a female pauper settled in and chargeable to another, is not such an overt act.

To allege in an indictment that an unmarried woman in a parish was with child, is not equivalent to an allegation that she was chargeable to such parish. Per Lord DENMAN, Ch. J. and TAUNTON, J.

Quære, whether an allegation that defendants conspired together for the purpose of exonerating, &c. is equivalent to an allegation that they conspired to exonerate? Per WILLIAMS, J.

THIS was an indictment found at the General Sessions of oyer and terminer and gaol delivery in and for the Isle of Ely, holden at Ely. The first count charged that on, &c., in the 3 Will. IV., at the parish of Chatteris, in the Isle of Ely, and within the jurisdiction of the said Court, one Richard Bingham Spriggs was a poor unmarried man, and unable to maintain himself and any poor woman whom he should marry, and that the place of the last legal settlement of the said R. B. S. then was, and hath ever since continued to be, and still is, in the parish of St. Ives, in the county of Huntingdon; and that one Sarah

Mayles Brittan, now called Sarah Mayles Spriggs, on, &c., at, &c., and continually from thence until the marriage of the said S. M. B. hereinafter next mentioned, was a poor unmarried woman, legally settled in, and actually chargeable to, the said parish of Chatteris; and that John Seward, late of, &c., Robert Hemington, late of, &c., and Joseph Skeels, late of, &c., well knowing the premises, and unlawfully combining, conspiring, &c., to exonerate, free, and discharge the parishioners and inhabitants of the said parish of Chatteris from the charge and expense which might ensue to them from the said Sarah Mayles Brittan, as a poor person, and then having a legal settlement in the said *parish of Chatteris, and wrongfully and [*707] unjustly to oppress and aggrieve the parishioners and inhabitants of the said parish of St. Ives, and wrongfully and unjustly to charge and burthen the parishioners and inhabitants of the said parish of St. Ives with the maintenance and support of the said S. M. B., on, &c., with force and arms, at the parish of Chatteris, in the isle and within the jurisdiction, &c., unlawfully did combine, conspire, confederate, and agree together, for the wicked intent and purposes aforesaid, to cause and procure a marriage to be had and solemnized between the said R. B. S. and the said S. M. B., they the said R. B. S. and the said S. M. B., at the time of the said combination, conspiracy, &c., being respectively such poor persons of the said several and respective parishes in that behalf aforesaid; and that the said J. S., R. H., and J. S., in pursuance of the said combination, conspiracy, &c., afterwards, to wit, &c., did promise the said R. B. S., that they the said J. S., R. H., and J. S., or one of them, would pay for a marriage-license and all the other costs, charges, and expenses, in, about, and attending the solemnization of the marriage between them the said R. B. S. and S. B. M.; and also that they the said J. S., R. H., and J. S., or one of them, would give to the said R. B. S. a large sum of money, to wit 3*l.* of lawful, &c., if he the said R. B. S. would marry and take to wife the said S. M. B. By reason of which said premises, the said R. B. S. was then and there prevailed upon by the said J. S., R. H., and J. S. to consent and agree, and did then and there consent and agree, to marry and take to wife

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her the said S. M. B., and did afterwards, to wit, on, &c., at, &c., marry and take to wife the said S. M. B. (he the said R. B. S., before and at the time of the said combination, *conspiracy, &c., and before and at and after the time of the said marriage, being a poor person as aforesaid, and not having a legal settlement in the said parish of Chatteris, but having a legal settlement in the said parish of St. Ives; and the said S. M. B., before and at the time of the said combination, conspiracy, &c., and until, and at, and after the time of the said marriage, being a poor person, and before and at the time of the said combination, conspiracy, &c., and until the time of the said marriage, having a legal settlement at, and being actually chargeable to, the said parish of Chatteris). By means of which said premises, the said parishioners and inhabitants of the said parish of St. Ives, for a long time, to wit, ever since the day of the said marriage, until the day of taking this inquisition, have been put to great charges and expenses, amounting in the whole to, &c., in and about the maintenance and support of the said S. M. S., the wife of the said R. B. S., and are likely to be put to further great charges and expenses in and about the maintaining, &c., of the said S. M. S., to the great damage of the said parishioners, &c. The second count stated no promise, except to give Spriggs 3*l.* if he would marry Brittan: in other respects it was like the first.

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The third count stated, that the defendants, unlawfully contriving to exonerate Chatteris, and to oppress and aggrieve St. Ives, and to burthen the inhabitants with the maintenance, &c., as stated in the first count, unlawfully, &c. did combine, conspire, confederate, agree, and meet together for the purpose last aforesaid; and, being so met, did then and there unlawfully and unjustly persuade and procure Spriggs, then being such poor person, &c. to marry Brittan, she then being such poor unmarried woman, and an inhabitant of C., as *aforesaid: that, in pursuance of the conspiracy, Spriggs and Brittan, then being such poor persons, &c., and he being such inhabitant of St. Ives, and she such inhabitant of Chatteris, as last aforesaid, were married together according to the rites and ceremonies of the Church of England; and that the defendants

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afterwards, by colour and pretence of the said marriage, caused the said Sarah Mayles Spriggs to be removed, as the wife of the said R. B. S., to St. Ives, as the place of his last legal settlement, by virtue of an order, bearing date, &c., under the hands of, &c. (two justices for the Isle of Ely): by means whereof the inhabitants of St. Ives were put to great expense, &c.

The fourth count (commencing as before) stated, that Sarah M. B. was a poor unmarried woman with child, and from thence until her marriage, &c. was legally settled in Chatteris; that the defendants, unlawfully conspiring and devising to exonerate the inhabitants of C. from the charge and expense which might ensue to them from and in consequence of S. M. B., as a poor person, being an unmarried woman with child, and then having a legal settlement in C., and to aggrieve the inhabitants of St. Ives, and wrongfully to charge and burthen them with the maintenance of the said S. M. B., then being such poor unmarried woman with child, and with the charges of her lying-in and delivery, unlawfully did combine, conspire, confederate, and agree, and meet together for the purpose last aforesaid, and, being so met, did wrongfully and unlawfully cause and procure the said R. B. S., being such poor unmarried man and settled in St. Ives, to marry the said S. M. B., she then and there being such poor unmarried woman with child, and being, before and until the said marriage, such inhabitant of C. as last aforesaid: that, in pursuance of the said *conspiracy of the defendants, the said R. B. S. and S. M. B. did intermarry, and R. B. S. took S. M. B. to wife; and that, by means of the premises, the inhabitants of St. Ives were put to great charges for the maintenance of the said S. M. Spriggs, and in and about her lying-in and delivery, &c.

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The fifth count stated, that the defendants, being respectively parishioners and inhabitants of Chatteris, and combining, &c. (as in the first count), unlawfully did conspire, &c. to cause and procure, for the purposes last aforesaid, a marriage to be solemnized, &c. The overt acts alleged were, that they promised Spriggs to pay for a license for his marriage with Brittan, and that it should not cost him anything, and that they would give him 3*l.* to induce and prevail upon him to marry Brittan: and

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it was stated that they did, in further pursuance, &c., pay for such license, and give 3*l.* to Spriggs to induce him, &c.: by means whereof he was induced to consent to marry, and did consent, &c., and did marry the said S. M. Brittan. Averments were introduced, as to the settlements of the parties, and chargeability of Brittan, nearly as in the first count; and there were similar averments of damage to St. Ives.

The defendants having been convicted, a motion was made, in last Easter Term, for a rule to shew cause why the judgment should not be arrested, because the indictment did not shew that the marriage had been procured by any violence, threat, contrivance, or other sinister means, without the voluntary consent or inclination of the parties themselves; and 1 East's P. C. ch. XI. s. 11 (p. 461) was cited, where it is said to have been held by BULLER, J. (1), that, in support of an indictment for [*711] *conspiring to marry paupers, such misconduct ought to be shewn. A rule *nisi* having been granted,

Kelly and *B. Andrews* now shewed cause:

The ruling of BULLER, J., in the case cited, seems to refer to what is to be proved, not what is stated in the indictment.

(LORD DENMAN, Ch. J.: The latter part of the passage shews that the matter ought to appear on the indictment (2).)

The objection here taken is founded on an erroneous view of the offence, which is, in substance, a conspiracy, not to procure a marriage, but unlawfully to exonerate one parish from the maintenance of a pauper, and throw it upon another.

(TAUNTON, J.: It is not the combining to do any wrongful act that constitutes a conspiracy: *Rex* v. *Turner* (3).)

A conspiracy merely to procure a marriage would not be indictable; but it becomes an offence if the thing is to be done

(1) *Rex* v. *Fowler*, MS.

(2) "But where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was holden sufficient, without averring it in terms to have been against the will or consent of the parties; though that must be proved." *Rex* v. *Parkhouse*, Exeter Sum. Ass. 1792, cor. Buller, J., MS., is cited.

(3) 13 East, 228.

for an unlawful end, or by unlawful means. Here, an unlawful end is stated,—to transfer a burden wrongfully from one parish to another: if no means were stated, or no overt acts alleged, the indictment would still be good. The third count simply states the conspiracy to have been to exonerate Chatteris from the charge of a person settled there, and wrongfully, unjustly, and unlawfully to burthen St. Ives with it. The means by which it was proposed to be done, whether it were by improperly procuring a marriage, as here, or by forging an order of removal, are matter of evidence, and do not affect the indictment.

(LORD DENMAN, Ch. J.: If you state the *means, must not we take notice of them? [*712]

TAUNTON, J.: If the means are set forth, and appear to be innocent, the generality of the other part of the count cannot avail.)

As to overt acts, if some such acts are charged, and they prove not to be criminal, the rest of the indictment is not affected.

(LORD DENMAN, Ch. J.: It tends to mislead, if you set out some acts, and those are not unlawful.

TAUNTON, J.: It is a trap to bring parties into Court unprepared.)

Supposing it necessary that any of the overt acts alleged should be unlawful, some are so here. In some instances they are expressly laid to have been done unlawfully.

(LITTLEDALE, J.: That is nothing.)

The fourth count states, in substance, that the defendants conspired wrongfully to charge St. Ives with the maintenance of an unmarried woman with child, legally settled elsewhere; and that, in pursuance of such conspiracy, they unlawfully caused and procured a poor unmarried man to marry her. After verdict

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for the Crown, it will not be presumed that that was done lawfully and with the man's consent. It is alleged to have been done unlawfully; and that it was so, was matter of evidence. The woman was actually chargeable to Chatteris at the time of these proceedings; for the stat. 35 Geo. III. c. 101, s. 6, enacts, that every unmarried woman with child shall be deemed and taken to be a person actually chargeable, within the meaning of that Act, to the parish in which she shall inhabit.

(TAUNTON, J.: The statute does not make an averment, that an unmarried woman was with child, equivalent to an averment that she was chargeable: *Rex* v. *Holm, East Waver Quarter* (1).

LORD DENMAN, Ch. J.: You only state *primâ facie* evidence of her chargeability.)

[*713] *The case cited was that of an order of removal, which must expressly adjudge the party to be chargeable. But at all events, the gist of this indictment is the conspiracy; and that is well charged as having an unlawful object. It is said in 2 Russell on Crimes, p. 567, 2nd ed., that in an indictment, "though it is usual to state the conspiracy, and then shew that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration:" and *Rex* v. *Gill* (2) is cited.

(LORD DENMAN, Ch. J.: There the conspiracy was to commit an offence: here it was to do an act which might be lawful unless it were shewn to be otherwise.)

In some of the counts it is laid, that the defendants unlawfully conspired to exonerate Chatteris and burthen St. Ives. *Regina* v. *Best* (3) shews, that a conspiracy to burthen an individual unjustly (and it is the same of a parish) is an offence, and that

(1) 11 East, 381. And see the judgment of Lord ELLENBOROUGH, Ch. J., in *Rex* v. *Alveley*, 3 East, at p. 566.

(2) 20 R. R. 407 (2 B. & Ald. 204).

(3) 1 Salk. 174.

the offence is complete as soon as the parties have conspired. It would be requiring too much precision to insist that the means of carrying the conspiracy into effect should be stated so as to shew how they were unlawful.

(TAUNTON, J.: It is not said that all the means must be specified.)

Sir James Scarlett, *Storks*, Serjt., and *F. V. Lee*, *contrà*, were not heard.

LORD DENMAN, Ch. J.:

I am of opinion that this rule must be absolute. An indictment for conspiracy ought to shew, either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means: that is *not done here. To say, that meeting together and combining [*714] to exonerate one parish from the burthen of a poor person, and throw it on another, amounts to an indictable conspiracy, is extravagant. If such a proposition could be maintained, it would apply to parishioners hiring out a poor boy from their own parish into another. Then, when it is said that such a proceeding is a conspiracy, because it is to be carried into effect by unlawful means, we must see in the means stated something which amounts to an offence. In *Rex* v. *Fowler* (1), money was given to procure the marriage; but BULLER, J., directed an acquittal, no force or contrivance appearing. As to *Regina* v. *Best* (2), it was properly held there that the conspiracy was indictable, though nothing had been done in pursuance of it, because the object was falsely to charge a person with being the father of a bastard child. From the nature of the fact, there could be no doubt that the conspiracy in itself was unlawful. In *Rex* v. *Spragg* (3), the indictment only charged a conspiracy to indict a person for a crime, not saying "falsely to indict;" and this was objected to as insufficient; but it being afterwards alleged that the defendants, according to the conspiracy, did falsely indict the party, Lord MANSFIELD said that "this was

(1) 1 East's P. C. C. XI. s. 11, p. 461.
(2) 1 Salk. 174.
(3) 2 Burr. 993.

REX v. SEWARD.

a complete formed conspiracy, actually carried into execution:" the averment of the execution, there, reflected back upon the statement of the conspiracy. That case is not like the present.

LITTLEDALE, J.:

The mere procuring of this marriage was a legal act in itself, and the indictment does not state that such procuring was [*715] effected by any unlawful *means or devices, or false pretences. If it had been alleged to have been done with a sinister purpose, and by unlawful means, that statement would have been sufficient. The substance of this charge is, that the defendants conspired to burthen the parish of St. Ives with a pauper (for the merely exonerating themselves could be no offence); but, because the natural consequence of the marriage of these parties was to subject the husband's parish to a burthen, it does not follow that those who procured the marriage were indictable.

TAUNTON, J.:

I am of the same opinion. Merely persuading an unmarried man and woman in poor circumstances to contract matrimony, is not an offence. If, indeed, it were done by unfair and undue means, it might be unlawful; but that is not stated. There is no averment that the parties were unwilling, or that the marriage was brought about by any fraud, stratagem, or concealment, or by duress or threat. No unlawful means are stated, and the thing in itself is not an offence: to call this a conspiracy, is giving a colour to the case which the facts do not admit of. As stated, it is nothing more than the case where the officers of a parish agree, after consultation, to apprentice out children from their own parish into another: no doubt, when that is done, the one parish may be exonerated and the other subjected to a charge; but no offence is committed.

WILLIAMS, J.:

I have always understood that an indictment was sufficient if it alleged what amounted to a conspiracy in law, though no overt act were stated, or none stated perfectly: and in this case, I have had some doubt whether the fourth count was not sufficient; but, on consideration, I can hardly think that, in

that count, *if the overt acts are rejected, and the conspiracy alone relied upon, enough appears to make out an indictable offence. Among other things, the fact of the woman having been a burthen to Chatteris at the time in question, is not clearly averred: the terms used are not such that we can, judicially, take her to have been actually chargeable to that parish when the alleged offence was committed. Furthermore, I doubt whether the allegation of conspiracy in that count is to be understood in the sense in which the counsel for the prosecution have put it to us. It is stated, that the defendants, unlawfully conspiring to exonerate the inhabitants of Chatteris from the expense which might ensue to them from S. M. Brittan, as a poor person, being an unmarried woman with child, and then having a legal settlement in Chatteris, and to aggrieve the inhabitants of St. Ives, and wrongfully to burthen them with the maintenance of the said S. M. B., and with the charges of her lying-in, unlawfully did combine, conspire, and meet together for the purpose last aforesaid; and, being so met, did unlawfully cause and procure, &c. Now, whether a conspiracy for the purpose of doing an act is equivalent to a conspiracy to do an act, may be doubted. In *Rex* v. *Neild* and others (1), the defendants were convicted under a statute (39 & 40 Geo. III. c. 106), which makes it penal to enter into agreements for controlling certain workmen; the conviction stated the defendants to have entered into an agreement (which was not set out) for the purpose of controlling; and this was held insufficient.

[*716]

Judgment arrested.

DOE ON THE JOINT DEMISE OF BARBARA POOLE AND ELIZABETH POOLE *v.* ERRINGTON (2).

1834. *June* 9.

(1 Adol. & Ellis, 750—757; S. C. 3 N. & M. 646; 3 L. J. (N. S.) K. B. 215.)

[750]

A count in ejectment, laying a joint demise by two, is not supported by proving the two to be entitled as tenants in common.

EJECTMENT for lands in Northumberland. The declaration was on a joint demise by Barbara Poole and Elizabeth Poole.

(1) 6 East, 417.

(2) The proceeding by ejectment was modified in form by the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 168 *et seq.*; and the form of remedy is again made more elastic by the rules

DOE d. POOLE v. ERRINGTON.

On the trial before Taunton, J., at the last Spring Assizes for Northumberland, the plaintiffs claimed as devisees under the will of William Ord, by which the lands in question were given, devised, limited, bequeathed, and appointed "unto and to the use of my dear wife Elizabeth Ord for and during the term of her natural life; and from and after her decease, unto and for the use of my nieces Barbara Poole and Elizabeth Poole, their heirs, executors, administrators, and assigns, for ever, as tenants in common, and not as joint tenants." Elizabeth Ord died before this action was brought. The counsel for the defendant urged that the plaintiff must be nonsuited, on the ground that tenants in common could not join in a demise in ejectment. The counsel for the plaintiff applied to the learned Judge to have the record amended, by inserting several demises, or striking out the name of one of the lessors; but his Lordship refused to amend, saying that he considered that the nature of the lessor's title was a question affecting the merits of the case: and the plaintiff was nonsuited. In Hilary Term last, *Coltman*
[*751] obtained a *rule to shew cause why the nonsuit should not be set aside, and a new trial had.

Cresswell (with whom were *Alexander* and *W. H. Watson*) now shewed cause. * * *

[753] *Coltman* and *Ingham* in support of the rule. * * *

[755] LORD DENMAN, Ch. J.:

When the motion was made in the present case, I thought that there had been some alteration in the old law on this point; but it is clear that the ancient rule which originally prevailed in actions of *ejectione firmæ*, continued in force after the proceeding had become fictitious: and there is good reason for this. Were it otherwise, titles of any kind, however unconnected, might be joined in a demise.

LITTLEDALE, J.:

The old law certainly was, that in all real actions tenants in common must sever, and that in personal actions they must

under the Judicature Acts. It does not follow that the principles of the old cases relating to parties are unimportant.—R. C. And see the Preface.—F. P.

join (1). In mixed actions they were to sever (2). I do not see that the fictitious nature of this proceeding suggests any reason for departing from the rule. It is laid down, as now insisted upon by the defendant, in Buller's Nisi Prius (3).

TAUNTON, J.:

There is an authority in favour of the defendant which has not been mentioned: *Blachasper's* case, cited from Noy, in Lord Hale's MSS. (4). The fictitious action of ejectment appears to be more ancient than *Mr. Coltman* supposes (5). The Year Book of 7 Edw. IV. *fol. 6, cited by Mr. Selwyn in his Nisi Prius, shews that [*756] the term was recovered by the judgment, at some time between the sixth year of Richard the Second and the seventh year of Edward the Fourth. This form of *judgment introduced the proceeding [*757] in which the actual parties were fictitious. The exact commencement of this we do not know: it certainly was earlier than the beginning of the eighteenth century. A case in Cro. Eliz. p. 21, leads me to infer the existence at that time of the action of ejectment, as a mode of trying the title of the lessor of the plaintiff.

WILLIAMS, J., concurred.

Rule discharged.

DOE D. BIASS *v.* HORSLEY.

1834. *June* 10.

[766]

(1 Adol. & Ellis, 766—772; S. C. 3 N. & M. 567; 3 L. J. (N. S.) K. B. 183.)

Lands were devised in fee, charged with an annuity; and power was given to the annuitant to distrain, if the annuity were in arrear for twenty days after the day of payment, being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter and enjoy the lands, and to take the profits, until the annuitant should be thereby paid and satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears and costs: Held, that upon the annuity being forty days in arrear, the annuitant might bring ejectment, without making any demand.

EJECTMENT for lands in the county of York. At the trial before Alderson, J. at the York Spring Assizes, 1832, the plaintiff

(1) See Littleton, ss. 314, 315, 316.
(2) See *Curtis* v. *Bourn*, 2 Mod. 61.
(3) B. 3, ch. 2, p. 107.
(4) Noy, 13. Hargrave's note (7) to Co. Litt. 45 a. But, *quære*, whether any decision appear in Noy's report?
(5) [I cannot find in the argument, as reported, to what opinion on this point *Mr. Coltman* had committed himself.—F. P.]

DOE d. BIASS v. HORSLEY.

was nonsuited, subject to the opinion of this Court upon the following case: Thomas Biass the elder, by his will dated the 21st of August, 1800, devised the lands in question to his son Thomas Biass in fee, subject to an annuity of 30*l.* per annum to his daughter Hannah, payable quarterly, and thereby charged the lands with the payment of the said annuity; and he also thereby declared his will and desire, that if the said annuity should be behind and unpaid for twenty days after the day of payment, being lawfully demanded, it should be lawful for the said Hannah to enter upon the said lands so charged, and distrain for the same; and in case the said annuity should be behind and unpaid for forty days next after any of the days of payment whereon the same ought to be paid, then and so often it should and might be lawful for the said Hannah to enter into and enjoy the said lands so charged with the said annuity, and receive and take the rents, issues, and profits thereof to and for her own use and benefit, until she should be therewith and thereby paid and satisfied all the arrears of her annuity, with all costs and charges, or until the person or persons who should be then entitled to immediate possession of the said premises should pay, satisfy, and discharge to her the said Hannah all the arrears of the said
[*767] annuity and every part thereof, incurred before *and that should incur during such times as they should respectively receive the rents, issues, and profits thereof, or be entitled to receive the same, together with all her costs, &c. The testator died on the 9th of January, 1802, upon which event, his son Thomas entered upon the said lands, and occupied them, by himself or tenants, till Lady Day, 1830, when certain persons, to whom the lands had been mortgaged by him, took possession, and continued in possession until Lady Day, 1831; the defendant then entered into possession as their tenant. The annuity was in arrear from 1823 to 1828, after which time it was regularly paid by or on behalf of the persons in possession. Notice to pay the current annuity had been given to the tenants of Thomas Biass after 1828, but no demand of the arrears from 1823 to 1828 was shewn to have been made on any person, nor was any demand of possession of the lands proved. The jury found that the four years of the annuity between 1823 and 1828 still

remained unpaid at the time of the bringing the ejectment. But the learned Judge being of opinion that proof of a demand was also requisite, nonsuited the plaintiff, subject to a special case, with liberty to enter a verdict for the plaintiff, in case a demand was not necessary. This case was argued on a former day in this Term (June 6) (1).

J. Henderson, for the plaintiff:

The will provides two remedies for the nonpayment of the annuity, distress and re-entry. In the distress clause, a demand at twenty days is required. Yet a distress might be made, although this condition is introduced, without *a demand: [*768] *Browne* v. *Dunnery* (2), *Kind* v. *Ammery* (3). But, in the clause of re-entry, there is no condition requiring demand, and there can be no reason for carrying such a condition on from the preceding clause; and the general rule of law is, that a demand is not necessary in such a case. This is not an entry which defeats the estate in the land, as in the case of condition broken; and, therefore, it does not fall within the rule, that a demand must be made where the tenant loses his estate; Co. Litt. 201 b, Gilbert on Rents, 73. In the latter book it is said, "Where the remedy is by way of re-entry for nonpayment, there must be an actual demand made previous to the entry, otherwise it is tortious; because a condition of re-entry is in derogation of the grant, and the estate at law, being once defeated, is not to be restored by any subsequent payment; and it is presumed, that the tenant is there residing on the premises in order to pay the rent, for the preservation of his estate, unless the contrary appears by the lessor being there to demand it: and therefore, unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be upon the land ready to pay the rent, the law will not allow the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear without a demand hath actually been made upon the land:" and the same rule is laid down on the same principle in

(1) Before Lord Denman, Ch. J., Littledale, Taunton, and Williams, JJ.

(2) Hob. 208 (5th ed. 1724), pl. 262.

(3) Hutt. 23.

DOE d. BIASS v. HORSLEY.

the case of a *nomine pœnæ*. But here, the interest acquired by the re-entry is of another kind; it is defined in Littleton, sect. 327, "But where a feoffment is made of certain lands reserving a
[*769] *certain rent, &c., upon such condition, that if the rent be behind, that it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, &c.; in this case if the rent be behind, and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the feoffor shall have the land but in manner as for a distress, until he be satisfied of the rent, &c., though he take the profits in the meantime to his own use, &c." In *Jemmot* v. *Cooly* (1), where the question turned upon the effect of an entry by the grantee of such a rent, only one of the several reports of the case (1 Keb. 784) makes any mention of a demand, and no point seems to have been raised respecting it. Nor does there appear to be any similar case in which a demand came in question. In *Peirson* v. *Sorrel* (2), PEMBERTON, Ch. J., held at Nisi Prius that, if legacies be given by will, "and that, in case of nonpayment, the legatees may enter and enjoy the profits of such and such land till satisfied," no demand is necessary; for it is no forfeiture, but an executory devise, although there be a place and time appointed for payment. In *Havergill* v. *Hare* (3), land was conveyed by fine to the use that a grantee of a rent might, upon its being in arrear, and no sufficient distress, enter and enjoy till the rent should be satisfied: and the Judges agreed that this was not a condition,
[*770] *but a limitation of an use. The law, though it incline against a penalty, will favour a remedy.

Hoggins, for the defendant:

It is true that, inasmuch as the distress itself is a demand, a distress might have been taken in this case, without previous

(1) 1 Lev. 170; *S. C.* 1 Saund. 112 b; Sid. 223, 334; Sir T. Ray. 135, 158; 1 Keb. 784, 915; 2 Keb. 20, 184, 270, 295.
(2) 2 Show. 185.
(3) Cro. Jac. 510. First question.

demand, but for the condition expressly requiring it: Com. Dig. Rent, (D.) 4. But it is clear from this, that the devisor meant the forfeiture to accrue only after demand made, and that he understood that it would be so; for, in the case where he conceived that the demand was not necessary without the insertion of the condition, he did insert it. His meaning plainly was, that a demand should be necessary before enforcing either remedy, by the words of the devise in the case of distress, and by the common law rule in the case of the forfeiture. Lord Coke (Co. Litt. 201 b) says (sect. 325), "Where our author saith, if the rent be behind," it is to be understood, "that though the rent be behind and not paid, yet if the feoffor doth not demand the same, &c., he shall never re-enter, because the land is the principal debtor; for the rent issueth out of the land," &c. Now the present case is parallel to that of an entry for non-payment of rent; for the money is to grow out of the rent, and the annuitant is to take the rent till the arrears be satisfied. The entry produces a temporary forfeiture, and must be governed by the same rules as if it produced an absolute forfeiture. It puts an end to the tenant's possession of the land which is to pay the annuity. In Com. Dig. Rent, (D.) 3, it is said: "If there be a lease, and a *nomine pœnæ* for non-payment of the rent, the rent must be demanded before he is entitled to the *nomine *pœnæ*." In *Dormer's* case (1) it was said that re-entry might be for default of payment, without demand, by special consent of the parties; which was acted on in *Doe* d. *Harris* v. *Masters* (2). [*771]

(LITTLEDALE, J.: There is a case like this in Dyer (3), where the Judges were divided.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This is an ejectment, brought by the devisee of an annuity under the will of the last owner of the land. The devise was in the following terms: (His Lordship here read the will.) And the question was, whether, the annuity being unpaid for six weeks, a demand of it was necessary before the right of entry for

(1) 5 Co. Rep. 40 b.
(2) 26 R. R. 422 (2 B. & C. 490).
(3) 3 Dyer, 348 a.

DOE d. BIASS v. HORSLEY.

non-payment accrued. At the trial, my brother ALDERSON nonsuited the plaintiff for want of a demand, after consulting my brother PATTESON. This circumstance, rather than any doubt entertained by the Court on the argument, made us pause before we came to a decision. But we have reason to believe that the learned Judge who presided at the trial acted from no strong or decided opinion; and the judgment I am about to pronounce has the concurrence of my brother PATTESON.

We think the plaintiff entitled to recover, although no demand was made, on the principle established by many authorities cited at the Bar, that the present is not a case of forfeiture for non-payment of the annuity, but only a right to enter and receive the profits till the arrears are satisfied. In the former case, a demand is necessary; in the latter, there is no authority for [*772] saying *that it is. The *Anonymous* case quoted from Dyer (1) appears to go farther; for it is there decided that the heir may enter for non-payment of an annuity to the devisee of it, without any demand. But *Peirson* v. *Sorrel* (2) is directly in point. PEMBERTON, Ch. J. held, at the Chelmsford Assizes, that if legacies be given by will, and that in case of non-payment the legatees may enter and enjoy the profits of such and such land till satisfied, no demand is necessary; for it is no forfeiture, but an executory devise, although there be a place and time appointed for payment. The reporter adds, "So was the case of *Tyrrel* v. *Classick*, here." This, indeed, occurred at Nisi Prius; but it is the ruling of a great Judge, at a time when the learning on subjects of this nature was in daily operation, and is consistent with all the authorities.

The nonsuit must, therefore, be set aside; and our judgment will be for the plaintiff.

Postea to the plaintiff.

(1) 3 Dyer, 348 a.

(2) 2 Show. 185.

DOE D. FOSTER *v.* THE EARL OF DERBY (1).

1834. *June* 10.

[783]

(1 Adol. & Ellis, 783—791; S. C. 3 N. & M. 782; 3 L. J. (N. S.) K. B. 191.)

A. being seised of two closes, which he claimed as heir-at-law, conveyed one to B. Both A. and B. were afterwards ousted by C., and brought actions of ejectment against him for the premises respectively, which they recovered. B. was again dispossessed by C., and again brought ejectment against him, claiming the same premises as in the former action, and by the same title. On the trial, B. offered to prove the deposition made by a witness, since deceased, upon the trial of the former ejectment between A. and C.: Held, that the evidence was inadmissible.

EJECTMENT for lands at Huyton in the county of Lancaster. At the trial before Alderson, J. at the Lancaster Spring Assizes, 1834, it appeared that the defendant purchased the premises in dispute in 1823, from Henry Foster, who claimed to have become entitled to this and another property called the Croft estate (which H. F. continued to hold), as heir-at-law to Mary Travers: that the said Mary Travers died in January, 1823, before the above-mentioned purchase: that in 1826, Thomas Foster, the present lessor of the plaintiff, also claiming to be heir-at-law to Mrs. Travers, *brought actions of ejectment, in which he recovered [*784] the premises now in question from the present defendant, and the Croft estate from Henry Foster: that the defendant and Henry Foster afterwards brought two actions of ejectment against Thomas, the now lessor of the plaintiff, to recover back the said premises respectively: that at the Lancaster Summer Assizes, 1830, the two causes stood next to each other, Henry Foster being lessor of the plaintiff in the first, and claiming as heir-at-law of Mrs. Travers, and the now defendant being lessor of the plaintiff in the second, and claiming through Henry Foster as such heir-at-law: that H. F., the lessor of the plaintiff, obtained a verdict in the first cause, no evidence being offered for the defendant: that the witnesses and evidence in the second cause would have been the same as in the first, except only as to the additional fact, in the latter cause, of the conveyance from Henry Foster to the present defendant; that the defendants' counsel were the same in both; that when the first cause was over, and the jury sworn in the second, the counsel for the then defendant and now

(1) Cited and applied by CHANNELL, B. in *Hodson* v. *Walker* (1872) L. R. 7 Ex. 55, 61, 41 L. J. Ex. 51, 54.—R. C.

DOE d. FOSTER v. THE EARL OF DERBY.

lessor of the plaintiff said, "they would not trouble the Court in the second case, the evidence in both being precisely the same" (except as above mentioned), but would consent to a verdict for the plaintiff, which was accordingly taken. It further appeared, that among the witnesses examined on that occasion in Henry Foster's ejectment was one William Foster, and that he was now dead; and at the trial of the present cause, in which the same premises and title were in question as in the former ejectment brought by Lord Derby, it was proposed to read as evidence for the now defendant Lord Derby, a short-hand writer's note of

[*785] *the examination of William Foster on the trial in 1830. The learned Judge thought the evidence not admissible, because the parties in that cause and in this were not the same; he therefore rejected it, and the plaintiff had a verdict. In the following Term a rule *nisi* was obtained for a new trial, on the grounds, first, that the testimony given by the deceased witness in the cause, *Doe* d. *Henry Foster* v. *Thomas Foster*, was legitimate evidence in the cause between the present parties; and, secondly, that when the defendant's counsel, in the cause, *Doe* d. *Earl of Derby* v. *Thomas Foster*, agreed to a verdict being at once taken for the plaintiff, it was understood that the evidence in the preceding cause should be considered as repeated; and, consequently, the evidence of William Foster had, in effect, been given in a former cause between the present parties, and, therefore, ought now to have been admitted.

[After argument:]

[789] LORD DENMAN, Ch. J.:

Supposing that there is no proof of a particular agreement at the time of the former trials, to consider the evidence in the first ejectment as read upon the trial of the second, I think the deposition of the deceased witness was not admissible in this case, for

[*790] the reason given by the learned Judge at Nisi Prius. *It appears to me perfectly clear that there is no such privity between the parties to the present ejectment, and to the ejectment, *Doe* d. *Henry Foster* v. *Thomas Foster*, as could make the verdict in the latter evidence in this, or warrant the reception, in this case, of William Foster's deposition in the former one. In *Kinnersley* v.

Orpe (1) the same title must have come in question in both actions. We have felt great difficulty in this case, on account of the understanding which is said to have taken place between the parties when the second of the two former ejectments was called on for trial; but I think it is best to require that, where any such matter is relied upon, the understanding should be distinctly shewn: the burden of proving it here lay on the defendant, and I think he failed to establish it.

LITTLEDALE, J.:

I also think that the evidence was not receivable. A passage has been cited from Com. Dig. Evidence, A. 5, where it is said, that "a verdict in another action for the same cause shall be allowed in evidence between the same parties. So, it shall be evidence, where the verdict was for one under whom any of the present parties claim." But that must mean a claim acquired through such party subsequently to the verdict (2): if, as it has been now argued, the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might be carried back for a hundred years. None of the cases support such a proposition. As to the second point made, I think the general understanding relied upon by the defendant was not sufficient to let in *the evidence in question. [*791] If the parties on the former occasion consented that the evidence given at the first trial should be considered as read on the second, a minute to that effect might have been made upon the Judge's notes: but none appears. The mere understanding of the parties, as it is alleged here, cannot be relied upon as an agreement. Then the evidence of the deceased witness comes before us merely as evidence given upon a trial between different parties from those in the present cause. *Kinnersley* v. *Orpe* (1) does not apply. There the defendant in each cause justified as the servant of Dr. Cotton, and he was the real defendant in both actions. The rule must be discharged.

TAUNTON and WILLIAMS, JJ., concurred.

Rule discharged.

(1) 2 Doug. 517. (2) See *Lock* v. *Norborne*, 3 Mod. 141.

DOE d. FOSTER v. THE EARL OF DERBY.

Reporters' note (1835).

The present Earl of Derby afterwards brought another ejectment against Thomas Foster for the premises claimed in the above action, laying the demises in the names of Henry Foster, and of the late and present Earl. At the trial before Alderson, B., at the Lancaster Spring Assizes, 1835, the above-mentioned examination of the deceased witness, William Foster, was offered in evidence for the plaintiff, on the counts laying the demises in the name of Henry Foster. This was objected to on behalf of the defendant, inasmuch as the trial on which that examination was taken related to the property, late Mrs. Travers's, at Croft, whereas the present action was for the land, formerly her's, at Huyton, a different property. The learned Judge, without hearing counsel in answer to the objection, said that he had no doubt of the examination being admissible, the question being the same in both actions, viz. who was the heir-at-law of Mrs. Travers. On this decision, a compromise was offered by the defendant, and acceded to.

1834. *June* 10.

[792]

LAINSON, EXECUTOR OF OWEN GRIFFITHS *v.* TREMERE (1).

(1 Adol. & Ellis, 792—804; S. C. 3 N. & M. 603.)

In an action upon a bond, appearing upon oyer to be conditioned for the payment of the rent of certain premises, recited in the condition to be demised by indenture at a certain specific rent, as by the said indenture, &c. the defendant cannot plead that the indenture mentioned in the condition was an indenture by which a certain rent, less in amount than the rent mentioned in the condition, was reserved, and that such less rent has been paid.

DEBT on bond for 1,000*l.*, made to the testator by the defendant. The defendant, set out, on *oyer*, the bond and condition. The bond was joint and several, by the defendant and two other persons, and dated the 29th of October, 1809. The condition recited, that by indenture of lease bearing even date therewith, made between Owen Griffiths (the testator) of the one part, and

(1) Cited and followed in *Bowman* v. *Taylor* (1834) 2 A. & E. 278 (to be reported in 41 R. R.).—R. C.

James Tremere (the defendant) of the other part, Griffiths, for the considerations therein mentioned, demised certain messuages and premises, *habendum* to Tremere, his executors, administrators, and assigns, for a term of thirty-one years, at the yearly rent of 170*l.*, payable quarterly, and subject to certain covenants, &c. therein contained, on the tenants' parts to be performed, as by the said lease, &c.: and the condition of the bond was stated to be the payment to Griffiths, his executors, &c., of the said yearly rent or sum of 170*l.* and also the performance of all the covenants, &c. in the same indenture of lease contained on the part of the lessee, tenant, or assignee to be performed, &c.

First plea, *non est factum;* upon which issue was joined.

Second plea. That the indenture of lease in the condition mentioned, was a certain indenture of lease bearing even date with the said writing obligatory in the said declaration mentioned, that is to say, &c. (the indenture was then set forth, down to the *reddendum*, *rather more fully than in the condition); yielding [*793] and paying therefor yearly and every year during the said term unto the said Owen Griffiths, his executors, &c. the yearly sum of 140*l.* of lawful, &c. And the said defendant did thereby for himself, his heirs, executors, &c. covenant, promise, and agree to and with the said Owen Griffiths, his executors, &c. (stating a covenant by the defendant to pay the said rent of 140*l.* at the appointed days). And the defendant further alleged, that there were not, nor are, any other covenants, clauses, provisoes, conditions, or agreements in the same indenture of lease contained, which from and after the execution of the said writing obligatory during the continuance of the said term by the said lease granted, on the part of the lessee therein mentioned, tenant, or assignee, were or ought to be paid, observed, performed, fulfilled, or kept: as in and by the said indenture, &c. The plea then alleged that the defendant entered by virtue of the demise, and was possessed, and that he, from time to time and at all times, well and truly paid to Owen Griffiths in his life time, and to the plaintiff as his executor since his death, the said yearly rent or sum of 140*l.* at the days and times, &c., and in the manner and form by the said indenture limited and appointed, &c. according to the true intent and meaning of the said indenture, &c.

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Replication. That the said defendant has not since the making of the said writing obligatory, and during the continuance of the term in the said condition thereof mentioned, well and truly paid or caused to be paid to the said plaintiff, executor as aforesaid, since the death of the said Owen Griffiths, the said yearly rent or sum of 170*l.* in the said condition mentioned, according to the terms thereof, but has hitherto neglected, &c. Demurrer,

[*794] *assigning for causes that the plaintiff had not answered, traversed, or denied the material allegations in the plea, namely, the payment of the 140*l.* in the manner and form, &c. according to the true intent, &c.; but on the contrary had alleged a breach in payment of a supposed rent or sum of 170*l.* not mentioned in the said indenture; and also that the replication did not allege any breach of any covenant in the said indenture of lease mentioned; also that the plaintiff had alleged a supposed breach by non-payment of a certain supposed rent or sum of 170*l.*, by way of answer to the plaintiff's allegation of performance of the several covenants in the said indenture of lease mentioned, which said indenture of lease was in and by the plea averred to be, and in fact was, the identical lease mentioned in the condition of the said writing obligatory, and so by the said plaintiff in and by his replication to that plea admitted to be; and also that the subject-matter of the plaintiff's said replication was unconnected with the covenant of the said defendant in the said indenture contained, the true performance whereof was by the plea expressly alleged, &c. Joinder in demurrer.

Third plea. That the said indenture of lease in the said condition mentioned was a certain indenture, &c., being the same indenture of lease as is hereinbefore in the said second plea mentioned, &c., whereby, &c. (as before), yielding and paying therefor yearly, and every year during the said term, to the said Owen Griffiths, his executors, &c., a certain yearly rent therein mentioned, and that the said rent in the said indenture of lease mentioned, and thereby reserved as aforesaid, was and is in the said condition of the said writing obligatory by mistake stated

[*795] and set forth to be 170*l.* per *annum instead of 140*l.*, the said yearly rent in the said indenture of lease mentioned, and thereby reserved, being 140*l.* and no more, and no other rent or yearly

sum being thereby reserved or made payable. The plea then averred payment of the last-mentioned rent, and that Owen Griffiths never demised the premises in the said indenture and in the said condition mentioned, or any other premises whatever, to the defendant, at or under any greater or other yearly rent than the said sum of 140*l.* Replication, that the said rent in the said indenture is by mistake stated to be 140*l.* instead of 170*l.*, without this that the said rent in the said condition of the said writing obligatory mentioned, is by mistake stated and set forth to be 170*l.* per annum instead of 140*l.* And this, &c. (to the country). *Similiter.*

Fourth plea. That the said defendant hath from time to time, and at all times since the making of the said indenture of lease in the said second plea mentioned, being the same indenture of lease in the said condition of the said writing obligatory also mentioned, during the continuance of the said term, &c., hitherto well and truly paid, or caused to be paid, unto the said O. G., his executors, &c., the said yearly rent or sum in the said indenture of lease mentioned and thereby reserved and made payable, according to the true intent and meaning of the same indenture of lease. Replication, that the said defendant has not, since the making, &c., and during the continuance, &c., well and truly paid, or caused to be paid, to the said plaintiff, executor as aforesaid, since the death of the said O. G., the said yearly rent or sum of 170*l.* in the said condition mentioned, according to the terms thereof, but has hitherto *neglected, &c. Rejoinder, that [*796] the said defendant hath from time to time, and at all times since the making, &c. (as in the plea), during the continuance, &c., well and truly paid, or caused to be paid, unto the said O. G., and his executors, the said yearly rent or sum in the said indenture of lease mentioned and thereby reserved, according to the true intent and meaning of the same indenture of lease and of the said condition of the said writing obligatory. And of this, &c. (to the country). Demurrer, assigning for causes, that the said defendant has not alleged any new matter, nor any thing materially differing from the allegations in the last plea; and the defendant has thereby tendered no material issue, and has no denied or noticed the allegation of the plaintiff in his replication,

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that the defendant had not paid the rent of 170*l.* in the condition of the said bond mentioned. Joinder in demurrer.

The demurrers were argued on a former day (May 30th) in this Term (1).

R. V. Richards, for the defendant:

The question substantially depends on the goodness of the second and fourth pleas. The bond and the indenture may be considered as constituting one instrument. The defendant could not have pleaded performance of the condition of the bond without setting out the indenture: *Anonymous* case in Siderfin (2), *Lewes* v. *Ball* (3), *Tapscot* v. *Wooldridge* (4), *Cook* v. *Remington* (5), *Stibbs* v. *Clough* (6), Viner's Abr. Fait. (O. a. 2), pl. 4. This shews that [*797] the *indenture must be looked to, in order that it may be seen what the defendant was to perform. If the condition were simply for the payment of the 170*l.*, this defence could certainly not be set up, unless fraud could be shewn; but, as the condition mentions the indenture, the Court must look at the indenture. If they do so here, the pleas shew an answer to the declaration; for it cannot then be said that the condition was for the payment of 170*l.*

Dampier, for the plaintiff:

The question, as to so much of the record as is now before the Court, is, whether the defendant be entitled to make the averment which he has made. The question whether any mistake was made, is one of fact, which is to go to the country. In the second and fourth pleas, the defendant confesses that the lease, as mentioned in the condition, is at a rent of 170*l.*; the indenture set out in the plea is not that which is mentioned in the condition, and the defendant is estopped from denying that the indenture is truly set out in the condition. The estoppel might have been replied, but it may be insisted on upon demurrer, where

(1) Before Lord Denman, Ch. J., Littledale, Taunton, and Williams, JJ.

(2) 1 Sid. 50, pl. 13; and see note (2) to *Lord Arlington* v. *Merricke*, 2 Wms. Saund. 409.

(3) 1 Sid. 97.

(4) 1 Sid. 425.

(5) 6 Mod. 237; *S. C.* 2 Salk. 498.

(6) 1 Str. 227.

it arises upon the pleadings; and it is not waived by the plaintiff replying over. The indenture and the bond constitute a double security. Thus, in *Cotterel* v. *Hooke* (1), it was held, that where defendant covenanted to pay an annuity, the deed of covenant reciting a bond of even date to secure the payment of the annuity, and the bond had become forfeited before a discharge of the defendant under the Insolvent Act, 16 Geo. III. c. 38, (but the penalty did not appear to have *been enforced,) the remedy on [*798] the covenant for payments due subsequently to the discharge was not affected by the provisions of that Insolvent Act. If the interpretation of this condition were to be confined to the indenture, as set out in the plea, there would, in effect, be only one security. It is a rule that, where a recital in a valid deed is special, of an act which is perfect and not executory, where the parties are private individuals, and no fraud is alleged, and no statute or public policy contravened, there an estoppel shall take effect; consequently the defendant here is estopped from varying the effect of the indenture, as recited in the condition: *Hill* v. *The Manchester Water Works Company* (2), and the authorities there cited; *Rowntree* v. *Jacob* (3), *Strowd* v. *Willis* (4), *Jermin* v. *Randall* (5), *Hosier* v. *Searle* (6), *Lampon* v. *Corke* (7). Even if the issue on the third plea be found for the defendant, the plaintiff will be entitled to judgment *non obstante veredicto*, for the defendant was not entitled to aver against the condition admitted upon the record, as appears from what is said in *Goddard's* case (8) and *Buckler* v. *Millerd* (9). The effect of an estoppel is to prevent a party from pleading matter which may be true, because he has solemnly confessed something contrary to that which he attempts to plead: the plaintiff's demurrer, therefore, does not confess the truth of the defendant's plea, but denies that such plea can be pleaded. The defendant had said that the indenture was one by which 170*l.* is reserved: an indenture by which 140*l.* is reserved cannot be that *indenture. It is true that a party [*799] may plead such matter in discharge as is not inconsistent with

(1) 1 Doug. 97.
(2) 36 R. R. 656 (2 B. & Ad. 544).
(3) 2 Taunt. 141.
(4) Cro. Eliz. 362.
(5) Latch. 125.
(6) 2 Bos. & P. 299.
(7) 24 R. R. 488 (5 B. & Ald. 606).
(8) 2 Co. Rep. 4 b.
(9) 2 Vent. 107.

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the record: thus, if the record here did not shew the covenants in the indenture, the defendant might plead that there were no covenants: *Holloway's* case (1): but he cannot do so when the record shews the covenants. It is true, also, that, if the condition refer to a generality, the existence of it may be traversed in the plea; but no traverse can be taken upon a particularity averred in the condition, as here. If the defendant here is estopped by the condition on the record from pleading that there was no indenture, he must be equally estopped from pleading matter, the effect of which is to shew only that there is no such indenture as that recited in the condition; as a lessee, who is estopped from pleading that his lessor *nil habuit in tenementis*, cannot plead that his lessor conveyed in fee before the lease: *Palmer* v. *Ekins* (2). In *Trevivan* v. *Lawrance* (3), a *scire facias* had been brought, reciting the judgment of a wrong term, but, on *nul tiel* record being pleaded, the issue had been found for the plaintiff, and an *elegit* had issued: ejectment being brought by the plaintiff in the *scire facias*, it was held that the defendant, who had also been defendant to the *scire facias*, could not take advantage of the variance. The very object of the bond, in the present case, may have been to correct summarily a mistake in the lease, or to supersede the necessity of proof of a lease. It may be said that estoppels are odious; that, however, is true to this extent only, [*800] that they shall not be implied, as appears by the *language of the COURT in *Palmer* v. *Ekins* (4). It may also be said that here is an estoppel against an estoppel, which sets the matter at large, as laid down in Co. Litt. 352 b. In order to avail himself of this, the defendant should have pleaded the estoppel regularly, which would have enabled the plaintiff to deny, if he could, the existence of the record or deed relied upon by the defendant as an estoppel. If the plaintiff had sued on the covenant as it appears in the indenture set out in the plea, it is clear that he could have claimed only 140*l.* rent; yet, if the doctrine of mutual estoppel were to prevail to the extent suggested, he might have sued for 170*l.*, and have given evidence that this was the amount of the

(1) 1 Mod. 15.
(2) 2 Ld. Ray. 1550.
(3) 1 Salk. 276; *S. C.* 2 Ld. Ray. 1036, 1048.
(4) 2 Ld. Ray. 1553.

rent really covenanted for, since the bond of the defendant would have prevented him from confining the plaintiff to the sum named in the indenture, and the matter would have been set at large. The case is one for a court of equity, where there is a mode of inquiring into the real facts. If the defendant has any remedy in this Court, it is not by pleading but by affidavit, which the plaintiff may answer: *Mease* v. *Mease* (1).

R. V. Richards, in reply:

The fallacy of the argument on the part of the plaintiff consists in reducing this to a question of estoppel: the real question is, the meaning of the parties. If their intention was that the covenants in the indenture should be performed, the indenture must be looked at. Now, the condition does expressly refer to the indenture; and that indenture is set out in the plea. Since the statute 8 & 9 Will. III. c. 11, s. 8, execution could not have been taken out on such *a bond as this without referring to the [*801] indenture. The decisions in the class of cases to which *Hosier* v. *Searle* (2) belongs, are inapplicable: there the defendant pleaded that the indenture was never executed at all; here the plea merely explains the meaning of the parties in a contract which is not denied.

Cur. adv. vult.

LORD DENMAN, Ch. J. on this day delivered the judgment of the COURT. After having stated the pleadings, his Lordship proceeded as follows:

It appears upon these pleadings, that the condition of the bond is to pay the rent of 170*l.*, at certain times mentioned in the condition, and to perform and observe the covenants, conditions, and agreements in the lease; and then, as the lease, when set out, shews the rent to be 140*l.*, the question is, whether the payment of 140*l.* constitutes a performance of this part of the condition of the bond, or whether the defendant is estopped from shewing that the rent is different from the 170*l.* mentioned in the condition.

The first point to be considered is, whether, upon this bond,

(1) 1 Cowp. 47. (2) 2 Bos. & P. 299.

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the defendant would be estopped from saying there is no such lease as is mentioned in the condition.

In 1 Rolle's Abridgment, 872 (1) it is said, "If the condition contains a generality to be done, the party shall not be estopped to say there was not any such thing. But in all cases where the condition of a bond has reference to any particular thing, the obligor shall be estopped to say that there is no such thing" (2).

[*802] The same rule, as to generalities and particularities, is laid *down in *Strowd* v. *Willis* (3), and *Shelley* v. *Wright* (4), and urged in argument in *Hosier* v. *Searle* (5), and *Hill* v. *The Proprietors of the Manchester and Salford Water Works* (6). A great number of instances are given in Rolle's Abridgment, and in several other books, of these generalities and particularities. And amongst them, as more nearly applicable to the present case, if a condition be to perform the covenants of an indenture, the obligor is estopped to say there is no such indenture: 1 Roll. Abr. 872 (7). So also in *Jewell's* case (8), *Holloway's* case (9), and *Hosier* v. *Searle* (5). In the present case, the condition is as to a particular thing, as it gives the date and all the particulars of the lease. And, by parity of reason, the defendant would be estopped from saying that there is no such indenture.

But the defendant says he admits that he is estopped from saying there is no lease granted to him; but then, to discharge himself from the bond, he sets out the lease. This he was bound to do, according to the established rules of pleading, and as more particularly detailed in *Cook* v. *Remington* (10). That was debt on bond, with a condition to perform covenants in an indenture. The defendant craved *oyer;* and the COURT held that, where one is bound to perform covenants in an indenture, in an action on the bond, the defendant, in order to discharge himself, ought to shew the deed to the Court, that they may see what the covenants are. And the same rule is laid down in 1 Siderfin, 50 (11) and

[*803] 97 (12), *which have been cited. And the whole lease being set

(1) Estoppell (P.), pl. 1.
(2) *Ibid.*, pl. 7.
(3) Cro. Eliz. 362.
(4) Willes, 9.
(5) 2 Bos. & P. 299.
(6) 36 R. R. 656 (2 B. & Ad. 544).
(7) Estoppell (P.), pl. 3.
(8) 1 Rol. R. 408.
(9) 1 Mod. 15.
(10) 6 Mod. 237; *S. C.* 2 Salk. 498.
(11) *Anonymous* case.
(12) *Lewes* v. *Ball.*

out, the defendant contends that the actual lease is to be taken as a further description of the lease recited in the condition of the bond, according to what is said by HOLT, Ch. J. in *Evans* v. *Powel* (1); and that the bond and lease are to be taken as together forming one instrument. And, as it appears by the lease that the rent is 140*l.* a year, the defendant says, as it is the lease which contains the real contract of the parties, and the rent being to be paid for the occupation of the land, that if he has paid the rent stipulated, he has performed the contract specified in the lease, and it is therefore an answer to the action; that the bond does not shew the contract as to the rent, but is merely given as a collateral security for the performance of the terms of the lease: and if he has performed the terms of the lease, the bond cannot be enforced against him.

But, notwithstanding this argument, we think, as far as the bond goes in a court of law, the obligor is estopped from saying that the rent was not 170*l.* a year, because his shewing the lease at a rent of 140*l.* is, in effect, the same thing as saying that there is no such lease as is stated in the bond. In 1st Rolle's Abridgment, 873 (2), there is a case of *Fletcher* v. *Farrer*, as follows: "If the condition of an obligation be to do certain things, for which he is bound in a certain recognisance, shewing the certainty of it, then the obligor shall be estopped to plead that he was not bound in any recognisance, inasmuch as the condition has reference to a particular. So the obligor, in the case aforesaid, shall be estopped *to plead a special plea by which he [*804] owns that he acknowledged a thing in the nature of a recognisance, but, upon the special matter, it appears to the Court it was not any recognisance in law; for this amounts but to this,—that he was not bound in any recognisance."

Upon what appears on the record, there is no doubt but, if an action of covenant had been brought on the lease, only 140*l.* could be recovered; and there certainly is an apparent incongruity in saying that different sums are to be recovered according as the proceeding is on the bond or the lease. This, however, is occasioned by the defendant having executed two apparently inconsistent instruments. And we think, upon the pleadings

(1) Comb. 377. (2) Estoppell (P.), pl. 10, 11.

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now under consideration, that the defendant cannot get rid of the estoppel; and that therefore there must be judgment for the plaintiff.

Judgment for the plaintiff.

1834. *June* 10.

[812]

SALTMARSHE *v.* HEWETT, CLERK. SKRINE *v.* THE SAME.

(1 Adol. & Ellis, 812—822; S. C. 3 N. & M. 656; 3 L. J. (N. S.) K. B. 188.)

H., a beneficed clergyman, gave S. a warrant of attorney to enter up judgment against him for 3,600*l.* The defeasance recited, that S. had agreed to purchase an annuity of H. for 1,800*l.*, and that the annuity was or was intended to be secured to S. by indenture of even date with the warrant of attorney, charging the annuity on his benefice; and that H. and S. had also agreed that the annuity should be secured by warrant of attorney as above, which had been executed. The defeasance further declared, that the judgment on the warrant of attorney was to be a collateral security only, and that execution was not to issue till payment should have been twenty-one days in arrear, in which case, and as often as it should so happen, S. might immediately obtain sequestration of the rectory, to the intent that he should recover the arrears.

The Court set aside the warrant of attorney, as charging the benefice, contrary to stat. 13 Eliz. c. 20.

H. gave another warrant of attorney to S. S., reciting an agreement between them for the purchase by S. S. of an annuity for 1,950*l.*, such annuity to be charged upon his benefice, and also secured by H.'s warrant of attorney, and judgment thereon, for 3,900*l.* It then recited an indenture between the parties, charging the benefice with the annuity, and declaring that the judgment was to be a security for the same, and that, in case of default in payment for twenty-one days, it should be lawful for S. S. to issue execution for 3,900*l.* and costs, in order that he might sequester the benefice, and thereby be in possession in trust for better securing to him all arrears then due on the annuity, and all future payments thereof; and it was further stipulated by the indenture, that execution was not to be sued out before default, but might issue as often as the annuity should be in arrear. The warrant of attorney then proceeded, in pursuance of the said agreement, and for further securing the annuity, to authorise the attornies to confess judgment for 3,900*l.* &c.

The COURT set the warrant of attorney aside.

A RULE *nisi* was obtained on behalf of the defendant in each of these causes, for setting aside the warrant of attorney, judgment, and sequestration therein.

The warrant of attorney (dated June 23rd, 1821), given by the defendant to the plaintiff Saltmarshe, was to confess judgment for 3,600*l.*, and it had a defeasance which recited as follows: That Saltmarshe had agreed to purchase of Hewett an annuity

for his, Hewett's, life, of 244*l.* a year, for 1,800*l.*; that the said annuity was, or was intended to be, secured to Saltmarshe by Hewett's bond in the penal sum of 3,600*l.*, of even date with the warrant of attorney, and also by indenture of the same date, to which Saltmarshe and Hewett were parties, and whereby Hewett charged the said annuity upon his *rectory of Rotherhithe, and [*813] the glebe lands, &c.; that the parties had agreed that the said annuity should also be secured by a warrant of attorney from Hewett to confess judgment for 3,600*l.*, which Hewett had accordingly executed; and that the purchase-money had been paid by Saltmarshe. After this recital, it was declared that the judgment on the warrant of attorney was to be entered up as a collateral security only for payment of the annuity, and that no execution should issue on such judgment unless and until the payment of the same or some part thereof should be twenty-one days in arrear after any of the specified days of payment; but that in case of such arrear, then, and so often as it should so happen, it should be lawful for Saltmarshe to sue out such execution on the said judgment as he should think fit, and also to sequester the rectory, and all and singular or any of the glebe lands, &c., thereto belonging, or any other benefice or benefices which Hewett might take in lieu thereof, and for that purpose to instruct counsel, &c., to act for both the parties in such proceedings as should be necessary to obtain an immediate sequestration of the said rectory or other ecclesiastical preferment, to the intent that, by virtue of all or any of the ways aforesaid, the said Saltmarshe, his executors, &c., might recover the arrears of the said annuity, and all costs, &c.

In *Skrine* v. *Hewett*, the warrant of attorney (dated February 18th, 1826) began by reciting that Hewett had agreed to sell Skrine an annuity of 256*l.* per annum for 1,950*l.*, to be secured by and made chargeable upon, and to be issuing and payable out of, all and singular the rectory of Ewhurst, and the rectory of the parish church of Rotherhithe, and also to be secured by Hewett's warrant of attorney, and a judgment to be entered up *thereon for 3,900*l.* and costs. It then recited an annuity deed, [*814] whereby the said annuity was to be charged and chargeable upon and issuing and payable out of the said rectories, and whereby

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it was also declared that the judgment was to be considered as a security for the said annuity; that in case default should be made in the payment thereof for twenty-one days, it should be lawful for Skrine to issue thereupon one or more writs of *fi. fa. de bonis ecclesiasticis*, and such other writ or writs as he should think fit to ground the same, indorsed to levy 3,900*l.* and costs, in order that Skrine might sequester all and singular the glebe lands, &c., belonging to the said rectories, and thereby be in possession in trust for better securing to him all arrears then due on the said annuity, and all future payments thereof. The indenture also stipulated that execution was not to be sued out before default, but might issue as often as the annuity should be in arrear. After this recital, the warrant of attorney proceeded, "in pursuance of the said agreement, and for further securing the said annuity," to authorise the attornies to confess judgment for 3,900*l.* with costs. Judgments were entered up on the warrants of attorney; and sequestrations were afterwards issued in the two causes for arrears of the respective annuities. In this Term (June 7th),

Follett and *R. V. Richards* shewed cause against the first-mentioned rule (1):

The effect of the defeasance is only that the grantee of the annuity shall sequester for arrears actually due, which is a [*815] lawful object: *Gibbons* *v. *Hooper* (2), *Britten* v. *Wait* (3): and not that the sequestration shall operate as a continuing charge upon the benefice. In this respect the case differs from *Flight* v. *Salter* (4), and resembles *Colebrook* v. *Layton* (5). The annuity deed is not before the Court; the warrant of attorney only gives power to issue execution from time to time, as arrears fall due. Such a warrant of attorney was held good in *Moore* v. *Ramsden* (6), and the Court distinguished the case from *Flight* v. *Salter*, on the ground that the sequestration was only for satisfaction of arrears, and not to give continual possession (7).

(1) Before Lord Denman, Ch. J., Littledale, Taunton, and Williams, JJ.
(2) 36 R. R. 726 (2 B. & Ad. 734).
(3) 3 B. & Ad. 915.
(4) 35 R. R. 413 (1 B. & Ad. 673).
(5) 38 R. R. 314 (4 B. & Ad. 578).
(6) 3 B. & Ad. 917, *n.*
(7) *S. C.* Lumley on Annuities, p. 238.

Sir J. Campbell, Attorney-General, and *Comyn, contrà:*

In *Colebrook* v. *Layton* (1), the attempt was to invalidate the warrant of attorney by matter stated on affidavit. Here enough appears by the instrument itself to bring it within 13 Eliz. c. 20. It recites that the annuity is charged upon the benefice, and the warrant of attorney is for enforcing, by the process therein described, the debt so charged. *Flight* v. *Salter* (2) was decided on the ground that the warrant of attorney was given for the express purpose of enabling the grantee of the annuity to get possession of the benefice; and the warrant of attorney was set aside as well as the sequestration. The same objection applies here. It is true that in *Flight* v. *Salter* (2) the warrant of attorney provided that the execution should be issuable immediately, whereas in the present case it is not to issue *till the annuity [*816] shall have been twenty-one days in arrear, but that makes no material difference. It may also be said that in *Flight* v. *Salter* (2) the sequestration was to be continued during the continuance of the annuity, but the effect would only be, that the sequestration would operate while there were arrears, and no longer. In *Gibbons* v. *Hooper* (3), the warrants of attorney made no reference to the deeds which charged the living, and on that account they were held valid; and *Colebrook* v. *Layton* (1) was considered as not distinguishable from that case. Here the intention to charge the living is elaborately expressed in the defeasance, and the annuity deed distinctly referred to. In *Newland* v. *Watkin* (4), where the warrant of attorney was to enter up judgment for the arrears of an annuity, and expressly authorised the attorney to issue a sequestration, the Court of Common Pleas pronounced a rule that the sequestration should be no further enforced.

(TAUNTON, J.: Were the recent cases cited there?)

Flight v. *Salter* (2), and *Gibbons* v. *Hooper* (3), were referred to.

(*F. Pollock*, who was to shew cause in *Skrine* v. *Hewett*, here referred to *Aberdeen* v. *Newland* (5), where a clergyman, having conveyed his benefice in trust to secure an annuity, gave, as an

(1) 38 R. R. 314 (4 B. & Ad. 578).
(2) 35 R. R. 413 (1 B. & Ad. 673).
(3) 36 R. R. 726 (2 B. & Ad. 734).
(4) 35 R. R. 524 (9 Bing. 113).
(5) 33 R. R. 113 (4 Sim. 281).

SALTMARSHE v. HEWETT.

additional security, a warrant of attorney to confess judgment against him for 800*l.*, which judgment being entered up, the living was sequestered; and upon a question being raised as to the validity of the warrant of attorney, the VICE-CHANCELLOR said, "there is a distinction between a security which absorbs all
[*817] the *ecclesiastical profits of a benefice, and a warrant of attorney which produces a sequestration, and which does, of necessity, provide for the serving of the cure. If the Legislature had meant to prevent a clergyman from giving a warrant of attorney, they would have said so; but they have cautiously avoided using any words to that effect.")

It does not appear that the warrant of attorney there was in the same form as that in *Flight* v. *Salter* (1): the case does not necessarily go farther than *Gibbons* v. *Hooper* (2). If the VICE-CHANCELLOR had laid down that a warrant of attorney, providing in direct terms for a sequestration which should enforce a charge upon the benefice, was valid, provided enough of the ecclesiastical profits were left for serving the cure, it might well be contended that such a judgment was inconsistent with the statute of Elizabeth.

(LORD DENMAN, Ch. J.: That case appears singularly at variance with *Newland* v. *Watkin* (3).)

Cur. adv. vult.

F. Pollock and *Curwood* then shewed cause in *Skrine* v. *Hewett*:

There is no ground for setting aside the warrant of attorney. Although, upon the face of it, it be not free from objection, yet it is not wholly invalid, like the instrument of the same description in *Flight* v. *Salter* (1), which authorised the immediate issuing of a sequestration, to be a continuing security for the payments named in the annuity deed. This warrant of attorney gives execution only in case of the annuity being in arrear
[*818] twenty-one days; it does, indeed, profess *to make the sequestration a security for future arrears; but there is no necessity for its being enforced to that extent; and so far as it can legitimately operate, namely, in compelling payment of arrears

(1) 35 R. R. 413 (1 B. & Ad. 673).
(2) 36 R. R. 726 (2 B. & Ad. 734).
(3) 35 R. R. 524 (9 Bing. 113).

actually due, the Court may give it effect. A similar course was taken in *Britten* v. *Wait* (1), where the sequestration was, in a certain degree, irregular. It was unnecessary here to insert any clause in the warrant of attorney for the purpose of authorising execution; the introduction of such a clause, therefore, ought not entirely to invalidate the instrument, which at least ought to have the same force as if nothing had been said of issuing sequestration. Nor does it appear that, in this case, any improper sequestration has in fact issued.

Sir J. Campbell, Attorney-General, and *Comyn, contrà:*

If the warrant of attorney appears manifestly by its terms to be illegal and void, the Court cannot say that it shall be good in part and bad in part, but must set it aside altogether, as was done in *Flight* v. *Salter* (2). How far it has yet been put in force is immaterial. It is an instrument by which the authority of this Court is made use of; and upon which, therefore, the Court will exercise its judgment at any period. The statute of Elizabeth, in declaring that "all chargings" of benefices shall be utterly void, must mean all deeds by which benefices are charged; and any such deed must be altogether invalid, like an instrument tainted with usury. The sequestration here is to issue, in order that Skrine may be in possession, in trust for better securing to him all arrears then due on the annuity, and all future payments *thereof. That clearly makes it a continuing charge to the full amount of 3,900*l.* [*819]

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the judgment of the COURT in *Saltmarshe* v. *Hewett:*

This was a rule calling upon the plaintiff to shew cause, why the warrant of attorney in the said rule mentioned, the judgment and writ of sequestration, should not be set aside.

And the question to be decided is, whether that warrant of attorney is void, as being contrary to the statute of 13 Eliz. c. 20. The warrant of attorney is to confess judgment in an action of debt for 3,600*l.*, and the defeasance thereto, upon which the

(1) 3 B. & Ad. 915. (2) 35 R. R. 413 (1 B. & Ad. 673).

SALTMARSHE v. HEWETT.

question turns, is in the following form. (His Lordship then read the defeasance.) It is therefore expressly provided, that in case the said annuity, or any part thereof, shall be in arrear for a certain time therein specified, "then and so often as it shall so happen, it shall be lawful for the said A. Saltmarshe, his heirs, &c. to sue out such execution or executions, upon or by virtue of the said judgment, as he or they shall think fit, or be advised; and also to sequester the said rectory of Rotherhithe, and all and singular or any of the glebe lands, buildings, &c. thereto belonging." So that if we had been called upon now for the first time to put a construction upon the Act of Parliament, it seems hardly to admit of a doubt but that the rectory of Rotherhithe is charged with the payment of the annuity in the event of its being in arrear, or, in other words, that the said benefice is [*820] charged with a "profit, out of the same to be yielded *and taken." Cases, however, have been brought under our notice, bearing (as they certainly do) upon the point in question. In support of the rule, reliance was placed upon the case of *Flight* v. *Salter* (1); and against it, upon the recent case of *Colebrook* and others v. *Layton* (2). In the former case the warrant of attorney directly referred to the annuity deed, and was declared to be "for the purpose of securing the said annuity, and to the end and intent that a sequestration may be obtained or procured, and continued by the said Thomas Flight, his executors, &c. pursuant to the hereinbefore recited indenture." In the latter case it was averred, by affidavit, "that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and for the purpose of enabling the plaintiffs to sue out the before-mentioned executions." Upon the discussion of this case of *Colebrook* and others v. *Layton*, the authorities were brought under the consideration of the COURT, and particularly the case of *Flight* v. *Salter*, upon which then, as now, reliance was placed to set aside the judgment entered upon the warrant of attorney, which was then in question. The COURT, however, distinguished (and we think rightly) between the impeachment of the warrant of attorney depending upon affidavit, and an objection to the warrant of attorney which is presented to

(1) 35 R. R. 413 (1 B. & Ad. 673). (2) 38 R. R. 314 (4 B. & Ad. 578).

the notice of the Court upon the face of the instrument itself. And accordingly, as the COURT then thought, and we are now of opinion, that there was not sufficient relation or connection between the warrant of attorney and the annuity deed to shew that the benefice was to be charged *to pay the annuity, in the [*821] event of its being in arrear, the rule to set aside the judgment was discharged. In the present case however, from the language of the defeasance, to which reference has been already made, we are of opinion that enough appears to shew that the warrant of attorney was given "to charge the benefice," and is therefore void by the statute. In adopting this distinction, we think that we are not only deciding in conformity to the authorities and the meaning of the statute, but are, probably, laying down as intelligible a rule as can easily be suggested, for preventing the recurrence of those questions which have been so frequently raised, in a very short time, upon the construction of these instruments.

It seems proper to add that the authorities cited to us, (with the exception of *Colebrook* and others v. *Layton*, which is of a more recent date), namely, *Shaw* v. *Pritchard* (1), *Flight* v. *Salter* (2), *Gibbons* v. *Hooper* (3), and *Doe* v. *Carter* (4), were brought under the consideration of the Court of Common Pleas, in the case of *Newland* v. *Watkin* (5). There a rule had been obtained to set aside the plaintiff's warrant of attorney, judgment and sequestration. The warrant of attorney is not set out, but the report states that the defendant, a clergyman, gave it to the plaintiff "to enter up judgment for the arrears of the annuity, and in the warrant expressly authorised him to issue sequestration." The Court, having taken time to consider, made the rule absolute, deciding that the plaintiff should no further enforce his writ of sequestration, but should not be subject to an action of trespass. *The reasons of the Court are not given, but the [*822] decision was as already stated.

Upon the whole, we are of opinion that this security cannot be supported, and that the rule must be made absolute.

In *Skrine* v. *Hewett*, *Rule absolute.*

(1) 34 R. R. 381 (10 B. & C. 241).
(2) 35 R. R. 413 (1 B. & Ad. 673).
(3) 36 R. R. 726 (2 B. & Ad. 734).
(4) 4 R. R. 586 (8 T. R. 57, 300).
(5) 35 R. R. 524 (9 Bing. 113).

1834.
June 11.

REX *v.* PEDLY (1).

(1 Adol. & Ellis, 822—828; S. C. 3 N. & M. 627; 3 L. J. (N. S.) M. C. 119.)

[822]

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term.

So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.

If a party buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner relet, or, having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance. Per LITTLEDALE, J.

And such purchaser is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance.

THIS was an indictment for a nuisance, removed by *certiorari* from the Quarter Sessions for the town of Bedford. The first count charged that the defendant, on, &c., at a certain place commonly called Diamond Alley near unto divers public streets and dwelling-houses, unlawfully did make, erect, and set up two buildings called necessary houses, for the common use of divers persons residing in and frequenting Diamond Alley, and did also make and cause to be made a certain open sink for the reception of ordure &c., and then and there, and on divers other days and times between &c., divers persons residing in and frequenting Diamond Alley did resort to and use, and yet do resort to, and use, the said necessary houses, and did place and leave, and caused to be placed and left, in the said open sink, divers large

[*823]

quantities of ordure *&c., by reason of which &c. (stating the nuisance resulting). The second count charged the defendant with continuing the necessary and sink before that time made &c., by persons unknown, and laid the nuisance as before. The third count charged that the defendant, near &c. (as before) did put, place, and leave, and did cause and procure to be put, placed, and left, divers large quantities of ordure &c. The fourth count

(1) The following cases may be referred to as bearing on the liability of the owner who has given up the occupation to another: *Todd* v. *Flight* (1860) 9 C. B. (N. S.) 377; *Hadley* v. *Taylor* (1865) L. R. 1 C. P. 53; *Gwinnell* v. *Eamer* (1875) L. R. 10 C. P. 658; *Bowen* v. *Anderson*, '94, 1 Q. B. 164.—R. C.

charged the defendant with permitting and suffering the nuisance (as in the third count, except that the nuisance was said to be created by persons unknown) to remain. On the trial before Lord Denman, Ch. J. at the last Spring Assizes for Bedford, it was proved that the defendant was in the receipt of the rents of twelve dwelling-houses, which were let for short periods to tenants, and that two necessary houses and a sink belonging to them were used in common by the persons occupying the dwelling-houses. It did not appear whether any of the present tenants commenced occupying the dwelling-houses before the defendant began to receive the rents; but the necessary houses and sink were constructed and used by the tenants of those premises before his time. There was no distinct proof of any actual demise of the necessary houses and sink, but they had regularly been cleansed by the persons occupying the dwelling-houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. The only method of draining the places from which the nuisance proceeded would be by cutting through a close belonging to the defendant. Some evidence was given to shew an implied admission by the defendant that he himself was *bound to do [*824] the cleansing. The jury, under the direction of the LORD CHIEF JUSTICE, found a verdict of guilty, subject to a motion for setting aside the verdict and entering an acquittal. *Kelly* obtained a rule accordingly in Easter Term last.

Storks, Serjt. and *Austin* now shewed cause:

The defendant is liable, whether the occupiers be so or not. The law on this subject is stated in Selwyn's Nisi Prius, Nuisance II. (1). In *Brent* v. *Haddon* (2), a lessee of a water mill was held liable for continuing the banks of the mill pond at an undue elevation, though they had been so erected by the lessor before the demise; on the other hand, in *Rosewell* v. *Prior* (3), a tenant for years had erected a nuisance, and had underlet with the nuisance; and it was held that he should be liable to a civil action (after a recovery against him for the original erection)

(1) P. 1130 (8th edit. 1831).
(2) Cro. Jac. 555.
(3) 2 Salk. 460; more fully in 12 Mod. 635.

REX v. PEDLY.

for continuing the nuisance during the underlease; the COURT saying that he had transferred the erection with the original wrong, and that his demise affirmed the continuance of it; that he had rent as a consideration for the continuance, and therefore ought to answer the damage it occasioned; that receipt of rent was upholding (1); and that the action lay against either lessor or lessee, at the plaintiff's election. That case is recognised by BULLER, J., in *Cheetham* v. *Hampson* (2). And the law on this point must be the same as to public and private nuisances, which
[*825] differ only in respect *of the number of persons injured. In *Rex* v. *Moore* (3), the owner of grounds converted into a shooting ground, was held liable for a nuisance naturally and probably resulting from the use of them for that purpose, though the actual nuisance was committed by strangers not on the premises. Here the defendant takes the liabilities and powers of the owner from whom he purchased. The reversioner, if he does not demise, can abate the nuisance, and is clearly liable for the continuance; but he cannot get rid of such a liability by demising (even if he has so done), without a power to abate. But, in fact, it does not appear certain that the buildings which create the nuisance have been demised.

Kelly, in support of the rule:

In all the cases cited, the defendant had been guilty of either creating or permitting the nuisance: neither of which can be charged here. It is true that, if a nuisance be committed, the liability may be fixed upon the person for whose benefit it was committed; and it is also true that when, as in *Rex* v. *Moore* (3), a building is so erected, or disposed of, that the inevitable, or perhaps even the probable, consequence is a nuisance, the person so erecting or disposing of it is indictable. In *Rosewell* v. *Prior* (4), the defendant had himself erected the nuisance, and had demised the premises, with the nuisance upon them, for a pecuniary consideration: he was therefore guilty of both the erection and the continuance. But here, the defendant

(1) *Christian Smith's* case, Wm. Jones, 272, is cited for this in Salkeld.

(2) 2 R. R. 397 (4 T. R. 318).

(3) 37 R. R. 383 (3 B. & Ad. 184).

(4) 2 Salk. 460; *S. C.* 12 Mod. 635.

has never had possession during the existence of the nuisance; and no nuisance was produced till the tenants neglected to cleanse; so that the principle of *Rex* v. *Moore* (1) is *inapplicable; [*826] for it cannot be said that the neglect of the tenants was a probable consequence of the erection of the buildings, or of their being demised. Nor can it be said that the nuisance was produced by building them without a drain: that does not create a nuisance, if the tenants act properly: and as for the adjacent close, through which alone a drain could be made, happening to belong to the defendant, it is impossible to found a general rule upon an accidental circumstance. Indeed, from the fact of the tenants having always cleansed, it may be presumed that they were let into possession under a contract with the landlord to do so; in which case he has done all that lay in his power.

LORD DENMAN, Ch. J.:

I entertained no doubt at the time of the trial; the principles admitted by *Mr. Kelly* are correct, but make against his client. The nuisance here has been a natural consequence of the nature of the erection; therefore, on the principle of *Rex* v. *Moore* (1), as well as of the earlier case which shews that the receipt of rent is an upholding and continuing of the nuisance, the defendant is liable. It has been said that the tenants were bound to cleanse, as if a liability of the tenants to their landlord, *ratione tenuræ*, could exonerate the landlord. But, in the first place, no contract on the part of the tenants has been distinctly proved: and, in the second place, if such a contract were proved, it would only shew that the landlord considered himself bound to provide for the cleansing; and he should, in that case, have taken care to enforce the contract. Had the use of the buildings by which the nuisance is produced *been matter of independent contract, no [*827] one could have doubted that the person receiving a profit from the use would have been answerable for the nuisance.

LITTLEDALE, J.:

I see no difficulty in this case. If a nuisance be created, and a man purchase the premises with the nuisance upon them,

(1) 37 R. R. 383 (3 B. & Ad. 184).

REX v. PEDLY.

though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it. Here the periods are short, so that there has been a reletting; and that has taken place after the user of the buildings had created the nuisance. This is, therefore, a case in which the reversioner is liable.

TAUNTON, J.:

If, as has been suggested, these buildings were not demised at all, but only the use of them permitted in common to the occupiers of the dwelling-houses, there is an end to the defendant's objection. But, supposing it otherwise, and that he could not enter for the purpose of cleansing without making himself liable to an action of trespass, he may thank himself; for I hold that a landlord, in a case like this, should exact from his tenants
[*828] an obligation to cleanse, *with a right of entry for himself in default of their so doing. A landlord makes similar provisions in the case of ditches which require cleansing. This being so, the law so clearly laid down by my Lord, and my brother LITTLEDALE, applies.

WILLIAMS, J.:

I am entirely of the same opinion. The language of the defendant supports the construction which has been suggested as to the actual situation of the parties; for he appears by his expressions to have admitted that it lay in his own power to remove the nuisance.

Rule discharged.

REX *v.* THE JUSTICES OF THE CITY OF YORK (1).

1834.
June 11.

(1 Adol. & Ellis, 828—835; S. C. 3 N. & M. 685.)

[828]

A local Act empowered certain trustees to purchase messuages &c., and enacted that if the owners should not agree with the trustees on the terms, or should neglect or refuse to treat, or by reason of absence or disability should be prevented from treating, the trustees should cause a jury to be summoned by the sheriff to assess compensation, and the sheriff should summon and examine witnesses upon oath; and if the jury should give a verdict for more than the trustees had offered, the costs and expenses of summoning and returning such jury and witnesses, and also of the inquest, to be settled by a justice, were to be borne by the trustees, and recovered by the persons entitled thereto, by distress; but if the verdict should not be for more than the sum offered, the trustees were to bear one moiety of the costs and expenses aforesaid, and the other party the other moiety; but where parties from absence or inability could not treat or agree, such costs and expenses were to be borne by the trustees: and afterwards it was enacted that, in a particular event, messuages, &c. should be sold to certain parties, and that, in case of disagreement as to price, the price should be assessed by a jury, as before, and the expense of hearing and determining such difference be borne in like manner:

Held, that an owner of lands to be purchased, in favour of whom a jury awarded more than the sum offered, was entitled to the costs of the enquiry, including witnesses, attendance by attorney at the inquest, conferences, and briefs, and not merely to the expenses of the sheriff and jury; but that the expenses of surveyors, merely as such, could not be included in the costs.

CRESSWELL had obtained a rule in this Term, calling on the justices of the city of York to shew cause why a *mandamus* should not issue, commanding them to settle *and allow the [*829] costs and expenses contained in a paper writing annexed to the affidavits in support of the rule, and incurred by Matthew Gawthorpe in and about an inquest holden for assessing damages under stat. 3 & 4 Will. IV. c. lxii. (local and personal, public) (2).

(1) Referred to as an authority as to the nature of the cases in which the Court will grant a *mandamus* in *Reg.* v. *Justices of London*, '95, 1 Q. B. 214, 217; aff. *ibid.* 616, 64 L. J. M. C. 100, 102.—R. C.

(2) For improving and enlarging the market places within the city of York, &c., and for amending an Act of his late Majesty, for paving, lighting, watching, and improving the said city; and other purposes.

Sects. 1, 2, 3, and 4 provide for the election of certain trustees.

Sect. 23 gives power to the trustees 'to purchase the messuages &c. mentioned in the first schedule to the Act (including those of Gawthorpe), for the purposes of the Act.

Sect. 28 enacts, that if any bodies politic &c., corporations &c., tenants for life &c., or any other persons or person, proprietors of, or interested in any messuages &c.,

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[*830]

It appeared *that the trustees under the Act, requiring a messuage and hereditaments belonging to Gawthorpe, offered him 680*l.* for the purchase, which offer he declined; and a jury, mentioned in the first schedule to the Act annexed, or any occupier of any messuages &c., sustaining any loss, injury, or damages, shall, for the space of ten days next after notice given (as by this section is directed), neglect or refuse to treat and agree, or shall not agree, for the sale of the said premises, or by reason of absence or disability shall be prevented from treating and agreeing, or cannot be found or known, or shall not produce a clear title &c., the trustees shall cause the value and recompense to be made for such messuages &c. to be enquired into and ascertained by a jury &c. which shall be summoned and returned on the warrant of the trustees issued to the sheriffs of the city, or sheriff of the county, and twelve of whom shall be sworn (as by this clause is directed). "And the said sheriffs or sheriff are and is hereby required from time to time, as occasion shall be or require, to call before the said jury, and examine upon oath, (which oath the said sheriffs or sheriff are and is hereby empowered to administer,) all and every person and persons who shall be thought necessary and proper to be examined as a witness or witnesses touching or concerning the premises; and they or he shall also order and cause the said jury, or any three or more of them, to view &c.; and the said jury shall assess the damages and recompense to be given for the messuages &c., to the respective owner or owners and occupier or occupiers thereof, according to their respective interests therein, and shall give in their verdict thereupon," &c., and the sheriffs or sheriff shall thereupon order and adjudge the sum so assessed to be paid.

Sect. 31 enacts, that in case any such jury shall give a verdict for more money as a recompense for the right, interest &c., of any person &c., in or to such messuages &c., or for any such damage &c. as aforesaid, than shall have been offered by the said trustees before the summoning or returning of such jury, "then the costs and expenses of such notice or notices, precept or precepts, and of summoning and returning such jury and witnesses, and also of the said inquest, (such costs and expenses to be settled and allowed by any justice of the peace for the said city not being one of the said trustees, and not a person interested,) shall be borne and paid by the said trustees out of the money arising by virtue of this Act, and shall and may be recovered by the person or persons entitled thereto by distress and sale of the goods and chattels of the said trustees or of their treasurer," (unless otherwise defrayed by such treasurer, as the clause points out), under a warrant to be issued &c.; but if any such jury shall give a verdict for no more or for less than shall have been offered as aforesaid by the trustees, "then one moiety of the costs and expenses aforesaid shall be borne and paid by the person or persons, bodies politic or corporate, with whom the said trustees shall have had any controversy or dispute, and shall be recovered in the same manner as any penalties or forfeitures are hereinafter directed to be recovered, and the other moiety thereof shall be borne and paid by the said trustees out of the money arising as aforesaid, and be recovered by distress and sale in manner aforesaid; but in cases where parties, by reason of absence or disability, shall have been prevented

summoned under the provisions of the Act, assessed the damages and recompense at 720*l.* Gawthorpe's attorney then made out a bill against him as in the case of a common trial (which was the paper annexed to the affidavits), containing charges for attendances, *conferences, brief, &c., and an item as follows: [*831] "January 22nd. Attending this day at the Guildhall all day, when case heard, and compensation fixed at 720*l.*, 3*l.* 3*s.* Paid the following witnesses for their attendance and loss of time in surveying, measuring, and valuing the property in question, and in attending as witnesses at the inquest." The names of the witnesses, and sums paid, were then added. Application was made to a single justice of the city to settle and allow the costs contained in this bill; but the justice, conceiving that the statute did not authorise the allowance of the costs, refused the application.

Sir James Scarlett and *Alexander* now shewed cause:

The costs of the inquest mentioned in the Act are only the costs of the sheriff and the jury; part of the other expenses specified in the Act are expenses with which the sheriff has nothing to do: but the words, taken all together, including the costs of the inquest, will cover the whole expenses connected with the sheriff, and were obviously not intended to comprehend more. If the expenses of surveyors, witnesses, and brief, which are now claimed, were meant to be comprehended in this clause, that intention might easily have been expressed; but the Legislature, having distinctly specified particular expenses, must be understood to have excluded all others.

from treating and agreeing, such costs and expenses shall be paid and borne by the said trustees out of the money arising by virtue of this Act, and by distress and sale in manner aforesaid."

Sect. 42 provides for sale of any purchased messuages &c. found unnecessary.

Sect. 43, after providing that, before such sale, they shall be offered to the parties from whom they were purchased, and that, if such person shall be desirous of purchasing them, but shall not agree with the trustees as to the terms, the price shall be assessed by a jury, as before, enacts that "the expense of hearing and determining such difference shall be borne and paid in like manner as by this Act is directed with respect to such purchases made by the said trustees, *mutatis mutandis*."

REX v. THE JUSTICES OF THE CITY OF YORK.

(LITTLEDALE, J.: The Statute of Gloucester (1) gives only "the costs of the writ purchased;" yet these words extend to all the legal costs of the suit (2).)

Acts of Parliament were very shortly engrossed at the time when that statute was made: and, if it had specified a particular part
[*832] of the costs, the words would probably not *have been held to include the costs not specified. In *Cone* v. *Bowles* (3), it is laid down that all statutes that give costs are to be taken strictly; and there is a *dictum* to the same effect in *Rex* v. *Glastonby* (4).

The clause now in question provides that, if a jury give a verdict for less money than has been offered, each party is to bear a moiety of the "expenses aforesaid." That may reasonably apply to such expenses as are incurred by the parties in common, as those of the sheriff and jury, but not to costs which the respective parties have incurred on their separate accounts, as those of their own counsel and witnesses; for it cannot be supposed that the whole expenses of the two parties are to be added together, and each party to pay a half of the aggregate. Had the meaning of the words "expenses aforesaid" been so extensive, the enactment would certainly have been, that each party should pay his own. The costs and expenses are to be settled and allowed by a justice of peace for the city: but a justice would be a very unfit person to tax an attorney's full bill. The words "such costs and expenses" are used in the concluding part of sect. 31, with reference to the case where parties are prevented by absence or disability from treating and agreeing; yet, there, it is not likely to have been contemplated that the expenses now in question would arise.

Cresswell, in support of the rule:

This is a statute enabling parties to take property, for certain purposes, against the will of the owner; and the language of it (which is, in fact, their own) ought therefore to be construed
[*833] strictly against such parties. The owner is entitled *to a full compensation from them. They make an offer, which is rejected; a jury decides that the offer is inadequate; they are then in the

(1) 6 Edw. I. c. 1, s. 2.
(2) See 2 Inst. 288 (11).
(3) 1 Salk. 205.
(4) Cas. temp. Hard. 357.

situation of a party to a cause, who has had a verdict against him. If the costs now claimed be not included in the proviso, the enactment, that the costs shall be recovered from the trustees "by the person or persons entitled thereto," is without meaning; for then no person, besides the sheriff, can have any claim upon the trustees. In *Rex* v. *Glastonby* (1), Lord HARDWICKE thought that if any costs were recoverable, all would be so; and it may perhaps be true that, as said in *Cone* v. *Bowles* (2), the question, whether costs be or be not recoverable at all under a statute, is to be decided on a strict interpretation of the statute; but it does not follow that the same strictness is to be used in determining the extent to which, if recoverable, they are to be allowed. Costs of a trial are considered to include costs of witnesses and counsel; so are costs of a reference: the costs of the inquest must mean as much. Then, as to the proviso that, in a particular event, each party shall pay half the costs: in the first place, the meaning probably is, that each shall pay his own costs, which construction would be put on an award that each party should pay a moiety of the costs of a reference; and, secondly, even if this be not so, the Legislature may have considered the whole proceeding to be an enquiry into the truth, made in common by both parties, and therefore to be paid for by a single party, on one event, or in equal shares, on another. With respect to the difficulty of taxation, a single justice can have the bill taxed by competent persons: the justices at Quarter Sessions *have the [*834] costs on appeals taxed by their officer; and the Judges of the superior Courts, though in form they allow the amount of the costs, entrust the actual taxation to the officer of the Court. In the forty-third section, where reference is made to the thirty-first, the expression is, "the expense of hearing and determining."

LORD DENMAN, Ch. J.:

The *dictum* in *Cone* v. *Bowles* (2) is hardly consistent with the principle upon which the Statute of Gloucester has been interpreted. It appears to me, that the statute now before us should be liberally construed: the trustees should pay this price for the great power which is given to them. The words are these [his

(1) Cas. temp. Hard. 356. (2) 1 Salk. 205.

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Lordship here read the first part of the thirty-first section]. Now the words "also of the said inquest" must mean something besides that denoted by the preceding words; and I cannot draw any line: I think they must mean all costs whatsoever: it is like the case of a trial, where one party obtains a verdict. There are certainly later parts in this section which appear to be rather inconsistent with the earlier part; but I do not think that we are bound to reconcile them: and at any rate they have no distinct bearing upon the present question. The costs, therefore, of the brief and witnesses are to be allowed, but not costs of surveyors.

LITTLEDALE, J.:

I am of the same opinion. The twenty-eighth section describes the inquest to be held, and points out what is to be done. All the expenses incidental to this proceeding appear to me to be costs of inquest; as would be the case with costs of an inquisition
[*835] *or trial. With respect to the forty-third section, it seems to me rather to make against the application, for it provides expressly for the expenses of the hearing and determining.

TAUNTON, J.:

Our decision in this case will not affect the decision as to costs in other cases. At common law no costs were recoverable; then they were given by the Statute of Gloucester (1), in cases where damages should be recoverable, either by that statute or otherwise (2). No costs are recoverable except by statute. The words here are, costs "of the said inquest." This must be intended to include all the costs of the trial, like the costs of a reference. With respect to the costs of surveyors, I should pause before saying that costs are to be allowed for them, *quâ* surveyors; but if they have been witnesses, they will be on the same footing as others.

WILLIAMS, J. concurred.

Rule absolute, for a mandamus to allow the costs and expenses incurred by M. G. in and about the inquest.

(1) 6 Edw. I. c. 1, s. 2.

(2) See 2 Inst. 289 (13). [As to the principles of the law on costs, see *Garnett* v. *Bradley* (1878) 3 A. C. 944; Judic. Act, 1890, s. 5; *Re Fisher*, '94, 1 Ch. 453.

MILLS *v.* REVETT AND OTHERS.

1834.
June 12.

(1 Adol. & Ellis, 856—860; S. C. 3 N. & M. 767.)

[856]

If, on a taxation of an attorney's bill, as between attorney and client, the Master strike off a part of the charges, on the ground that the client is not the person liable for such part, the sum upon which the sixth is to be calculated, under stat. 2 Geo. II. c. 23, s. 23 (1), is the original bill reduced by the part so disallowed; and the disallowance of such part is not a reduction upon taxation, within that clause.

Costs in a suit were taxed as between party and party, and the residue, after taxation, paid to the attorney of the successful party. The attorney afterwards delivered his bills to his client, under an order of Court for such delivery, and for a general reference of the bills for taxation. They included, among other matters, the above costs as reduced, for which the attorney gave credit: Held, that he was entitled to insert the reduced, and not the original amount of costs, and that, on taxation of the bills, the client could not add the sum formerly deducted from these costs to the sum taxed off from the general amount of the bills, in order to make the whole reduction exceed one sixth of such amount.

THE plaintiff having employed M., an attorney, to conduct various legal business for him; the attorney's bills, amounting to 4,857*l.* 19*s.* 5*d.*, were referred to the Master for taxation. The Master excluded from the taxation certain items amounting together to 182*l.* 14*s.* 5*d.* on the ground that for these items the plaintiff was not liable at all to the attorney: and from the remaining sum of 4,675*l.* 5*s.* he taxed off 675*l.* 19*s.* 4*d.* He also made the following deduction: "Balance on cash account due from Mr. M." (the attorney) "to the plaintiff, the whole of which, with the exception of 310*l.* 0*s.* 11*d.* *were received by Mr. M." (the [*857] attorney) "for damages and costs in the several actions relative to the Brandeston estate, 1,627*l.* 18*s.* 11*d.*;" leaving due to M. on the whole taxation, 2,371*l.* 6*s.* 9*d.* It further appeared that, of the 4,675*l.* 5*s.*, 1,300*l.* consisted of bills for business done by M. as attorney for the plaintiff, in certain suits, in which the parties opposed to the plaintiff had finally become liable to pay the costs. These last mentioned costs, on being taxed as between party and party, had been reduced from 1,531*l.* 8*s.* 10*d.* to the said sum of 1,300*l.*, which had been received by M., the attorney, from the parties liable; and this, with other sums received for damages due to the plaintiff from the same parties, formed a part of the 1,627*l.* 18*s.* 11*d.* deducted by the Master: but only

(1) See now the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.—R. C.

MILLS v. REVETT.

a very trifling deduction was made, on this last taxation, from the 1,300*l.* *Hutchinson*, in this Term, obtained a rule calling on the plaintiff to shew cause why it should not be referred to the Master to tax the attorney's costs occasioned by the taxation of the bills, and why such costs when taxed should not be paid by the plaintiff. The affidavits in opposition to the rule contained some statements introduced for the purpose of shewing that M., the attorney, had not acted fairly towards the plaintiff in the transaction.

F. V. Lee now shewed cause:

First, the aggregate of the bills before the Master being 4,857*l.* 19*s.* 5*d.*, and the whole sum deducted by him being 858*l.* 13*s.* 9*d.*, the case is within stat. 2 Geo. II. c. 23, s. 23, which directs that, if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation. It is true that, in order to make out the deduction to be as much [*858] as one sixth, the sum disallowed altogether *must be treated as part of such deduction; and it will be said that this is contrary to *White* v. *Milner* (1). That case (decided in the Common Pleas) has not been confirmed by any decision in this Court. Secondly, the attorney ought not to have laid before the Master, for taxation as between himself and his client, the bills already taxed as between party and party, and for which he had been satisfied. Had he not done so, the deduction would have amounted to more than one sixth. But, if he was entitled to include these bills, he should have inserted them as amounting to 1,531*l.* 8*s.* 10*d.*; and the deduction 231*l.* 8*s.* 10*d.*, made on the previous taxation, should have been added to the deduction of 675*l.* 19*s.* 4*d.*; in which case also the deduction would, on the whole, have amounted to more than one sixth; for, instead of a total of 4,675*l.* 5*s.* and a reduction of 675*l.* 19*s.* 4*d.*, there would have been a total of 4,906*l.* 13*s.* 10*d.* and a reduction of 907*l.* 8*s.* 2*d.* Thirdly, the stat. 2 Geo. II. c. 23, s. 23, directs, that if the deduction be less than one-sixth, "the Court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills." This is not a case in

(1) 2 H. Bl. 357.

which the Court, in their discretion, will charge the client, upon the facts disclosed by the affidavits in opposition; besides, the reduction, upon any method of calculation, comes very nearly to one-sixth of the bill.

Sir James Scarlett and *Hutchinson* in support of the rule:

The bills which the Master put out of consideration were never taxed by him at all. The case of *White* v. *Milner* (1) is conclusive.

LITTLEDALE, J. (2): [859]

Mr. Tidd certainly lays down a general rule which is in favour of the present application. He says (3), "In the exercise of this discretion, however, the Courts are governed by the statute; and, accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not, been taken off." Most of the authorities which he cites for this are cases in equity, or old cases; and, for my part, I think the point deserves to be looked into. But, as my brothers are of a different opinion, the rule must be made absolute.

TAUNTON, J.:

The objections to this rule being made absolute are threefold. First, as to the sum of 182*l.* 14*s.* 5*d.* which has been totally disallowed by the Master, the question, whether that sum is to be considered a part of the sum deducted, is disposed of by *White* v. *Milner* (1). To that case no objection is made, except that there is no other to the same effect; the reason of which I believe to be, that it has never been disputed, and that it has been unnecessary to confirm so simple a point. Secondly, as to the 1,300*l.* made up of bills which have been taxed twice, first between party and party, and, secondly, between the attorney and his client. On the last taxation, the attorney puts down

(1) 2 H. Bl. 357.

(2) Lord Denman, Ch. J. had left the Court during the argument.

(3) Tidd's Pract. ch. 14, p. 336 (9th edit. 1828). The statute does not give a discretion where a sixth part is taken off; and, accordingly, it has been held that in such case the enactment is imperative, and the attorney must pay the costs: *Higgins* v. *Woolcott*, 29 R. R. 389 (5 B. & C. 760).

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these bills as they stood after the first taxation, and charges his client with them, giving credit for the taxed costs which he has
[*860] received. In this there is nothing *irregular. The two taxations are of a different sort; and the attorney, in making his claim against his client, was not precluded from introducing the costs already taxed between party and party. Thirdly, it is said that the statute gives the Court a discretion (1), where a bill has not been reduced by so much as a sixth on taxation. In practice, at least as far as my experience goes, the liability has been constantly held to be reciprocal; if a sixth be taken off, the attorney pays; if less, the client; and it is so laid down by Mr. Tidd. I think that is in conformity with the statute, which puts the decision on the reasonableness or unreasonableness of the bills.

WILLIAMS, J.:

The only debateable point is, as to the exercise of the discretion (1) of the Court in making the attorney or client pay the costs: and, as to this, I think the safest rule is to take the taxation for the test.

Rule absolute.

1834.

HALL *v.* BOOTH.

[316]

(3 Nevile & Manning, 316—319.)

A private person cannot apprehend another, upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief.

TRESPASS for assaulting, seizing, and laying hold of the plaintiff, and forcing and compelling him to go to a pawnbroker's shop, and having kept and detained him there for a long time, and forced and compelled him to go to a police station-house, and searching and damaging the clothes of the plaintiff, and taking away from him divers papers belonging to him, and imprisoning him and detaining him in prison, without reasonable or probable cause.

[317] Pleas: first, the general issue; secondly, a justification of the assaulting &c., and compelling the plaintiff to go to the pawn-

(1) The "discretion" is omitted in 6 & 7 Vict. c. 73, s. 37.—R. C.

broker's shop and there detaining him; that before the time when &c., a certain gun had been and was feloniously stolen, and taken and carried away from and out of the possession of the defendant, by some person or persons to the defendant unknown; and afterwards and before the time when &c., the said gun or fowling-piece was discovered in the pawnbroker's shop, and to have been there pawned by some person to the said defendant unknown; and the person so pawning the same had afterwards and before the said time when &c. been traced to a house wherein the plaintiff just before the said time when &c. resided, and that the said person who had so pawned the said gun bore a strong resemblance to the plaintiff; and the plaintiff just before the time when &c., in the declaration mentioned, had come from and out of the said house, where the said person unknown had been so traced to as aforesaid, and then ran off with great speed from the said house, to a certain public-house, wherefore he the defendant having reasonable and probable cause for suspecting, and actually suspecting, the plaintiff to have been guilty of and concerned in the feloniously stealing, taking, and carrying away of the said gun, did at the time when &c., in the declaration mentioned, with the assistance of a certain policeman, jointly lay hands on the said plaintiff, and assaulted him the plaintiff, and seized and laid hold of him, in order to carry and convey, and did carry and convey him the plaintiff to the said pawnbroker's shop in the declaration mentioned, for the purpose of ascertaining if the plaintiff was the person who had pawned the gun as aforesaid, and there kept and detained the plaintiff for a reasonable time in that behalf, as it was lawful for the defendant to do for the cause aforesaid, using no unnecessary violence and doing no unnecessary damage to the plaintiff on the occasion aforesaid.

General demurrer, and joinder.

Gunning, in support of the demurrer: [318]

The plea is bad. In Selwyn's Nisi Prius (1) it is said, "Where a private person apprehends another on suspicion of felony, he does it at his peril, and is liable to an action, unless he can

(1) 7th edit., p. 911.

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establish in proof that the party has actually been guilty of a felony. Proof of mere suspicion will not bar the action (for false imprisonment), although it may be given in evidence in mitigation of damages. And the plea justifying an arrest by a private person on suspicion of felony, must shew the circumstances from which the COURT may judge whether the suspicion was reasonable." For the first of the propositions, it is true that Mr. Selwyn cites a MS. case of *Adams* v. *Moore*, which is omitted in a later edition of his work; but for the last proposition he cites the case of *Mure* v. *Kaye* (1), in which the COURT decided to that effect. Here, no reasonable or probable cause for suspecting the plaintiff to have stolen the gun is stated in the plea. Whether sufficient cause is stated on the plea is a question for the COURT, but the same degree of evidence is necessary to be stated as would be sufficient to satisfy the jury at Nisi Prius. All the facts necessary to shew that there was reasonable and probable cause must appear on the plea. There is not enough stated here to satisfy a jury. It does not appear when the party was traced to the plaintiff's house, whether before or after the theft. That the thief, or supposed thief, resembled the plaintiff, and that the plaintiff came out of the house to which the supposed thief had been traced, and ran violently from such house to a public-house, formed no reasonable and probable cause for apprehending the plaintiff on suspicion of felony. There certainly are cases which shew that a constable may arrest on suspicion, where no felony has been committed; but the circumstance of the defendant, in this instance, seizing the plaintiff with the assistance of a policeman, can make no difference, as the policeman was set in motion by the defendant:

[*319] **Hedges* v. *Chapman* (2).

(*Cresswell:* I do not rely on the presence of the policeman.)

It does not appear that the defendant apprehended the plaintiff for any purpose for which he was justified in apprehending him. It appears to have been for the purpose of ascertaining whether the plaintiff was the person who had stolen the gun.

(1) 4 Taunt. 34.

(2) 27 R. R. 704 (2 Bing. 523).

Cresswell, contrà:

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This objection does not seem to be ground of general demurrer.

(DENMAN, Ch. J.: It is of the very essence of the defendant's justification.)

A party may take another to the place where the theft was committed, in order to inquire.

(DENMAN, Ch. J.: You may *go* to inquire, but you cannot take him.)

Per CURIAM:

Leave to amend upon payment of costs.

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1834.

(3 Nevile & Manning, 512—519; S. C. 3 L. J. (N. S.) K. B. 93.)

[512]

An executor, who gives no orders for the funeral of his testator, is liable only to the extent of the expenses of a funeral suitable to the rank and circumstances of the testator.

And it seems that he is not liable at all where the funeral is ordered by another person, to whom the undertaker gives credit.

A testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant. The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay. An action was brought against the executor in his own right, in which he suffered judgment by default: Held, that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow.

ASSUMPSIT for goods sold and delivered, and for work, labour and attendance by the plaintiff, as an undertaker of funerals, done, performed and bestowed by the plaintiff and *his servants about the funerals of certain persons (1), deceased, at the request of the defendant, and for divers horses, coaches, hearses, &c. used in conducting the funerals by the plaintiff for the defendant, at his request, and for divers fees and sums of money paid

[*513]

(1) The particulars of the plaintiff's demand contained charges for the funeral of a child, in addition to those made for the funeral of Mr. Windsor. At the trial, however, the claim against the defendant in respect of the funeral of the child seems to have been abandoned.

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by the plaintiff in respect thereof for the defendant, and at his request.

The defendant suffered judgment by default; and upon the execution of a writ of inquiry before the under-sheriff of Middlesex, on the 20th of last December, the jury assessed the damages at 52*l.* 4*s.* 7*d.*

Butt, in the early part of this Term, obtained a rule to shew cause why the inquisition taken upon the execution of the writ of inquiry should not be set aside, and a new writ of inquiry issued and executed, upon an affidavit which stated as follows:

This action was brought against the defendant, who is executor of David Windsor, deceased, in his individual capacity, to recover the amount of the plaintiff's charges for the funeral of the said David Windsor, a farmer, who, in January, 1833, died insolvent. The defendant attended the funeral as a mourner, not having previously given any orders for it, nor being at all acquainted beforehand with the arrangements that had been made. From the notes of the under-sheriff, which the affidavit verified, it appeared that the evidence given upon the execution of the writ of inquiry was to the following effect:

The plaintiff received orders for conducting the funeral from Mrs. Windsor, the widow of the deceased, through her brother, Mr. Mills, to whom also, about a month after the funeral, the plaintiff delivered the bill, charging Mrs. Windsor as the debtor. Orders for funerals are rarely given to the undertaker by the
[*514] executor, but generally by some *member of the family or by the nurse. It was unexpectedly discovered after the funeral that the testator had died insolvent, and a meeting of creditors took place. The funeral was considered by the witnesses an extravagant one for a person of the testator's rank and circumstances, but the charges, which altogether amounted to 52*l.* 4*s.* 7*d.*, were fair. The defendant, upon attending the funeral as a mourner, was furnished with gloves and a hat-band, in the same manner as the rest of the mourners, and did not appear to have then objected to the expensiveness of the funeral. The defendant, at a time subsequent to the delivery of the bill to

Mills, said to the plaintiff's sister, who assisted him in conducting his business, that he was glad the plaintiff had not been at the meeting of creditors, and that he would pay the bill soon. Two letters, the one written by the defendant and the other by Mr. Watson, his attorney, and both addressed to the plaintiff, were put in and read. The first was as follows:

"LONDON, 13th May, 1833.

"DEAR SIR,—In reply to yours of the 10th instant, I am sorry that at present it is not in my power to place at your disposal the sum total of your account. I would have (according to promise) transmitted you 25*l.* on account; but as it is in contemplation to liquidate the whole of the funeral charges in the early part of July next, I prefer waiting till that time to the payment of any part by instalments. Consequently I sincerely trust that this arrangement will not inconvenience you, being an arrangement more congenial to my feelings than paying on account. I hope to see you at Hemel Hempsted.

"I am, &c.

"JOHN WILSON."

The second was as follows:

"GERARD STREET, 29th June, 1833.

"*Re Windsor*, deceased.

"SIR,—In answer to yours of the 25th inst., I beg to inform you, that although you may rest perfectly satisfied that you will be paid, yet from the state of Mr. Windsor's *affairs, we shall [*515] not have funds in hand until the end of July or beginning of August, when your claim shall be immediately satisfied.

"I am, &c.

"JOHN WATSON."

The defendant's counsel contended before the under-sheriff, that the defendant (not having ordered the funeral) was only liable to such an amount as was reasonable for a person in the testator's station in life, and which he, the defendant, would be entitled to charge against the specialty and other creditors of the estate. But the under-sheriff told the jury that the defendant was liable to all the expenses of the funeral, and directed them to find for the whole amount claimed in respect of the testator's

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funeral, if they thought the charges reasonable. The jury returned a verdict for the plaintiff, damages 52*l.* 4*s.* 7*d.*

Against the above rule *nisi*, cause was shewn in the course of the same Term, in the Bail Court, before Patteson, J., by

Charles Turner, for the plaintiff:

The defendant, by suffering judgment to go by default, has admitted the cause of action. If a defendant suffers judgment by default in an action upon a bill of exchange, the bill is admitted, and upon the execution of a writ of inquiry, the only purpose for which the bill is in such case required to be produced is, that it may be seen whether any part of the amount has been paid. By suffering judgment by default, in an action for goods sold and delivered, the defendant, according to BULLER, J., in *Green* v. *Hearne* (1), only admits that something is due; but this must be understood to mean, that though the defendant admits the plaintiff's right to recover in respect of all demands that come within the scope of the declaration, he does not admit the correctness of the charges in point of amount: *De Gaillon* v. *L'Aigle* (2). *Here the reasonableness of the charges in point of amount was expressly found by the jury. The circumstances of the orders for the funeral having been given by Mrs. Windsor, and of the plaintiff's having sent his bill to her, and in it treated her as his debtor, do not affect the defendant's liability; for he has, by suffering judgment by default, adopted Mrs. Windsor's acts. If the defendant had meant to deny his responsibility beyond a limited amount, he should have pleaded the general issue, and have paid such amount into Court.

[*516]

But it is contended that the defendant is liable only upon an implied contract as executor: *Rogers* v. *Price* (3); and that as the testator died insolvent, the implied promise would be limited to such a reasonable amount as would be allowed to the executor as against creditors of the testator: *Hancock* v. *Podmore* (4). If the defendant had in this action been sued in the character of an executor, and there had not been assets, this argument might have applied. Here, however, he is sued in his individual

(1) 3 T. R. 302.
(2) 1 Bos. & P. 368.
(3) 32 R. R. 729 (3 Y. & Jer. 28).
(4) 35 R. R. 287 (1 B. & Ad. 260).

capacity, and has suffered judgment by default, which, indeed, would have been an admission of assets so as to have bound him to the full extent, even if he had been sued as executor: Selwyn's N. P., 5th edit. 779. The defendant, at the time of adopting the acts of Mrs. Windsor and promising to pay, does not make any objection that the funeral was conducted on too extravagant a scale.

Butt, in support of the rule:

First, the funeral in this case was not ordered by the defendant, but by another person. The extent, therefore, of the executor's liability is that the amount which he would be entitled to retain against the creditors of the estate; in other words, to the reasonable charges for the funeral, regard being had to the condition of the testator. *Hancock* v. *Podmore* is an authority that, as against a creditor, 20*l.* for the funeral of a person *in the testator's [*517] rank of life would be the utmost that the law would allow. An executor, where he has assets, is liable to the expenses of a decent funeral, even though the testator be buried without his authority: *Rogers* v. *Price*. But that implied liability is only to the extent of a suitable funeral, and for such an amount as he might charge against creditors in the distribution of the assets of the estate; and that, in the present case, would be 15*l.* or 20*l.* * * *

2ndly. The liability of the defendant is not extended by his suffering judgment by default. He was liable, it must be admitted, to the reasonable charge for the funeral; but by letting judgment go by default on a declaration containing the common counts only, a defendant only admits that *something* is due. It has been suggested that the reasonable amount might have been paid into Court under the general issue; but that would not have altered the defendant's situation. The legal effect of paying money into Court under the common counts, and of suffering judgment by default on a declaration so framed, is the same. In the one case it is only an admission to the extent of the money paid in; in the other, an admission merely that a contract was made, and that something was due to the plaintiff: *Seaton* v. *Benedict* (1), *Meager* v. *Smith* (2).

Then 3rdly. The legal situation of the defendant is not altered

(1) 5 Bing. 28; 2 Moore & P. 76. (2) 4 B. & Ad. 673; 1 N. & M. 449.

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by the letters promising to pay the plaintiff's bill. Assuming that the defendant (who did not make the contract) was previously only liable to the extent of the reasonable charge for the funeral, the letters did not extend his liability. There is no consideration in the letters for a promise to pay any thing which he was not before legally bound to pay. A promise by an executor, without assets, is *nudum pactum*; and in the present case the plaintiff, in order to raise the question, should have declared specially. *There was nothing to shew that the widow, who ordered the funeral, acted as the agent of the executor; and it was not pretended on the other side that such was the case. If then the defendant, under these circumstances, is to be charged with the amount found by the jury, he will be made personally answerable, without any act or contract of his own, for the difference between that sum and the amount which the law allows, as against creditors, for a suitable funeral.

[*518]

Cur. adv. vult.

On the last day of Hilary Term judgment was delivered in this Court by

PATTESON, J.:

This was an action of *indebitatus assumpsit*, brought by the plaintiff against the defendant in his own right, for the expenses of the funeral of a person of the name of Windsor, to whom the defendant was executor. The defendant suffered judgment by default; and on the execution of a writ of inquiry before the undersheriff, it appeared that the funeral had been ordered by the widow of the testator, who was not an executrix. The defendant attended the funeral, and did not then make any observations as to its being too expensive. He, being executor, was, it appears, afterwards applied to for the amount of the expenses of the funeral by a letter, to which he replied by a letter dated May 13th, and which was produced at the inquiry. And it appears that another application was made in the latter part of June, to which he answered by his attorney, who wrote to the plaintiff a letter dated 29th June, which was also produced in evidence. From these letters it is perfectly clear that there was here an express

promise on the part of the defendant to pay the plaintiff's demand. It was contended before the under-sheriff, and again here, that the defendant was only liable upon an implied promise to the extent to which a funeral, suited to the rank and circumstances of the deceased, would have amounted. It has been decided, by several cases, that an *executor is liable upon an [*519] implied promise, at common law, to pay reasonable expenses for the funeral of his testator, where no other person is liable upon an express contract, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by a person to whom credit is given, the executor is liable at law. Here, the funeral was certainly ordered by Mrs. Windsor; and it would seem that credit was originally given by the plaintiff to her, and not to the executor. If therefore the case had rested merely on the common law liability of the defendant as executor, he might have answered that he was not liable beyond 20*l.*, as being the extent of the expenses of a reasonable funeral for a person in the circumstances in which the testator was, and as being the utmost amount which he would be allowed as against the creditors of the insolvent testator's estate. But it seems to me that the defendant, by all that he has done, has adopted the acts of the widow, and has treated her as his agent, and has thus rendered himself liable; and as he has suffered judgment by default in this action, he has rendered himself liable to the whole amount. I think therefore that the plaintiff is entitled to recover, not on the ground of a common liability of the defendant as executor, but on the ground of his having expressly rendered himself so. Under these circumstances, I think it clear that the direction of the under-sheriff was right, and that the rule must be discharged.

DENMAN, Ch. J.:

I think it right to say, that having heard the arguments upon the application for this rule, I entirely concur in the view of the case which has been taken by my brother PATTESON.

LITTLEDALE, J. and TAUNTON, J. also concurred.

Rule discharged.

1834.

Revenue.

[1]

IN THE COURT OF EXCHEQUER.

REX *v.* THE MAYOR AND COMMONALTY OF THE CITY OF LONDON. IN THE MATTER OF MOZELEY WOOLF'S FINE.

(1 Cr. M. & R. 1—19; S. C. 4 Tyrwh. 709; 3 L. J. (N. S.) Ex. 223.)

The city of London is entitled to a fine imposed for a misdemeanor committed within the city, though the fine be adjudged by the Court of King's Bench sitting at Westminster.

LEWIS LEVY and Mozeley Woolf having been indicted at the Old Bailey for a misdemeanour committed within the city of London, the indictment was removed by *certiorari* into the Court of King's Bench. The defendants having been tried upon that indictment at Guildhall, before the Lord Chief Justice, were found guilty, and being afterwards called up for judgment in the Court of King's Bench, a fine was imposed upon Levy of 5,000*l.*, and upon Woolf of 10,000*l.* These fines being estreated into the Exchequer, the city of London made claim

[*2] to the *fine imposed upon Mozeley Woolf, and the following is the form of the proceedings under that claim:

MORE COMMON MATTERS OF EASTER TERM,

In the 59th Year of the Reign of King George III.

ENGLAND.—An Estreat of fines imposed and set in the Court of our lord the King, before the King himself, at Westminster, of Easter Term, in the fifty-ninth year of the reign of King George the Third, but not paid.

LONDON.—Of Lewis Levy, late of London, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 5,000*l.*, and he is sentenced to be imprisoned in his Majesty's gaol, at Gloucester, in and for the county of Gloucester, for the term of two years. And it is ordered, that the Marshal of the Marshalsea of this Court, or his deputy, do deliver the said Lewis Levy into the custody of the keeper of the said

gaol of Gloucester, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of London are commanded of the goods and chattels, lands and tenements of the said Lewis Levy, to levy the said fine, and to have the said sum of money in this Court in three weeks of the Holy Trinity, and the like command is given to the sheriff of Middlesex . . . . . 5,000*l.*

Of Mozeley Woolf, late of London, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 10,000*l.* And he is sentenced to be imprisoned in the House of Correction, in Cold Bath Fields, in and for the county of Middlesex, for the term of two years. And it is ordered, that the Marshal of the Marshalsea of this *Court, or his deputy, [*3] do deliver the said Mozeley Woolf into the custody of the keeper of the said House of Correction, in Cold Bath Fields, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of London are commanded of the goods and chattels, lands and tenements of the said Mozeley Woolf to levy the said fine, and to have the said sum of money in this Court in three weeks of the Holy Trinity; and the like command is given to the sheriffs of Middlesex . . . . . 10,000*l.*

The claim of the mayor and commonalty and citizens of the city of London, upon the account of E. H. Lushington, Esq., coroner and attorney of our sovereign lord King George the Fourth, accounting for monies by him received, and payable to his said Majesty, amounting to 5,912*l.* 8*s.* 10*d.* The same mayor and commonalty and citizens, by William Foxton their attorney, claim a certain fine of 5,000*l.*, and also a certain fine of 10,000*l.*, which have been retained or forfeited, and hereinafter particularly mentioned, but with which the said coroner and attorney is not charged, only to the amount of 5,912*l.* 8*s.* 10*d.*, part of the said sum of 10,000*l.*, in his account before the clerk of the pipe of his said Majesty's Exchequer, in these words, (to wit) England—An estreat of fines imposed and set in the Court of our lord the King, before the King himself, at West-

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minster, of Easter Term, in the 59th year of the reign of King George the Third, but not paid. London, of Lewis Levy, late of London, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 5,000*l.*, and he is sentenced to be imprisoned in his Majesty's gaol of Gloucester for the term of two years. And it is ordered, that the Marshal of the Marshalsea of this Court, [*4] or his deputy, do *deliver the said Lewis Levy into the custody of the keeper of the said gaol, at Gloucester, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of London are commanded of the goods and chattels, lands and tenements of the said Lewis Levy, to levy the said fine, and to have the said sum of money in this Court in three weeks of the Holy Trinity, and the like command is given to the sheriff of Middlesex, 5,000*l.* Of Mozeley Woolf, late of London, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 10,000*l.*, and he is sentenced to be imprisoned in the House of Correction in Cold Bath Fields, in and for the county of Middlesex, for the term of two years. And it is ordered, that the Marshal of the Marshalsea of this Court, or his deputy, do deliver the said Mozeley Woolf into the custody of the keeper of the said House of Correction in Cold Bath Fields, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of London are commanded of the goods and chattels, lands and tenements of the said Mozeley Woolf, to levy the said fine, and to have the said sum of money in this Court in three weeks of the Holy Trinity, and the like command is given to the sheriff of Middlesex, 10,000*l.* (x$^{de\ li}$) (1) as by a *constat* thereof, under the hand of Thomas Farrar, deputy clerk of the foreign estreats of this Court, appears. Which said sums of 5,000*l.* and 10,000*l.*, the

(1) [There is something wrong with this abbreviation: the original estreat cannot be found in the Public Record Office, but the "de" above the line probably represents a badly-formed M for *mille*. I am indebted for this information to Mr. Hubert Hall.—F. P.]

said mayor and commonalty and citizens of the said city of London claim to belong to them; for that the said Lewis Levy, under whose name the said sum of 5,000*l.* in the aforesaid *constat* demanded, and the said Mozeley Woolf, under whose name the said sum of 10,000*l.* in the same *constat* is particularly demanded, were severally and respectively, at the times when the said fines were so set and imposed upon them by the said *Court of our said lord the King, before the King himself, the [*5] resiants of the said mayor and commonalty, and citizens within the said city of London; and which said sums of 5,000*l.* and 10,000*l.* the said mayor and commonalty and citizens of the said city of London claim to belong to them; for that the said Lewis Levy and the said Mozeley Woolf were severally and respectively, at the time when the said offence and misdemeanor were committed, in respect whereof the said fines were so set and imposed as aforesaid, resiant within the said city of London; and which said sums of 5,000*l.* and 10,000*l.* the said mayor and commonalty, and citizens of the said city of London, claim to belong to them; for that the said trespasses, offences, and misdemeanours, in respect whereof the said fines were so set and imposed upon the said Lewis Levy and Mozeley Woolf as aforesaid, were committed by them the said Lewis Levy and Mozeley Woolf within the said city of London; and also, for that Henry VI., late King of England. [Here the claim set out the clauses in the charter of the 23 Henry VI. (1), relating to the administration of justice in the city, and the clause containing the grant of fines, &c. under which the city claimed. The latter clause was in the following words:] "And further of his more abundant grace, he did grant to the citizens aforesaid and their successors, all manner of fines, issues forfeited and to be forfeited, redemptions, forfeitures, pains, and amerciaments of and for all manner of matters, causes, and occasions, and all things aforesaid, and

(1) Dated 26th October. This charter still exists in the Town Clerk's office, and is copied in Liber Albus. All grants of lands and tenements by Henry VI. were declared void by a statute passed in the 28th year of his reign; but this grant was confirmed by charter in Parliament, 20 Hen. VII.; and, doubts still existing, it was confirmed again by subsequent charters, and, lastly, by the general Inspeximus of Charles II. —Norton's Commentaries on the City of London, p. 281.

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whatsoever trespasses, riots, insurrections, offences, misprisions, extortions, *usurpations, contempts, and other misdemeanours, done or to be done in the city or suburbs aforesaid, before the
[*6] mayor, recorder, and aldermen of the city aforesaid for the time being, the justices of him, his heirs, or successors, assigned or to be assigned to hear and determine felonies, trespasses, and misdemeanours in the city aforesaid, or the suburbs thereof, or the justices assigned or to be assigned to hold pleas before the said lord the King, his heirs or successors, the justices of the Common Bench, the Treasurer and Barons of the Exchequer, or the Barons of the Exchequer, or whatsoever other justices and officers of him, his heirs or successors, adjudged or to be adjudged, together with the assessments and levying of the same, as often and when it should be needful. And treasure-trove in the city aforesaid, or the suburbs thereof; and also waifs and strays and goods and chattels of all and singular felons and fugitives, for felonies by them committed or to be committed in the city or suburbs aforesaid, adjudged or to be adjudged before the said King, or his heirs or successors, or any of the justices aforesaid; and all merchandize and victuals which in coming to the city aforesaid to be sold in the said city or the suburbs thereof, and in the water of Thames, and elsewhere within the same city, the liberties and suburbs thereof, should be found forestalled or regrated, and which therefrom thenceforth should happen to be forestalled or regrated. And that the said citizens should have all and every thing which should happen to be adjudged by the said mayor, or the justices aforesaid, to be due or to belong to the said King, his heirs, or successors, of or for any recognizances or securities made for good behaviour and observing of the peace before them, or any of them, within the city aforesaid or the suburbs thereof, broken and not observed." [The claim then set forth the statute 1 Edw. IV., confirming the liberties and franchises of the city, and then
[*7] a charter of 20 Hen. VII., and that of the *14 Charles I. In the latter charter the clause containing the grant of fines, &c., was as follows:] "And also fines and issues of jurors, and all other issues, fines, and amerciaments forfeited or to be forfeited of and for all manner the matters, causes, and singular the

occasions aforesaid, and of and for whatsoever transgressions, riots, offences, misprisions, extortions, usurpations, contempts of laws, violations, and other misdemeanors done or to be committed in the city aforesaid or the liberties of the same, before the mayor, recorder, and aldermen of the same city for the time being, or one or any of them, or any of the justices of the said King, his heirs and successors, concerning the peace in the said city aforesaid, or before the justices of him, his heirs and successors, assigned or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same, or before any justices of him, his heirs or successors, of Nisi Prius for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs or successors whatsoever, or any of them, in the city aforesaid, judged or to be adjudged forfeited or to be forfeited, together with the assessments and levies of the same, as often and when there should be need, saving nevertheless always and reserving to the said King, his heirs and successors, all and all manner of issues and amerciaments, commonly called fines or issues royal, thereafter from time to time to be imposed upon the mayor, aldermen, and sheriffs of London and Middlesex for the time being, or one or any of them respectively, or by them to be forfeited and paid." [The claim then set out a charter of 15 Charles II., and concluded as follows:] "As by the said last-mentioned letters patent now produced and shewn to the Court here does more fully appear. Wherefore the said mayor and commonalty and citizens of the city of London are, and at the said times when the said fines of 5,000*l.* and 10,000*l.* were set and imposed as aforesaid were, *a body corporate in deed and name, and persons able in law [*8] to plead and to be impleaded, and to challenge, demand, and prosecute all the liberties, privileges, and franchises aforesaid, by the aforesaid name of mayor and commonalty and citizens of the city of London. By virtue of all which premises the aforesaid mayor and commonalty and citizens do claim to belong to them the aforesaid sum of 5,000*l.*, so as aforesaid set and imposed by the said Court of our said lord the King before the King himself, upon the said Lewis Levy, and the said sum

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of 10,000*l.*, so as aforesaid set and imposed by the said Court of our said lord the King before the King himself, upon the said Mozeley Woolf. Wherefore they pray that their said claim thereto may be allowed, &c."

The replication was in the following form: And *Sir Thomas Denman*, Knight, Attorney-General of our lord the now King, being present here in Court, on behalf of our said lord the King, and having heard the said claim of the said mayor and commonalty and citizens of the city of London, of the allowance to them of the said fine of 10,000*l.*, set and imposed upon the said Mozeley Woolf as aforesaid, for our said lord the King, says that, notwithstanding any thing by the said mayor and commonalty and citizens above alleged, the said fine of 10,000*l.* ought not to be allowed to them, because the said *Attorney-General* of our said lord the King says that the said Mozeley Woolf, under whose name the sum of 10,000*l.* in the aforesaid *constat* is particularly demanded, was not, at the time when the said fine was so set and imposed upon him by the said Court of our said lord the King, before the King himself at Westminster, the resiant of the said mayor and commonalty and citizens within the said city of London, as stated in their said claim. And this the said *Attorney-General* prays may be inquired of by the country, &c. And the said *Attorney-General* of our said
[*9] lord the King further says, that the said *Mozeley Woolf was not, at the times when the said offence and misdemeanor was committed, in respect whereof the said fine was so set and imposed upon him the said Mozeley Woolf as aforesaid, resiant within the said city of London, as stated in the said claim of the said mayor and commonalty and citizens. And this, he the said *Attorney-General* prays may be inquired of by the country, &c. And the said *Attorney-General* of our said lord the King further says, that the said fine of 10,000*l.*, so set and imposed upon the said Mozeley Woolf as aforesaid, was not a fine, issue forfeited, redemption, forfeiture, pain or amerciament, set or imposed within the said city of London, or suburbs or liberties thereof, or by or before the lord mayor, recorder, and aldermen of the said city, or any or either of them; and this the said *Attorney-General* of our said lord the King is ready to verify;

wherefore the said *Attorney-General* of our said lord the King prays judgment if the said fine of 10,000*l.* ought to be allowed to the said mayor, commonalty, and citizens of the city of London.

The rejoinder of the city ran as follows: And the said mayor and commonalty and citizens of the city of London, as to the said replication of the said *Attorney-General*, by him first above pleaded, and which he hath prayed may be inquired of by the country, do the like. And the said mayor and commonalty and citizens of the city of London, as to the said replication of the said *Attorney-General* by him secondly above pleaded, and which he hath prayed may be inquired of by the country, do the like. And as to the replication of the said *Attorney-General*, by him lastly above pleaded, the said mayor and commonalty and citizens say, that notwithstanding any thing by the said *Attorney-General* therein above alleged, the said fine of 10,000*l.* ought to be allowed to them, because they say that the indictment on which the said Mozeley Woolf was charged (together with others) *with the said trespasses, offences, and misdemeanors, in respect [*10] whereof the said fine of 10,000*l.* was so set and imposed upon the said Mozeley Woolf as aforesaid, was presented and found by the jurors of our then lord the King of and for the city aforesaid, at the General Session of oyer and terminer of our late sovereign lord George the Third, holden for the city of London at Justice Hall, in the Old Bailey, within the parish of St. Sepulchre, in the Ward of Farringdon Without, in London aforesaid, on Wednesday the 6th day of May, in the 58th year of the reign of his said late Majesty King George the Third, before the then mayor, the then recorder, and certain other aldermen of the said city for the time being; and also before certain justices of his said late Majesty King George the Third, and others their fellows, justices of our said lord the King, assigned by letters patent of our said lord the then King, made under the great seal of our lord the then King of the United Kingdom of Great Britain and Ireland to the several justices therein named, and others, or any two or more of them, directed to inquire more fully the truth by the oath of good and lawful men of the city of London, and by other ways, means, and methods, by which

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they should or might better know, (as well within liberties as without), by whom the truth of the matter might be better known of (amongst other things) all confederacies, trespasses, contempts, oppressions, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the city aforesaid, (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever; and the said premises to hear and determine according to the law and custom of
[*11] England; which said indictment his said late *Majesty King George the Third, afterwards for certain reasons caused to be brought before him to be determined according to the law and custom of England. And the said mayor and commonalty and citizens further say, that the said indictment was afterwards tried at the sittings for Nisi Prius, holden for the said city of London at the Guildhall of and within the said city, before the Right Hon. Sir Charles Abbott, Knight, then the Chief Justice of our lord the then King assigned to hold pleas before the King himself, John Henry Abbott then being associated to the said Chief Justice; and that the said Mozeley Woolf (together with others) was thereupon found guilty of the premises charged upon him in and by the said indictment. And the said mayor and commonalty and citizens further say, that afterwards, in the Court of our lord the King, before the King himself, at Westminster, the said Mozeley Woolf being brought there into Court in custody of the keeper of his Majesty's gaol of Newgate, by virtue of a writ of *habeas corpus*, it was adjudged and ordered, in and by the said Court of our lord the King, before the King himself, at Westminster, that the said Mozeley Woolf, for his offences aforesaid, should pay the said fine of 10,000*l.* to our sovereign lord the King, and should be imprisoned in the House of Correction in Cold Bath Fields, in and for the county of Middlesex, for the term of two years. And it was further ordered by the said Court, that the Marshal of the Marshalsea of his Majesty's Court of King's Bench, or his deputy, should deliver the said

Mozeley Woolf into the custody of the keeper of the said House of Correction in Cold Bath Fields, to be kept in safe custody, in execution of the said judgment, until he should have paid the said fine of 10,000*l.* And this they, the said mayor and commonalty and citizens, are ready to verify; wherefore they pray judgment, and that their said claim to the said fine of 10,000*l.* may be allowed to them.

Demurrer and joinder in demurrer.

Wightman, for the Crown: [12]

The question is, whether, by force of the charters of Henry VI. and Charles I., or either of them, the city is entitled to the fine, upon the ground that the offences were committed within the city by Mozeley Woolf who was at that time, and also at the time of the imposition of the fine, a resiant within the city. These are the only grounds stated in the claim of the city, and it is upon the validity of that claim, that, in the present state of the pleadings, the Court is called upon to decide. On behalf of the Crown, it is contended that the city ought to have gone further, and to have shewn either that the fine was adjudged in the city, or at least that the trial of the indictment was within the city, neither of which facts is alleged. Upon ths face of the claim, it appears that the fine was imposed "by the Court of our lord the King before the King himself," that is to say, by the Court of King's Bench, at Westminster.

The claim of the city is founded entirely upon the charters, and it is therefore incumbent upon them to bring themselves strictly within the words of those charters; for, in the construction of grants from the Crown, the rule applicable to the grants of the subject, viz. that they are to be taken most strongly *contra proferentem*, is reversed, and they are construed most strictly against the grantee, and nothing will pass to him but by clear and express words. Thus, by a grant from the Crown of the goods and chattels of felons, the goods of a *felo de se* will not pass (1). Again, if the King grants *omnes terras dominicales manerii de W.*, customary lands held by copy, parcel of the

(1) *Rex* v. *Sutton*, 1 Saund. 269; 1 Sid. 420; 1 Vent. 32; 2 Keb. 526, 533; 2 Roll. Abr. 194, C., pl. 2.

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manor of W., shall not pass; though it is otherwise in the case of a common person: case of *Alton Woods* (1). And when the Crown grants all mines, gold and silver mines *will not pass: case of *Mines* (2). So, when the King has two manors A. and B., and grants *totum illud manerium de A. et B.*, although, if the grant had been by a subject, both manors would have passed; yet, in the case of the Crown, the grant is void (3). The same rule of construction is laid down in *Williams* v. *Berkeley* (4), where it is said, that, by the common law, the grant of every person is taken more strongly against himself, and more favourably for a stranger; but that the grant of the King is taken more strongly against a stranger, and more favourably as to the King. It is to be seen, therefore, whether, following this rule, the Crown can be held by either or both of these charters to have granted to the city of London the fines of persons wheresoever convicted, if they be convicted for offences committed within the city. The charter of Henry VI. gives all fines, &c. for all manner of causes, &c., done in the city, before the mayor, recorder, and aldermen, (and then it enumerates the other parties), "adjudged or to be adjudged, together with the assessments and levying of the same, as often and when it should be needful, and treasure-trove, in the city aforesaid or the suburbs thereof." It will be contended for the city, that the charter gives the fines imposed by any of the justices enumerated, whether imposed in the city or elsewhere; but the true construction of the charter is, to refer the words "in the city aforesaid," to the word "adjudged," and then the King only grants such fines for offences committed within the city, as before any of the various justices mentioned in the charter are adjudged in the city.

[*13]

(LORD LYNDHURST, C. B.: The charter speaks of the Courts at Westminster, which are named in their proper order, first, the justices assigned to hold pleas before the King himself, viz. the King's Bench; secondly, the justices *of the Common Bench, and then the Treasurer and Barons, or the Barons of the Exchequer.

[*14]

(1) 1 Co. Rep. 48.
(2) Plowd. 314 a, 336 b, 339; 1 Co. Rep. 46 b.
(3) Case of *Alton Woods*, 1 Co. Rep. 46 a.
(4) Plowd. Com. 243.

What is there inconsistent in the city being entitled by the charter to fines adjudged in the Courts at Westminster?)

If the words of the charter of Henry VI. be general in their effect, they are restricted by those of the charter of Charles I. That instrument is a regrant of all the privileges of the city, and is as comprehensive and precise in all respects as if it were a charter granted for the first time. It constitutes the mayor, and certain of the aldermen, keepers of the peace of the King within the city; and it assigns the mayor, certain aldermen, and the recorder, to be justices of the King, to inquire concerning all manner of murders, felonies, &c. The granting clause gives all fines &c., for all matters &c., "done or committed in the city aforesaid or the liberties of the same, before the mayor, recorder, and aldermen of the said city for the time being, or one or any of them, or any of the justices of the said King, his heirs and successors, concerning the peace of the city aforesaid, or before the justices of him, his heirs and successors, assigned or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same, or before any justices of him, his heirs, or successors of Nisi Prius, for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs, or successors whatsoever, or any of them, in the city aforesaid judged or to be adjudged forfeited or to be forfeited, together with the assessments and levies of the same, as often and when there should be need." Here at all events the words "in the city aforesaid judged or to be adjudged," apply to the first words of the clause, and mean that all fines, &c. for all offences committed in the city, and before the mayor or other justices, adjudged in the city, are to be taken by the city. If this were not the construction, the charter of Charles I. would be a senseless repetition of the charter *of Henry VI. In conveyances every [*15] restriction has its proper operation, and general words in a grant may be overthrown by words restrictive, provided the restriction concurs with the general words of the grant: *Clay* v. *Barnett* (1).

(1) Godb. 237.

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Follett, contrà:

The principal question is, whether, in order to entitle the city to the fine, it is necessary to shew that it was imposed, or adjudged within the city. The facts are that Mozeley Woolf committed the offence within the city; that a true bill was found for that offence at the Old Bailey; that the indictment was removed by *certiorari* into the King's Bench and tried before the Chief Justice at Guildhall, and that the fine was imposed by the Court of King's Bench, at Westminster. The answer of the Crown to the claim of the city is that the fine ought to have been imposed in the city. With regard to the charters, there is no occasion to call in the rule of construction which has been referred to, and which may be admitted to be correct. No doubt whatever can rest upon the construction of the charter of Henry VI. It grants all fines for offences committed within the city, before the justices in the charter named "adjudged or to be adjudged." Now, who are the justices there named? The city magistrates, the commissioners sitting at the Old Bailey; and then are enumerated, according to their rank and order, the Courts of King's Bench, Common Pleas, and Exchequer. When these Courts are mentioned, it could not have been intended that the fines adjudged by them should be adjudged in the city of London. There is no instance of the King's Bench having ever sat there, and the Court of Common Pleas, being stationary at Westminster, could not have sat in any other place. It is clear, therefore, that the
[*16] grant is of *all fines "adjudged," without any reference to the place where they are adjudged, provided they be adjudged by the Courts mentioned in the charter. But it is said, that if the words of the charter of Henry VI. be sufficiently general to pass all fines to the city wherever adjudged, that generality is restricted by the charter of Charles I.; and it is argued, that, unless this be the case, the clause in the latter charter would be an unmeaning repetition of the identical grant in the former. But this is not so: the grants differ in many particulars. The charter of Charles grants fines before justices of the peace, which were not given by the charter of Henry VI. The former charter gives the fines for offences committed within the city or the liberties, the latter for offences committed in the city or suburbs, which is a

more confined grant. The exception in the charter of Charles, reserving to the King all fines or issues royal imposed upon the mayor and sheriffs of London and Middlesex, shews that it could not have been intended to convey only such fines as were adjudged within the city. The words at the conclusion of the clause, "in the city of London," immediately preceding the words, "judged or to be adjudged," are to be read in connexion with the previous words, "other justices of him, his heirs or successors whatsoever, or any of them." Even if any doubt could be raised upon the construction of the charter of Charles, it ought not to be allowed to prevail against the clear and unequivocal words of the charter of Henry VI. It would carry the rule of construction in favour of the King's grant further than ever yet it has been carried, to set aside the grant in the charter of Henry VI., which is perfectly clear, because the construction of the later charter is not clear. There is another point, which it may be proper to bring before the Court, though it is scarcely necessary to do so. By the charter of Henry VI., "if it should be charged or commanded to the mayor, recorder, or aldermen aforesaid, *or to the sheriffs [*17] of the city aforesaid, &c., to certify or send to the King or his heirs, or into any of the Courts of the King, his heirs or successors, any indictment of felonies, trespasses, extortions, or other misdemeanours whatsoever, or any recognizance or security of the peace, before them or any of them taken, made, or found, the King willed that they, or any of them, should not on that account be holden and compelled to certify or send such indictments, recognizances, or securities, but it should be sufficient to return and transmit only the tenors or transcripts of the same, so that they, at the determination and execution to be made in that behalf, might be able freely to proceed, and lawfully and without hurt, as of right and according to the law and custom of the city aforesaid might be done, any mandate, &c. notwithstanding." The record itself therefore remaining in the city, judgment upon that record must virtually be given in the city, although, in point of form, it is pronounced by the Court of King's Bench sitting at Westminster (1).

(1) The claim to this privilege, on the part of the city, was earlier than the charter of Henry VI. In *Hopestill Tylden's* case, Cro. Car. 265, *Noy*,

REX v. THE MAYOR, &C., OF LONDON.

[*18]

(LORD LYNDHURST, C. B.: You say that *judgment might have been entered up in the city, not that it was so. Might not the *Attorney-General* in every case deprive the city of the fine, by removing the indictment, if judgment in the city be necessary ?)

According to the argument on the other side he might. The city, however, are not compelled to rely upon this latter point. They rest their claim upon the unequivocal words of the charter of Henry VI., which they contend are not restricted by the grant in the subsequent charter.

Wightman, in reply.

Attorney-General, shewed a record of E. 43 Edw. III. rot. 19, out of the treasury of the Exchequer, to the following effect: A writ being awarded out of Chancery to the mayor and commonalty of London to certify an indictment there taken against one Lumbard, for engrossing silk, upon the *alias* they made this return: That by ancient charters, confirmed by Parliament and ancient usage, they had such a privilege that all indictments and proceedings for any cause, unless felony, should be tried and determined there, and not elsewhere; and thereupon a *pluries* was awarded to return the indictment into Chancery, and then they should be there the same day to shew their evidence and charters to maintain their claim.

Upon the ground of the record remaining in the city, it has been held that an amendment may be made, which could not be done where the record itself is removed, for then there is nothing to amend by. Thus, in *Alcock's* case, 1 Sid. 155, it is said that there is a distinction between London and other counties, for, if an indictment is certified out of London, that may be amended on motion, by the original; and the reason is, that by their charter they only certify the tenor of the record, and the record itself remains with them, by which that which is certified may be amended. See also 1 Keble, 252. So, it is laid down by Serjeant Hawkins, that although the body of an indictment removed into the King's Bench from any inferior Court cannot be amended, yet, if from London, it may be amended; because, by the city charter, a tenor only of the record can be removed from thence. Hawk. P. C. b. 2, c. 25, s. 97. See also *Id.* c. 27, s. 26. *Cusack's* case, Cro. Car. 128.

The practice of returning a transcript only has been discontinued for a long series of years, and now, in all cases, the record itself is removed from London, as well as from other places, upon the *certiorari*. This appears from the case of *Rex* v. *Richardson*, 2 Leach, 560, which was an indictment for perjury, removed by the prosecutor by *certiorari* into the King's Bench. *Knowlys*, for the prisoner, moved, at the Old Bailey, that as there was now no record before the Court, the prisoner might be discharged. BULLER, J., said, that when once a prisoner was in custody for an offence, he must find sureties before he could be discharged.

LORD LYNDHURST, C. B.:

I can see nothing inconsistent in the two charters. The words of the charter of Henry VI. are clear and distinct. In that charter the grant of treasure-trove is interposed between the word "adjudged" and the words "in the city aforesaid or suburbs thereof," and the latter words apply to the treasure-trove, and not to the adjudication of the fine, which *is general, [*19] so far as regards the place of adjudication. In the charter of Charles I., the words, "in the city aforesaid," are not to be read in conjunction with the words which follow, "judged or to be adjudged," but are to be connected with the words "justices" in the clause immediately preceding, and restrict the general description of "other justices" to justices in the city. Before we finally pronounce our judgment, however, we are desirous of seeing a copy of those parts of the original charters in Latin which relate to this subject.

Lord LYNDHURST, C. B., afterwards stated that the Court had examined the charters in the original Latin, and that they found no reason to alter the opinion they had before expressed. That it was obvious, from the nature of the Courts before which, according to the words of the charter of Henry VI., the fines might be adjudged, amongst which Courts was that of the Common Pleas, which could not sit in the city, that the intention was to pass all fines for misdemeanours committed in the city, whether they were adjudged there or elsewhere; and that the charter of Charles I. contained nothing inconsistent with this grant.

Judgment for the city.

1834.

Exch. of Pleas.

[20]

SNELLING *v.* LORD HUNTINGFIELD (1).

(1 Cr. M. & R. 20—26; S. C. 4 Tyrwh. 606; 3 L. J. (N. S.) Ex. 232.)

A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year, B. took the proposals and went away, and entered into A.'s service on the 24th of July: Held, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the Statute of Frauds.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiff, together with one Hannah Lincoln, at the request of the defendant, would become and be
[*21] the servants of the defendant, to wit, *that the plaintiff would become such servant in the capacity of a bailiff, and that the said H. L. would become such servant in the capacity of a housekeeper and to manage the dairy and some poultry, and would remain in the service of the defendant, as such servants, for a year then next following, for certain wages, &c. &c., defendant promised plaintiff to employ him in the defendant's service at those wages, and to continue him in such service until the expiration of one year next ensuing. Breach—that the defendant did not continue the plaintiff in his service till the expiration of a year, but discharged him therefrom. The second count stated, that, in consideration that the plaintiff, at the request of the defendant, would become servant to the defendant, and would find and provide for a person who should act for the defendant in the capacity of a housekeeper, &c., and would remain and continue in the service of the defendant as such servant, and find, provide for, and pay such person in the capacity aforesaid, for the space of a year then next following, at and for certain wages, to wit, &c., the defendant promised the plaintiff to retain and employ the plaintiff in the defendant's service, and in the capacity aforesaid, at the wages aforesaid, and to continue him in such service and employ until the expiration of one year then next ensuing. Breach—that the defendant did not continue the plaintiff in his service and employ till the expiration of one year from the making of the

(1) Cited and followed in *Britain* v. *Rossiter* (1879) 11 Q. B. Div. 123, 48 L. J. Ex. 362.—R. C.

promise, but refused to permit him to continue, and discharged him therefrom. The declaration also contained an *indebitatus* count for wages and salary as a servant, for goods bargained and sold, and sold and delivered, for work and labour, for money lent, for money paid, for money had and received, and on an account stated. The defendant pleaded *non assumpsit*, except as to 21*l.* 3*s.*, parcel of the sums in the *indebitatus* count mentioned, and as to that a tender. He also pleaded (except as to the amount tendered) a set-off for goods sold and delivered, *and an account stated. Upon these pleas the plaintiff took issue.

[*22]

The cause was tried at the London sittings in Trinity Term, 1833, before Gurney, B., when the following appeared to be the facts of the case. On the 20th July, 1832, the defendant proposed to hire the plaintiff as a bailiff, and the defendant at that time wrote the following memorandum, (which was signed by neither of the parties), but was delivered to the plaintiff, and by him taken away:

"The pork wanted to be at 5*s.* a stone.

"The wheat required at 27*s.* a comb.

"The board of two servants at 2*s.* a day.

"The person and his daughter, a housekeeper, to do for them and manage the dairy, and some poultry.

"The person to have the road running through the parks, as the division of the lands to be managed by each bailiff. You take the south side. The salary for bailiff and housekeeper to be 80*l.* a year.

"All expenses going either to market or sales."

The plaintiff did not enter the service of the defendant until the 24th July. He boarded three of the defendant's servants, and claimed on his account, at the trial, a balance of 9*l.* 3*s.* Before the expiration of the year, the defendant, being displeased with the plaintiff, gave him a month's warning to quit his service; and, on the 14th November, the defendant's agent settled an account with him respecting the board of the servants, and his own wages, and the plaintiff assented to the account, with the exception of his wages, for which he claimed the full year's amount. The defendant's agent told him that he considered him discharged from that day. On the 6th December, 1832, the plaintiff

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finally quitted the defendant's service; and now claimed damages for not being continued in his service for the remainder of the year. On the part of the defendant, it was objected *that the plaintiff [*23] was not entitled to recover on the special counts, the contract being made on the 20th July, to serve from the 24th for a year, and that not being in writing and signed, no action could be maintained upon it, under the 4th section of the Statute of Frauds; and *Bracegirdle* v. *Heald* (1) was cited. With regard to the claim for the board of the servants, it was objected that there was no *indebitatus* count applicable to that demand. No question ultimately arose either as to the tender or set-off. The learned Judge reserved the point, and left the case to the jury, telling them, that, although the plaintiff was to come into the service of the defendant on the 24th, he had some doubts whether that was the day on which the plaintiff's service commenced; that if it commenced on the day of the making of the contract, it might have been completed within the year; but that it was for the jury to say whether the special counts were proved or not. That, with regard to the demand for board, the jury would say whether there was anything due to the plaintiff after the 14th November. The jury found for the plaintiff, with 60*l.* damages for the wages for the remainder of the year, and 3*l.* for the board of the servants after the 14th November. In Trinity Term, 1833, *Law* obtained a rule to shew cause why the verdict should not be set aside, and a verdict for the defendant or a nonsuit be entered, or for a new trial, upon the ground (amongst others) that the agreement was void by the Statute of Frauds, and that there was no evidence to support the 3rd count.

Bompas, Serjt., and *Platt* shewed cause:

First, With regard to the claim for damages for the plaintiff's not being continued in the service of the defendant for the whole [*24] year, there was sufficient evidence to support the special *counts, and the finding of the jury was correct. There was nothing to shew that the contract as to the hiring was entered into on the 20th July. The parties met, and proposals were made, and the plaintiff took away with him the memorandum written by

(1) 19 R. R. 442 (1 B. & Ald. 722).

the defendant; but the contract was not assented to by the plaintiff, nor completed until the 24th July, when he expressed his assent to it, by entering into the defendant's service. That contract was upon the terms of the memorandum which were incorporated in it, in the same manner as where a tenant enters upon premises under a lease void by the Statute of Frauds; in which case it has been held that he becomes tenant from year to year, under the terms specified in the void lease (1). The contract of hiring was an implied contract, arising out of the circumstances of the plaintiff coming into the defendant's service on the 24th July, subject to the terms of the memorandum of the 20th, so far as these terms were applicable to the circumstances of the case. That the contract between the parties was not that contained in the memorandum appears from this circumstance, that the plaintiff boarded three, and not two of the defendant's servants, as specified in the writing. The plaintiff was retained as a bailiff in husbandry; and, with regard to such servants, the presumption of law is, that a general hiring is a hiring for a year (2). Such has been the invariable construction of similar contracts in settlement cases (3); and it is not competent to the master in those cases to terminate the service by a month's notice, as may be done in the case of domestic servants (4). It is *clear, therefore, that there was a contract [*25] for a year; and if, supposing the contract to have been made on the 20th July, it was void by the Statute of Frauds, a fresh implied contract arises on the 24th, when the plaintiff entered into the defendant's service.

(ALDERSON, B.: Will the law presume such a contract as that set forth in the special counts of the declaration?)

The law will presume a contract for a year's service, on the terms of the defendant's memorandum or proposal. With regard

(1) *Doe* v. *Bell*, 2 R. R. 642 (5 T. R. 471).

(2) See *Earl of Mansfield* v. *Scott*, 1 Cl. & Fin. 319.

(3) *Rex* v. *Wincaunton*, Burr. 299; 2 Bott, 195; 1 Nol. P. L. 367; 4 Burn, 352.

(4) "In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice; as a month's warning or a month's wages. There does not appear to be any such practice with regard to servants in husbandry." Per GASELEE, J. *Beeston* v. *Collyer*, 29 R. R. 580 (4 Bing. 313; 2 C. & P. 607.)

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to the second point, there certainly is no count for boarding the defendant's servants; but it is impossible that the plaintiff can have boarded them, without purchasing the necessary articles, and he may, therefore, recover under that part of the third count, where a claim is made for money paid, and for goods sold and delivered.

Law and *Chilton*, *contrà*, were stopped by the COURT.

LORD LYNDHURST, C. B.:

The first point arises upon the special counts, under which the plaintiff seeks to recover damages against the defendant, upon a contract to continue him in his service for a year. Then the question is, at what time that contract was made; for if it was made on the 20th of July, and was for a year's service, to commence on the 24th, it was a contract not to be performed within the year, upon which, by the 4th section of the Statute of Frauds, no action could be maintained, being "an agreement not to be performed within the space of one year from the making thereof": *Bracegirdle* v. *Heald* (1). The plaintiff apparently assents to the proposals made on the 20th, takes the writing with him, and enters into the service of the defendant on the 24th. Then, if there was a contract in fact upon the 20th, although, [*26] *by the Statute of Frauds, no action can be brought upon it, how can another contract be implied? (2) It is not like the case of a demand for services rendered; it is a claim for damages against the defendant for not continuing the plaintiff for the year, and a contract of hiring for a year must be proved. Upon this part of the case, therefore, the defendant is entitled to have the rule for a nonsuit made absolute.

The rest of the COURT concurring, the rule was made absolute, the defendant undertaking to pay the 3*l*. to the plaintiff for the board of the servants, and the plaintiff undertaking not to bring a fresh action (3).

(1) 19 R. R. 442 (1 B. & Ald. 722).

(2) See *Cook* v. *Jennings*, 4 R. R. 468 (7 T. R. 381); *Grimman* v. *Legge*, 32 R. R. 398 (8 B. & C. 324).

(3) See *Gandell* v. *Pontigny*, 4 Camp. 375; 1 Stark. 198; recognized in *Collins* v. *Price*, 30 R. R. 542 (5 Bing. 132; 2 Moore & P. 233), which, it should seem from the present case, cannot be supported.

WOODWARD *v.* COTTON.

1834.

Exch. of Pleas.

[44]

(1 Cr. M. & R. 44—48; S. C. 4 Tyrwh. 689; 3 L. J. (N. S.) Ex. 300; S. C. at Nisi Prius, 6 Car. & P. 491.)

A local Act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees under the Act, under a penalty of 50*l.*: Held, that a surveyor, who, after a sewer had been commenced, directed it to be continued (without the consent of the trustees), had incurred the penalty.

A local Act, with a clause declaring it to be a public Act, and that it shall be taken notice of as such without being specifically pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the King's printer.

DEBT upon the statute 5 Geo. IV. c. 125, s. 97. The first count of the declaration stated, that the defendant, on &c., at &c., did narrow a certain ditch, situate and being in &c., and not under or within the limits of the jurisdiction of any commissioners of sewers, without the consent or approbation of the trustees mentioned in a certain Act of Parliament, made in the 5th year of the reign of his late Majesty King George the Fourth, intituled "An Act to repeal several Acts for the relief and employment of the poor of the parish of St. Mary, Islington, in the county of Middlesex; for lighting and watching, and preventing nuisances and annoyances therein; for amending the road from Highgate through Maiden Lane, and several other roads in the said parish; and for providing a chapel of ease, and an additional burial ground for the same, and to make more effectual provisions in lieu thereof;" in writing first had and obtained, according to the form of the statute in such case made and provided, whereby, and by force of the statute, the said defendant for the said offence forfeited the sum of 50*l.*, and thereby, and by force of the said statute, an action hath accrued, &c.

The declaration contained twenty-six other counts, varying the description of the ditch or watercourse, and of the mode in which the offence had been committed. In one set of counts it was alleged to have been committed "contrary *to the terms and [*45] stipulations, and in other manner than had been expressed in a certain consent or approbation in writing had and obtained by the defendant from the trustees mentioned in the said Act of Parliament, in this, to wit, that the said consent and approbation,

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so given and granted by the said trustees, expressed that the said last-mentioned ditch, to be arched over by the said defendant as aforesaid, was not to be less than thirteen feet superficial." The defendant pleaded *nil debet*.

At the Middlesex sittings after Michaelmas Term, 1833, the case was tried before Lord Lyndhurst, C. B.; and the facts proved, so far as material to the questions afterwards raised, were as follows: The defendant was a surveyor, who was employed in that capacity by certain persons who had erected several dwelling-houses within the limits of the local Act referred to in the pleadings. After the buildings had been erected, it became necessary to make a sewer, and, there being an open ditch in front of the ground, the defendant applied to the trustees under the local Act for permission to make such sewer along the line of the ditch. To this application an answer was received from the clerk to the trustees, granting permission to make such sewer, but requiring that it should be of thirteen feet capacity. The builders of the houses being dissatisfied with this restriction, the sewer was built of smaller dimensions than thirteen feet. It appeared, that, when the sewer was partly proceeded with, the defendant came to the premises, and gave directions with regard to the work, saying, "You must build it according to that which is done." On the production of the local Act, no evidence was given of the copy having been compared with the Parliament roll, or of its having been printed by the King's printer; but it contained the usual clause that it should be deemed and taken to be a public Act, and should be taken notice of as such by all Judges, &c. without being specially pleaded (1). The clause in it, [*46] imposing the penalty for which *the defendant was sued, was as follows: "That it shall and may be lawful for the said trustees from time to time, as they shall see occasion, to widen, deepen, embank, alter, arch over, cleanse and scour all and every and any of the water-courses, &c." And the section concluded with this proviso, "Provided always, that no ditch, drain, or other watercourse shall be narrowed, filled up, altered, covered in, or

(1) A similar clause was enacted generally in 1850, by 13 & 14 Vict. c. 21, s. 7, now embodied in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.—R. C.

arched over, by any person or persons whatever, without the consent and approbation of the trustees in writing first had and obtained, nor in any other manner than is or shall be expressed in such consent; and in case any person shall so narrow, fill up, alter, cover in, or arch over any such drain or watercourse whatever, within such part of the said parish, contrary to the intention hereof, he, she, or they shall for every such offence forfeit and pay the sum of 50*l.*" It was contended, for the defendant, first, that the Act of Parliament, being a private Act, had not been properly proved; and, secondly, that the defendant was not a person within the meaning of the 97th section, who had narrowed, &c. The jury found a verdict for the plaintiff on the 20th count (for arching over a certain drain contrary to the consent of the trustees). They also found that the defendant had acted as surveyor. Leave having been given by the CHIEF BARON to move to enter a nonsuit, a rule was obtained by *Steer* for that purpose, upon the ground of the objections taken at the trial.

Holt now shewed cause:

The first objection is disposed of by the case of *Beaumont* v. *Mountain* (1), lately decided by the Court of Common Pleas, in which *Brett* v. *Beales* (2), relied upon for the defendant at the trial, was cited.

(The COURT relieved him from arguing the second point.)

Steer, contrà:

The case of *Brett* v. *Beales* was understood *to confirm the doctrine that the clause usually added at the conclusion of private Acts did not dispense with the necessity of shewing that they were printed by the King's printer. [*47]

(ALDERSON, B.: I think Lord TENTERDEN only meant to say, in *Brett* v. *Beales*, that the clause was one respecting the mode of proving the Act; and that for other purposes, as, for instance, the recital of matters in it, it did not give it the effect of a public Act.)

(1) 38 R. R. 484 (10 Bing. 404).

(2) 34 R. R. 499 (Moo. & Mal. 416; 10 B. & C. 508).

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With regard to the second objection, the defendant was not such a person as is contemplated by the Act. That, being a penal statute, must be construed strictly: Dwarris on Statutes (1); and the penalty imposed by it must, according to the language of Mr. Justice BAYLEY, in *Denn* d. *Manifold* v. *Diamond* (2), be imposed in clear and unambiguous words. The words of the statute here (which imposes a penalty of 50*l.*) are, "That if any person shall narrow," &c. Now the defendant never did narrow the drain; he never laid a brick, or took any one step. He was not even the servant of those for whom the work was done. The jury found that he was the surveyor only. But it is said that he directed the workmen. The sewer was, in fact, begun before he took any part; and the mere direction to proceed will not render him liable to the penalty. The Act does not impose the penalty upon those who direct the work, but upon those who do it. The defendant was neither the person who did it, nor the person for whose benefit it was done. He does not come, therefore, within the operation of the statute.

LORD LYNDHURST, C. B.:

The case of *Brett* v. *Beales* has been much misconceived. It is certainly not well reported; but I think, that, upon the whole scope of it, Lord TENTERDEN meant to rule the same law that is decided in *Beaumont* v. *Mountain*. The history of the law, with regard *to the proof of private Acts of Parliament, is this: Originally, they were required to be proved by a copy examined with the Parliament roll. To avoid this inconvenience, a clause was usually inserted, declaring that a copy printed by the King's printer should be evidence. It was then objected, that, in such cases, it was necessary to prove that the Act produced was in fact printed by the King's printer; and, to meet this objection, the present form of clause was adopted.

[*48]

With regard to the other point, it is clear that the defendant is liable. He is charged with arching over a certain drain contrary to the consent of the trustees. He was the person, emphatically, who caused this to be done by the directions which

(1) P. 376.

(2) 28 R. R. 237 (4 B. & C. 243; 6 Dowl. & Ry. 328).

he gave. It is not necessary that he should have done any part of the work himself in order to render him liable. Where one man directs another to commit a misdemeanor, and the other does so accordingly, the two are equally guilty.

The rest of the COURT concurred.

Rule discharged.

COLBURN *v.* PATMORE (1).

1834.

Exch. of Pleas.

[73]

(1 Cr. M. & R. 73—85; S. C. 4 Tyrwh. 677; 3 L. J. (N. S.) Ex. 317.)

The declaration stated that the defendant had been employed by the plaintiff to edit the "Court Journal" for reward, and that he did not perform the duties of editing the same in a proper manner, but, without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously, and negligently inserted and published in the same a false and malicious libel," &c. That, afterwards, an information was exhibited against the plaintiff "for the falsely and maliciously printing and publishing" of the said libel, and such proceedings were thereupon had that the plaintiff was convicted of that offence, and fined 100*l*. After verdict for the plaintiff the judgment was arrested, on the ground that the injury sustained was not connected with the breach of duty averred, it not appearing that the printing and publishing of which the plaintiff was convicted was the same act as that with which the defendant was charged, viz. the inserting and publishing.

Semble, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction.

CASE. The declaration stated that the defendant, before and at the time of the committing of the grievances by the defendant, had been and was retained and employed by the plaintiff to take upon himself the various duties of editing a certain publication, to wit, a publication called the "Court Journal or Gazette of the Fashionable World," then the entire property of the plaintiff, and whereof the plaintiff was then and there the proprietor, and to devote all his time and attention to the same, save and except the hours he had already engaged to devote to the superintendence of the "County Press," and which hours were not

(1) See now the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7. And, as to the effect under that section of a general authority given to an editor, see *R.* v. *Holbrook* (1878) 4 Q. B. D. 42, 48 L. J. Q. B. 113.—R. C.

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to be increased beyond those then required on the Saturday and Monday in each week, so that they should not interfere with the time and attention necessary to be given to the "Court Journal;" and to undertake the literary management of the said "Court Journal," and to prepare for the press all articles and matters belonging thereto to the best of his ability, and to the satisfaction of the plaintiff; to write on the average one original article weekly, also the reviews, and articles of fashion, music, literature, the drama, the fine arts, digest of political events; to select from other journals all that might be found suitable to the pages of the "Court Journal;" and generally to contribute to the utmost of his power to the interest and success of the said journal, for reward to the defendant in that behalf. And it was stipulated that political controversy and party politics [*74] should form no part of *the said journal without the consent of the plaintiff; and that the most perfect impartiality should be adopted in the literary and critical departments; and the defendant had then and there accepted such retainer and employment; and under and by virtue thereof, at the time of the committing of the grievances hereinafter next mentioned, had taken upon himself the various duties aforesaid, and then and there was the editor of the said publication called the "Court Journal;" yet the defendant, disregarding his duty in that behalf, and contriving and wilfully intending to injure and aggrieve the plaintiff, did not perform and discharge the various duties of editing the said publication called the "Court Journal" in a due and proper manner; but on the contrary thereof, to wit, on &c., in &c., without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently (1) inserted and published, and caused to be inserted and published, in the said publication called the "Court Journal," the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning &c. &c.—[the declaration then set out a gross libel on a peeress]—contrary to his duty as such editor as aforesaid, and to the duties which he had been retained to perform as aforesaid, and in breach and violation thereof. And

(1) The declaration had been amended by the insertion of the word "negligently."

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the plaintiff further says, that an information was afterwards, to wit, in Easter Term, in the second year of the reign of our said lord the King, filed in the Court of our said lord the King, before the King himself, by Edmund Henry Lushington, Esq., coroner and attorney of our said lord the King, in the Court of our said lord the King, before the King himself, who prosecuted for our said lord the King in that behalf against the plaintiff and one Thomas Hargette, one Thomas Saville, and one Mr. Thomas, for the falsely and maliciously printing and publishing *of the [*75] said libel; and that such proceedings were thereupon had in the same Court that it was then and there considered and adjudged by the said Court that the plaintiff should be convicted of the said offence, and that he should pay a fine to our lord the King of 100*l.* for that offence; and that he should be committed to the custody of the marshal of the Marshalsea of the said Court of our said lord the King, before the King himself, until he should have paid the said fine; by means and in consequence whereof the plaintiff was then and there forced and obliged to pay and did then and there pay the said fine; and also, by means and in consequence of the premises, the plaintiff was forced and obliged to pay and became liable to pay certain costs and expenses to a large amount, to wit, to the amount of 100*l.* in and about his defence in the said prosecution, and in and about the endeavouring to mitigate the sentence of the said Court upon him for the said offence. [And the plaintiff says, that he was so prosecuted as aforesaid by reason and in consequence of the committing of the said grievances by the defendant as aforesaid]; and that by reason and in consequence of the premises, the plaintiff has been otherwise greatly injured and damaged, to wit, &c. There was a second count similar in substance to the first, but not containing the averment marked with brackets. The defendant pleaded the general issue. At the trial before Lord Lyndhurst, C. B., at the sittings after last Hilary Term, the facts of the plaintiff's case were proved as stated in the declaration. It appeared that the plaintiff had pleaded guilty to the information. The jury found a verdict for the plaintiff, with 193*l.* damages. In Easter Term, *Maule* obtained a rule to shew cause why the judgment should not be arrested,

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or why the verdict for the plaintiff should not be set aside, and a new trial had.

Follett and *Cowling* shewed cause:

[*76] The only point to be *argued is this: Whether the proprietor of a newspaper, who, in consequence of a libel inserted in the paper by his editor, has been subjected to a criminal information, convicted, and fined, is entitled to recover against the editor the expenses which he has incurred by his misfeazance. The plaintiff is, in fact, a perfectly innocent person. The declaration states, that the defendant, "without the knowledge, leave, authority, or consent of the plaintiff," caused the libel to be inserted; and it was never contended that the plaintiff was in any degree cognizant of or consenting to that act. He was perfectly ignorant of the whole transaction. Had it been otherwise, had he been in any degree consenting to the publication, he could not, of course, have maintained this action.

(ALDERSON, B.: Is it not more correct to say that the plaintiff was actually ignorant but legally cognizant?)

The principle upon which a publisher is held to be criminally responsible for a libel published by his servant, is not grounded upon a presumption of his knowledge and consent to the publication; for if so, this presumption, like all others, would be liable to be rebutted by evidence that he had no knowledge, and that he never consented. But it has been repeatedly held that the fact of the party's entire ignorance is no answer to a criminal proceeding. Persons residing at a distance, who could not possibly have been cognizant of the publication, have, notwithstanding that fact appeared upon the trial, been convicted of publishing libels. The principle upon which this part of the criminal law, which is certainly anomalous, rests, appears to be this, that, upon grounds of public policy, the law will hold the master to be criminally answerable for the acts of his servants, in order that he may exercise the greatest prudence in the selection of those whom he employs.

(ALDERSON, B.: My difficulty is this. If the law presumes the proprietor cognizant of the acts of his servants, and holds him criminally liable, must not that liability be taken with all its usual consequences?)

[*77]

There *cannot be a conclusion of law founded upon that which is contrary to the facts of the case; and therefore the doctrine in question must rest upon another principle, viz. that the party is bound to take care that nothing libellous is inserted in his publications, and that the neglect of that duty is for reasons of public policy criminally punishable. The plaintiff, then, being actually innocent, though compelled by the act of his servant to pay the penalty of an offence, seeks to recover the damages which by that act he has sustained. The defendant is charged in the declaration with having "negligently" caused the insertion of the libel. Now, it is a clear principle of law, that where damage is occasioned to one man by the negligent act of another, an action on the case may be maintained (1). In the present case, it is clear that the plaintiff has suffered damage by the negligent act of his servant; and there is this peculiarity, that he has also been rendered by that neglect criminally responsible. What distinction is there between the present case and those in which the master has been held liable in a civil action for the negligence of his servant? Suppose, in this case, that the plaintiff, instead of being proceeded against by a criminal information, had been sued for the libel in a civil action, would not his servant be liable?

(LORD LYNDHURST, C. B.: There is this distinction between the case of libel and that of other acts committed by servants, that, whether the libel be published negligently or wilfully, the master is responsible, but in other cases he is answerable only where the act is negligent.

ALDERSON, B.: A master is presumed to authorise the insertion of a libel; in other cases the master is not presumed to authorise the wilful act of his servant in committing a tort. Does not the proprietor of a newspaper give authority to the

(1) Com. Dig. Action on the Case.

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editor to publish every thing, libellous or not? Does not such a general authority cover *the publication of a libel?)

It is a sufficient hardship upon the proprietors of newspapers, that they should be held responsible criminally for acts of which they were totally ignorant; but it would be adding injustice to hardship if they were prevented from recovering from the party really offending the damages which they have sustained by his negligence. It will be contended on the other side, that the plaintiff and the defendant are joint tort-feazors, and that no action can be maintained in consequence. But this is not the case of a wrong jointly committed by the two. It appears, and is admitted on the face of the record, that the act in question was done without the knowledge and consent of the plaintiff. But it will be said, that, though the fact may be so, the law regards them both as guilty. For the purpose of criminal animadversion it certainly does so, and with regard to the party libelled, but not *inter se*. The common case of a servant made answerable to his master for his negligence proves this. In law, both the master and servant are guilty of the negligence; and in law a party who has been guilty of negligence himself cannot recover for the damage he has suffered in consequence; and yet, in numerous instances, the master has been allowed to recover against his servant under such circumstances. That the fact of the parties being joint tort-feazors as against a third person will not prevent one of them from recovering against the other, appears from the case of *Adamson* v. *Jarvis* (1). BEST, Ch. J., there states: "From the inclination of the Court in this last case (2), and from the concluding part of Lord KENYON'S judgment in *Merryweather* v. *Nixan* (3), and from reason, justice, and sound policy, the rule, that wrong-doers cannot have contribution [*79] *or redress against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act;" and he adds the following

(1) 29 R. R. 503 (4 Bing. 66; 12 Moore, 241).

(2) *Phillips* v. *Biggs*, Hardr. 164.

(3) 16 R. R. 810 (8 T. R. 186). Lord KENYON said, that "this decision would not affect cases of indemnity, where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right."

illustration: "If a man buys the goods of another from a person who had no right to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him." In the following case, also, a remedy was afforded to one who was in law a joint tort-feazor. "A sea captain, in the African Company's service, seized a ship trading on the coast of Guinea. She was condemned as prize, and her cargo accounted for to the company. Nineteen years afterwards, a freighter brought trover against the executor of the captain, and recovered 2,500*l.* damages. The executor brought a bill against the freighter and the company, but was dismissed as to the freighter, because the executor might have defended himself at law; but the company was decreed to indemnify the executor, and the freighter to prosecute the decree in the executor's name. And though the captain had received 700*l.* for his service from the company, yet the executor was not to refund or abate, that being only a gratuity to him, he acting only as their servant or agent; and the *quantum* of the damage must be the same as was recovered against the executor at law, because they might have defended the trial." *Langdon*, executor of *Dickenson*, v. *The African Company* (1). The same principle was recognised in *Humphrys* v. *Pratt* (2). There a creditor delivered a *fi. fa.* to a sheriff to be executed against the goods and chattels of his debtor, and pointed out some cattle on the lands of the debtor as being the property of the latter, when, in fact, they were not so. Upon this representation the sheriff took them in execution. *The real owner [*80] sued the sheriff and recovered; and it was held by the House of Lords, that the sheriff was entitled to recover against the creditor the damages and costs incurred by his misrepresentation. Yet there, as against the owner of the cattle, the sheriff and the creditor were joint tort-feazors. Suppose that, in the agreement recited in the declaration, the defendant had expressly promised to make good to the plaintiff all damages which he might sustain by reason of the insertion of any libel by the defendant in the "Court Journal;" could it be said that such

(1) 15 Vin. Ab. 316.

(2) 35 R. R. 41 (5 Bligh (N. S.) 154; 2 Dow & Clark, 288).

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an agreement was illegal, and could not be carried into effect? A bond given by a surety to indemnify a master against the embezzlement of his clerk, and a bond given to indemnify the sheriff against the illegal acts of his bailiff, are valid instruments.

(GURNEY, B.: Is there any instance of an action having been brought for compensation for having been convicted of an offence?)

No: but this is an anomalous case; for though, by the policy of the law, the plaintiff is convicted of the offence, yet, in point of fact, the defendant is the real offender, and that fact appears upon the record. The plaintiff in this case does not seek contribution but indemnity. This distinguishes the case from *Merryweather* v. *Nixan*, which was an action for contribution, the plaintiff admitting that he was equally guilty of the tort with the defendant; and Lord KENYON there adverts to the distinction between indemnity and contribution. There is nothing to take this case out of the general principle, that where a party has suffered a loss or damage from the negligent act of another, he is entitled to be indemnified against it; and it makes no difference whether the damage has been occasioned by writ or by criminal proceedings.

Maule, for the defendant:

No such action as the present can be maintained. It is an [*81] action brought by a person *who has been convicted of a crime to exonerate himself from the consequences of that conviction. It has been assumed on the other side, that, upon the face of this record, it appears that the plaintiff was in point of fact neither cognizant of, nor consenting to the commission of the offence of which he has been convicted. But upon examining the declaration, it will appear that there is no averment of his not having committed the offence himself. It states, that the defendant, without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently inserted the libel in question in the "Court Journal," and that an information was afterwards filed against the plaintiff, "for the falsely

and maliciously printing and publishing of the said libel," and that such proceedings were thereupon had that the plaintiff was convicted "of the said offence." Now, what is the offence as thus stated? That of "falsely and maliciously printing and publishing the said libel." But what is there to connect this printing and publishing, of which the plaintiff was convicted, with the inserting and publishing the same libel in the "Court Journal," with which the defendant is charged? The two acts upon the face of this record stand perfectly distinct. The defendant inserts and publishes a libel; the plaintiff prints and publishes the same libel. It is not averred that this is one act. Had it been proved, that, after the inserting and publishing of the libel in the "Court Journal" by the defendant, the plaintiff had re-printed and re-published it in another publication, the evidence would have supported the declaration. The averment of the plaintiff's innocence, therefore, does not extend to the act of which he was convicted, but merely to the act of which the defendant was guilty.

(LORD LYNDHURST, C. B.: Is there any averment that the plaintiff was ignorant of the libel?)

None.

(ALDERSON, B.: You say there is nothing to connect the act of the defendant *with the offence of which the plaintiff was convicted; but at the end of the count there is an averment, that "the plaintiff was so prosecuted as aforesaid, by reason and in consequence of the committing of the grievances by the said defendant as aforesaid.") [*82]

This averment does not carry it any farther; it may have been by reason and in consequence of the defendant's inserting the libel, that the plaintiff, approving of it, afterwards published it himself; but this is immaterial, for, in the second count, there is no such averment.

The main question is, whether a person, convicted of a criminal offence, can claim an indemnity from another who has participated with him in the commission of that offence. The

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difficulty in the present case arises from supposing that the publication of a libel in a newspaper differs from the case of other offences. The law has pronounced it to be a criminal act, and, being so, it must be followed by all the usual consequences of a crime.

(LORD LYNDHURST, C. B.: Suppose that Colburn, instead of having an information filed against him, had been sued in an action for damages.)

The correct principle is this, that in all cases where the act done is a public wrong, a party connected with the commission of that act cannot claim either indemnity or compensation. The right to recover does not depend upon the form of proceeding, but upon the circumstance whether the offence is against the public or against an individual. When the law has once declared that a particular act, however innocent it may be in itself, shall be a crime, such act, if committed, must necessarily be followed by all the consequences of a crime. The law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge. If so, in contemplation of law he stands in the situation of a criminal; and he cannot aver in
[*83] *a court of justice, that he is in fact innocent of the offence, and entitled to the remedies which an innocent man may claim.

LORD LYNDHURST, C. B.:

It appears upon this record that the first act was done by the defendant Patmore, who inserted and published in the "Court Journal" the libel in question. This, according to the statement in the declaration, was followed up by the plaintiff, Colburn, printing and publishing what was so inserted by Patmore. It may have been that the latter was a totally separate act from the former, and this view is quite consistent with the record. But it is said, that there is an averment that the defendant inserted and published the libel without the knowledge or consent of the plaintiff. That averment may be very true, and yet, after the insertion, Colburn may have been so well pleased with the libel as to have published it again.

The question upon the merits, which we are not called upon to decide in this case, is one of very great importance. I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.

BOLLAND, B.:

I am of the same opinion. At the commencement of the argument I took a different view of the general question from that entertained by the rest of the Court, and I did not adopt the principle upon which their opinion on that point is founded without considerable *doubt. It is not, however, necessary to [*84] decide the question in the present case.

ALDERSON, B.:

The plaintiff, in his declaration, alleges a duty on the part of the defendant, and alleges a breach of that duty in not performing and discharging the duties of editor of the "Court Journal" in a due and proper manner. He should then have proceeded to shew that the injury sustained by him was a consequence of the breach of duty alleged. This he has not done; for the injury sustained appears to have been the consequence of his own wilful act in printing and publishing the libel before inserted by the defendant in the "Court Journal." Upon the general question, I coincide in the view of it taken by the LORD CHIEF BARON.

GURNEY, B.:

It is quite clear, on the first point, that the plaintiff is not entitled to judgment upon this record; and, with regard to the other question, I certainly entertain a strong opinion.

Rule absolute (1).

(1) In *Poplett* v. *Stockdale*, Ryan & Moody, N. P. 337, which was an action by a printer against the publisher of a libellous work ("Memoirs of Harriette Wilson,") to recover for the printing, BEST, Ch. J., says, "It

1834.

Exch. of Pleas.

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SHEPHERD AND OTHERS *v.* KEATLEY (1).

(1 Cr. M. & R. 117—128; S. C. 4 Tyrwh. 571; 3 L. J. (N. S.) Ex. 288.)

On a sale by auction of leasehold property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title." The purchaser having *aliunde* discovered certain defects in the lessor's title: Held, that notwithstanding the above condition, he was entitled to insist upon those defects; and that the proper meaning of the condition was, that the vendor should not be obliged to give evidence of the lessor's title.

THIS was an action brought by the plaintiffs, as assignees, against the defendant, for the breach of a contract entered into

would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law," and the plaintiff was non-suited. Where the subject-matter in respect of which the plaintiff seeks to recover is tainted with illegality, it seems to be immaterial that the plaintiff was acting *bonâ fide*, and without any intention of transgressing the law. Thus, in an action to recover the value of corn sold by the hobbett, (forbidden by 22 Car. II. c. 8,) it was held, that the plaintiff could not recover, although, as it was observed by the Lord Chief Baron ALEXANDER, there was no doubt that the parties dealt *bonâ fide* with each other in making the contract, without any notion of taking advantage of the law at that time: *Tyson* v. *Thomas*, M'Clel. & Y. 119. So, in an action for coals sold and delivered, it appearing that the coal-meter had not signed the ticket pursuant to the statute 47 Geo. III. c. 68, the vendor cannot recover. For the purposes of the Act, Mr. Justice BAYLEY observes, the vendor and the meter are to be considered as the same person: *Little* v. *Pool*, 32 R. R. 630 (9 B. & C. 192).

[*85] Again, *where the subject-matter in respect of which the plaintiff sues is tainted with illegality, he can found no claim upon it, although, as regards the person sued, he stands in a situation wholly free from fraud or blame. "It seems," says an eminent Scotch writer, "to be contrary to principle to hold, that, where the doing of an act is declared to subject the party to a penalty, the exaction of the penalty is the only consequence which follows from the performance of the act." "It may be true, that a penal statute is to be strictly construed; but it does not follow from this that the party who has done the act is entitled to demand the aid of a court of justice to enforce the performance of a contract founded upon that unlawful act:" Brown on Sales, 145. In *Farmer* v. *Russell*, 1 Bos. & P. 296, 301, Mr. Justice ROOKE says, "I think that a man who has been guilty of an indictable offence ought not to have the assistance of the law to recover the profit of his crime; and that, whether his agents be innocent or criminal, privy or not privy, his claim against those agents is equally inadmissible in a court of law."

(1) Cited and followed by Sir W. PAGE-WOOD, V.-C., in *Darlington* v. *Hamilton* (1854) Kay, 550, 556. Compare *In re National Provincial Bank of England and Marsh*, '95, 1 Ch. 190, 64 L. J. Ch. 255; and *In re Scott and Alvarez's Contract*, '95, 1 Ch. 596, 64 L. J. Ch. 376.—R. C.

between the plaintiffs, as assignees, and the defendant, for the purchase by him, the defendant, of a certain leasehold estate. The declaration contained three special counts on the contract, and an *indebitatus* count for a leasehold estate bargained and sold, and for monies, and on an account stated. The defendant pleaded *non assumpsit;* and issue having been joined thereon, by the consent of the attornies for the plaintiffs and for the defendant, and, by the order of Mr. Baron PARKE, the following case was stated for the opinion of the COURT, according to the form of the statute (1):

Case. "By indenture, bearing date the 21st day of March, 1816, and made between John Crosse Crooke, therein described, of the first part; John Ellison, therein described, of the second part; Henry Bates, therein described, and Sarah his wife, and John Henry Bates, son and heir-apparent of the said Henry Bates, by the said Sarah his wife, of the third part; and John Plummer, therein described, of the fourth part; after reciting that the said John Crosse Crooke, John Ellison, Henry Bates, and Sarah his wife, and John Henry Bates, were seised of and entitled to the messuage or tenements and other hereditaments and premises thereinafter particularly mentioned and described, and agreed to be demised in the shares or proportions following; that is to say, the said *John Crosse Crooke to two equal [*118] undivided fourth parts or shares thereof, the whole into four equal parts or shares to be considered as divided; the said John Ellison to one other like equal undivided fourth part or share thereof; and the said Henry Bates and Sarah his wife, and the said John Henry Bates, to the remaining like one equal undivided fourth part or share thereof; and that they had agreed, for the consideration thereinafter mentioned, and especially in consideration of the said John Plummer having undertaken to lay out the sum of £—— in erecting one or more substantial building or buildings of brick or stone on the said demised premises, in addition to or improvement of the buildings already standing thereon, each of them to demise to him the said John Plummer their several and respective parts or shares of and in the said messuage or tenement, hereditaments, and premises, subject as

(1) 3 & 4 Will. IV. c. 42, s. 25. [Rep. as to Sup. Ct., 44 & 45 Vict. c. 59 s. 3.]

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in the said indenture thereinafter contained; it was witnessed, that, in pursuance of a license for that purpose, granted from the lord of the manor of Vauxhall, in the county of Surrey, and in consideration of the said sum of £—— so to be laid out by the said John Plummer in manner before mentioned, and of the rents and covenants thereinafter contained, they the said John Crosse Crooke, John Ellison, and Henry Bates, and Sarah his wife, and John Henry Bates, did each and every of them, according to the part, share, and interest, he, she, or they respectively had or might possess in the premises, demise, lease, set, and to farm let unto the said John Plummer, his executors or administrators, the said tenements and premises therein mentioned and particularly described, except as therein is excepted: To hold the same unto the said John Plummer, his executors and administrators, from the feast day of St. Michael the Archangel then last, for the term of fifty years from thence next ensuing, at the yearly rent of 50*l.*, in the proportions following, that is to say, to the said John Crosse Crooke, his heirs, and assigns, or to such person or [*119] persons as for the time *being might be entitled to the reversion and inheritance of his said two undivided fourth parts or shares, the sum of 25*l.*, as his proportionate share of the said yearly rent; unto the said John Ellison, his heirs and assigns, 12*l.* 10*s.*, as his proportionate share of the said yearly rent; and unto the said Henry Bates for his life, and, after his decease, unto the said Sarah his wife for her life, and, after the decease of the survivor of them, unto the said John Henry Bates, his heirs and assigns, the sum of 12*l.* 10*s.*, as his, her, and their proportionate share of the said yearly rent of 50*l.*; payable quarterly, on the 25th December and the 25th March, the 24th June and the 29th September in every year, without any deduction on account of the land tax, or any other taxes, rates, &c., property tax only excepted. The said indenture, amongst other covenants and provisoes therein mentioned, contained a proviso, that he the said John Plummer, his executors, administrators, and assigns, should be at liberty to underlet the premises, or any part thereof, or to assign the term thereby granted of the same to any person or persons who should become party or parties to an indenture or indentures, and thereby enter into the said

covenants and agreements with the said John Crosse Crooke, John Ellison, Henry Bates, and Sarah his wife, and John Henry Bates, their respective heirs and assigns, as were contained in the said indenture. [The case then stated that Plummer and Wilson became bankrupts; the conveyance by deed of the 30th December, 1830, from the commissioners to the provisional assignee; the appointment of the plaintiffs as assignees, and the assignment to them. The case then proceeded as follows:] The said John Crosse Crooke, after the making of the first-mentioned indenture, and about the year 18—, died, since which time the said two undivided fourth parts or shares of the rent aforesaid, which had been reserved payable to the said John Crosse Crooke, have been paid to and accepted by Elizabeth *Crooke, his widow, [*120] (who has survived him, and is still living), but constantly under protest. The said Henry Bates, after the making of the first-mentioned indenture, and about the year 18—, died, since which time the said undivided fourth part or share of the said rent aforesaid, which had been reserved payable to the said Henry Bates, has been paid to Sarah Bates, his widow, who has survived him, and is still living. The plaintiffs, on the 11th day of May, 1831, put up and exposed for sale by public auction, (amongst other property), the said premises, by the said indenture of the 21st March, 1816, demised as aforesaid, for the residue of the said term of fifty years then to come and unexpired, subject to (amongst others) the following conditions of sale: 'The purchaser to pay down immediately a deposit of 20*l.* per cent. in part of the purchase money, and sign agreements for payment of the remainder on or before the 24th June, 1831; but should the completion of the purchases be delayed from any cause whatever beyond the period, the purchasers to pay interest at 5*l.* per cent. per annum from that time on the balance of the purchase money, and be entitled to the rents and profits of such of the lots as are let from the said 24th day of June. That the vendors should deliver an abstract of the lease, and of the subsequent title under which the leasehold lots are held; but shall not be obliged to produce the lessors' title.' The defendant was the highest bidder for the said premises at the said sale, and was declared to be the purchaser thereof for the sum of 820*l.*, whereupon, in pursuance

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of the said conditions, he paid down the sum of 164*l.*, being a deposit of 20*l.* per cent., in part of the said purchase money, and also signed an agreement for the payment of the remainder and the completion of the said purchase, according to the said conditions of sale. The plaintiffs afterwards delivered an abstract of the lease and of the subsequent title under which the said premises are held, and subsequently tendered to the defendant

[*121] *a certain indenture of assignment, purporting to assign the said premises to the defendant for the residue of the said term of fifty years; but the defendant refused and still refuses to accept the same. On investigating the title of the vendors, the following are the facts relating to the same, and which it is contended on the part of the defendant render the same title insufficient: The demised premises were, at the time of executing the said lease, copyhold of inheritance; and a customary tenement of the manor of Vauxhall, in the county of Surrey, and in which, by custom, any estate or interest in a copyhold tenement, may be demised for a term exceeding one year, provided the previous license of the lord in writing for the granting the lease has been duly obtained; but without such license, by the custom of the said manor, a lease for the term of more than one year is cause and ground of forfeiture of the demised estate to the lord. The said John Crosse Crooke, one of the said lessors, had only an estate for life in the said demised premises, under a settlement made on his marriage with Elizabeth Parry, spinster, and dated the 14th March, 1776, with a power to lease the said premises by indenture of lease under his hand and seal, and subscribed and sealed by him in the presence of two or more credible witnesses, and that the lease in this case was, as to his signature, witnessed only by one single witness, and which power is in the words following: 'Provided also, and it is hereby further declared and agreed, by and between all the said parties to these presents, that it shall and may be lawful to and for the said John Crosse Crooke, at any time or times during his natural life, and also to and for the said Elizabeth Parry, the daughter, in case she shall happen to survive him, at any time or times during her natural life, and also to and for the said Thomas Pritchard and Richard Whishaw, their heirs, executors, administrators, and assigns,

during the respective minorities of the child or children of the said intended marriage, *by indenture or indentures under their hands and seals, respectively subscribed and sealed by him, her, or them in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the freehold, copyhold, or leasehold messuages or tenements, lands, hereditaments, and premises hereinbefore mentioned, and intended to be hereby respectively granted, released, assigned, and covenanted to be surrendered as aforesaid, unto any person or persons who shall be willing to take the same, either upon building or repairing leases, or otherwise, for any term or number of years in possession, reversion or remainder, without taking any fine, premium, sum or sums of money for the same, at the best and most improved yearly rent or rents, payable quarterly or half yearly, that can or may be reasonably had or gotten for the same, so as no such lessee or lessees be made dispunishable of waste by any express words therein, and so as there be contained in every such lease a clause or condition of re-entry for non-payment of the rent or rents thereby to be reserved and made payable, with all usual and reasonable covenants; and so as the lessee and lessees, to whom such lease or leases shall be made, do seal and deliver counterparts of all such leases.' The said John Ellison, another of the said lessors, before obtaining the license to demise hereinafter stated, and before executing the said lease, viz. on the 17th November, 1814, duly surrendered all his estate and interest in his fourth part of the said demised premises, on his marrying Susannah Smith, to trustees, John Henry Bates and George Whittingham, in fee, in trust for himself for life, with remainder over; and the said trustees were, on the 10th November, 1815, duly admitted; and the said John Ellison had no legal estate or interest in the said premises at the time of his executing the said lease. The license obtained from the lord of the manor for the said John Crosse Crooke and John Ellison to demise the said premises, or grant a lease *thereof, was dated the 1st of April, 1815, and only for a term not exceeding forty years from Lady-day then next; but the lease is granted for a term of fifty years from Michaelmas then last (1815), and a copy of which license is as follows: [The case here set out the license.] No license

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whatever was obtained for the said Sarah Bates, and her son, John Henry Bates, in his own right, nor for the said John Henry Bates and George Whittingham, as the trustees of the said John Ellison, to execute the said lease, or otherwise to demise their interest or either of their interests in the said premises for any term whatever. At the time of the said defendant's signing the said agreement of purchase, the said Elizabeth Crooke, the widow of the said lessor, John Crosse Crooke, then dead, was legally entitled to the following estate and interest in the said demised premises, viz. to an estate for life only, under the said settlement of the 14th March, 1776, with power of leasing; and, on the 3rd August, 1831, Mr. Barker, her solicitor, sent to the defendant's solicitors a letter, of which the following is a copy, but no proceedings have yet been taken in consequence thereof:

"GRAY'S INN, Aug. 3, 1831.

"SIR,—Understanding that you are the solicitors for the landlord of the 'Greyhound' public-house at Streatham, who purchased by auction the lease held by Mr. Plummer, I think it proper to inform you, that the validity of that lease is questioned by Mrs. Crooke, the tenant for life of an undivided moiety of the property.

"To Messrs. YOUNG & Co. "I am, &c.
"Blackman Street. "G. BARKER.

"The defendant, therefore, refuses to complete his contract, on the ground that the lease was invalid, and on the ground that no perfect or secure legal title to hold and enjoy the said premises for and during the residue of the said term of fifty years could, under the circumstances, *be assigned to the said defendant. The plaintiffs contend, that the points raised by the defence have relation solely to the title of the lessors not appearing on the abstract of the lease itself; and say that they cannot be entertained under the conditions of sale, which have been stated, and which, as the plaintiffs further contend, bind them only to deliver an abstract of the lease and of the title subsequent thereto, without regard to the title of the lessor; and that it is not open to the defendant, upon his contract, to go into the landlord's title. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action? If the Court

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should be of that opinion, then the defendant agrees that a judgment shall be entered against him by confession immediately after the decision of this case, or otherwise, as the Court may think fit; and, if the Court shall be of opinion that the said plaintiffs are not entitled to recover in this action, then the plaintiffs agree that a judgment shall and may be entered against them of *nolle prosequi* immediately after the decision of this case, or otherwise, as the said Court may think fit; and that judgment shall be entered accordingly."

Maclean, for the plaintiffs:

The plaintiffs, who are assignees of a bankrupt, and who cannot therefore be taken to be cognizant of the vendor's title, have done all they were bound to do by the conditions of sale.

(LORD LYNDHURST, C. B.: The question is, not whether the plaintiffs were bound to produce the lessors' title, but whether the defendant was precluded from taking objections to it.)

The clause in question was intended to protect the vendor from any objection to the lessors' title, and, in substance, it has the same operation as the clause in *Spratt* v. *Jeffery* (1). There the words were, "and the said W. S. doth hereby agree to accept a proper assignment of the *said two leases and premises as above [*125] described, without requiring the lessor's title." There, BAYLEY, J., says, the fair and reasonable construction of those words is, that the purchaser shall not be at liberty to raise any objection to the lessor's title. By the purchase of a bad lease the party may derive the same benefit as if it were good; and, if he cannot, the lessee or his assignee has a remedy over against the grantor of the lease." PARKE, J., says, "For the plaintiff it is contended, that he is, nevertheless, at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained." Unless the clause in question has the same operation as that in *Spratt* v. *Jeffery*, it will not, in fact, be a protecting clause. In purchasing from the assignees of a bankrupt lessee, the purchaser

(1) 34 R. R. 387 (5 Man. & Ry. 188; 10 B. & C. 249).

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must have known that the vendors never intended to warrant the lessor's title. The very insertion of a clause like this in conditions of sale, shews that there are suspicions with regard to the title, of which the vendors do not choose to run the risk. It was long a *vexata quæstio*, whether, where there was no special stipulation on the subject, the vendor was bound to produce the lessor's title; but that question was settled by the decision of RICHARDS, C. B., in *Purvis* v. *Rayer* (1). In that, and in the other equity cases, there is a distinct reference to a clause like the present, which is treated as a protecting clause, exonerating the vendor from the consequences of any defects in the lessor's title (2): *White* v. *Foljambe* (3); *Deverell* v. *Lord* **Bolton* (4). In *Denew* v. *Deverell* (5), which arose out of the case of *Deverell* v. *Lord Bolton*, Lord ELLENBOROUGH treated a clause of this nature as rendering the vendor secure. He says: "A practice has very properly sprung up amongst auctioneers, in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to shew the lessor's title. The plaintiff (the auctioneer) was bound to take notice of the practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been secure, and Lord Bolton must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands, with expensive litigation."

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(ALDERSON, B.: The Court has no doubt upon the question as to the production of the lessor's title. The point is, whether the purchaser may not take advantage of objections discovered by himself.)

The purchaser buys the lease, with all its infirmities, from the assignees of a bankrupt, and that lease, on the face of it, shews a good title. In *Spratt* v. *Jeffery* it was admitted that the lease

(1) 23 R. R. 707 (9 Price, 488).

(2) RICHARDS, C. B., says: "It is said that it is now the usual course to state in the advertisement for the sale of such property, that the title of the lessor will not be warranted. That may be so, and the leases may be purchased on such terms, if purchasers are to be found who will buy them with so much rashness." 23 R. R. 711 (9 Pri. 521, 522).

(3) 11 Ves. 337.

(4) 18 Ves. 505.

(5) 3 Camp. 451.

was bad; and the present case comes within the authority of that decision.

Platt, for the defendant:

The whole question arises upon four lines of the case, and comprises two points, viz. the subject-matter of the sale, and the terms of the contract. The case differs from *Spratt* v. *Jeffery* in both particulars. With regard to the first, the purchaser, in *Spratt* v. *Jeffery*, agreed to purchase "the two leases and good-will in trade of the house," &c. He therefore specifically engaged to purchase those leases, whatever might be their validity. Here, there is no agreement to purchase the lease. The subject-matter of the contract, therefore, is different. Then the words of the protecting clause in *Spratt* v. *Jeffery* are much stronger. [*127] "Without requiring the lessor's title" is an engagement that no question shall be raised as to its validity; but that is very different from the vendor "not being obliged" to produce his lessor's title, which is merely a stipulation to prevent the inconvenience which requiring such a production might create. In the present case, after the sale, a notice was given by one of the parties entitled to take advantage of the defect in the lease; and can it be pretended that the purchaser shall be compelled to take to the title in the face of that objection?

LORD LYNDHURST, C. B.:

The whole case depends upon the construction of the words—"shall not be obliged to produce the lessor's title;" and it seems to me that those words mean nothing more than that there shall be no obligation upon the vendor to produce, for the satisfaction of the purchaser, any evidence of the lessors' title; but that they do not preclude the purchaser from taking any objection, derived from another source, to the validity of that title. It is frequently a matter of great inconvenience to the lessee to produce evidence of the landlord's title, and from this inconvenience the clause in question protects him. Of *Spratt* v. *Jeffery* it is sufficient to say, that the words of the clause in that case are very distinguishable from those in the present. The construction put by the Court upon the words there used was, that they operated as a waiver

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of the objection; but there is nothing to shew that the parties in the present case had any intention of the kind. I do not say what my own opinion would have been upon the words of the clause in *Spratt* v. *Jeffery*. It is sufficient to distinguish them from the words here used.

BOLLAND, B.:

I am of the same opinion. *Spratt* v. *Jeffery* does not govern this case. The clause here has a sufficient operation in protecting
[*128] the vendor from the inconvenience, *or perhaps the impossibility of producing the lessors' title. But it does not protect him from defects in the title, which come to the knowledge of the vendee. Here, on the face of the special case various objections are stated —that the power to lease was ill executed—that the license did not warrant the lease, extending only to forty years, while the lease was for fifty years—that one of the parties, before executing the lease, had divested himself of all his interest. I think it was competent to the purchaser to insist on these objections.

ALDERSON, B.:

I also am of the same opinion. *Spratt* v. *Jeffery* was a case not merely of a waiver of producing the lessor's title, but a waiver of that title altogether. Mr. Justice LITTLEDALE there says: "The main difficulty arises from the words, 'without requiring the lessors' title.' Taking the agreement altogether, I am disposed to say, that the defendant contracted to sell a qualified title only." Possibly, upon the words there used, I might not have come to the same conclusion as the Court of King's Bench did; but it is unnecessary to give an opinion upon that point, as those words differ from the expressions employed here. The not being "obliged" to produce the lessors' title merely confers upon the vendor the power of enforcing the contract without producing or giving evidence of that title, but that expression cannot prevent the purchaser from taking objections discovered by himself. There is another point: This is a case stated under the provisions of the new Act, and there appears to be a plea of the general issue. Now, under that plea, the defence in question could not have been given in evidence.

GURNEY, B.:

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I am of the same opinion. If the vendor meant to protect himself at all events from the defects in his lessors' title, he ought to have used unambiguous language.

DOE D. ELLERBROCK AND OTHERS *v.* FLYNN (1).

1834.

Exch. of Pleas.

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(1 Cr. M. & R. 137—141; S. C. 4 Tyrwh. 619; 3 L. J. (N. S.) Ex. 221.)

A tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his hostile title, not with the intention that he should hold under the lease: Held, that the term was forfeited.

EJECTMENT for a messuage and premises situate at Cow Cross, Smithfield, on the demise, amongst others, of John Phillips and Jane his wife. At the trial before Gurney, B., at the sittings after last Michaelmas Term, the lessors of the plaintiff proved that a Mr. Cropley, twenty years ago, had been in possession of the premises, and had built a house upon part of them; that Cropley died, and demised the premises to a Mr. Broad, upon various trusts; that Mr. Broad died about 1830; and that Jane Phillips was his heir-at-law. The defendant, in answer to this case, put in a lease, executed by Broad, in 1829, to a person of the name of Townsend, for five years; and they proved that Townsend's occupation under the lease had been recognised by John Phillips, the husband of Jane, the other lessor of the plaintiff. In reply, the plaintiff called Townsend, who proved that Flynn, the defendant, had applied to him, stating that the premises were his; that he had told Flynn that he was afraid that his landlord would distrain upon him; and that Flynn said he would bail him. Flynn gave him 5*s.* and he gave up possession to Flynn, who claimed a title adverse to that of the lessors of the plaintiff. Townsend proved, on cross-examination, that he had delivered the lease to Flynn. The plaintiff also put in an affidavit made by Flynn, on an application by him to put off the trial, in which he stated his

(1) Dist. by Lord DENMAN, Ch. J., *Doe* d. *Graves* v. *Wells* (1839) 10 A. & E. 427, 435.

DOE d. ELLERBROCK v. FLYNN.

claim to this and other property under a title hostile to the plaintiff. The plaintiff then contended, that the letting in Flynn, claiming an adverse title, was such a betraying of the possession of his landlord by Townsend, as amounted to a forfeiture of the lease. The learned Judge reserved the point; and left it to the jury to say, whether Townsend had given up the possession to Flynn in order that the latter might hold *bonâ fide* under the [*138] lease, in which case he directed *them to find for the defendant; or whether he had delivered up the possession in fraud of the landlord, to enable Flynn to set up a title adverse to that of the landlord, in which case he directed them to find for the plaintiff. The jury gave a verdict for the plaintiff, and they found that the possession was delivered up by Townsend to Flynn in fraud of the landlord.

Platt obtained a rule, pursuant to the leave reserved at the trial, against which—

Cresswell and *Crompton* now shewed cause:

The question is, whether, at the time of the demise in the declaration, the lease to Townsend was a subsisting lease, or whether it had not been forfeited by his act, in delivering up the possession of the premises to Flynn, in fraud of the landlord, for the purpose of enabling Flynn to set up a claim adverse to the title of the landlord. The act of Townsend was inconsistent with his duty as a tenant. The rule of law on the subject is founded on feudal principles. According to the feudal law, every act tending to the disherison of the lord was accounted a forfeiture. Even the committing of waste, which tended to alter the evidence of the lord's title, was held to occasion a forfeiture. It is laid down in Wright's Tenures (1), citing Glanville and Bracton (2), that estates for life, besides that they are forfeitable by attainder and by cesser, are likewise, agreeably to the law of feuds, forfeited by waste, and by all such acts as in the eye of the law tend to devest the reversion or remainder, or in any manner to pluck the seignory out of the lord's hands. So, with regard to copyholds; as, if a copyholder swear in court, that he

(1) P. 203, 2nd edit.
(2) Glanv. lib. 9, c. 1, p. 68 b; Bract. lib. 2, c. 25, s. 11; Co. Litt. 151, 152.

is not the lord's copyholder (1); or, if he shews the steward a deed pretending thereby that he is a freeholder, and tears to pieces the Court roll, these *are forfeitures (2). The same rule is applicable to the case of a termor. Thus, if a tenant for years make a feoffment to gain the freehold, it has been held to be a forfeiture of the term. It is a forfeiture, even though he has previously assigned the term to a trustee to protect it against such forfeiture: *Lord Dormer's Ejectment*, H. T., 1817 (3). In a *Quid juris clamat* against a termor, he claimed the freehold, and for this cause judgment was given that the term was forfeited: *Saunders* v. *Freeman* (4). In Bacon's Abridgment (5), it is said, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of his lease; for to every lease the law tacitly annexes a condition, that, if the lessee do anything that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. Besides, every such act necessarily determines the relation of landlord and tenant, since to claim under another, and at the same time to controvert his title—to affect to hold under a lease, and at the same time to destroy that interest out of which that lease arises —would be the most palpable inconsistency. This rule of law is recognised by Lord REDESDALE, in delivering his judgment in *Hovenden* v. *Lord Annesley* (6), in which he treats the betraying of the possession by a tenant for years as a ground of forfeiture. The usual practice of dispensing with evidence of a notice to quit, where there has been a disclaimer, is founded on the same principle, viz. that the term is forfeited, and no longer in existence, and that the party disclaiming is no longer tenant. It is said in Buller's Nisi Prius (7), that, if a tenant hold from year to year, the landlord cannot maintain an ejectment against him, *without giving six months' previous notice unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord, and in that

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(1) The Complete Copyholder, Coke's Law Tracts, p. 132.

(2) The Complete Copyholder, Coke's Law Tracts, p. 132.

(3) Cited in Preston on Conveyancing, p. 32, 2nd edit.; 3 B. & C. 399, *n.*

(4) Dyer, 209 a.

(5) Lease, (T.) 2.

(6) 9 R. R. 119 (2 Sch. & Lef. 607).

(7) *Throgmorton* v. *Whelpdale*, 8 R. R. 425, *n.* (6 East, 123, *n.*).

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case no notice is necessary. This law has been recognised in various cases: *Doe* d. *Williams* v. *Pasquali* (1); *Doe* d. *Calvert* v. *Frowd* (2); *Doe* d. *Grubb* v. *Grubb* (3). In the present case, although the tenant did not claim the freehold himself, yet he enabled Flynn, who was making a claim hostile to that of the landlord, to set up that title. It was distinctly left to the jury to say, whether they were of opinion that Flynn came in *bonâ fide* under Townsend's interest as tenant, or whether the possession was delivered up to him by the tenant, to enable him to set up a title hostile to that of the landlord. The jury found the latter; and there was, therefore, such a disclaimer of the landlord's title, by betraying the possession, as to create a forfeiture of the lease. It was urged at the trial, that, unless the lease had been surrendered, it was still subsisting, and that there was no surrender in writing within the Statute of Frauds; but the question is one of forfeiture, and not of surrender, and the provisions of the Statute of Frauds do not apply.

Platt, contrà:

The term was still subsisting, unexpired, and unforfeited, in Townsend, on the day of the demise laid in the declaration. No act has been done by him to revest a title to the possession in the landlord, unless it can be made out that the term is forfeited. It may be admitted as a general rule, that, wherever a tenant claims or assumes to himself more than is granted to him by his landlord, in derogation of the title of the latter, that it is a forfeiture. But that was not the case here. Townsend had a right to the possession of the remainder of the term of five years,

[*141] and he had a right to admit any person *during that period to the possession. He did so admit Flynn, and by that act the landlord was placed in no worse situation; indeed, he had the additional advantage of a distress upon the goods of Flynn. This act could not incur a forfeiture. The law leans against forfeitures, and, in order to create a forfeiture, there must be some clear, precise, and unequivocal act of disclaimer. An intention on the part of a tenant to defraud his landlord is no

(1) 3 R. R. 688 (1 Peake, 259).
(2) 29 R. R. 624 (4 Bing. 557; 1 M. & P. 480).
(3) 10 B. & C. 816.

forfeiture; for, it has been held, that the assignee of a lease may assign the term to a beggar in order to relieve himself from the responsibility (1). The *animus* of the tenant in delivering up the possession is therefore immaterial. He has merely done an act which he was entitled by law to do, and his objects and intentions in doing it cannot be inquired into. It would be highly inconvenient if the intentions of parties could be examined in every transaction. Lastly, there was nothing on the part of the lessor of the plaintiff to shew that he intended to insist upon this as a forfeiture. There was no entry or claim made to the possession.

(LORD LYNDHURST, C. B.: No entry was necessary; the ejectment was sufficient.)

LORD LYNDHURST, C. B.:

I think that the jury, upon the facts proved at the trial, came to a right conclusion. If a tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture.

The rest of the COURT concurred.

Rule discharged.

BOYDELL *v.* M'MICHAEL (2).

1834.

Exch. of Pleas.

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(1 Cr. M. & R. 177—180; S. C. 3 Tyrwh. 974; 3 L. J. (N. S.) Ex. 264.)

Where A. took the lease of a house and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord, and afterwards assigned the term to B., by way of mortgage, expressly including the fixtures, and subsequently became bankrupt: Held, that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees.

The tenant of a house has a special property in the materials and fixtures, per Parke, B.

TROVER for certain stoves, grates, cisterns, &c. Plea, the general issue.

At the trial before Bolland, B., at the Middlesex sittings in

(1) *Taylor* v. *Shum*, 4 R. R. 759 (1 Bos. & P. 21).

(2) Foll. *Hitchman* v. *Walton* (1838) 4 M. & W. 409, 416.

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Hilary Term, it appeared that the defendant and another person had demised a house and certain premises in the Strand to Ryan, the bankrupt, for a term of years. The house, at the time of the demise, contained certain fixtures, viz. stoves, grates, pier glasses, wooden and glass partitions, leaden cistern and sink, dressers and shelves. These fixtures were taken at a valuation by the bankrupt, and the price of them paid to the lessors. In November, 1832, the plaintiff, who was an attorney, lent the bankrupt money, and, by way of security, took an assignment of the house, expressly including all fixtures on the premises. In June, 1833, Ryan became a bankrupt, and the defendant and another were chosen assignees. Conceiving that the fixtures above mentioned were within the order and disposition of the bankrupt at the time of his bankruptcy, the defendant directed them to be detached from the premises, and they accordingly were so, and were carried away. The defendant had notice of the mortgage, but refused to deliver up the articles in question. It was proved that the fixtures were of comparatively little value when severed from the premises; that they were worth about 80*l.* when attached, but lost about two-thirds of that value when disannexed. The jury found a verdict for the plaintiff, with 75*l.* damages; but the learned Judge gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that the fixtures in question passed to the assignees notwithstanding the mortgage. *Follett* having obtained a rule accordingly,

Erle and *Jardine* were to have shewn cause, but the COURT called on—

[178] *Follett*, in support of the rule:

This action is brought by the plaintiff, who is a mortgagee of the premises; and he contends, that, as these were tenant's fixtures, they passed to him by the mortgage, and that they were, therefore, his property. But, if he is entitled to them at all, he is entitled to them as something distinct from the freehold; and, if so, then they are goods and chattels within the order and disposition of the bankrupt. The plaintiff has no interest in

them, for either they are affixed to the freehold, and belong to the landlord, or, if not, they are goods and chattels within the order and disposition of the bankrupt. The assignment only passed the right to use the fixtures during the term. Suppose the case, where a tree is cut down on land during the existence of a term, and it is carried away by a stranger, the tenant is not entitled to maintain trover, but the landlord can only do so, as the property in it vests in him as soon as it is severed. The other cases on this subject were cases where the freehold was mortgaged; and, where the freehold passed, the fixtures passed as part of the freehold. But the articles in question, as between these parties, are goods and chattels within the order and disposition of the bankrupt. The bankrupt obtained credit by reason of the possession of them.

(ALDERSON, B.: A man may obtain credit by reason of the apparent possession of real property, but that is not within the clause in the Bankrupt Act as to order and disposition. Here, the plaintiff could not have had any property in these articles, except under a conveyance of goods and chattels, and he therefore can have no right to them except as goods and chattels. He cited *Trappes* v. *Harter* (1) as in point.)

PARKE, B.:

I always considered that the case of *Horn* *v. *Baker* (2) had determined that fixtures affixed to the freehold were not goods and chattels within the order and disposition of the bankrupt. These articles were part of the freehold during the term, the tenant having a right to remove them at the end of the term. The tenant assigned the term and the fixtures in the house to the plaintiff, and by that assignment the plaintiff acquired all the rights that the tenant had. The plaintiff took the house for the term, and every thing that was affixed to the freehold, and the tenant's right to remove the fixtures at the end of the term. Suppose a person enters a house, and severs part of the materials of the house, cannot the tenant bring trespass *de bonis asportatis*? I am aware, that, in the case of timber, the property [*179]

(1) 2 Cr. & M. 153. (2) 9 R. R. 541 (9 East, 215).

BOYDELL v. M'MICHAEL.

in it, when severed, vests in the landlord; but you find no authority that the tenant cannot maintain trespass *de bonis asportatis* against a stranger who has severed and carried away the materials of a house. The tenant has a special property in the materials. In *Bowles'* case (1) it was said, that, where a house is blown down, the tenant has a special property in the timber to rebuild the house. It certainly has always been the practice to add a count *de bonis asportatis* in an action of trespass *quare clausum fregit*, when part of the materials or soil has been removed, whether the plaintiff was tenant in fee, or for life, or for years. The real nature of the tenant's interest in this case is, that he has a right to remove the fixtures during the term. That interest has been held sufficient to enable the sheriff to seize them under a *fi. fa.*; but *Horn* v. *Baker* decides that they are not goods and chattels within the meaning of the clause as to the order and disposition of the bankrupt. The reason is this, that, with regard to real property, the possession is considered as nothing, but that the title only is looked to. In [*180] this case, it is clear that the plaintiff took the interest *in the realty, and every thing affixed thereto, and the tenant's right to remove the fixtures during the term.

ALDERSON, B.:

This question turns entirely on the nature of the property. It is clear, that nothing of a freehold nature is within the meaning of the clause in the Bankrupt Act as to order and disposition. It was settled, by the case of *Horn* v. *Baker*, that fixtures were not within the meaning of the statute of James. It is immaterial whether the mortgagee acquires the right as tenant for life or for years. The simple and plain rule is, that fixtures are not goods and chattels within the order and disposition of the bankrupt.

Rule discharged.

(1) 11 Co. Rep. 79; see also Bull. N. P. 33.

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(1 Cr. M. & R. 181—195; S. C. 4 Tyrwh. 582; 3 L. J. (N. S.) Ex. 347.)

A., the tenant of a farm, required some repairs to be done at the farm house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and, during the progress of it, got drunk; and some circumstances occurred which induced A. to believe that C. had broken open his cellar door and obtained access to his cyder. A., two days afterwards, met C. in the presence of D., and charged him with having broken his cellar door, and with having got drunk and spoilt the work. A. afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar door: Held, that the complaint to B. was a privileged communication, if made *bonâ fide*, and without any malicious intention to injure C. (1): Held also, that the statement made to C. in the presence of D. was also privileged, if done honestly and *bonâ fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives: Held also, that the statement to D., in the absence of C., was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

SLANDER. The first count of the declaration stated that the plaintiff, at the time of committing the grievances thereinafter mentioned, was a journeyman carpenter, and accustomed to employ himself as a journeyman carpenter, and gain his living by that employment, and had been, and was at the time of committing the grievances &c., retained and employed by, and in the service of, one James Brinsdon, as his journeyman carpenter and workman, at and for certain wages and rewards by the said James Brinsdon to him to be paid in that behalf; and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor, until the time of committing the grievances, was suspected to have been or to be, dishonest, drunken, dissolute, vicious, or lazy, to wit, in the county aforesaid; by means of which said several premises he had not only

(1) Cp. *Kine* v. *Sewell* (1838) 3 M. & W. 297; and see Mr. Baron PARKE's definition in this case, of a privileged communication, cited and applied by Lord PENZANCE in *Capital and Counties Bank* v. *Henty* (H. L. 1882) 7 App. Cas. 741, 754, 52 L. J. Q. B. 232, 239.—R. C.

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acquired the good opinion of his neighbours and divers other good and worthy subjects, &c., and especially the high esteem of his masters and employers, but had also derived and acquired for himself divers great gains, &c. That the plaintiff, at the time of committing the grievances in the first, second, and last counts mentioned, had been employed by the said James Brinsdon, as his workman and journeyman, in and upon certain work, to wit, on and about certain premises of the defendant, and then and there, upon and throughout that occasion, and during the whole of his the plaintiff's work [*182] in and about the same, had behaved and conducted *himself with honesty, sobriety, and great industry and decorum, and in a proper and workmanlike manner, yet, the defendant, well knowing &c., but contriving &c., and to cause it to be suspected and believed that the plaintiff had been and was guilty of the offences and misconduct thereinafter stated to have been charged upon and imputed to him by the defendant, theretofore, to wit, on the 9th of January, 1834, in the county aforesaid, in a certain discourse which the defendant then and there had with the plaintiff of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers worthy subjects &c.; then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, scandalous, malicious and defamatory words following, that is to say—"What a d——d pretty piece of work you (meaning the plaintiff) did at my house the other day." And in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say—"What, sir!"—then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to, and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following, that is to say—"You broke open

my cellar door, and got drunk, and spoiled the job you were about," (meaning the aforesaid work).

The words, as stated in the second count, were—"He broke open my cellar door, and got drunk, and spoiled the job he was about."

In the third—That in answer to an assertion of the plaintiff that he had never broken into or entered the defendant's *cellar, the defendant said—"What! I will swear it, and so will my three men." [*183]

The fourth count stated, that on &c., in a certain other discourse which the defendant then and there had with a certain other person, to wit, one Richard Taylor, of and concerning the plaintiff, in the presence and hearing of the said last-mentioned person, and of divers other good and worthy subjects, &c., and in answer to a certain question, whereby the last-mentioned person, to wit, the said Richard Taylor, did then and there, in the presence and hearing of the other last-mentioned subjects, interrogate and ask of the defendant, whether he, the defendant, meant to say that the plaintiff had broken into the cellar of the defendant, he, the defendant, then and there, in the presence and hearing of the last-mentioned subjects, falsely and maliciously answered, spoke, and published to the last-mentioned person, to wit, the said Richard Taylor, in his presence and hearing, these other false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, that is to say—"I" (meaning the defendant) "am sure he" (meaning the plaintiff) "did" (meaning that the plaintiff had broken into his the defendant's cellar); "and my" (meaning the defendant's) "people will swear it."

The words in the fifth count were alleged to be spoken generally, as in the first three, and not to any particular individual; and they were these—"You got drunk, and spoiled the job you were about," (meaning the aforesaid work). The declaration then alleged, that, by reason of the committing of the grievances, he, the plaintiff, was greatly injured in his good name, fame, character, occupation and credit, and brought into public scandal, &c., insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff

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in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed and *still do suspect and believe him to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the defendant; and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also by means of the premises the said James Brinsdon, who before and at the time of the committing of the said grievances had retained and employed and otherwise would have continued to retain and employ the plaintiff as his journeyman, workman, and servant for certain wages and reward, to be therefore paid to the plaintiff, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, discharged the plaintiff from his service and employ, and wholly refused to retain and employ the plaintiff in his said service and employ; and the plaintiff hath from thence hitherto wholly, by means of the premises, and from no other cause whatever, remained and continued and still is out of employ, &c.

The defendant pleaded—first, the general issue; secondly, that, before the committing of the grievances, to wit, on the 7th January, 1834, the said plaintiff broke open a door of a cellar of the said defendant, in a house of the said defendant, and then and there broke into the said cellar, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; wherefore he the said defendant did speak and publish the said words, as in the said declaration respectively mentioned, of and concerning and relating to the said house and the said cellar door, as he lawfully might for the cause aforesaid. And this, &c. Thirdly, as to the first, second, and last counts, and as to the speaking and publishing of the following words, that is to say—"I am sure he" (meaning the plaintiff) "did," (meaning that the said plaintiff had broken

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into *his the said defendant's cellar), as in the said fourth count of the declaration mentioned, that before &c., to wit, on the

7th of January, 1834, the said plaintiff broke open the door of a cellar of the said defendant in a house of the said defendant, and then and there broke into the cellar of the said defendant, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; therefore, the said defendant did commit the supposed grievances in the introductory part of that plea mentioned, as he lawfully might for the cause aforesaid. And this &c.

Replication—*De injuriâ* to the second and last plea.

At the trial before Bosanquet, J., at the last Spring Assizes for the county of Devon, it appeared that the plaintiff was a journeyman carpenter and had been in the employ of Brinsdon, a master carpenter in the constant employ of the Earl of Devon, at Powderham Castle. That the defendant resided on a farm under the Earl of Devon. That the defendant required some repairs at his farm; and that, pursuant to the orders of Mr. Brinsdon, the plaintiff and another workman went to the defendant's residence on the 7th of January, for the purpose of erecting a new door to the defendant's tool-house (which adjoined the cellar), and doing other repairs to the house and premises of the defendant. It was proved that the work was done in a negligent manner, and not to Brinsdon's satisfaction, the door being cut so small as not to answer the purpose for which it was intended. That, during the progress of the work, the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar door and obtained access to his cyder. Brinsdon had requested the defendant to inspect the work. It was proved that the plaintiff and one Taylor were at work on the 9th of January, at Powderham Castle, and that the defendant came up, and addressing himself to the plaintiff, spoke in his presence the following words—"What a d——d *pretty piece of work you [*186] did at my house the other day." That the plaintiff said—"What, sir!"—and that the defendant replied—"You broke open my cellar door, and got drunk, and spoiled the job you were about." That the plaintiff denied the charges, but that the defendant said he would swear it, and so would his three men. It was also proved, that, in a subsequent conversation,

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when the plaintiff was not present, the defendant, in answer to a question put to him by Taylor, whether he really thought the plaintiff had broken the cellar door, said—"I am sure he did it, and my people will swear to it." That the defendant then went away in search of Mr. Brinsdon. It was proved that the defendant afterwards saw Brinsdon on the same day, the 9th of January, and that he said to him that Toogood had spoiled the door, and that the cellar had been broken open, and that Toogood had got drunk; he said, he considered it had been done with a chisel, and that Toogood did it, because of the getting drunk. It appeared that Brinsdon went afterwards to the plaintiff and told him, that he could be no longer in the employ of the Earl of Devon until this was cleared up; that he must come to the defendant's with the other workman the following morning to have the matter investigated; that he, Brinsdon, went to the defendant's the following morning, and that the plaintiff and defendant were there, and that he examined the cellar door, but doubted whether it had been broken open at all, though the bolt was broken; and Brinsdon told the plaintiff he considered the charge against him was not made out, and that he thought his character was cleared up, and that he might go to work again if he thought proper; but the plaintiff said his character was not cleared up; and he did not go to his work afterwards.

The learned Judge, in summing up the case to the jury, said, that he should have thought that the defendant would have been justified if he had made the complaint to Mr. Brinsdon
[*187] in the first instance; but that he had spoken the *words in the presence of a third person, and that the speaking was not in the nature of a complaint to the plaintiff's employer. That it appeared to him that the act of making the imputation to the plaintiff in the presence of another person gave the plaintiff a right to maintain the action. That the plaintiff also was not justified in making the subsequent charge to Taylor, in the absence of the plaintiff, that he had broken open the cellar door. The jury having found a verdict for the plaintiff, with 40*s.* damages, *Follett*, in Easter Term last, obtained a rule to shew cause why a nonsuit should not be entered, or a new

trial had, on the grounds—first, that the circumstances under which the words were spoken constituted it a privileged communication; and, secondly, on the ground of misdirection on the part of the learned Judge.

Praed shewed cause:

There are two questions here—first, it is said that the words in question were spoken under circumstances which made it a privileged communication; and, secondly, that the case was improperly summed up to the jury. With regard to the first point, it is submitted that this went beyond the nature of a privileged communication. Even if the defendant would have been justified in stating what he did to Brinsdon, he could not justify speaking the words to the plaintiff in the presence of a third person. The defendant does not even say that he comes to complain to Brinsdon. In *M'Dougall* v. *Claridge* (1), Lord ELLENBOROUGH, in speaking of a communication as privileged, where it is made by one party interested to another having an interest in the same matter, complaining of the conduct of a person whom they had employed to manage their concerns, expressly puts it on the ground of the communication not being meant to go *beyond those immediately interested in it. [*188]

(ALDERSON, B.: Here the damages were taken generally. Now, who can say what damages the jury gave for what was said to Brinsdon, and what damages they gave for what was spoken before Taylor?)

If the defendant had a right to complain that the work was improperly done, he had no right to charge the plaintiff with breaking open the cellar door and getting drunk, as that amounts to a charge of felony. It may be said, that there is no allegation in the declaration, that the defendant meant to impute felony to the plaintiff; that, however, is immaterial, as there is an allegation and proof of special damage. In *Moore* v. *Meagher* (2) it was held, that if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of

(1) 10 R. R. 679 (1 Camp. 267). (2) 9 R. R. 702 (1 Taunt. 39).

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friends, that is a sufficient temporal damage whereon to maintain an action.

(PARKE, B.: Here there was no special damage proved.)

It is submitted that there was evidence to go to the jury, as it was proved that Brinsdon said he would not employ the plaintiff until his character was cleared; and though he told him afterwards that he might go to his work again, the plaintiff did not do so, because his character was not cleared.

(PARKE, B.: To make out special damage in this case, you should have shewn that the plaintiff was removed from a beneficial employment, which you have not done. The jury did not find special damage—they gave general damages.)

Secondly, it is submitted, that the case was properly left to the jury, as the circumstances under which the words were spoken shewed a malicious intention to injure the plaintiff. In *Dunman* v. *Bigg* (1), Lord ELLENBOROUGH said: "It will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or with good faith to communicate facts to the surety which he was interested to know." Now, here, *the words were not spoken to the party alone, but before another person; and, as it was not necessary that the defendant should speak the words in Taylor's presence, or say what he did to Taylor, his doing so unnecessarily and officiously, is a circumstance from which malice may be inferred. Here the defendant was betrayed into a passion, and has gone beyond what he was justified in saying. In *Rogers* v. *Clifton* (2) it was held, that although a master is not in general bound to prove the truth of a character given by him to a person applying to him for the character of his servant, yet, if he officiously state any misconduct, even of a trivial nature, which he is not able to prove, the jury might, from these facts, infer malice. It depends much on the manner in which the words are spoken, whether they are to be deemed malicious or not. If I go to a tradesman, and, in a spiteful and revengeful manner before his other

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(1) 10 R. R. 680, *n.* (1 Camp. 269, *n.*). (2) 3 Bos. & P. 587.

customers, say, that he has spoiled my coat, or sent me a bad joint of meat, that is conduct from which malice may be inferred. Besides, the plaintiff was not in the employ of the defendant, but in the employ of Brinsdon, and therefore the defendant had no right to complain of him. Here, the defendant has, at all events, gone beyond the limits of a confidential communication, in charging the plaintiff with breaking the cellar door and getting drunk. In *Godson* v. *Home* (1), RICHARDSON, J., says: "If a man, giving advice, calls another a thief, surely it is not necessary to leave it to the jury whether such language is a privileged communication or not." Here, although the word thief is not used, the defendant says what is equivalent to it. It is quite clear the defendant meant more than to complain of the work being spoiled. If a man say to his tailor, in the presence of customers, "you sent me a bad coat," though he might be justified in speaking those words, he *cannot be justified in saying, "you sent me a bad coat, and stole five of my books." [*190]

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Follett, contrà:

In this case no special damage was proved, as the plaintiff was not dismissed by Brinsdon. When Brinsdon found that the door had not been broken open, he directed the plaintiff to go to his work again, but he did not do so; and therefore, if he suffered any damage, it was his own fault. The words spoken to Taylor were not spoken of the plaintiff in the way of his trade.

(PARKE, B.: Might not the words be spoken of him in his character of a journeyman carpenter? They might be spoken of him as having committed a felony in the course of his trade. It might be that he availed himself of his situation to commit the felony.)

It is submitted, that such a general proposition cannot be laid down. Here, it was no part of the business of the carpenter to break open the cellar door. It is an act totally unconnected with his business as a carpenter, and those words are not spoken of him in the character of a carpenter. Words to be spoken of

(1) 1 Brod. & B. 7.

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a man in his trade must relate to something done by him in the course of his particular calling. Besides, if the plaintiff had meant to say that the defendant had imputed felony to him, he should have alleged it in his declaration; there is, however, no such allegation or innuendo in this declaration. Suppose the words had been, "he had cheated his fellow-workmen," would they be actionable? It is submitted that they would not, inasmuch as they would have no relation to the plaintiff's trade.

(ALDERSON, B.: "You are an idle, dissolute workman; and when employed by me you robbed me:" are not these words actionable?)

At all events, it was a question for the jury whether these words were spoken of the plaintiff in his trade, and that question was not left to them; therefore, the defendant is entitled to a new trial. Then, the learned Judge said that the defendant had no right to make the complaint in the presence of a third person;

[*191] *but surely a master has a right to complain of his servant in the presence of a third person, if it is done *bonâ fide*. If that were not so, in every case where the master complains of his servant in the presence of a third person, the servant would have a right of action against the master. Can it be said that a person who complains to a tradesman has no right to say in the presence of a third person that the work is badly done, when the complaint is made *bonâ fide*?

(ALDERSON, B.: You say that it is only evidence, more or less, of malice; but there is a communication to Taylor alone, which is not justified.)

The complaint to Brinsdon was, at all events, justifiable. The Court cannot know what damages the jury gave for those words, and what for the others, as the damages are general. If the complaint is made under circumstances that induce the party to believe in the truth of it, and he makes the complaint to the other party *bonâ fide*, it is privileged. All the cases where it has been held that the communications were not justifiable, were made to a third party, and not to the party himself.

(ALDERSON, B.: There are many cases in which words spoken in the presence of a third party have been held actionable, where the transaction was gone by, so that the party complained of was not able to right himself.)

Here, the complaint was made at the time. It is submitted, that the learned Judge ought to have nonsuited.

(ALDERSON, B.: Surely it was a question for the jury.)

It is only where there is some evidence to shew that the defendant is not acting *bonâ fide* that it becomes a question for the jury. But, where a party *bonâ fide* complains that work is badly done, it is a question of law, whether it is a privileged communication or not.

Cur. adv. vult.

On a subsequent day, the judgment of the COURT was delivered by—

PARKE, B.: [192]

In this case, which was argued before my brothers Bolland, Alderson, Gurney, and myself, a motion was made for a nonsuit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the Earl, and the plaintiff, who was generally employed by Brinsdon, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cyder. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to

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look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned Judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the

[*193] communication to Brinsdon was protected, *and that the statement, upon the second meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defence in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the

principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed) (1), the simple fact that there has been *some casual bye- [*194] stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact that the imputation was made in Taylor's presence, does not, of itself, render the communication unwarranted and officious, but at most is

(1) *Child* v. *Affleck*, 33 R. R. 216 (9 B. & C. 403; 4 Man. & Ry. 338).

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a circumstance to be left to the consideration of the jury. We agree with the learned Judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and

[*195] therefore not protected, although made in the belief *of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned Judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

Rule absolute for a new trial.

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BRIGHT *v.* WALKER (1).

(1 Cr. M. & R. 211—223; S. C. 4 Tyrwh. 502; 3 L. J. (N. S.) Ex. 250.)

Where a way had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester: Held, that under the Act 2 & 3 Will. IV. c. 71, this user gave no right as against the Bishop, and did not affect the See.

Held also, that, as the user could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee and the persons claiming under him, and that no title was gained by an user which did not give a valid title as against the Bishop, and permanently affect the See.

The declaration for disturbance of the above-mentioned right of way alleged that the plaintiff was possessed of a certain wharf, close, and premises, and by reason thereof ought to have had, and still of right ought to have, a certain way from this wharf, close, and premises into &c. (describing the way), as to the said wharf and premises belonging and appertaining: Held, that the declaration was sufficient, and that the way might be claimed as appurtenant to the plaintiff's possession of the land at the time of the injury committed.

CASE. The first count of the declaration stated, that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter mentioned, was and

(1) Approved, *Wheaton* v. *Maple & Co.*, '93, 3 Ch. 48, 62 L. J. Ch. 963, 69 L. T. 208, C. A. Mr. Baron PARKE's judgment in the principal case has been frequently cited; see the judgments in *Dalton* v. *Angus* (H. L. 1881) 6 App. Cas. 740, 783; of LINDLEY, L. J. in *Hollins* v. *Verney* (1884) 13 Q. B. Div. 304, 307; and of POLLOCK, B. in *Bass* v. *Gregory* (1890) 25 Q. B. D. 481, 484, 59 L. J. Q. B. 574, 575.—R. C.

from thence hitherto hath been and still is lawfully possessed of a certain wharf, close, and premises, with the appurtenances, situate, lying, and being in the county of Worcester, and by reason thereof the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said wharf, close, and premises, into, through, and along a certain close, and from thence into, through, and along a certain road or way unto and into a certain common King's highway, and so from thence back again from the said King's highway into, through, and along the said road or way, into, through, and along the said close, unto and into the said wharf, close, and premises respectively, so in the possession of the said plaintiff, for himself and his servants on foot, and with horses, mares, and geldings, carts and waggons, and other carriages, to go, return, pass, and repass every year, and at all times of the year, at his and their free will and pleasure, as to the said wharf, close, and premises, with the appurtenances, of the said plaintiff belonging and appertaining; yet the said defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of the said way, whilst he, the said plaintiff, was so possessed of the said wharf, close, and premises, with the appurtenances as aforesaid, to wit, on, &c. and on divers *other days and times between [*212] that day and the commencement of this suit in the county aforesaid, wrongfully and injuriously placed and erected, and caused to be erected and built, divers, to wit, five gates in and across the said way; and put and placed, and caused and procured to be put and placed, divers large quantities of posts, planks, wood, and timber in the said way, and kept and continued the said gates so put, placed, and erected in and across the said way as aforesaid, and also the said other posts, planks, wood, and timber, in the same way as aforesaid, for a long space of time, to wit, from thenceforth hitherto, and thereby, during all the time aforesaid, the said way was and still is greatly obstructed and stopped up. By means whereof, &c. the said plaintiff could not enjoy, &c. &c. There were two other counts similar to the first. The defendant pleaded the general issue.

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At the trial before Gurney, B., at the Worcester Summer Assizes, 1833, it appeared that the way claimed was from a wharf in a close called Cliff Meadow, which adjoined the river Severn, through a meadow called Eacham Meadow, over a close called the Acre, where the obstruction took place, into a public highway; that the Cliff and Eacham Meadow were, in the year 1805, demised by the then Bishop of Worcester, to a Mr. Alderman Davis, for three lives. In the year 1809, a person of the name of Roberts, under whom the plaintiff claimed, purchased the leasehold interest in both the meadows from Davis, and established a large brickwork in Cliff Meadow. He then made an opening or carriage road out of Cliff Meadow into Eacham Meadow, and by that road carried the bricks through the piece called the Acre into the highway. At that time the Acre, now the property of the defendant, belonged to a person named Dallow, and he, in the month of April, 1811, erected a gate in the Acre to prevent Roberts from carrying bricks from the Cliff Meadow through the Acre, and locked up the gate; Roberts
[*213] broke *the gate down, and he and the plaintiff who claimed under him continued to carry bricks without interruption until April, 1833, when the defendant, who had purchased Dallow's interest in the Acre, put up a gate across the road, and locked it up, and this action was brought for that obstruction. It appeared that when Roberts first purchased Davis's interest in the Eacham and Cliff Meadows, there was a road through the Acre to the Eacham Meadow, but no communication between the Eacham and the Cliff Meadow; but the road to the latter was by a place called Grimley Stile; and the defendant contended that the plaintiff had a right to use the road through the Acre to the Eacham Meadow only, and had no right to use it to the Cliff Meadow. The plaintiff on the contrary insisted that he had acquired a right of way to the Cliff Meadow by uninterrupted enjoyment for more than twenty years. The plaintiff obtained a verdict with 5*l.* damages; the jury finding that there had not been any grant of a right of way by the Bishop, but that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years. The learned Judge gave the defendant leave to move to enter a nonsuit; and, in Michaelmas Term last,

R. V. Richards obtained a rule accordingly on two grounds: First, that the right of way was not made out by the evidence; and, secondly, that it was not properly described in the declaration.

Ludlow, Serjt., and *Whatley* shewed cause:

The plaintiff acquired a right to the way in question by the uninterrupted enjoyment for twenty years, and, although the Bishop as the reversioner may not be barred, the right is good as against the lessee. By the 2 & 3 Will. IV. c. 71, s. 2, it is enacted that "no claim which may be lawfully made at the common law to any way, &c. to be enjoyed or derived, upon, over, or from any land of the King, &c., or being the property of any ecclesiastical or lay person or *body corporate, when such way shall [*214] have been actually enjoyed by any person claiming a right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by shewing that such way was first enjoyed at any time prior to such period of twenty years; but that nevertheless such claim may be defeated in any other way in which the same is now liable to be defeated;" so that the right of way acquired by user is saved out of the operation of that Act. Here, it is not necessary to contend that the Bishop would be barred, because he might say that he was not bound by the act of his lessee. That question would only arise at the expiration of the term when the Bishop came into possession. It was observed by Mr. Baron BAYLEY when this rule was moved for, that the user during the term might bind the party in possession, though not the reversioner. But the defendant cannot set up, that the right of way claimed is not good as against the reversioner. Here, as against the defendant and the person under whom he claimed, there was an uninterrupted adverse enjoyment of this way for more than twenty years, and the statute in such cases gives the right absolutely.

The second question is, whether this right of way is properly stated in the declaration. It is submitted that it clearly is. In all the counts the plaintiff claims the right of way by reason of his possession of the land. The right is connected with the possession, and though not strictly appertaining it is sufficiently

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so to support the counts. In Mr. Serjt. Williams's note to *Coryton* v. *Lithebye* (1), he says, that, in an action for disturbance of a way, it is sufficient to declare that the plaintiff was possessed of and in an ancient messuage, called C., by reason whereof he had and ought to have a way through and over the defendant's land; [*215] and that the *defendant stopped it up and obstructed the plaintiff in the use of it. (They also cited *Barlow* v. *Rhodes* (2), and *Whalley* v. *Tompson* (3).) But even if it be wrongly laid, that is ground for arresting the judgment and not for a nonsuit.

R. V. Richards and *Whateley, contrà:*

The land, over which this way is claimed, being held under a lease for lives under the See of Worcester, it is quite clear that, before the recent statute, user would not have created a right against the Bishop as the reversioner. Independently of the late statute, the user of a way for twenty years would not have given a right even as against a lay reversioner, if it took place during the occupation of a tenant. If user were to be held conclusive as against the lessee, these ecclesiastical leases being generally for a long term, it would very often be impossible to shew how or when the way came first to be used, and such user might so become a bar against the Bishop. A grant of way could not in a case of this kind be presumed. In *Barker* v. *Richardson* (4), where lights had been enjoyed for more than twenty years contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser under the 55 Geo. III. c. 147; it was held that no action would lie against such purchaser for building so as to obstruct the lights; inasmuch as the rector, who was tenant for life, could not grant the easement; and therefore no valid grant could be presumed. Lord TENTERDEN there says: "Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise the presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor." And in *Runcorn* v. *Doe* (5), it was held

(1) 2 Saund. 114.
(2) 38 R. R. 653 (1 Cr. & M. 439).
(3) 4 R. R. 826 (1 Bos. & P. 371).
(4) 23 R. R. 400 (4 B. & Ald. 579).
(5) 5 B. & C. 696.

that an adverse possession of twenty *years is not a bar to a rector or vicar, except against the same incumbent who submitted to such possession. On the true construction of the recent Act the defendant is entitled to use any argument which might hereafter avail the Bishop. Secondly, the declaration is insufficient. The first count lays the way as appurtenant to the plaintiff's wharf and premises, but it is not appurtenant. [*216]

(PARKE, B.: It is appurtenant at the time of the injury of which the plaintiff complains. There is no difficulty about the declaration. That is sufficient. We must take time to consider the point as to the recent statute, as that is a question of considerable importance.)

Cur. adv. vult.

On a subsequent day in this Term, the judgment of the COURT was delivered by—

PARKE, B.:

This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before my brother Gurney at the last Summer Assizes at Worcester, when a verdict passed for the plaintiff, with liberty to move to enter a nonsuit on two grounds—first, that the plaintiff's title to the right of way was not made out by the evidence; and, secondly, that it was not properly described in the declaration. On shewing cause, the second objection was disposed of by the COURT; and the only point now to be considered is, whether the right of way was established.

The way claimed was from a wharf in a close called Cliff Meadow, through Eacham Meadow, over the *locus in quo* called the Acre, where the obstruction took place, into a public highway. Cliff and Eacham Meadows were held under the Bishop of Worcester, by a lease for three lives, granted in 1805 to Alderman Davis. In 1809, Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff Meadow, and carried them through *Eacham Meadow and the Acre into the highway. In 1811, Dallow, the then occupier of the Acre, and the assignee of a lease for four lives under the Bishop of [*217]

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the close called the Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down; and he and the plaintiff, who claimed under him, continued to carry bricks over the Acre without interruption for more than twenty years, when the defendant claiming as assignee of the Bishop's lease under Dallow obstructed the way, and for that obstruction the action was brought. No proof was given on either side that either of the original leases had been surrendered; and, therefore, the case must be considered as if both had continued to the time of the obstruction. The jury found—first, that they would not presume any grant of right of way by the Bishop; and, secondly, that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years; and the only question is, whether such an enjoyment gives to the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action. And this depends upon the construction of the Act of the 2 & 3 Will. IV. c. 71, and particularly section 2.

For a series of years, prior to the passing of this Act, Judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the Statute of Limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie, in his excellent Treatise on Evidence, Vol. 2, p. 669, "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation;" and though in theory it was presumptive evidence, in practice and effect it [*218] was a bar. And that learned *author observes, that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the Legislature. The Act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury.

The title of the Act is, "For shortening the Time of Prescrip-

tion in certain Cases." And it recites, that the expression, "time immemorial," or "time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters which have been long enjoyed is sometimes defeated, by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice. It then proceeds to enact in the second section, that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived, upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way, by which the same is now liable to be defeated; and where such way or other *matter as herein last before mentioned shall have been so [*219] enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "as of right," for that is the form in which by section 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have

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occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed, "as of right." For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed "as of right" the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the Act is clear; and this enjoyment of twenty years, having been [*220] uninterrupted, and not defeated *on any ground above mentioned, would give a good title. But if the enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute? Will it be good to give a right against the See, and those claiming under it by a new lease; or only as against the termor and his assigns during the continuance of the term; or will it be altogether invalid?

In the first place, it is quite clear that no right is gained against the Bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. This section provides, "That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the Bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the Bishop, it certainly must from the shorter. Therefore, there is no doubt but that this possession of twenty years gives no title as against the Bishop, and cannot affect the right of the See.

The important question is, whether this enjoyment, as it cannot give a title against all persons having estates *in the [*221] *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the See. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of prescription"; and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the Bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant. This

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view of the case derives confirmation from the 7th section, which provides as follows: "That the time during which any person, otherwise capable of resisting any claim to any of the matters
[*222] *before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is tenant for life; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the Act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment against an owner of the fee. The conclusion, therefore, to which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course, nothing that has been said by the Court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking the possession into consideration, with other circumstances, as evidence of a grant, which they may still find to have been made,
[*223] if they are satisfied *that it was made in point of fact. We are therefore of opinion, that, in the present case, the plaintiff is not entitled to recover, but that a nonsuit must be entered.

Rule absolute.

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1834.

Exch. of Pleas.

[250]

(1 Cr. M. & R. 250—252; S. C. 4 Tyrwh. 850; 3 L. J. (N. S.) Ex. 294.)

A letter containing a libel was proved to be in the handwriting of the defendant, to have been addressed to a party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded from C. to London to be forwarded to Scotland, and it was produced at the trial with the proper post-marks, and with the seal broken: Held, sufficient *primâ facie* evidence that it reached the person to whom it was addressed, and of a publication to him.

The plaintiff and defendant were jointly interested in property in Scotland, of which C. was manager. The defendant wrote to C. a letter, principally about the property, and the conduct of the plaintiff with reference thereto, but containing a charge against the plaintiff with reference to his conduct to his mother and aunt: Held, that though the part of the letter about the defendant's conduct as to the property might be confidential and privileged, such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt.

CASE for libel. Plea, the general issue.

At the trial before Gaselee, J., at the last Lent Assizes for the county of Essex, it was proved that the letter in question was in the handwriting of the defendant, addressed to a person in Scotland; that it was received from the Colchester post-office at H., in Essex, and forwarded to London to be forwarded to Scotland, and it was produced with the proper post-marks, and with the seal broken. The letter was written by the defendant to a person in Scotland, who had the management of certain property, in which both the plaintiff and the defendant were interested, and principally related to such property; but it contained a charge against the plaintiff of bad conduct to his mother and aunt. It was objected, that there was not sufficient evidence of publication, and that the publication was privileged, on the ground of its being a communication about property in which the defendant and plaintiff were interested. The learned Judge overruled the objection, and told the jury that the letter, being put into the post and received by the party, was a publication. The jury found a verdict for the plaintiff, with a farthing damages. A rule was obtained in Easter Term for a new trial, upon the grounds taken at the trial; against which, cause was now shewn by—

Spankie, Serjt.:

On the evidence produced at the trial, no reasonable doubt

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could exist that there was at least evidence of publication to go to the jury. The handwriting of the defendant to the letter was proved, and the letter *was produced, bearing the proper post-mark, addressed to a person in Scotland, and with the seal broken.

(PARKE, B.: Surely the production of a letter with the seal broken, and with the post-mark upon it, is strong evidence that it was received by the person to whom it was addressed.

ALDERSON, B.: At least it is *primâ facie* evidence of that fact.)

As to the second point, it is clear that the part of the letter as to the plaintiff's alleged conduct to his mother and aunt does not fall within the class of privileged communications.

Channel, contrà:

On the first point, the fact of a letter being written in Essex, addressed to a person in Scotland, is no proof that it reached the hands of the person to whom it was addressed.

(GURNEY, B.: The post-master was called, who proved that his handwriting was upon it; that it was received from the post-office at H., at the post-office in Colchester, and forwarded to London on its road to Scotland. Was not that at least *primâ facie* evidence that it reached its destination?)

If it were only *primâ facie* evidence, the learned Judge was wrong in treating the fact of the receipt of the letter in Scotland as proved. He told the jury, that the letter was published by being put into the post-office and received by the party. He laid stress on the receipt by the party, as if that fact had been proved conclusively. It should have been left to the jury to say whether the party did receive it. Secondly, the communication was privileged. The letter was clearly written in answer to a letter which must have been about the property of these parties. That appeared from the contents of the letter itself. The person to whom the letter was addressed was the manager of property to which both the plaintiff and defendant were entitled; and

it appeared from the admission, that there had been a suit in Chancery about this property. A letter written to the manager of this property about the joint concerns of the plaintiff and defendant *in reference thereto, is clearly confidential; and if so, it was protected as a privileged communication, unless the other party could shew express malice.

[*252]

PARKE, B.:

If a letter is sent by the post, it is *primâ facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course. As to the other question, so far as related to the common property, the letter might be confidential; but with regard to that part which reflected on the plaintiff's conduct to his mother and aunt, it is impossible to hold that the defendant was privileged. The manager could have nothing to do with that. The rule must be discharged.

The rest of the COURT concurred.

Rule discharged.

TIPPETS *v.* HEANE (1).

1834.

Exch. of Pleas.

[252]

(1 Cr. M. & R. 252—254; S. C. 4 Tyrwh. 772; 3 L. J. (N. S.) Ex. 281.)

In order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt.

ASSUMPSIT for meat, lodging, &c., furnished by the plaintiff for the defendant's son. Plea, general issue and the Statute of Limitations.

At the trial before Vaughan, B., at the London sittings after last Hilary Term, the plaintiff, to take the case out of the Statute of Limitations, proved, by a Mr. A'Becket, that he had paid 10*l.* to the plaintiff by the direction of the defendant in the year 1829; but he could not speak to the account on which it

(1) See the judgment of PARKE, B. in this case cited by TINDAL, Ch. J. in *Mills* v. *Fowkes* (1839) 5 Bing. (N. C.) 455, and the judgment of TINDAL, Ch. J., including the citation, cited by STIRLING, J. in *Friend* v. *Young*, '97, 2 Ch. 421, 433, 66 L. J. Ch. 737, 744.—R. C.

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was paid, or give any evidence beyond the mere fact of having paid the money by the defendant's direction. The learned Baron left it to the jury to say, whether the 10*l.* was paid on account of the debt in question; and observed to them, that no other account was proved to have existed between the parties.

[*253] *The jury having found a verdict for the plaintiff, a rule for a new trial was obtained in Easter Term by *Ludlow*, Serjt.; against which, cause was now shewn by—

Kelly, who contended that there being no evidence of any other account or transaction between the parties, the jury were right in referring the payment of 10*l.* to the only account which appeared to have existed between the plaintiff and defendant.

Ludlow, Serjt., and *Petersdorff*, *contrà*, were stopped by the COURT.

PARKE, B.:

This rule ought to be made absolute. There was not in my opinion sufficient evidence to go to the jury of this being a part payment, so as to take the case out of the Statute of Limitations. In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not shew any particular account to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt.

[*254] Unless *then, in the present case, it could be collected that the

payment was in part of a greater debt, the statute was a bar, and there being no evidence from which a jury were warranted in coming to such a conclusion, the present rule must be made absolute.

The rest of the COURT concurred.

Rule absolute.

HALLEN *v.* RUNDER (1).

1834.

Exch. of Pleas.

[266]

(1 Cr. M. & R. 266—277; S. C. 3 Tyrwh. 959; 3 L. J. (N. S.) Ex. 260.)

A. having occupied a house as tenant to B. in which there were certain fixtures which A. had purchased on entering the house and which he had a right to remove during his tenancy, agreed, at B.'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation to be made by two brokers. A., at the expiration of his tenancy, delivered up possession of the house to B., leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. A. having brought *indebitatus assumpsit* for the price and value of fixtures, &c. bargained and sold, and for fixtures sold and delivered: Held that the action was maintainable, and that this was not a sale of an interest in land within the 4th section of the Statute of Frauds.

And *semble*, that a note or memorandum in writing was not necessary within the 17th section of that statute relating to the "Sale of Goods" above the value of 10*l.* (2).

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the defendant had bargained for, and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had sold to the defendant divers chattels, fixtures, and effects, then lying and being in and fastened to a certain dwelling-house and premises, at and for a certain price, to wit, the price of 40*l.* 10*s.*, the defendant undertook to pay the said sum of 40*l.* 10*s.*, when he should be thereunto afterwards requested; and that, although the plaintiff afterwards requested the defendant to pay him the said sum of 40*l.* 10*s.*, yet, that the defendant did not, nor would then or at any other time pay him the same or any part thereof. The second count was in *indebitatus assumpsit*, for the price and value of goods,

(1) Followed in *Lee* v. *Gaskell* (1876) 1 Q. B. D. 700, 45 L. J. Q. B. 540.—R. C.

(2) See now the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 4).—R. C.

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chattels, fixtures, and effects, bargained and sold, and for the price and value of other goods, chattels, fixtures and effects sold and delivered, and for *money lent, money paid, money had and received, and for money due upon an account stated. The defendant pleaded the general issue.

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At the trial before Gurney, B., at the sittings in London, after last Michaelmas Term, it appeared in evidence that the plaintiff had for several years, prior to the 25th of March, 1833, occupied a house in Nelson Square, under the defendant, and that a few days before that day, when the plaintiff was on the point of removing to another house, the defendant called upon the plaintiff, and requested him not to remove the fixtures, saying, she would take them at a fair valuation; and it was agreed that each party should appoint their own broker. It further appeared, that, when the plaintiff entered the house as tenant to the defendant, he had paid 23*l.* for fixtures to the out-going tenant; and that prior to his quitting the house, he had added very considerably to the quantity of fixtures. The plaintiff gave up possession of the house on the 24th of March, leaving the fixtures on the premises. On the following day, the plaintiff sent for, and obtained the key of the house from the defendant's son, for the purpose of having the fixtures valued, and the key was accordingly delivered to the plaintiff's broker, who, together with one Sexton, a broker, who met him there on the defendant's behalf, valued the whole of the fixtures at 40*l.* 10*s.*, and they both signed the appraisement at that valuation. After the valuation was made, the key was returned to the defendant. On the trial it was proved by Sexton, the defendant's broker, that the defendant had desired him to go to the house in question to look at some fixtures and stoves; that she said, she did not know whether she would agree with the plaintiff for them or not, but that he was to appraise them. It was objected for the defendant, first, that there was no contract in writing proved, inasmuch as the appraisement was not signed by the defendant, or by her authority, and therefore

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*that the sale was void under the 17th section of the Statute of Frauds; and, secondly, that this form of action was not maintainable: that the fixtures not having been severed con-

tinued to be part of the freehold, and could not be considered as goods and chattels; and therefore, that *indebitatus assumpsit* was not maintainable, and that the action ought to have been special on the agreement. The learned Baron told the jury that if they believed that the defendant had authorised the broker to appraise the fixtures, he was of opinion that she had given him authority to sign the appraisement; and consequently, that there was a sufficient note in writing, if that were necessary. The jury found a verdict for the plaintiff for the amount of the valuation. The learned Judge gave the defendant leave to move to enter a nonsuit: and accordingly in Hilary Term last—

F. Kelly, moved either for a nonsuit or a new trial:

First, this form of action is not maintainable for fixtures before severance. The case of *Lee* v. *Risdon* (1) is an authority to shew that the price of fixtures affixed to a house cannot be recovered under a declaration for goods sold and delivered.

(BAYLEY, B.: In that case was Lee the owner of the inheritance? because, if he was, the fixtures would be part of the freehold. In *Lee* v. *Risdon* could the fixtures have been seized under a *fi. fa.* against the tenant?

LORD LYNDHURST, C. B.: In *Lee* v. *Risdon* the house and fixtures were both taken of the landlord, and not from the out-going tenant, and they were part of the freehold at the time of the sale.

BAYLEY, B.: Here these fixtures never were the property of the landlord, but of the tenant, who had a right to remove them during the term.

LORD LYNDHURST, C. B.: The tenant had a right to remove the fixtures during the term, and having that right he contracts *with the defendant for the sale of them, at a valuation, and agrees, at her request, not to remove them; and the key of the house is afterwards delivered to the defendant before the [*269]

(1) 17 R. R. 484 (7 Taunt. 188).

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valuation, and she is put into possession, and has never since relinquished it. What is there to shew that *indebitatus assumpsit* will not lie in such a case?)

The case of *Lee* v. *Risdon*, it is submitted, shews that a severance of the fixtures is not effected by a sale of them by the landlord to the tenant, because if it is so effected, that decision cannot be supported.

(BAYLEY, B.: It effects a severance when the purchase is complete, but not before.)

Here the purchase was not complete, as there was no possession.

(LORD LYNDHURST, C. B.: The learned Judge was of opinion that there was. The fixtures were left in the house, and the key was given up.

BAYLEY, B.: An action lies to recover the price of an estate bargained and sold. Unless the present action is maintainable, how can you seize fixtures under a *fi. fa.*, and how can they go to the executor and not to the heir? Since *Lee* v. *Risdon* it has been decided that growing crops are to be considered as goods and chattels.)

At all events there was no evidence of any authority to the broker to do more than to appraise the fixtures. There was no authority given to the broker to sign the contract.

LORD LYNDHURST, C. B.:

I am of opinion, on the first point, that no rule should be granted. Here the defendant was the landlady of the premises, and the tenant being about to leave them entered into an agreement to sell the fixtures to his landlady, and if they had been accepted and removed there is no doubt that an action of *indebitatus assumpsit* would have been maintainable, as for fixtures bargained and sold, or sold and delivered; and I think this is distinguishable from *Lee* v. *Risdon*, on the ground stated by my brother BAYLEY. On the other point I think there is some doubt whether there was sufficient *to justify the jury in

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considering that the defendant's broker had authority to sign the appraisement, and on that ground you may take a rule to shew cause.

BAYLEY, B.:

It may possibly be a question whether the defendant had not actually accepted the fixtures, as it does not appear that she gave the plaintiff any notice to take them away.

The COURT granted a rule *nisi* on this point, against which—

Thesiger and *Petersdorff* now shewed cause:

The contract for the fixtures was complete and unconditional, and not an imperfect contract depending on the price being ascertained. There was a perfect contract that in consideration that the plaintiff would not remove the fixtures during the term, the defendant would take them at a valuation to be subsequently made. The appraisement was only to ascertain the amount to be paid, and the moment the price was ascertained, the agreement was complete and perfect. Here the jury have found that Sexton, the defendant's broker, had authority to appraise, and the case of *Poulter* v. *Killingbeck* (1), is therefore in point. There A. had agreed verbally with B. to let him land rent-free, on condition that A. should have a moiety of the crop; while the crop was still on the ground it was appraised for both parties; A. declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to B., without stating the special agreement; and it was held that the action was maintainable, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it. So, here, the moment the price was ascertained, the agreement was complete and perfect, and *indebitatus assumpsit* was maintainable. In *Salmon* v. *Watson* (2), the agreement was verbal, to take a house and purchase the fixtures at a valuation to be made *by two brokers. The defendant, having taken possession of the fixtures and paid part of the sum, was held liable for the remainder in *indebitatus assumpsit* on the account stated. That, it is

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(1) 1 Bos. & P. 397. (2) 4 Moore, 73.

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submitted, goes the whole length of the present case. The only additional circumstance there was, the payment of part of the money. Here, possession of the house and fixtures was taken by the defendant, which shews that the contract was complete. It was only during the term that the tenant could remove the fixtures, and the defendant having obtained possession of the fixtures, affirmed the contract to pay for them at the valuation, and then all that was necessary to perfect the agreement was to appraise them. The defendant could not intend to give her broker authority to appraise, without intending to give him authority to complete the appraisement by signing it. It has been the practice, where the possession of land sold has been given, to insert a count for land bargained and sold.

(PARKE, B.: There you must shew an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the *indebitatus* count. In point of practice such a count seldom occurs, and it generally could not be sustained, because the deed of conveyance which must be shewn to pass the interest in the land generally contains a release of the purchase-money.)

Kelly, in support of the rule:

The articles in question are either fixtures and constitute part of the freehold, and therefore this form of action is not maintainable to recover the value of them before severance, or else they are goods and chattels, in which case it was requisite that the contract should have been reduced into writing and signed by the defendant or by some person authorised by her. In this case the original contract was by parol: then the appraisement is made and signed by the defendant's broker: that, it is contended [*272] on the other side, was a sufficient memorandum in *writing to satisfy the statute. There was, however, no memorandum signed by the defendant herself: then, was the broker her agent lawfully authorised to sign a contract of purchase? It is submitted that the evidence given at the trial proves the very reverse of his having any authority to do so. It was proved by the broker himself that the defendant desired him to go and look at the

fixtures, but that she said she did not know whether she should agree with the plaintiff for them or not. That, it is submitted, in no way authorised the broker to sign a contract in writing for the purchase of the fixtures, and did not constitute him her agent for that purpose. His authority at the most only extended to appraising the fixtures. But it has been said, that, by using the word appraise, an authority to sign the appraisement was necessarily implied.

(ALDERSON, B.: The question is, whether the Statute of Frauds has any application to this case.

PARKE, B.: The general rule is, that goods, by being affixed to the freehold, become parcel of it, subject to the right of the tenant, if he affixed them or purchased them, to remove them during the term, or to part with them to any incoming tenant: here the tenant, at the request of the landlord, agrees to waive his right to remove the fixtures, in consideration of the landlord's agreeing to pay for them according to a valuation to be afterwards made.)

If there was such an agreement, it ought to have been made the subject of a special count, as it could not be in the nature of a transfer from hand to hand, the fixtures not being chattels but part of the freehold, the tenant having a right to use them during the term, and to remove them at the expiration of it. These are either to be considered as goods and treated as severed from the freehold, or else they continue parcel of the freehold, and are an interest in land within the fourth section of the statute. In *Lee* v. *Risdon*, the ground of the decision was that the fixtures continued to be parcel of the freehold until they were severed, *and *Horn* v. *Baker* (1) is to the same effect. [*273]

(PARKE, B.: The plaintiff in this case did not give the defendant a right to the fixtures before the expiration of the term, but he agreed to waive his right to sever them during the term, and to sell them to her at the end of the term. The only question is, whether the amount is recoverable on such a count as this.)

(1) 9 R. R. 541 (9 East, 215).

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It is submitted that it is not; but even admitting that it could, that must be on the ground that the fixtures come within the description of goods and chattels, and then they are within the 17th section of the Statute of Frauds, and a note in writing was requisite to render the contract valid. But it is submitted, that there must be a special count to enable the plaintiff to recover, and that he cannot recover on the common *indebitatus* count, either for goods and fixtures bargained and sold, or for fixtures and effects sold and delivered. If the absolute right to the fixtures was transferred by this agreement, there is nothing to prevent it from coming within the words goods, wares, and merchandizes in the 17th section of the statute. If this were to be held otherwise, all the mischiefs which the statute intended to remedy would arise. The learned Judge told the jury that if they thought the defendant had authorised the broker to appraise the fixtures, that he thought was a sufficient authority to him to sign the appraisement.

(PARKE, B.: You say, that if it did import an authority to sign a valuation merely as such, it did not give him authority to sign a valuation which would of itself be a contract, and that all that he was authorised to sign was a valuation, and not a contract. However, the question turns on the form of action.)

Without arguing whether a valuation may be an agreement within the Statute of Frauds or not, there was here no authority given to sign such a valuation, and the defendant being in this [*274] case the reversioner the taking of *the key of the house cannot be construed to amount to an acceptance of the fixtures.

Cur. adv. vult.

The judgment of the COURT was now delivered by PARKE, B.:

In this case, which was argued before my brothers Bolland, Alderson, Gurney, and myself, on Saturday last, all the questions were disposed of by the Court in the course of the argument except one, namely, whether the plaintiff could recover the amount of the valuation of the fixtures upon any count in this declaration. The first count stated, that in consideration that the defendant had bargained for and bought of the plaintiff, and

that the plaintiff, at the request of the defendant, had then and there sold to the defendant divers chattels, fixtures, and effects, then lying in and being fastened to a certain dwelling-house and premises, at the price of 40*l.* 10*s.*, the defendant undertook to pay the price so agreed upon. The second count stated that the defendant was indebted to the plaintiff in 50*l.* for the price and value of goods, chattels, fixtures, and effects, bargained and sold by the plaintiff to the defendant at her request; and in the like sum for the price and value of other goods, chattels, fixtures, and effects, sold and delivered by the plaintiff to the defendant at her request; and in the like sum upon an account stated and the question is, whether these counts, or any part of them, are applicable to the plaintiff's case. We think that the first count, or that part of the second count which charges the defendant with the price and value of fixtures bargained and sold, or indeed that which states her to be indebted for fixtures sold and delivered, is upon the evidence supported, and it is unnecessary to say whether the other part of the second, upon the account stated, was or was not sustained. The situation of the plaintiff was this, upon entering as tenant to the defendant, he had paid upwards of 20*l.* for the interest *which a former tenant [*275] had in certain chattels which had been annexed to the freehold, but which that tenant had a right to sever and remove whenever he pleased during his term; and the plaintiff had also, during his term, annexed other chattels to the freehold, which also he had the like right of removing. Shortly before the expiration of this term, the plaintiff agreed with the defendant, his lessor, that he should forbear to remove all these chattels so annexed, which he was about to do, and that they should be taken by the defendant on a valuation to be made by two appraisers. This valuation was ascertained by two brokers, both of whom must, upon the finding of the jury, be taken to have been properly appointed for this purpose: the value was fixed at 40*l.* 10*s.* The plaintiff left the chattels attached to the freehold, and the defendant took possession of them.

When chattels are thus fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels,

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as stated by Lord Chief Justice GIBBS in *Lee* v. *Risdon* (1), and in the very able work of Messrs. Amos & Ferard on Fixtures; but, whilst annexed, they may be treated for some purposes as chattels: for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels—*Poole's* case (2)—in like manner as growing crops of corn or other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. The case above cited of *Lee* v. *Risdon*, however, decides that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt* v. *Shew* (3) they were held to fall under the description of "goods, chattels, and effects" in an action of trespass,

[*276] we *cannot consider the previous authority as overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Lord Chief Justice ABBOTT certainly does not mention that circumstance as the ground of the decision.

The plaintiff, therefore, cannot recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels. And after the contract is executed, and the plaintiff has given up possession to the defendant, the question is, whether he may not declare as for fixtures bargained and sold, or sold and delivered. The term "fixtures" has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, in which sense it is used in the Treatise on Fixtures above referred to. And it has certainly been the practice, since the decision in *Lee* v. *Risdon*, to declare for the amount of valuations of such fixtures between one tenant and another, or the tenant and landlord, in a count in *indebitatus assumpsit* for fixtures. Although this may not be the most accurate mode of describing

(1) 17 R. R. 484 (7 Taunt. 188).
(2) 1 Salk. 368.
(3) 4 B. & Ald. 206.

the real contract between the parties, we think it is sufficient, and that the plaintiff may recover upon it; and the case bears a strong analogy to that of a contract by a tenant to give up to his landlord or successor those growing crops to which he is entitled by the common law or the custom of the country, as emblements, and the value of which after the contract is executed may certainly be recovered on a count for *crops bargained and sold. See [*277] *Mayfield* v. *Wadsley* (1). This question on the form of the declaration was indeed decided by the Court on a motion for a rule *nisi*; but as it was suggested by the learned counsel for the defendant, that the Court so decided under the impression that this was a sale of an interest in land, within the 4th section of the Statute of Frauds, leaving the point to be discussed whether the appraisement was a sufficient memorandum in writing, we have allowed the point to be argued, and given it full consideration, and decided it. We are quite satisfied that this is not a sale of any interest in land, for the reasons given in the course of the arguments; and the judgment of the Court, and particularly of Mr. Justice LITTLEDALE in *Evans* v. *Roberts* (2), upon the subject of growing crops, is an authority to the same effect; but treating this as not being a sale of any interest in land, we think the declaration is sufficiently adapted to the case.

Rule discharged.

ALIVON AND ANOTHER *v.* FURNIVAL (3).

1834.

Exch. of Pleas.

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(1 Cr. M. & R. 277—297; S. C. 4 Tyrwh. 751; 3 L. J. (N. S.) 241; 3 Dowl. P. C. 202.)

In an action brought by the syndics of a French bankrupt upon an arbitral sentence and *ordonnance*, whereby the defendant was adjudged to pay the bankrupt a sum of money: Held, 1st, that the agreement of reference (made in France) was sufficiently proved by an examined copy and the evidence of the attesting witness, it appearing that the

(1) 3 B. & C. 357; 5 Dowl. & Ry. 224.

(2) 29 R. R. 421 (5 B. & C. 829; 8 Dowl. & Ry. 611).

(3) Cited by NORTH, J. in *Re Henderson, Nouvion* v. *Freeman* (1887) 35 Ch. D. 704, 716. His judgment was, however, reversed in the Court of Appeal and by the House of Lords on the ground that the foreign judgment in that case was not in the nature of a final judgment. See 37 Ch. D. 244, 15 App. Cas. 1, 57 L. J. Ch. 367, 59 L. J. Ch. 337. [It must not be assumed, of course, that the incidental statements of French law are still correct.—F. P.]—R. C.

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original was deposited with a notary at Paris for safe custody, and that it is the established usage in France not to allow the removal of a document so deposited; 2ndly, that the proceedings in foreign Courts must be presumed to be consistent with the foreign law until the contrary is distinctly shewn; 3rdly, that the principle adopted by a foreign jurisdiction in assessing damages cannot be impugned, unless contrary to natural justice, or proved to be not conformable to the foreign law; 4thly, that two out of three syndics of a French bankrupt may sue without naming the third, or stating that the Juge Commissaire has authorized the suit, such appearing to be the rule in France.

DEBT. The third count of the declaration stated, that before
[*278] Peter Beuvain became a bankrupt, to wit, on *&c., in parts beyond the seas, to wit, at &c., by a certain instrument in writing then and there made between the defendant of the one part, and the said Peter Beuvain of the other part, the said parties made and concluded a certain agreement; and in the same instrument it was agreed between the said parties, that, in case of disputes, the parties recognised the jurisdiction of a certain Court, to wit, of the Tribunal of Commerce, sitting at Paris, in the Department of the Seine, and they thereby submitted the matters in difference to the decision of two arbitrators, being merchants, to be named by the parties respectively, such arbitrators, in case of disagreement, to have the power of naming an umpire, and that the two or the three arbitrators might be named by the Tribunal of Commerce, at the request of either of the said parties; and that the decision of such arbitrators or their umpire was to be supreme, and without appeal; and that after the making of the same instrument, and before the said Peter Beuvain became a bankrupt, to wit, on &c., at &c., such disputes as were mentioned and contemplated in and by the same instrument arose and were depending between the said Peter Beuvain and the defendant; and thereupon afterwards and before the said Peter Beuvain became a bankrupt, to wit, on &c., at &c., the said Peter Beuvain duly, according to the laws of France, impleaded the said defendant in the said Court, in the same instrument in that behalf mentioned, that is to say, in the Tribunal of Commerce sitting at Paris, in the Department of the Seine, and then and there duly, according to the laws of France, prayed and required that arbitrators should be appointed by the said Court in pursuance of and according to the provision so as

aforesaid contained in the same instrument: and the plaintiffs further say, that afterwards and before the said P. Beuvain became bankrupt, to wit, on &c., persons were duly, according to the laws of France, appointed in and by the *said last-mentioned Court to decide the said disputes which had so arisen between the said Peter Beuvain and the defendant—as by the said appointment, duly, according to the laws of France and the course and practice of the said last-mentioned Court, made and still remaining therein, will more fully appear: and that afterwards and before the said Peter Beuvain became a bankrupt, to wit, on &c., at &c., the said arbitrators, having heard the allegations and proofs of the said parties respectively, duly made their certain award, called an arbitral sentence, of and concerning the said disputes so referred to them as aforesaid, and did thereby award and order that the defendant should pay to the said P. Beuvain two several sums of foreign money, to wit, the sum of 51,589 francs 50 centimes, and the sum of 157,819 francs 68 centimes, making together the sum of 209,409 francs 18 centimes, as by the same arbitral sentence, duly according to the law of France and the course and practice of the said last-mentioned Court, now remaining in the same Court, will more fully appear; and that afterwards and before the said P. Beuvain became a bankrupt, to wit, on &c., by a certain ordinance, duly according to the law of France, made at Paris aforesaid, to wit, at &c., the President of a certain Court in the kingdom of France aforesaid, to wit, the President of the Civil Tribunal of First Instance in the Department of the Seine, declared and ordered that the said arbitral sentence should be executed in all its particulars according to its form and contents, as by the said ordinance, duly according to the law of France and the course and practice of the last-mentioned Court, registered in the same Court, and now remaining therein, will more fully appear; and that the said P. Beuvain, after the giving and making of the said judgment and of the said arbitral sentence and ordinance, and before the giving and registering of a certain judgment hereinafter mentioned, to wit, on &c., at *&c., became and was a bankrupt according to the laws of France, and the said plaintiffs were then and there duly appointed, and then and there became and

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were and still are, provisional syndics of the estate and effects of the said P. Beuvain, according to the law of France; whereupon and whereby the plaintiffs, as such provisional syndics as aforesaid, according to the law of France, became and were and still are entitled and empowered, in their own names to sue for and recover all debts which were due to the said P. Beuvain at the time when the said P. Beuvain became bankrupt, and entitled to enforce, by action in their own names, as such provisional syndics as aforesaid, all claims and demands which the said P. Beuvain, at the time he so became bankrupt as aforesaid, had or might have against the defendant; and that the said cause was afterwards, to wit, on &c., removed by the defendant into a certain other Court in the kingdom of France aforesaid, to wit, a certain Court called the Royal Court of Paris, by way of appeal, and such proceedings were thereupon afterwards had in the said last-mentioned Court, that, by the judgment of the same Court, pronounced on the day and year aforesaid, after setting forth therein, as the fact was, that the plaintiffs, as such provisional syndics as aforesaid, had been made parties in the said cause in the room of the said P. Beuvain, the appeal of the defendant was dismissed, and the defendant was condemned to pay a fine and the expenses of the appeal, as by the said last-mentioned judgment, duly according to the law of France and the course and practice of the said last-mentioned Court, still remaining therein, will more fully appear; which several judgments, arbitral sentence, and ordinance still remain in their full force and effect, not in anywise reversed, annulled, set aside, paid off, satisfied, or discharged: and that the said sum of 209,409 francs 18 centimes, at the time of the giving and making of the said several judgments, arbitral sentence, and ordinance,

[*281] *was and still is of great value, to wit, of the value of 8,200*l.*, of which several premises respectively the defendant, during all the time aforesaid there, had notice; yet, &c. Plea, *nil debet.*

A commission, issued for the examination of witnesses, was executed at Paris. The original agreement, in the French language, deposited with a notary, was produced before the commissioners; and the signatures of Beuvain and the defendant were proved by the attesting witness Albert, who stated,

in the course of his examination, that, according to the law of France, a notary, with whom an original agreement has been deposited, cannot part with it except by the directions of a French Court (1). The agreement was expressed to be "fait au double." An examined copy, verified by the former witness, was returned by the commissioners. A copy of the original award subscribed by the arbitrators was proved by the persons who had examined it with the original, (which it appeared was deposited in the "Tribunal de Première Instance,") and also returned by the commissioners; and evidence was given of the facts that Beuvain was a merchant, that he was in debt, and that he had stopped payment (2).

The cause was tried before Mr. Baron Vaughan at the Middlesex sittings after Trinity Term, 1833. The depositions taken under the commission, and the papers returned therewith, were read.

Official copies, verified by the seals impressed thereon, and proved to be those of the respective Courts, were put in to shew the judgment of the Tribunal of Commerce appointing arbitrators named by the parties; another *judgment of that Court, removing [*282] the arbitrator named by Furnival, on the ground that he was a foreigner and not a merchant, and appointing, on Furnival's default, a new arbitrator; a judgment of the Royal Court confirming, on appeal, the latter judgment; another judgment of the Tribunal of Commerce, extending the time for making the award; another judgment of the Royal Court, confirming the latter judgment on appeal, and further extending the time; the arbitral sentence; the ordinance, or *exequatur* of the President of the Tribunal of First Instance; another judgment of the Tribunal of Commerce, declaring Beuvain to be "en état de faillite;" another judgment of the same Court, appointing the plaintiffs and one Chatonnay provisional syndics, with power "agir ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre—sous la surveillance de M. le Juge

(1) "Les Notaires ne pourront se dessaisir d'aucune minute, si ce n'est pas dans les cas prévus par la loi, et en vertu d'un jugement."—Loi du 25 Ventose, an 11, sur le Notariat, tit. 1, sec. 2, pl. 22, Appendice aux Codes.

(2) See Code de Commerce, Art. 437.

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Commissaire;" and another judgment of the Royal Court, confirming the ordinance on appeal, to which the plaintiffs and Chatonnay were therein expressed to be made parties, as provisional syndics, in the place of Beuvain.

M. Colin, a French advocate, examined for the plaintiffs, stated, that, according to the law and practice in France, one or two, of three or more syndics, may sue, without proving the disability of the rest, or the authority of the Juge Commissaire, and deposed to the usage in France on various points of evidence. A French notary who was examined for the defendant stated, that syndics could not bring an action unless authorized by the Juge Commissaire, and said that he did not suppose a solicitor in France would bring an action for syndics unless the authority of the Juge Commissaire had been obtained.

The defendant's counsel took a variety of objections, the nature of which will appear in the course of the argument. The learned Judge, without pronouncing any opinion upon the objections, nonsuited the plaintiffs, giving them leave to move to enter a verdict for 8,200*l*. A rule *nisi* having been obtained—

[283] *Follett* and *Tomlinson* shewed cause:

This is an action on an award, and the agreement on which the award is founded has not been sufficiently proved. The plaintiffs have offered as evidence a copy of the document deposited with the notary, who might have attended the trial with the original. The agreement is expressed to be made in duplicate, "au double" (1), and the French law requires that there shall be as many originals as there are parties having distinct interests (2); yet the plaintiffs have neither accounted for the other original part, nor given the defendant notice to produce it.

The arbitrators were not duly appointed. According to the agreement, they were to be merchants appointed by the parties respectively. The arbitrator who was nominated by the defendant, was set aside by the Tribunal of Commerce, which appointed

(1) The agreement concludes thus: "Fait double et signé en presence de M. Charles Albert, &c."

(2) Code Civile, Art. 1325.

another arbitrator in his place, and there is no evidence that, by the law of France, the Tribunal had power to do so.

(PARKE, B.: Is not the judgment itself *primâ facie* evidence of the law therein laid down?)

The arbitrator substituted by the Court was not a merchant; and the Court has neither exercised its power of appointing both arbitrators, nor followed the nomination made by the parties. The award was made by Beuvain's nominee, and by another nominated by the Court, without the assent of the defendant, (who protested against the appointment,) and who was not qualified according to the agreement.

The arbitrators have exceeded their authority. They have awarded to Beuvain the exclusive use of the patent in question throughout all France, and the item of 157,819 francs 68 centimes arises from a calculation of prospective profits for fifteen years. The judgment affirming the award does not conclude the question, for the judgment *affords only *primâ facie* [*284] evidence of the right, and may be questioned.

(PARKE, B.: The decision in *Martin* v. *Nichols* (1) was well considered.)

That was an application for the extraordinary aid of the Court of Chancery to impeach the judgment of a Colonial Court, and it was observed that the parties might appeal to the King in Council. EYRE, Ch. J., in the case there referred to by the VICE-CHANCELLOR, said, that the judgment of foreign Courts might be examined. In the present case, the French Courts have not adjudicated on the merits at all. The ordinance merely renders the award executory (2), and is only formal; and, like the making of an agreement of reference a rule of an English Court for the purpose of issuing an attachment, does not exclude objections to the award itself. The judgment of the Royal Court rejects the appeal from the ordinance expressly on the ground that the questions raised on the award are matters of

(1) 3 Sim. 458.

(2) See Code de Procédure Civile, Arts. 1020 and 1021.

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a primary nature, and therefore not the subject-matter of appeal; and the question is not decided whether the award *per se* is good according to the law of France. No evidence is given to shew that the decision of the arbitrators is consistent with that law, and it is manifestly inconsistent with natural justice.

It has not been proved that the plaintiffs had any authority to bring this action. According to the language of their appointment, they are to act "sous la surveillance de M. le Juge Commissaire;" and the law under which they are appointed so limits their powers, and declares the authority of the Juge Commissaire necessary to their proceedings to recover debts (1). The evidence of M. Colin does not distinctly disprove the necessity for shewing that authority in proceedings of this sort in France, and is inconsistent with the language of the appointment and the law, and contradicted by the defendant's witness

[*285] *M. Girard. It was incumbent on the plaintiffs to shew clearly their authority and title to sue: *Tenon* v. *Mars* (2).

The action is brought by two out of the three provisional syndics appointed. It is true that they are in terms empowered to act "ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre;" but no evidence has been given of the absence or incapacity of the syndic not joined. Even if that absence or incapacity had existed, still the action should have been expressly brought in the names or on the behalf of the three syndics who represent Beuvain. So, in a case just decided in the Court of Common Pleas, *Trimbey* v. *Vignier* (3), it was held that, where the indorsement made in France of a French bill is general or in blank (4), the indorsee suing in this country must proceed in the name of the indorser. So, according to the English law, all the assignees of a bankrupt must join in an action (5). The plaintiffs have not pursued the authority conferred by the language of the appointment, an act done by

(1) Code de Commerce, Arts. 454 and 492.

(2) 8 B. & C. 638; 3 Man. & Ry. 38.

(3) 1 Bing. N. C. 151.

(4) See Code de Commerce, Arts. 136, 137, and 138.

(5) See *Snelgrove* v. *Hunt*, 20 R. R. 708 (2 Stark. 424), 22 R. R. 799 (1 Chitty, 71). The latter report states the pleadings, from which it appears that the action was brought exclusively on a contract made with the assignees.

two out of three not being a due exercise of a power to act jointly or separately (1).

The arbitral sentence is stated in the declaration to be in the Court of Commerce. The evidence shews that it is registered in the Court of First Instance: and therefore there is a variance.

The declaration throughout describes Beuvain as a bankrupt; and the alleged rights of the plaintiffs are therein expressly founded on his bankruptcy. In the event of a merchant stopping payment, the French law (2) defines three classes of cases, with various incidents peculiar to each, namely, "faillite," "banqueroute simple," and "banqueroute frauduleuse." *The French proceedings in evidence shew that there was no bankruptcy of either kind, but merely a "faillite," and that Beuvain was not a bankrupt, but "failli." [*286]

Bompas, Serjt., *Manning*, and *J. Henderson*, in support of the rule:

This is in substance an action on a judgment. It appears from the French proceedings, that Beuvain and the defendant were partners in the transactions out of which these differences grew, and, according to the French law (3), those differences could be decided only by arbitrators. The power of appeal possessed by the defendant (4) was exercised by him, and his appeal was rejected. The ordinance renders the arbitral sentence absolutely executory (5), and, unless successfully appealed from, conclusive (6). It is plain, then, that the defendant was absolutely bound in France by this arbitral judgment; and there being no question as to jurisdiction, no evidence on the part of the defendant impugning that judgment, and no irregularity apparent *ex facie*, it affords *per se* sufficient proof of the rights which it purports to establish.

The plaintiffs' case, however, may be sustained without ascribing to the award and ordinance the attributes of a judgment. The production and proof of the original agreement

(1) Co. Litt. 181 b.
(2) Code de Commerce, Arts. 437, 438, and 439.
(3) *Ibid.* Art. 51.
(4) *Ibid.* Art. 52.
(5) *Ibid.* Art. 61.
(6) Code de Procédure Civile, 1016.

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before the commissioners, coupled with the copy given in evidence, sufficiently shew the agreement. It appears that the original is beyond the control of this Court, and that it was deposited with the notary for safe custody; and one of the witnesses sworn under the commission, deposes, that, according to French law, it cannot be removed out of the notary's office without the authority of a [*287] French Court. It is, therefore, sufficiently manifest *that this original could not be produced before the jury. The expression "fait au double," at the foot of the agreement, is not explained in evidence, and does not necessarily raise the inference attempted to be drawn from it, that there was another part having the same obligatory effect. If such an inference were drawn, it is at least not to be further presumed that one complete original (and the case supposes only two) was delivered to either of the parties who were mutually bound; and the only other presumption, viz. that it also remained with the notary, removes the objection by accounting for that part, and the proof of either part in such case is sufficient.

By the terms of the agreement the parties expressly submitted themselves to the jurisdiction of the Tribunal of Commerce, and the judgment of that Court, which was confirmed on appeal, is sufficient, in the absence at least of any evidence impugning it, to answer the objection that the arbitrator nominated by the defendant was improperly removed. A sufficient reason is assigned in the judgment for the removal, viz. that the arbitrator nominated by the defendant was not legally qualified to be an "arbitre juge," being a foreigner. The defendant not having within the appointed time nominated another arbitrator, the Court exercised its power as if he had never appointed an arbitrator; and the power was, in substance, as well exercised by nominating the arbitrator chosen by Beuvain, and a new arbitrator on the defendant's default, as it would have been by nominating two new arbitrators.

It is not clearly shewn in the evidence whether the arbitrator nominated by the Court was a merchant, but assuming that he was not, still as the award has been confirmed on appeal, when this objection might have been taken, it must now be presumed, as there is no proof to the contrary, that the Court did not in

this respect exceed its power. On the agreement it does not appear that the restriction of choice of merchants imposed on the parties extends to the Tribunal of Commerce.

The confirmation of the award on appeal sufficiently shews [288] that the award itself is consistent with French law, and there is no evidence to the contrary. It is needless to inquire as to that part which awards to Beuvain the exclusive use of the patent, because the present action is not founded on that part; and, even if the award were bad *pro tanto*, it might be good for the rest. The award of the 51,589 francs 50 centimes is founded on proof of an excess to that amount of the expenses over the amount which the defendant by the agreement guaranteed to be the maximum, and that item has never been questioned. With respect to the item of 157,819 francs 68 centimes, the arbitrators in awarding it have construed the agreement as importing a guarantie that the profits of the undertaking should amount at the least to a certain sum annually during the duration of the agreement, viz. fifteen years, and the agreement will fairly bear such a construction. The anticipated profits and the mutual penalties are stated therein at very high rates. Beuvain, in case of failure on his part, was bound, under article 9 of the agreement, to pay the defendant 20,000 francs a year for fifteen years, and thus was contingently liable to the extent of 300,000 francs. The arbitrators, proceeding on the principle of a guarantie of such prospective profits, have calculated damages as they have been calculated in an action in an English Court for not granting a lease where the improved value is proved to exceed the rent agreed to be reserved, viz. by multiplying the profit by the number of years, and making a suitable reduction for present payment.

The evidence of M. Colin shews that the antecedent authority of the Juge Commissaire is not necessary to the validity of proceedings of the present kind in France, and the witness for the defence on this point states in effect no more than his opinion as to the course which a French solicitor would pursue. From the French proceedings in evidence it may be concluded that where syndics proceed in the French Courts against the debtors of the estate, it is *unnecessary to allege or prove the authorization [*289]

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of the Juge Commissaire. The syndics of Beuvain are in the appeal in the Royal Court made parties to the suit in the room of Beuvain, yet there is not in any part of those proceedings the slightest allusion to the Juge Commissaire. Considering that these French records state minutely every incident of the suit down even to the names and fees of the ushers, the absence of any reference to the Juge Commissaire tends directly to shew that his authorization needed not averment or proof. It might be presumed that the syndics are authorized by him to perform their duty of recovering debts; and the question whether they are so authorized affects only the interests of third persons; the issue to be tried on these pleadings was, whether the money was due to the syndics, not whether the payment ought to be thus enforced. The 1 Geo. IV. c. 119, s. 11, enacts that no suit at law instituted by the assignees of an insolvent shall proceed further than an arrest on mesne process, without the consent of the major part of the creditors given at a meeting called for the purpose; yet it has been held that the defendant in an action brought by the assignees can in no way avail himself of this provision, as it was not made for his benefit; and that the assignees need not in such action aver or prove their authority to sue: *Doe* v. *Spencer* (1); *Dance* v. *Wyatt* (2).

The testimony of M. Colin, on this point uncontradicted, clearly shews that in the French Courts two out of three syndics may sue, without alleging or giving evidence of the absence or incapacity of the third. In the present case there was indeed such evidence. A witness, cross-examined by the defendant's counsel as to a conversation with the plaintiff's agent, deposed on his re-examination, as a further part of the same conversation [*290] (which was therefore *matter to go to the jury (3),) that the agent stated that Chatonnay (the syndic not joined) was in Italy. M. Colin's evidence sufficiently supports the allegation in the declaration, that the plaintiffs, according to the law of France, are entitled to sue in their own names. The non-joinder of the third syndic at the utmost could only be the subject of a plea in abatement—as in the cases of executors and administrators, the

(1) 3 Bing. 204; 11 Moore, 7.
(2) 6 Bing. 486; 4 Moore & P. 201.
(3) *Queen's* case, 22 R. R. 662 (2 Brod. & B. 298).

plaintiffs here suing in *autre droit* (1). There is nothing to raise the presumption of any legal obligation to name the third at all, or of any ground for applying to this case the strict rule of English law in the construction of the words "jointly or separately." In *Guthrie* v. *Armstrong* (2) the COURT expressed an indisposition to extend that rule, and refused to apply it where there were reasonable grounds for presuming a different intention of the parties. Here, there is sufficient ground for such presumption. It is not to be inferred that the Court intended, that, if the number of the syndics capable of acting should be reduced to two by accident, it should be further reduced to one by the application of a technical rule, which has not been shewn to belong to the French law.

The averment in the declaration, that the arbitral sentence remains in the Tribunal of Commerce is immaterial and may be rejected: *Walker* v. *Witter* (3).

The sworn interpreters on their oath have rendered the words "failli" and "faillite" by the English words bankrupt and bankruptcy, and there is nothing to impeach their testimony as to the fidelity of the translation. It is evident that the French law recognises three species of bankruptcy, called in French "faillite," "banqueroute simple," and "banqueroute frauduleuse," and the translators have used the generic word. These species do not differ from *each other in what relates to the rights and powers of the syndics (4). [*291]

Cur. adv. vult.

The judgment of the COURT was afterwards delivered by PARKE, B.:

Many objections were taken in this case to the right of the plaintiffs to recover: first, it was contended that the agreement was not proved; secondly, that this was to be considered as an action on the award only, and that the arbitrators were not duly appointed; thirdly, that the award was not made pursuant to the submission, and was therefore void; fourthly, that the

(1) Com. Dig. tit. Abatement, (E.) 13, 14, (F.) 10.

(2) 5 B. & Ald. 628. And see the observations on *Bonifant* v. *Greenfield*, 4 Man. & Ry. 190.

(3) 1 Doug. 1.

(4) Code de Commerce, Art. 600.

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plaintiffs had no right to maintain the action; fifthly, that the declaration was not proved.

We have considered these objections, and are of opinion that they are not well founded, and that the rule must be absolute to enter a verdict for the plaintiffs.

The first objection is that the agreement was not properly proved; this divides itself into two branches, one, that even if there were no evidence of a duplicate original being in existence, this proof would not have been sufficient, because the original deposited with the notary ought to have been produced, or clear proof given that by the written law of France it could not be removed. And another branch of this objection is, that it was proved that there was another original of this agreement in existence; that the copy was only secondary evidence, and not admissible until the original was accounted for, and, if in the possession of the defendant, notice to produce given; and that no such notice was given. It seems to be clear that this document was not acknowledged before a notary, and is therefore not to be deemed a notarial act. It was simply deposited for safe custody; but there was sufficient evidence in the testi-

[*292] mony of M. Colin of the established *usage at least in France, though it was not a provision of the written law, not to allow the removal of documents so deposited, and consequently to let in secondary evidence of the contents; for such evidence is admissible where it is in effect out of the power of a party to produce the original, and that was sufficiently proved in this case to the satisfaction of the learned Judge whose province it was to decide upon this question, and we cannot say that his decision was wrong. The second branch of this objection is that there was evidence of the existence of a duplicate original, and that there is an established rule that all originals must be accounted for before secondary evidence can be given of any one. There is no doubt as to this rule; but we are not satisfied that there was any such duplicate original in this case which had the same binding force and effect on the defendant as the one deposited and proved. The only evidence of its existence is the expression "fait au double" at the foot of the agreement; but what is the precise meaning of these terms, and what was the nature

of the duplicate executed in this case, if there was one, was not made out by the evidence; and neither in the numerous cross-interrogatories exhibited to the witness Albert, nor in his depositions which were read on the trial, is there one which hints at the existence of any other obligatory document than the one deposited with the notary. It is very true that the 1325th article of the Code Civil requires duplicates where there are two interests; but I do not see how we can properly take notice of this law, as it was not proved on the trial. The objection is *strictissimi juris*, and beside the justice of this case; and we think that it ought not to succeed unless the existence of a duplicate original, in the proper sense of that word, was more distinctly made out than it was in this case.

I now come to the objections on the merits; and first as to the appointment of the arbitrators—First, it is contended, that, by the express agreement of the parties, in article 12, merchants must be appointed, and that the *Tribunal de Commerce had no [*293] power to appoint others. This depends on the construction of that article; which is as follows: "En cas de discussions, les parties reconnaissent la jurisdiction du Tribunal de Commerce, séant à Paris, Département de la Seine, et elles seront soumises à deux arbitres négociants respectivement nommés par elles, qui, en cas de désaccord, auront la faculté de nommer un troisième pour les départager; les deux ou les trois arbitres pourront également être nommés par le dit Tribunal de Commerce à la réquisition de l'une des parties, et la décision d'accord ou celle du partage sera souveraine et sans recours en appel." We do not think that the Tribunal de Commerce is restrained by this clause from appointing arbitrators not merchants; the parties are, but the Court has a general power; and it is to be remarked, that in none of the proceedings in the French Courts is the objection taken that the Tribunal de Commerce exceeded its powers in this respect. It is then said that the Tribunal de Commerce has no power to annul the appointment made by the defendant himself, which they have done by their act of 15th November, 1827. Now by this act it appears that the appointment of a foreigner as arbitrator was not a due exercise of the power reserved by the 12th article, and void, and was the same as if no arbitrator at all

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had been named by the defendant; and we must assume the judgment of the Court to be according to the French law, at least until the contrary was distinctly proved, according to the principle laid down in *Becquet* v. *MacCarthy* (1). Next it is contended that the Tribunal ought to have appointed two arbitrators and not one. But is there any substantial difference in allowing the former appointment to stand, naming another; and expressly appointing the arbitrator already named and the other jointly *de novo?* Certainly there is not; and in this [*294] respect also we must *assume that the Tribunal de Commerce acted according to law, unless the contrary be proved.

The third head of objection is the award itself, which, it is suggested, is not warranted by the submission. The award has proceeded upon the principle that the defendant, instead of being merely placed in *statu quo*, and reimbursed the expenses incurred upon the faith of the contract (which could have been done by awarding as damages the expense of constructing the new works, deducting the then value of the materials, to Beuvain under all the circumstances of the case); had a right to be placed in the same situation as if the defendant had fulfilled his contract. And it is impossible for us to say that this principle of adjusting the damages is wrong, as being contrary to natural justice; and there is no evidence that it is not conformable to the law of France. Indeed it appears to follow the rule laid down in the 1149th article of the Code Civil.

The fourth head of objection is, that the plaintiffs cannot sue, and this objection subdivides itself into several—First, that by the terms of the appointment two out of three cannot sue. The appointment is as follows: "Le tribunal nomme pour syndics provisoires de la faillite des sieurs Beuvain & Co. le sieur Chatonney, le sieur Deloustal, et le sieur Alivon, portés en la dite liste, pour exercer les dites fonctions de syndics provisoires telles qu'elles sont décrites dans les articles 476 à 525 du Code de Commerce, lesquels syndics pourront agir ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre, sous la surveillance de M. le Juge Commissaire." The answer to this objection is, that, by the law of France in such a case, two out

(1) 36 R. R. 803 (2 B. & Ad. 951).

of three may do an act as well as one separately, and that is distinctly proved by M. Colin. Secondly, it is said that they ought to have the previous authority of the Juge Commissaire. They are directed by the appointment to act under the surveillance of the *Juge Commissaire (1); but M. Colin proves that they may bring an action without his authority—that is the effect of his testimony; and though the defendant's witness, Girard, gave evidence to the contrary, it seems to amount only to this, that a solicitor would not act properly in doing so, not that the want of previous directions would avoid the act and constitute a defence to the action; and this is in conformity with the principle on which the cases cited for the plaintiff relating to actions brought by assignees of insolvents in this country were decided. Thirdly, it is insisted that by the law of France two cannot maintain an action for the debt due to the bankrupt. And this also depends upon the evidence. That all may sue, appears by articles 492 and 499 of the Code de Commerce, both given in evidence. That the bankrupt is deprived of the administration of his effects, appears by clause 442, also read. And M. Colin deposes that two have the same power to act under this appointment as three, and there is no evidence to the contrary. Fourthly, it is insisted that, if two can bring an action, it is a condition precedent upon the construction of the instrument of appointment that the third should be absent, or should have objected to the act done; and that there was no proof of either circumstance in this case; but in our opinion this would be to put a very strict construction upon the terms of the appointment. It seems to us that the act of two only sufficiently implies the absence or want of consent of the third, and that the effect of the authority given by the appointment is in substance to authorize two to do valid acts as to third persons, without the other. And it was in fact proved, that, by the law of France, one of the syndics might act if the other should not, without proving the absence of that other. Lastly, it is said that though two may act and bring an action, yet they must sue in the name of all. Now, the effect of the testimony of Colin is *that two may sue in France without a third, and the witness for the defendant does not prove the

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(1) By Art. 492 of the Code de Commerce, "Sous l'autorisation."

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contrary, and there seems no reason why it should not be so. The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country; but it should seem that the syndics act as mandatories or agents for the creditors; the whole three, or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country; and we think it may by the comity of nations be enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires: *Dutch West India Company* v. *Moses* (1), *National Bank of St. Charles* v. *De Bernales* (2), *Solomons* v. *Ross* (3). We do not pronounce an opinion whether this objection is available on the plea of *nil debet*, or ought to have been pleaded in abatement (though we were much struck with the argument of the learned counsel for the plaintiff), as we think it is not available at all upon the evidence in this case.

The fifth head of objection is that of variance, that the award is said to be registered in the Tribunal de Commerce, instead of the Court of First Instance; but the answer is that this is clearly surplusage.

The sixth, that there is a variance, because Beuvain is averred to be a bankrupt, whereas he was only an insolvent or *en état de faillite;* but this depends entirely upon the argument that the English term "bankrupt" necessarily means the same as the French, *banqueroute*, which it does not; and it is to be observed that in the English copy of the appointment of syndics the word *faillite* is translated bankruptcy.

[*297] These are all the objections to the plaintiff's right to *recover, and we think that they are not well founded, and that the action is maintainable without attributing to the acts of any of the Courts the same force as if they had been judgments between the litigating parties. The third count is the one adapted to the plaintiff's case.

Rule absolute.

(1) 1 Str. 612.
(2) 1 Ry. & M. 190.
(3) 1 H. Bl. 131, *n.*

The defendant having been charged in execution upon the judgment in the above cause—

Follett, in Michaelmas Term, moved that he might be discharged out of custody, or that he might have such other relief as to the Court, under the circumstances, should seem meet. He moved upon affidavits, stating that an appeal was now pending in France, in the Court of Cassation, from the judgment or award upon which the plaintiffs had proceeded and recovered in this Court; and that the fact of such appeal existing had not been brought before this Court in the proceedings that had already taken place.

(PARKE, B.: It ought to have been insisted upon by the defendant at the trial. An appeal has no other effect, while it is pending, than that of staying execution.)

All that the defendant asks is, that the Court will stay the execution.

(PARKE, B.: There is no writ of error upon the judgment of this Court.)

As the judgment here proceeded upon the fact of there being a valid judgment in the French Courts, and, as it now appears that such judgment is appealed against, and may, probably, be reversed, there is ground for the equitable interference of this Court.

The COURT said, that, at that stage of the proceedings in the French Court, there was no ground for the relief prayed; but that, if the Court of Cassation reversed the judgment, the application might be renewed.

Rule refused.

1834.

Exch. of Pleas.

[316]

JESSE, ADMINISTRATOR OF JESSE, DECEASED, *v.* ROY AND THOMPSON, EXECUTORS OF SMITH (1).

(1 Cr. M. & R. 316—344; S. C. 4 Tyrwh. 626; 3 L. J. (N. S.) Ex. 268.)

A seaman entered into articles of agreement to serve on board a ship "bound from the port of London to the South Seas to procure a cargo of sperm oil, and to return therewith to the port of London, where the voyage was to end," and he was to receive, in lieu of wages, a 95th share of the net proceeds of the cargo. By the 6th article of the agreement it was stipulated, that "no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at London, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles." The vessel sailed upon the voyage and procured a cargo; but, on her voyage home, was disabled and condemned in a foreign port. The cargo was transhipped, and, with the exception of a small portion sold for repairs, was delivered in London, and the freight upon it paid. The seaman accompanied the cargo in the vessel to which it was transhipped, but died before it reached London: Held, that the representatives of the seaman were not entitled to his share of the proceeds of the cargo under the agreement, but only to a *quantum meruit* for his services on board the second vessel.

THIS was an action of debt brought by the administrator of a [*317] seaman against the executors of the owner of *a vessel employed in the whale fishery, to recover the value of one 95th share of a cargo of sperm oil. At the trial before Bayley, B., at the Summer Assizes for Surrey, a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated—

That, on the 22nd of June, 1829, the plaintiff's intestate, Jonathan Arrowgate Wilson Jesse, duly executed the articles set forth in the declaration, with the defendants' testator, William Smith, who was the sole owner of the ship *Royalist*. That Jesse entered on board the ship as one of the crew, and sailed with the ship from the port of London on or about the 23rd of the same month of June upon the voyage mentioned in the articles, under the command of Thomas Steven Harris. The ship was

(1) Cited and followed in *Appleby* v. *Myers* (1867) L. R. 2 C. P. 651, 36 L. J. C. P. 331; distinguished in *Button* v. *Thompson* (1869) L. R. 4 C. P. 330, 38 L. J. C. P. 225. Contracts by which a seaman consents to forego his claim to wages in the event of the ship being lost are now void, and seamen's wages no longer depend upon freight: see Merchant Shipping Act, 1894, ss. 156, 157.—R. C.

seaworthy when she set sail, and, during the course of her voyage, the crew obtained the various quantities of oil hereinafter mentioned, partly in the lifetime of the said William Smith, and partly after his death; and that 22 tons of oil, parcel of the quantities produced as hereinafter mentioned, were taken out of the ship and disposed of by the master to Messrs. Kierulf & Co., of Manilla, for payment of necessary repairs of the ship, and for stores and other expenses, as mentioned and explained in the log-book, a copy of which is annexed to this case. That the gross value of the 22 tons of oil, according to the market price at Manilla on the 1st of January, 1832, was ——*l.* That the gross proceeds arising from the sale of the 22 tons of oil, which were forwarded to London to be sold for the account and at the risk of the owner of the *Royalist*, amounted to 580*l.* 16*s.* 8*d.*, and the value of the said 22 tons when taken out of the ship, at the market price in London, was 62*l.* per ton, or 1,364*l.* That the said ship *Royalist* obtained on her voyage, in the whole, 244 tons of 252 gallons each, imperial measure, or thereabouts; but that from the accidents the said ship met with at sea, and from tempestuous weather, not less than 71 tons were lost *by leakage. That, in consequence of other more serious sea damage, the said ship *Royalist* became unfit for further repair, and was legally condemned, with the sanction of the said Thomas Steven Harris, at Ternate, in the island of Timor, on or about the 5th day of August, 1832, where she was sold and ultimately broken up by the purchaser. That the said ship, tackle, stores, &c., produced by sale 8,438 guilders, or 700*l.* sterling. That the following is a copy of the survey held on the vessel, prior to which the cargo remaining on board was taken out. [Here the case set out the survey.] That such last-mentioned cargo consisted (exclusive of the oil lost by leakage, and exclusive of the said 22 tons, or thereabouts, aforesaid) of 148 tons, whereof 122 tons were, by the order of the said Thomas Steven Harris, shipped in the brig *Hope*, from Ternate to Batavia; and that at Batavia the said 122 tons were transhipped to and on board the *Alexander*, of London, which duly arrived at London; and these 122 tons, after deducting the leakage thereon during the homeward voyage, produced 91 tons of oil, net, which were sold and

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delivered, and the proceeds received by the defendants before the commencement of this action. That the account sales of these 91 tons, which produced 4,613*l.* 15*s.* 2*d.* gross, may be read. That the freight paid for the said oil per the ship *Hope*, and the charges on the said oil at Batavia, amounted to 666*l.*, and the freight per ship *Alexander* amounted to 1,022*l.* That 26 tons, the remainder of the said cargo, were carried in the ship ——, by order of the said Captain Thomas Steven Harris, from Ternate to Manilla, and were shipped by the like order in the *Planter*, for London. That the freight of the last-mentioned oil from Ternate to Manilla, and the charges then paid thereon, was 134*l.*, and from Manilla to England, per *Planter*, 218*l.* That the defendants will duly account for the proceeds of the sale of the said [*319] oil per *Planter*, if and when received, and be bound *to distribute the same in such manner as the judgment of this Court shall direct, with reference to the proceeds of the oil per *Alexander*, now in hand.

That the said Captain Thomas Steven Harris was satisfied with the conduct of his officers and crew, and gave to the said Jonathan Arrowgate Wilson Jesse, deceased, by the name of Jonathan Jesse, and others of the crew, certain certificates dated at Ternate, in or about the month of August, 1832. That the said Jonathan Arrowgate Wilson Jesse's certificate be considered for the purposes of this action as follows (the original having been lost by him at sea): "This is to certify that Jonathan Jesse has served as cooper's mate on board the ship *Royalist*, from the 21st June, 1829, until the 5th August, 1832, when the said ship was condemned as unfit for sea, and is entitled to the 95th share of 22 tons of sperm oil sent home from Manilla, also of 122 tons shipped on board the brig *Hope* for Java, and of 26 tons remaining in Ternate, after deducting slop bills and usual expenses. Dated in Ternate, 5th August, 1832. Signed, THOMAS S. HARRIS, master, ship *Royalist*." That the said Jonathan Arrowgate Wilson Jesse, deceased, John Nesbitt, the cooper, and David Higgins, the chief officer, all engaged and serving on board the said ship *Royalist*, attended to the discharging the said cargo at Ternate, to the re-coopering of the said cargo, and to the shipping the same on board the *Hope* and *Alexander*. That

the said John Nesbitt, the cooper, remained by the cargo of the said ship for four or five months after the condemnation thereof; and that the said John Arrowgate Wilson Jesse, and the said David Higgins, actually shipped themselves on board the said ship *Alexander*, for the purpose of attending to the said *Royalist's* cargo then on board; but that the said Jonathan Arrowgate Wilson Jesse died on the 27th of October, 1832, on board that ship on his homeward passage, not having any wages or other remuneration for his services on board thereof. That the said *David Higgins arrived with the said ship *Alexander* in the port [*320] of London. That no desertion or forfeiture took place during the voyage. That the said late William Smith, deceased, effected insurances on his said ship *Royalist* and her stores to the amount of 5,000*l.*; and that the defendants also effected insurances upon the said ship to the extent of 2,050*l.*, and, upon the cargo of oil obtained during the voyage, to the amount of 9,000*l.* That the said defendants have caused to be made up the following statement of the loss on oil to be recovered on the policies on oil, and which loss has been paid to the defendants. [Here the case set out the statement.] That the said William Smith departed this life on or about the — November, 1830, having first duly made his last will and testament, whereby he appointed the said defendants his executors, who duly proved the same in the proper Ecclesiastical Court, on or about the — December, 1830. That the said Jonathan Arrowgate Wilson Jesse, deceased, died intestate; and that the said plaintiff hath duly obtained letters of administration, dated the 6th June, 1833. That the said Thomas S. Harris remains in parts beyond the seas. That the tons of oil throughout these admissions be taken as tons of 252 gallons each, imperial measure.

"The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover the 95th lay or share upon the 22 tons of sperm oil, and the 148 tons, or upon either quantities, or any part thereof; and if upon the 22 tons only, then at what price per ton: or, if not to any portion of the oil—Whether or not the intestate is entitled to a *quantum meruit* for services rendered on board the *Royalist*, and for assisting the unloading and re-shipment and conveyance of the 148 tons of oil from the

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Royalist on board the other two ships in the manner stated in the case. And if the plaintiff is entitled to the lay or share upon the 148 tons, whether or not such lay or share is subject to any
[*321] portion of freight and expenses *in bringing home the same in the two ships mentioned in the case. The verdict to be altered and entered for the plaintiff or defendants as the Court shall direct. If the verdict is directed to stand for the plaintiff, the amount of debt shall be settled out of Court, according to the determination and direction of the Court as to the extent of the plaintiff's claim."

The articles referred to in the case were as follows: "That, in consideration of the share against each person's name hereinafter written, of the net and clear proceeds of the cargo which shall or may be procured and brought in the said ship or vessel to London, they, the said master, officers, and crew (each agreeing for himself only), do hereby promise, declare, and agree to and with the said owner, that they, the said master, officers, and crew, shall and will well and truly perform the above-mentioned voyage, and do their duty, and obey the orders and commands of their superior officers, and conduct themselves at all times and upon all occasions, and in all ports and places the said ship may touch or call at in the course of her said intended voyage, with sobriety, and as good and faithful seamen and mariners ought to do, as well on board the said ship as in her boats or on shore, and shall and will exert themselves and use their best endeavours to procure for the said ship a full cargo of the produce of the South Seas, with the greatest expedition, and conduct her therewith with proper care and attention to the said port of London, where the said intended voyage is to end. That no one of the said officers and crew shall absent himself from the said ship, or from his duty at any time during the said intended voyage, without first obtaining a ticket of liberty from the commanding officer of the said ship or vessel for the time being, for some certain time to be therein expressed, which, on no pretence, shall be exceeded by the person to whom the same shall be given
[*322] or *granted. That the master, officers, and crew of the said ship or vessel shall and will stand by the said ship or vessel in all ports and places, seas and dangers, and shall and will at all times use and exert their utmost skill and ability for the preser-

vation of the said ship or vessel, and her boats, tackle, apparel, furniture, stores, and cargo, until she shall have arrived back at the port of London, and her cargo shall be there wholly discharged. That no one of the said officers and crew shall neglect or refuse to do his duty by day or night, nor shall go out of the said ship or vessel, under any pretence whatsoever, until the said intended voyage shall be ended, and the said ship or vessel wholly discharged of her cargo, without obtaining a ticket of liberty as before mentioned. That each and every lawful command which the master and commanding officer of the said ship or vessel for the time being shall think necessary to issue for the effectual government of the said ship or vessel, or for suppressing immorality and vice of all kinds, shall be strictly attended to and complied with. That no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo, until the arrival of the said ship or vessel at London, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner, nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles. That, in ascertaining the net proceeds of the said cargo upon the completion of the said voyage, there shall be charged by the owner in respect of sperm oil and head matter ten pounds per ton imperial measure, upon the gross amount of the sales thereof, in lieu of casks, landing, delivery, lighterage, cooperage, wharfage, common discount, and other charges usually made by owners in this trade; and in respect of all other oil, eight pounds per ton imperial measure; and in respect of ambergris and seal skins, the duty and all other usual *expenses. That every one of the said officers and crew who [*323] shall not return in the said ship or vessel, with her cargo, to London (except in the case of death as after-mentioned), or who shall desert from the said ship or vessel, or who shall enter on board any of his Majesty's ships or vessels of war without the consent of the master or commanding officer of the said ship or vessel the *Royalist*, for the time being, or who shall break or neglect or refuse to perform these articles, or any of the engagements or agreements herein contained, in any respect whatso-

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ever, or who shall plunder, embezzle, destroy, or make away with anything on board of or belonging to the said ship or vessel, or to the owner, master, officers, or crew thereof, or any or either of them, or otherwise misconduct himself, shall thereby forfeit the whole of his share of the said cargo, and all his claim and right thereto, and all benefit and advantage accruing or to accrue to him therefrom, and also his chest, clothes, bedding, and effects which he shall have on board the said ship or vessel, and all benefit from the said voyage, any law, custom, or usage to the contrary thereof in anywise notwithstanding. That the said owner shall and may, and he is hereby authorized and empowered to sell and dispose of the said cargo, or any part thereof, at any time or times, and for any price or prices, and upon such terms and conditions as he shall think fit, and either upon credit or otherwise, and either at any time before or after the arrival of the said ship or vessel in the port of London; and by such sale or sales they, the said master, officers, and crew agree to be bound. That the said owner shall and may, and he is hereby authorized and empowered to deduct from each person's share of the net proceeds of the said cargo, all such sum and sums of money as he may owe or be indebted to the said owner, or to the master or commanding officer of the said ship or vessel for the time being, for advance money and legal interest thereon, clothes, or any other necessaries, at the usual and accustomed [*324] prices charged to seamen *in this trade, hired men, medicines, or any other account. That in case of the death of either of the said officers and crew, the executors or administrators of the party so dying shall not be entitled to more than the deceased's part or share of the net proceeds of such part of the said cargo as shall have been obtained whilst the deceased party was living and personally acting and serving in his proper capacity on board the said ship or vessel. That no person who shall execute these articles shall have, claim, or demand, under any pretence whatsoever, any monthly or other wages, pay, or recompense whatsoever for performing the said intended voyage, or any service on board the said ship, or in her boats, or on shore, save and except his share of the net proceeds of the said cargo to accrue to him under these articles."

The case was argued in Easter Term, by *Comyn* for the plaintiff, and *Shee* for the defendant, when the COURT directed a second argument.

Comyn, for the plaintiff:

The first question proposed for the opinion of the Court is, whether the plaintiff is entitled to recover the 95th part or share upon the 22 tons of sperm oil and the 148 tons, or upon either quantities? The plaintiff was entitled. Freight is earned, where a ship has been disabled, but repaired, and is willing to proceed on the voyage: *Luke* v. *Lyde* (1). In *Hunter* v. *Prinsep* (2), Lord ELLENBOROUGH says, "If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination." Freight is the mother of wages, and if the ship-owner is entitled to freight, the seaman is entitled to his wages. It appears from the above authorities, that a change in the ship does not induce a forfeiture of freight, neither then *can it a forfeiture of wages. [*325]

(LORD LYNDHURST, C. B.: Does it follow, that because the cargo is saved and put into another vessel, and freight earned, that therefore the seamen must be entitled to their wages?)

If they follow the cargo and are the instruments by which the freight is earned, they will be so entitled; and it is a reason for holding them so entitled that they cannot insure their wages: *Webster* v. *De Tastet* (3).

(LORD LYNDHURST, C. B.: That argument would be equally applicable to the case of a total loss.)

It is said by Lord TENTERDEN in his Treatise on Shipping (4), that, in the case of shipwreck, it is the duty of seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo; and that if the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it

(1) 2 Burr. 882.
(2) 10 R. R. 328 (10 East, 378).
(3) 4 R. R. 402 (7 T. R. 157).
(4) P. 451.

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seems upon principle that the seamen are also entitled to a proportion of their wages; and this is expressly directed by the French Ordinance. Upon the disability of the ship, is the seaman released from all duties with regard to the ship and cargo? Does that circumstance put an end to all his rights and obligations? Is he not bound to use every exertion to save both the cargo and the vessel? He is entitled, if not bound, to assist in the duty of transhipping the cargo; yet, notwithstanding these obligations, it is contended that he shall have no claim to wages. Where a ship had been stranded and sold for more than sufficient to pay the wages of the seamen, although no part of the cargo was saved, upon a suit for wages in the Admiralty Court, Lord STOWELL, after reviewing the several foreign authorities on the subject, admitted the claim of the seamen, who thereupon received their wages from the owners (1).

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The defendants rely upon the sixth article of the agreement, which provides that no one of the said officers and *crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at London, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have fully and truly performed the last-mentioned voyage according to the true intent and meaning of the articles. This, however, is nothing more than the common clause to be found in all articles of agreement between the masters and mariners of a vessel, as may be seen from the form given in the Appendix to Lord Tenterden's treatise (2). The clause must be construed, not by itself, but in connexion with all the other parts of the agreement, from which the general intent of the parties is to be gathered. It is a well established rule that the words of all instruments are to be liberally construed to serve the intent of the parties: Com. Dig. Condition (E); and it is sufficient if the substance, even of a condition, is performed: *Id.* (G 14). What was the object of the parties to this agreement? Was it not that a cargo of oil should be conveyed to London? and, although the stipulations in the agreement all refer to the 'said ship," it was never intended that if that ship should be

(1) *Neptune*, 1 Hagg. A. R. 227; Abbott, 452. (2) P. 494.

disabled from carrying the cargo, it might not be delivered by another vessel. All contracts of this kind must be understood with that reasonable latitude which provides for the occurrence of inevitable accidents. Thus, in *Beale* v. *Thompson* (1), where the stipulation by the seaman was, that he should not be on shore on any pretence whatsoever till the said voyage should be ended and the ship discharged of her cargo, without leave first obtained, it was held that the seaman was entitled to his wages, notwithstanding his having been imprisoned on shore for six months by the orders of a foreign power.

(LORD LYNDHURST, C. B.: The difficulty is, to give a different meaning *to the terms of the contract than they bear upon the face of it. In *Appleby* v. *Dods* (2) the Court decided upon the terms of the contract.) [*327]

In that case the ship was bound for the ports of Madeira, any of the West India Islands, and Jamaica, and to return to London; and it was agreed that the seamen should not demand or be entitled to their wages, or any part thereof, until the arrival of the ship at the port of discharge, and it was held, that, the vessel being lost on her passage home, the seamen were not entitled to their wages, though freight had been earned on the outward-bound voyage. Lord ELLENBOROUGH in that case founded his construction of the articles upon the policy of the statute 37 Geo. III. c. 73 (3), but Lord STOWELL has since decided that that Act applies only to West India voyages. Lord STOWELL appears to have been of opinion that the judgment in *Appleby* v. *Dods* is only to be sustained on that ground. "I think it is clear," he observes, "from this, that his Lordship calls in this particular Act as supplemental and auxiliary to this construction, and that he makes the intent of this stipulation to be without

(1) 7 R. R. 625 (4 East, 546).
(2) 9 R. R. 450 (8 East, 300).
(3) An Act to prevent the desertion of seamen from British merchant ships trading to his Majesty's colonies and plantations in the West Indies. It recites that seamen and mariners, after entering into articles to serve on board British merchant ships during the voyage from Great Britain to his Majesty's colonies and plantations in the West Indies and back to Great Britain, frequently desert in such colonies; and it enacts, that every seaman deserting shall forfeit all his wages.

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doubt the enforcement of the policy of the West India Act. But you cannot associate this policy with the East India voyage which has nothing to do either with its preamble or its provisions against West India desertions, for which purpose alone, as his Lordship asserts, the parties wanted the stipulation, and which therefore I presume he would not be inclined so to construe and apply when no such purpose was in contemplation." The case [*328] of *The Juliana* (1) is a strong *authority for the plaintiff. That was a case of a divided voyage, where freight was earned outwards; and on the ground of freight having been earned, Lord STOWELL held the mariners entitled to recover after the loss of the ship before her return home, notwithstanding a covenant that the mariners should not be entitled to any part of their wages unless the ship returned to her last port of discharge. This decision is in accordance with the cases decided in the common law Courts, and even with *Appleby* v. *Dods* as explained by Lord STOWELL. One of the earliest, and what is termed by his Lordship, "the great leading case in the common law," is an anonymous case in Lord Raymond's Reports (2), where Lord HOLT said, that if a ship be lost before the first port of delivery, then the seamen lose their wages, but if after she has been at the first port of delivery, then they lose only those from the last port of delivery. This case, which was recognised by Mr. Justice LAWRENCE in *Appleby* v. *Dods*, was the foundation of proceedings in Chancery, reported in Vernon (3) under the name of *Edwards* v. *Child*. From that book the case appears to have been this—The captain took bonds from the seamen when he hired them, not to demand any wages till the return of the ship to London, and not to demand any wages if she was lost before her return. The ship sailed to Bengal and delivered her cargo, but was captured on the homeward voyage. The captain was sued for the wages that became due at Bengal; and though the bonds were given in evidence in the action tried before Holt, Ch. J., yet the mariners recovered their wages. The captain having paid the wages of the seamen, the bill in equity was filed by [*329] the representatives of the captain *to recover the amount, and

(1) 2 Dods. Adm. Rep. 521
(2) Ld. Ray. 639; see also p. 739.
(3) 2 Vern. 727.

the LORD CHANCELLOR decreed accordingly; which, to use the language of Lord STOWELL (1), was a strong affirmance of the equity of Lord HOLT's decision. The rule of the Scotch law is likewise cited by the learned Judge who decided the case of *The Juliana*, as confirmatory of the principle there laid down. He referred to the case of *Morrison* v. *Hamilton* (2) as shewing a contract so worded to be only a suspension of the demand, and not a limitation of the right. [Upon the point as to the right of the plaintiff to recover upon the *quantum meruit*, the COURT expressed a strong opinion in the affirmative.] With regard to the last point, the amount of wages payable to a seaman cannot depend upon the amount of money expended in the repairing of the ship, and here the amount of the proportion of the cargo due to him cannot be affected by the circumstance of the 22 tons of oil having been sold to pay the expense of repairs.

Shee, for the defendant:

The plaintiff cannot claim to recover upon the *quantum meruit* consistently with the articles of agreement, which exclude such a claim. If he shapes his case in that manner he must abandon his claim upon the articles.

(LORD LYNDHURST, C. B.: If your construction of the articles be right, all claim upon them was at an end, and the mariner was at liberty to make a fresh engagement with the captain.)

While there is a written contract in existence no implied contract can arise; and the plaintiff contends that the written contract continued to operate notwithstanding the loss, and that under it the seaman was entitled to wages for bringing home the cargo.

(LORD LYNDHURST, C. B.: The plaintiff only says, if the written contract is subsisting, then I claim under it; if not and it is at an end, then I claim upon the *quantum meruit*.)

If the voyage be the same, the last clause of the articles *applies [*330]
which prohibits the seamen from claiming any monthly or other wages, pay, or recompense whatever for performing the intended voyage. It is correctly stated on the other side, that, in order

(1) 2 Dods. 517.

(2) 1 Bell's Com. 515.

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to arrive at the proper construction of the clause in question, it is necessary to consider the whole of the instrument, and thence to gather the intent of those who were parties to it. It is a rule in most cases, "quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est." In a late case of *Rickman* v. *Carstairs* (1), before Lord Denman, at Nisi Prius, it appeared that there was no doubt in fact that a policy was intended to protect a vessel on her outward bound voyage to Africa, but, as the intention did not plainly appear on the face of the policy, the Court would not give effect to it; and it was said that not what the parties might have intended but what they had actually said must govern the construction. It is for the very purpose of preventing such doubts with regard to construction that the contracts with seamen are directed by statute (2) to be in writing, "in order to prevent the mischiefs that frequently arise from the want of proof of the precise terms upon which seamen engage to perform their services in merchant ships" (3). To arrive at the proper construction of the 6th clause of the articles, it must be read in conjunction with the 7th and the 12th. In the 6th clause the word "until" must be read "unless."

(LORD LYNDHURST, C. B.: If read "unless," observe what follows. That word must apply to the succeeding part of the clause, and the seaman would not be entitled to demand any share of the net proceeds unless the cargo should be sold and delivered there (at London), and the money actually received by the owners. Now, by the 9th article, the owners are authorized to dispose of the cargo at any time before or after the arrival of
[*331] the ship at *the port of London. Suppose, then, that they do not sell the cargo at the port of London, will that deprive the seamen of their right to demand wages? The two clauses may be reconciled, if the former is held only to define the time.)

The 9th clause is an exception, and does not prevent the 6th clause from operating as a conditional one.

(VAUGHAN, B.: The 9th clause appears to have been inserted

(1) 39 R. R. 603 (5 B. & Ad. 651; 2 N. & M. 562).

(2) 2 Geo. II. c. 36, s. 51 [see now Merchant Shipping Act, 1894, s. 114].

(3) Abbott on Shipp. 435, 5th edit.

in order to give the power of anticipating the sale and getting a good market, even before the ship arrives.)

The 7th article contemplates the completion of the voyage as a condition precedent to the distribution of the proceeds. It states that "in ascertaining the net proceeds of the said cargo, upon the completion of the said voyage, there shall be charged," &c. No provision is to be found in any part of the instrument with reference to a loss of the vessel. The first five articles apply to the liabilities and duties of the mariners on board the ship *Royalist* only.

(GURNEY, B.: The contract of the seamen only applies to the vessel in which they embark.)

It is said that seamen cannot insure their wages; and that, while the owners may protect their interest in the freight, the mariners must, in case of loss, be wholly deprived of their wages. Here it is not a claim for wages, and there is no reason for saying that the seamen might not insure their share of the cargo. The object of the mode of remuneration adopted in whaling voyages is to secure, not merely hired servants, but persons who, by participating in the adventure, and being entitled to share in the profits, may have a peculiar interest in bringing the ship safely home. It is a hazardous service, and the risk is shared amongst all the parties. The object of the owners is the safety of the ship, to insure which they render the remuneration of the mariners dependent on her return in safety. If the construction contended for by the plaintiff is to prevail, the Court must erase the words "in the said ship or vessel to London," in the first article, and in the sixth, instead of the words *"until the arrival of the said ship or vessel at [*332] London," there must be inserted "until the arrival of the said cargo or any part thereof." The construction of the agreement contended for by the defendant is consistent with the principle of law which will not permit the wages of mariners to be insured, in order to secure their best exertions in providing for the safety of the vessel committed to them; nor can it be pretended that there is any particular hardship or oppression in this stipulation.

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It is the voluntary act of the seamen themselves, who choose to run the risk for the sake of the gain; and it is a condition not only to be found in the articles of English seamen, but in those of other countries. The fishers in Holland and West Friesland enter into such articles, and consider it no hardship (1). The hardship of the case is not greater here than in the common case of freight, where, unless the vessel arrives, the freight is lost. Thus, in *Cook* v. *Jennings* (2), where the freight was to be paid on the arrival of the vessel at the port of discharge, and she was lost on the homeward voyage, Lord KENYON said, "The question is whether the owner can enforce payment of the money under that contract, not having carried the goods to Liverpool, and the defendant having only undertaken to pay on their delivery at Liverpool. In answer to this action the defendant has a right to say, 'Non hæc in fœdera veni.'" *Bright* v. *Cowper* (3) is to the same effect. Then it is said that the owner may indemnify himself against the loss of the freight. So he may, but he buys that indemnity with his money. The mariner retains his money, and is not indemnified. As to the argument that the stipulation in the sixth article is illegal, that article goes no further than the rule of the law merchant. Upon the principle cited on the other side, that freight is the mother of
[*333] wages, the article is valid. *It merely provides that if the ship does not arrive in safety at London, her port of discharge, no remuneration shall be gained by the mariner. Unless she did arrive safely at the port of London, neither would any freight be earned. There are many authorities to shew that such a stipulation as this is legal. It is said in Molloy (4) that if the ship perishes at sea the mariners lose their wages and the owners their freight, and that this, being the marine custom, is allowed by the common law as well as by the civil law. So, upon a motion for a prohibition, it was agreed that if the ship do not return, but is lost by tempest, enemies, fire, &c., the mariners shall lose their wages, for, otherwise, they will not use their best

(1) See Scoreby's Voyage, vol. 11, p. 212.
(2) 4 R. R. 468 (7 T. R. 381).
(3) 1 Brownlow, 21; Abbott on Shipp. 319.
(4) 2 Molloy, c. 3, s. 9, cited 15 Vin. Ab. 235 (A. 2) 11.

endeavours, nor hazard their lives to save the ship: *Anon.* (1). In *Abernethy* v. *Landale* (2) it was held that an officer or sailor who had engaged to serve on board a letter of marque for certain wages during the voyage and a share of all prizes, was not entitled to any part of the wages where the ship was taken before she completed her voyage, although he had been sent from the ship before the capture, as prize-master on board a ship taken in the course of the voyage. Lord MANSFIELD says: "As a sailor on board a ship on a sailing voyage, the plaintiff is entitled to nothing, for freight is the mother of wages, and the safety of the ship the mother of freight. The question is whether he can now make any claim in the nature of wages for the time he had the care of the prize; and the light in which it strikes us is this—the ship sets out in a double capacity, she is to perform a trading voyage and is to carry negroes from Africa to America; but, before that, she is to cruize for three months as a privateer. All demand on account of the trading voyage is gone; but, in her character of a privateer, *the crew are entitled [*334] to no wages. They all run equal risks, and the chance of their respective shares in prizes." In *Cutter* v. *Powell* (3) it was held that where a sailor hired for a voyage took a promissory note from his employer for a certain sum, provided he proceeded, continued, and did his duty on board during the voyage, and died before the termination of the voyage, his representative could not claim anything for wages. If ever there existed a case of hardship, it was this; but the Court decided the case upon the clear meaning of the contract between the parties. Mr. Justice ASHHURST says: "Here the intestate was, by the terms of his contract, to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question. The intestate did not perform the contract on his part; he was not, indeed, to blame for not doing it, but still, as there was a condition precedent, and he did not perform it, his representatives are not entitled to recover." So, upon a voyage to Newfoundland, to

(1) 1 Sid. 179; 15 Vin. Ab. 235 (A. 2) 15.

(2) 2 Doug. 539.

(3) 3 R. R. 185 (6 T. R. 320).

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take in a cargo, and thence to Spain, Portugal, or some part of the Mediterranean, the ship being captured after loading at Newfoundland, it was held that neither freight nor wages were earned: *Hernaman* v. *Bawden* (1). But the later case of *Appleby* v. *Dods* is the strongest on the subject, and is conclusive in favour of the defendant. That was the case of a divided voyage, and freight for the first part had been earned, while here no freight had been earned at the time of the loss. In *Appleby* v. *Dods*, therefore, wages would have been payable had it not been for the express prohibition contained in the contract. It has been attempted to be shewn that Lord ELLENBOROUGH's judgment in that case proceeded upon the policy of the statute 37 Geo. III.

[*335] *c. 73; but no such inference can properly be drawn from the language used by him, which shews that the decision was founded upon the construction of the contract itself.

(VAUGHAN, B.: The articles are in a schedule to the statute 37 Geo. III.)

A similar form is given in Abbott on Shipping (2), which form is generally adopted. The case of *Beale* v. *Thompson* (3) is clearly distinguishable. There freight was earned, and the absence of the seaman was involuntary. Upon the question of the illegality of a stipulation like that contained in the sixth article, the judgment of Lord STOWELL, in the case of *The Juliana*, has been much relied upon; and it will therefore be necessary to examine the grounds of that judgment, and to see whether it can be sustained upon the authorities cited in its support. The case of *Buck* v. *Rawlinson* (4) is cited by Lord STOWELL as the first which occurred upon the point in question, and he treats it as a direct judgment of the Court of Admiralty, and a strong indirect judgment of that great master of equity, Lord SOMERS, upon the invalidity of bonds containing the stipulation in question. Lord Keeper WRIGHT had ordered the bill of the captain (who had paid the seamen) praying for relief, to be dismissed, and against

(1) 3 Burr. 1844.
(2) P. 493, 5th edit.
(3) 7 R. R. 625 (4 East, 546; 1 Dow, P. C. 299).
(4) 1 Br. P. C. 102.

the two orders made by him there was an appeal to the Lords. "The whole matter," says Lord STOWELL, "travelled afterwards to the House of Peers, where the LORD KEEPER'S decrees upon that point were reversed, and the payment to the mariners so far affirmed" (1). It does not appear that the payment of the mariners was affirmed, for all that was decided by the House of Lords was, that the orders should be reversed, and that the parties should be at liberty to bring their appeal from the Court of Admiralty to a Court of Delegates. Lord TENTERDEN takes a different view of this case from *Lord STOWELL; [*336] he says, "This decision of the Court of Admiralty is reported to have been disapproved of by the House of Lords, who, in a case arising out of it between the master and owners, gave liberty to the parties to appeal to the Delegates against the decision. Indeed," he adds, "I am at a loss to find any principle upon which the Court of Admiralty could have held these bonds to have been void" (2). That learned writer then proceeds to give his own opinion with regard to the validity of these stipulations when inserted in the articles: "It has of late years been usual to stipulate by express terms in the articles of agreement signed by the seamen employed in such ships, that, in case the ship shall, by the danger of the sea, or any other accident whatsoever, be disabled or lost during the voyage, so that she do not return to and arrive at the port of London, the seamen shall not receive or claim any further wages than the impress money paid to them in advance, notwithstanding the ship shall at any time, before her being so disabled or lost, have broken bulk, or delivered any goods at any port or place whatsoever; and there is no instance of a claim made by the seamen against the terms of this clause in the articles" (3). The case of *Edwards* v. *Child* (4), was under the consideration of Lord TENTERDEN in making these observations, and he cites it as a case in which "Lord Chief Justice HOLT is said to have decided in the same manner." In confirmation of the supposed authority of the cases of *Buck* v. *Rawlinson* and *Edwards* v. *Child*, Lord STOWELL then refers to a decision

(1) P. 513.
(2) Abbott on Shipp. 448, 5th edit. See Lord STOWELL'S observations on this passage, 2 Dods. 513.
(3) P. 449.
(4) 2 Vern. 727.

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in the Scotch Courts, of *Morrison* v. *Hamilton* (1), as establishing the position that a contract worded like the present is only a suspension of the demand, and not a limitation of the right; but

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he adds, *"Mr. Bell seems to think that if the agreement was more clearly expressed, it would be held effectual in Scotland." His Lordship then endeavours to take off the effect of Mr. Bell's observation, by referring to the case of *Ross* v. *Glasford* (2), where, with reference to the practice of taking such agreements, the COURT declared, "that, if such a practice did exist, it was highly to be disapproved of as fraught with inhumanity and destruction to trade, and that it was high time that it should be corrected." It does not appear from this that the Scotch Courts would hold such agreements unlawful, but merely that the practice of entering into them was contrary to good policy, and ought to be corrected.

(LORD LYNDHURST, C. B.: The real point appears to me to be this. It is obvious that it was not the intention of the Legislature in passing the 37 Geo. III., that the word "until" in the articles should operate as a postponement of the right only. *Appleby* v. *Dods* has put a construction upon that statute, and such construction is that for which the defendant in this case contends. The articles here are adopted from those given in the schedule to the Act, and it is therefore reasonable to conclude that the parties intended them to bear the same construction as that which has been put upon the form given by the statute. Does not Lord STOWELL, in the case of *The Juliana*, take a distinction between his own situation and that of a Judge sitting in a court of common law?)

He says, "A court of law works its way by short issues and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a court of general equity, but it is bound by its commission and constitution to determine the cases submitted

(1) 1 Bell's Com. Law of Scotland, 515; 2 Dods. Adm. Rep. 514.

(2) *Ibid.*

to its cognizance upon equitable *principles and the rules of natural justice" (1). The disputes between the Admiralty and common law Courts are in fact of very long standing, and led to the passing of the 13 Ric. II. c. 5, and 15 Ric. II. c. 3. In later times the jurisdiction of the Admiralty Courts over the contracts for seamen's wages has been settled by several cases: *The Mariner's* case (2), *Opy* v. *Child* (3), *Day* v. *Searle* (4), *Anon.* (5). The case of *The Juliana* is no authority on another ground. It was *coram non judice*. From the authorities just referred to, and from *Howe* v. *Nappier* (6), which contained a clause like the present, that the seamen should not receive their wages unless the ship returned home, it appears that the Court of Admiralty has no jurisdiction over contracts for wages containing special clauses, and that a prohibition would lie. [*338]

(LORD LYNDHURST, C. B.: The parties there made no question as to the jurisdiction.)

The neglect of the parties to insist upon the point of jurisdiction cannot give the Judge cognizance.

Comyn, in reply:

The case of *Howe* v. *Nappier* is no authority, for no prohibition was moved for and the jurisdiction of the Court was not disputed. The cases cited on the other side do not apply, because no freight was earned; but here the cargo reached London, and was accepted, and freight earned. In *Cook* v. *Jennings* the cargo never reached its port of delivery.

(LORD LYNDHURST, C. B.: That case turned upon the terms of the charter-party which were not performed.)

In that case LAWRENCE, J., says, "When a ship is driven on shore, it is the duty of *the master either to repair his ship or to procure another, and having performed the voyage, he is then [*339]

(1) P. 521.
(2) Mod. 879.
(3) 1 Salk. 31; 12 Mod. 38; *S. C.* nom. *Opy* v. *Adison*.
(4) 2 Str. 968; 2 Barnard. 419. The judgment is more fully given from MS. in Abbott on Shipp. 481, 5th edit. See also the *Sydney* case, 2 Dods. A. R. 12.
(5) 1 Sid. 179.
(6) 4 Burr. 1944.

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entitled to freight. *Appleby* v. *Dods* does not govern this case. It was decided upon peculiar grounds. The argument for the plaintiff is this. The voyage has been performed and freight has been earned, and the seaman is therefore entitled to his wages, or to that for which he has stipulated instead of wages; and although the cargo was not brought home in the same vessel, yet as it was the duty of the owners to forward it, and the duty of the seaman to assist in forwarding it to its destination, and as the seaman has performed that duty, he is entitled to his recompense. In point of authority upon the subject, nothing can be stronger than the case of *The Juliana*, decided by one of the most eminent Judges of modern times, after a review of all the decisions, and after a full consideration of the case of *Appleby* v. *Dods*. The case of *The Juliana* has been acted upon in the Courts of the United States, the decisions of which upon questions of mercantile law, which so frequently occur there, are well deserving of attention.

(LORD LYNDHURST, C. B.: There appears to have been both before and after the judgment of Lord STOWELL, in the case of *The Juliana*, a variety of decisions in conformity with it in the American Courts. They are mentioned by Mr. Justice Story, an extremely able man, in his edition (1) of Lord Tenterden's Treatise on Shipping.)

The case of *Johnson* v. *Sims* (2) is precisely similar to the present, and it was there held that the seaman was entitled to recover.

Cur. adv. vult.

[340] The judgment of the COURT was now delivered by—

LORD LYNDHURST, C. B.:

This was an action brought by an administrator of Jesse, a mariner, to recover a sum of money claimed to be due in respect of services on board the *Royalist*, on a whaling adventure to the South Seas. By the articles entered into and signed by the captain and owner and crew, it was stipulated that the intestate should receive the 95th share of the clear net proceeds of the

(1) Newburyport (U. S.), 1810. (2) 1 Peters's Adm. Rep. 215.

cargo, which should be procured and brought in the said ship to London. There was in the articles this stipulation, "That no one of the ship's company shall be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship at London, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage, according to the true intent and meaning of these articles." The vessel proceeded on the voyage in the summer of 1829, and obtained a considerable quantity of oil; but, in consequence of tempestuous weather, sustained so much damage, that on her arrival at the island of Timor a survey took place, and, it being found to be impossible to repair her, she was in consequence condemned. The part of the cargo that remained was shipped to England, partly by the way of Manilla, and partly by the way of Batavia, and the intestate accompanied that part of the cargo which proceeded to Batavia, and died before its arrival at London. The question is, under these circumstances, whether the plaintiff is entitled to recover. The plaintiff's right to recover depends entirely on the contract, and I know no principle by which a contract entered into by a mariner is to be construed on different principles from a contract by other persons. The stipulation is clear and distinct. He is not to receive any of the net proceeds of the cargo till after the arrival, not of the cargo only, but of the vessel in the port of London. The vessel never did arrive in the port of London, and we are of opinion, that, under this contract, the *plaintiff is not entitled [*341] to recover. This is not the first time this stipulation has been made the subject of consideration in a court of law. In the case of *Appleby* v. *Dods* the same question arose. That was a voyage from London "for the ports of Madeira, any of the West India Islands and Jamaica, and to return to London," at monthly wages; and there was this stipulation contained in the articles, "that no seaman, &c. shall demand or be entitled to his wages, or any part thereof, until the arival of the said ship at the above-mentioned port of discharge, and her cargo delivered, &c." The ship sailed from Gravesend with a full cargo to Madeira and thence to Dominica, and afterwards to Kingston, and the West

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Indies, Port Antonio in Jamaica, and then proceeded to Martha Bray in the same island, delivering goods and taking in a new cargo at each port successively, and freight successively earned. The vessel at last set sail from Jamaica to London, but was lost on the homeward voyage. It was clear, that, independently of any express stipulation, freight having been earned at the intermediate points to which I have referred, the mariners would be entitled to their wages *pro ratâ*, and the question was, therefore, whether they were entitled to their wages notwithstanding that stipulation which was contained in the articles. The stipulation was in these terms, "that no seaman, &c., shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered." Lord ELLENBOROUGH was of opinion, that the language of the stipulation was so express and precise that it was impossible the plaintiff could maintain the action; and thereupon nonsuited the plaintiff. The question was afterwards brought before the Court on a motion for a new trial, and the Court confirmed the decision of the Judge at Nisi Prius, being clearly of opinion that, unless the vessel arrived in London, the plaintiff could not recover. So far upon the

[*342] authorities in courts of law. *On the other side, the case of *The Juliana*, decided by Lord STOWELL in 1822, is relied upon. In that case the words were the same, and the decision at variance with that of *Appleby* v. *Dods*; but the learned Judge, in the course of the judgment which he gave, drew a distinction between the principles by which courts of common law are regulated, and those rules and principles which regulate the decisions in Courts of Admiralty. He says, "A court of law works its way by short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles, and the rules of natural justice." It is further to be observed, that, in that case, the learned Judge appears to have misapprehended the case

decided by Lord HOLT in Lord Raymond. He supposes that learned Judge to have pronounced these bonds to be illegal and invalid; whereas the true effect of Lord HOLT's decision is given by Mr. Justice LAWRENCE in *Applebly* v. *Dods*, and amounts to no more than this, that the sailors were entitled to recover according to the terms of their contracts, whatever counter claims there might be against them, upon the bonds into which they had entered. Therefore, it was not necessary, nor was Lord HOLT called on to pronounce, nor could he have pronounced, any opinion as to the legality or illegality of the bonds. The learned Judge also seems to have misapprehended the judgment in *Applebly* v. *Dods*. He seems to consider it to be founded on its being a West India voyage; but it is clear that Lord ELLENBOROUGH did not enter into any such consideration. He says, "The terms of the contract are general, and include the present case; and we cannot say, against the express contract of *the parties, that the seamen shall recover *pro ratâ*, although [*343] the ship never did reach her port of discharge named." The decision therefore was founded, not on the nature of the voyage, but on the express contract of the parties. As to *Buck* v. *Rawlinson*, and *Edwards* v. *Child*, they were cases in equity. It is extremely difficult to be certain of the precise grounds on which the Courts proceeded, but enough appears on the reports to justify us in coming to the conclusion that those decisions were founded solely on equitable principles—principles which have no application to decisions in courts of law. We are of opinion, therefore, that this being a question agitated and to be decided in a court of law, it must be decided according to those rules which the courts of common law have adopted as applicable to the construction of contracts. The language of this contract is clear and distinct, and the plaintiff cannot recover. As to the services performed subsequent to the vessel being sold, not under the contract, in bringing home part of the proceeds, to that extent the plaintiff will be entitled to recover on the last count of the declaration—the amount to be ascertained by agreement out of Court.

Judgment for the defendant on the special counts.

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF EXCHEQUER.)

1834.

Exchequer Chamber.

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CHAMBERS, THE ELDER, *v.* BERNASCONI AND OTHERS (1).

(1 Cr. M. & R. 347—368; S. C. 4 Tyrwh. 531; 3 L. J. (N. S.) Ex. 373.)

Depositions of deceased witnesses taken before commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees afterwards appointed pursuant to the Bankruptcy Act of 1825, held not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees for the purpose of disputing the validity of the commission.

By the course of the office of the sheriff of M. the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to W., a sheriff's officer, to arrest A. B., W. arrested him accordingly, and made the following return: "9th November, 1825, arrested A. B. in South Molton Street, at the suit of W. B.," which return was signed by the officer and sent by him to the sheriff's office on the execution of the writ, and was then filed with the writ according to the course of the office. The writ and certificate were produced by the under-sheriff at the trial: Held, that in an action brought by A. B. against a third party, the certificate was not admissible after the death of the officer to prove the place where the arrest was made.

ERROR on a bill of exceptions. This was an action of assumpsit for money had and received, brought by the plaintiff against his assignees to try the validity of a commission of bankrupt issued against him. The defendants pleaded the general issue. The caused was first tried before Lord Lyndhurst, C. B., at the Middlesex sittings after Hilary Term, 1831, when the plaintiff obtained a verdict. The Court of Exchequer having afterwards granted a new trial, the case was again tried before Lord Lyndhurst, C. B., at the Middlesex sittings after last Hilary Term, when it was proved that the defendants were assignees of the estate and effects of the plaintiff and A. H. Chambers, the younger, under a commission of bankrupt issued against them on the 19th of November, 1825. The material question

(1) Cited and followed in *Smith* v. *Blakey* (1867) L. R. 2 Q. B. 326, 332, 8 B. & S. 157, 36 L. J. Q. B. 156; and in *Polini* v. *Gray*, *Sturla* v. *Freccia* (1879—80) 12 Ch. D. 411, 49 L. J. Ch. 41; affirmed, H. L. 5 App. Cas. 623, 50 L. J. Ch. 86.—R. C.

at the trial was, whether the plaintiff had committed an act of bankruptcy, and that principally depended upon the place where the *plaintiff was arrested on the 9th of November, 1825; whether at the plaintiff's residence at Paddington, or in South Molton Street; the alleged act of bankruptcy being the keeping house by the plaintiff and denying himself to his creditors at his residence at Paddington. The bill of exceptions stated, that, to prove that the arrest had taken place at Paddington, one Thomas Brett was called as a witness for the defendants, and that he stated that in the year 1825 he was assistant to Thomas Wright, who was then one of the officers of the sheriffs of Middlesex, but who has since died; that he and Wright arrested the plaintiff by virtue of a warrant from the sheriff of Middlesex on the 9th of November, 1825, and that to the best of his belief such arrest took place at the plaintiff's cottage at Paddington. The exceptions then stated that the plaintiff's counsel, for the purpose of shewing that the arrest of the plaintiff was made at an office in South Molton Street, tendered in evidence certain depositions of one Fletcher, a late clerk of the plaintiff's, but who was proved to have since died, and also of Wright, the sheriff's officer, taken before the commissioners of bankrupt at Basinghall Street, on the opening of the commission on the 19th of November, 1825, which depositions stated the arrest of the plaintiff to have taken place on the 9th of November, 1825, at an office in South Molton Street, and which depositions had been duly entered of record by the defendants as assignees, under and by virtue of the 6 Geo. IV. c. 16, s. 96 (1). That the defendants' counsel objected to the admissibility of the depositions, and that the learned LORD CHIEF BARON refused to receive the evidence. The exceptions further stated that Mr. Burchell, the under-sheriff of Middlesex, was called, and that he proved that it was part of the course of the office of the sheriff of Middlesex to require a return in writing of the arrest, and of the place where the arrest is made, under the hand of the *sheriff's officer making the arrest; that the certificate of arrest after mentioned was annexed to a writ issued the 8th of November, 1825, at the suit of one William Brereton, against the said

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(1) 1825 (Bankruptcy) since repealed.—R. C.

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plaintiff and A. H. Chambers, the younger, and that Wright was the officer who had the execution of that writ; and that he, the under-sheriff, could not return a defendant not arrested when he had got a certificate of arrest from the officer, and that these certificates were the papers on which the sheriff acted in making the return. Mr. Burchell then produced the writ and the certificate of Wright annexed thereto, which he stated was returned by Wright after the execution of the writ, and was written and signed by him. The certificate was as follows:

"9th Nov. 1825. Arrested Abraham Henry Chambers, the elder, only, in South Molton Street, at the suit of William Brereton.

"THOMAS WRIGHT."

The LORD CHIEF BARON having refused to receive the certificate as well as the depositions in evidence, the defendants obtained a verdict. A bill of exceptions was tendered to the learned LORD CHIEF BARON on his rejecting this evidence, and was according sealed by him, and the exceptions came before this Court for argument in the vacation after last Easter Term.

[The case having been argued by the *Attorney-General* for the plaintiff, and *Sir James Scarlett*, *contrà*, the COURT, after hearing reply, took time for consideration.]

[366] The judgment of the COURT was now delivered by Lord DENMAN, Ch. J.:

This action was brought by a person who had been declared a bankrupt, against his assignees, for the purpose of disputing the validity of his commission. On the trial it became necessary to inquire whether the plaintiff had been arrested in a particular place (South Molton Street) on the 9th of November, 1825, by one Wright, a sheriff's officer, who died before the trial, accompanied by a person named Brett. To prove that the plaintiff had been so arrested he tendered evidence of two descriptions; both of which the CHIEF BARON refused to receive; a bill of exceptions was thereupon tendered, and the question was argued on the 9th of May before this Court of error. The first head of evidence rejected consisted of depositions made by two deceased persons

on the opening of the commission against the plaintiff, which had been inrolled of record in the Court of Chancery by the defendants as assignees. It was contended that they were admissible against the defendants, first, by reason of some supposed privity between them, as assignees, and the petitioning creditor, who must have brought forward the depositions, and to whom the defendants were said to have attorned by acting under the commission; and, secondly, *because the assignees [*367] had substantially affirmed the truth of the depositions by causing them to be inrolled, and so making them evidence. But no decision or *dictum* was cited in favour of this attempt: no instance was even cited of such evidence ever having been tendered, often as it must have been desirable; and we think the admission of it could not be justified by any principle of law. To prove the same fact, the plaintiff tendered a certificate, written and signed by Wright, the deceased sheriff's officer before mentioned, stating in terms that he arrested the plaintiff on the day in question in South Molton Street, at the suit of one Brereton. The tender of this certificate was preceded by proof, that it was part of the course of the office of the sheriff of Middlesex to require a return in writing of the arrest and of the place where it is made, under the hand of the officer making it: that the certificate tendered was annexed to the writ issued against the plaintiff on the 8th of November, 1825, at the suit of Brereton, of which writ Wright had the execution. The under-sheriff also proved that he could not return a defendant not arrested, when he had got a similar certificate of arrest, The writ and certificate were produced by the under-sheriff. Whether the certificate is evidence of the arrest having been made at the place named in it, is the question which we are now to decide. The ground on which the *Attorney-General* first rested his argument for the plaintiff in error, was not much relied on by him, viz. that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as

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proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. The discussion of this point involved the general *principles of evidence; and a long list of cases, determined by Judges of the highest authority, from that of *Price* v. *Lord Torrington* (1), before Holt, Ch. J., to *Doe* d. *Patteshall* v. *Turford*, recently decided by Lord TENTERDEN (2) and the Court of King's Bench, was cited. After carefully considering, however, all that was argued, we do not find it necessary, and therefore think it would not be proper, to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails, the plaintiff in error cannot succeed; and we are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done.

Judgment for the defendants.

1834.

Exch. of Pleas.

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SIGGERS *v.* LEWIS (3).

(1 Cr. M. & R. 370—372; S. C. 4 Tyrwh. 847; 3 L. J. (N. S.) Ex. 312; 2 Dowl. P. C. 681.)

To a declaration against the indorser of a bill of exchange, the defendant pleaded that the action was commenced before a reasonable time for the payment of the bill by the defendant had elapsed after notice of dishonour: Held, bad.

ASSUMPSIT against the defendant as indorser of a bill of exchange. Plea, that the action was commenced before a

(1) 1 Salk. 285.
(2) 37 R. R. 581 (3 B. & Ad. 890).
(3) See now Bills of Exchange Act, 1882, s. 47 (2).—R. C.

reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment. Demurrer and joinder.

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Mansel, in support of the demurrer, was stopped by the COURT.

Chandless, in support of the plea:

The defendant was only bound to pay in a reasonable time after notice of non-payment by the acceptor. That appears from *Walker* v. *Barnes* (1), where it was held that a tender within a reasonable time after notice of dishonour prevented the plaintiff from recovering damages for the time between the notice of dishonour and the tender. If any cause of action arises in such case before a reasonable time has elapsed, the plaintiff, in *Walker* v. *Barnes*, would at least have been entitled to nominal damages. The question in the present case is, whether the action was not commenced before the cause of action accrued; in other words, whether there was any cause of action before a reasonable time had elapsed.

(ALDERSON, B.: According *to your argument, every declaration against the indorser of a bill of exchange ought to allege that a reasonable time had elapsed. But nobody ever heard of a declaration containing such an averment. The truth is, that the not paying in a reasonable time after notice is not the cause of action as you argue, but the cause of action is the non-payment on request.)

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Then the plaintiff, in *Walker* v. *Barnes*, would have been entitled to nominal damages, as in *Hume* v. *Peploe* (2), where the acceptor of a bill of exchange was held liable, notwithstanding a tender after the day of payment. It is submitted that the implied contract is to pay in a reasonable time after notice.

LORD LYNDHURST, C. B.:

There seems to have been a kind of compromise in *Walker* v. *Barnes*. The CHIEF JUSTICE says, that no jury would have given

(1) 15 R. R. 655 (5 Taunt. 240; 1 Marsh. 36).

(2) 9 R. R. 399 (8 East, 168).

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a farthing damages. The contract of the drawer is an undertaking that the acceptor shall pay the bill. Until notice of the acceptor's default is given to the drawer, no action can be maintained; but it is maintainable immediately upon notice being given, if the money is not paid. If an action is improperly commenced, the remedy in such case is by application to stay the proceedings.

ALDERSON, B.:

If you had a defence arising within a reasonable time after notice of dishonour, you might, perhaps, plead it with an averment of its having arisen within such reasonable time. Thus, supposing that *Walker* v. *Barnes* is a decision which can be supported, you might perhaps be within the principle of that case if you pleaded a tender or payment within a reasonable time after notice of dishonour.

GURNEY, B.:

[*372] After notice of dishonour to the drawer, *he is bound to pay on demand. The proposition as to a reasonable time is not to be found any where except in *Walker* v. *Barnes*.

Judgment for the plaintiff.

1834.

HERRING *v.* BOYLE.

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(1 Cr. M. & R. 377—382; S. C. 4 Tyrwh. 801; 3 L. J. (N. S.) Ex. 344; S. C. at Nisi Prius, 6 Car. & P. 496.)

Defendant, a schoolmaster, improperly, and under a claim for money due for schooling, refused to allow the mother of an infant scholar to take her son home with her, and the son was, though frequently demanded by the mother, kept at school during a part of the holidays, but there was no proof that the infant knew of the demand or denial, or that any restraint had been put upon him; an action of trespass for assault and false imprisonment having been brought by the infant: Held, that it was not maintainable.

TRESPASS for assault and false imprisonment. Plea, the general issue. At the trial at the Middlesex sittings in Easter Term before Gurney, B., the following appeared to be the facts of the case: The plaintiff, who sued by his next friend, was an infant

about ten years old. He was placed by his mother, who was a widow, at a school kept by the defendant at Stockwell. The terms of the defendant's school were twenty guineas a year, payable quarterly. The first quarter, which became due on the 29th of September, 1833, was duly paid. On the 24th of December in the same year, the plaintiff's mother went to the school and asked the defendant to permit the plaintiff to go home with her for a few days. The defendant refused, and would not permit the mother to see her son, and told the mother that he would not allow him to go home, unless the quarter ending on the 25th of December was paid. The mother remonstrated, and said she would pay the quarter's schooling in a short time, but it was not due until the next day. A few days afterwards, the mother went again to the defendant at his school, and demanded from *him to see her son, and be allowed to take him home with her. [*378] The defendant refused. On the 31st of December, the mother went again with a friend, and made the same demand; but the defendant refused to let her see the plaintiff, or to allow her to take him home, and he then claimed another quarter's schooling, as a few days of the quarter after the 25th of December had then elapsed, and he insisted on keeping the plaintiff until that amount also should be paid. A formal demand was afterwards made, and on a writ of *habeas corpus* being sued out, the plaintiff was sent home, seventeen days having elapsed after the first demand by his mother. No proof was given that the plaintiff knew of the denial to his mother, nor was there any evidence of any actual restraint upon him. On these facts the learned Baron was of opinion that there was no evidence of an imprisonment to go to the jury, and he nonsuited the plaintiff.

Comyn obtained a rule to set aside the nonsuit and for a new trial, against which cause was now shewn by

Hutchinson, for the defendant:

The nonsuit was right. There was no corporal touch or restraint on the plaintiff. The form of the proceeding in trespass shews that there must be an actual force. It must be laid *contra pacem* and *vi et armis*. Here there was no force or restraint for

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which either an indictment or an action of trespass *vi et armis* was maintainable.

Comyn and *Butt*, *contrà*:

The boy was sent by his mother to the defendant's school. She had authority to place him in the care of the schoolmaster, and she had authority to determine his continuance there. Now it was proved that the authority from the mother to the master was withdrawn, and the defendant could not justify the detention
[*379] after such authority was withdrawn. When the rule was *moved for, Lord LYNDHURST, and Mr. Baron PARKE considered, that, if an action was brought against the schoolmaster, he could only justify by virtue of the authority to detain the boy which was delegated by the mother; and that, if the withdrawal of such authority were replied, it would be an answer to the justification.

(BOLLAND, B.: Lord LYNDHURST and my brother PARKE did not by any means deliver that as their opinion. They threw it out as the most favourable mode of putting the case in your favour.)

Here, when the authority to keep the boy was withdrawn, the master persisted in detaining him for the purpose of extortion.

(ALDERSON, B.: The fallacy seems to me to be, that you assume, for the purpose of your argument, that every boy at school is in prison. If that were so, you would go a long way to convince us that when the authority to keep him there is at an end, his remaining at school might be an imprisonment. That however is not so with regard to a boy at school. In the case of a lunatic perhaps it may be different. A person of full age restrained as a lunatic, might probably be taken *primâ facie* to be detained against his will.)

The assent of a child of such tender years may perhaps be assumed, in the first instance, because the law will presume the assent of an infant to what is for his benefit; but that assent must be taken to be revoked when the contract for schooling is determined by the act of the mother. In the present case, the

plaintiff was detained during the holidays, and it may fairly be presumed that a keeping at school during the holidays is against the will of a school-boy.

(BOLLAND, B.: The evidence did not bring the schoolmaster and the plaintiff into contact, so as to shew that there was any the least restraint of the one upon the other.)

Every detention against the will is a false imprisonment, and every false imprisonment includes an assault in point of law, so that any argument to be derived from the form of the action for assault is totally unfounded. The only question is, whether *there was any evidence to go to the jury of a detention against [*380] the will of the plaintiff. It is submitted that there was. The child was kept through the holidays, and it ought to have been left to the jury, whether that was not against the plaintiff's will. Besides, in the case of a child of such tender years, the will of the parent is to be considered as the will of the child, and in this case the will of the mother was sufficiently expressed. The master declared distinctly that he would detain him until he was compelled by *habeas corpus* to deliver him up; and he was detained at school, and such declaration of the master, coupled with the fact of the boy remaining at school during the holidays, was surely evidence to go to the jury that the master had acted on such declaration and had kept the boy there against the will both of his mother and himself.

(ALDERSON, B.: It is clear that the assent of the plaintiff would put an end to an action in this form; that shews that the will of the mother is not the will of the child. In the present case there was no proof that the master conducted himself to the boy in a different manner in any respect before and after the refusal to deliver him up to his mother; as against the mother he detained him unlawfully; he says in effect to the mother, I will not give him up to you without a *habeas corpus*. That might however be with or without the assent of the boy. The plaintiff was bound to prove his dissent, and not to leave that question in ambiguity.)

Cur. adv. vult.

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The judgment of the COURT was delivered on the next day:

BOLLAND, B.:

This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these: the plaintiff had been placed by his mother at
[*381] the school kept by *the defendant, and it appeared that she had applied to take him away. The schoolmaster very improperly refused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the Judge's notes that there was any evidence of a trespass to go to the jury? I am of opinion that there was not, and, consequently, that this rule must be discharged. It has been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I cannot find any thing upon the notes of the learned Judge which shews that the plaintiff was at all cognizant of any restraint. There are many cases which shew that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of opinion that the rule must be discharged.

ALDERSON, B.:

There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment. My brother PARKE, who heard the rule moved, but who was not present at the argument, concurs in the opinion of the Court.

GURNEY, B.:

This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that any thing passed between the plaintiff and defendant which shewed that there was any compulsion upon the boy; and there was nothing to shew that he was conscious that he was in any respect restrained.

Lord LYNDHURST stated that he was present when the rule was moved, though he did not hear the case argued, and that he concurred in the judgment.

Rule discharged.

DOE D. LEWIS, ESQ. *v.* CAWDOR.

1834.

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(1 Cr. M. & R. 398—401; S. C. 4 Tyrwh. 852; 3 L. J. (N. S.) Ex. 239.)

The father of the defendant, and, after his death, the defendant, had held lands by the permission of and under the father of the lessor of the plaintiff, and after the death of the father of the lessor of the plaintiff, the defendant continued to hold the lands. To shew that the tenancy was determined, the lessor of the plaintiff offered in evidence the following letters. The first was a letter written by the defendant to the plaintiff, in which, after acknowledging the receipt of a letter from the plaintiff on the subject of the premises in question, he says, "As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. F., and have requested them to communicate with you." The second letter, which was from Messrs. F. to the plaintiff, was as follows: "Earl C. (the defendant) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. L. (the father of the lessor of the plaintiff) in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late earl's own." Another letter from Messrs. F. requested further information "as to the late Mr. L. having a right to let the piece of ground in question to Earl C., as it appears to us that the mere fact mentioned in your letter at the utmost only shews that Mr. L. might claim it, and not at all aver that Lord C. admitted it even on the representation of his own agent:" Held, that those letters did not amount to a disclaimer.

A disclaimer, in such case, must be before the date of the day of the demise.

An admission, made after the day of the demise, of a disclaimer, must,

DOE d. LEWIS v. CAWDOR.

to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise.

Held, also, that the letter of the defendant did not confer on the agent any authority to bind the defendant by making a disclaimer.

THIS was an ejectment brought to recover a smelting house and foundry near Llanelly, in Caermarthenshire. The day of the demise laid in the declaration was the 2nd of March, 1830. At the trial before Bosanquet, J., at the last Summer Assizes for the county of Caermarthen, the plaintiff's case was—That, in the year 1812, his father, who was the confidential agent of the late Lord Cawdor, the father of the defendant, had permitted him to build the works in question for the purpose of smelting lead ore, on a spot of waste ground called the Hook, which adjoined and was parcel of a farm called Penrhos, the property of Mr. Lewis, on an understanding that a lease should be granted, on terms to be subsequently arranged; that the works were accordingly built in the year 1812, but abandoned in a few years, and subsequently let by Lord Cawdor's agent to the present occupiers, Messrs. Waddle, as an iron foundry. The late Lord Cawdor died in 1821. Mr. Lewis died in 1829, and in a few months afterwards his son and heir-at-law, the lessor of the plaintiff, applied to Lord Cawdor's agents, and subsequently to Lord Cawdor himself, requesting that some arrangement might be made respecting the terms on which Lord Cawdor was to hold the works as tenant to the lessor of the plaintiff. The following
[*399] letters from Lord Cawdor and *his solicitor, Mr. Farrer, were the result of that application:

"GROSVENOR SQUARE, March 3rd, 1830.

"SIR,—I beg to acknowledge the receipt of your letter on the subject of the lead works at Llanelly. As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. Farrer, and have requested them to take an early opportunity of communicating with you.

"Yours, &c.

"DAVID LEWIS, Esq. "CAWDOR."

"SIR,—Earl Cawdor has given us a letter from you on the subject of some ground you state to have been let by the late Mr. Lewis in 1811, and which has ever since been in the posses-

sion of his Lordship's family. We will thank you to let us have the proofs that it was not the late Lord's own, as you are aware the subject is one that the present Earl is totally unacquainted with, except from your letter.

"March 4th, 1830. "Yours, &c.

"—— LEWIS, Esq. "FARRERS & Co."

"SIR,—I should be very glad if you would furnish further information than that contained in your letter of the 6th of March as to the late Mr. Lewis having a right to let the piece of ground in question to Earl Cawdor, as it appears to me that the single fact mentioned in your letter at the utmost only shews that Mr. Lewis might claim it, and not at all aver that Lord Cawdor admitted it even on the representation of his own agent. However, I hope to see Mr. Williams either at the Hereford Assizes or in town soon, and will then enter upon the subject with him.

"Yours, &c.

"March 10th, 1830. "THOMAS FARRER."

[400] At the close of the plaintiff's case, the defendant's counsel submitted that even if the plaintiff's case were taken to be proved as opened, notice to quit was necessary. But the learned Judge was of opinion that the letters in question amounted to a disclaimer, which rendered a notice to quit unnecessary. The defendant's case was then gone into, and it was contended on his behalf that the ground on which the works had been built was not parcel of Penrhos farm, but of the wastes of the manor, of which Lord Cawdor was the lord. The learned Judge told the jury that if they thought, upon the evidence, that the works had been built on the land of the late Mr. Lewis by his permission, they were to find for the plaintiff. A verdict having passed for the lessor of the plaintiff—The *Attorney-General*, in Michaelmas Term last, obtained a rule to enter a nonsuit according to leave reserved by the learned Judge, on the ground that the above letters did not amount to a disclaimer.

The case was argued in Easter Term by *John Evans* and *E. V. Williams* for the plaintiff, and by the *Attorney-General*, *Wilson*, *Chilton*, and *Whitcombe* for the defendant. The Court

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took time to consider. The judgment of the COURT was now delivered by

PARKE, B.:

This was an ejectment brought against Lord Cawdor for the recovery of certain property which had been enjoyed by the father of the present Lord Cawdor under the father of Mr. Lewis, the lessor of the plaintiff. The chief question for the opinion of the Court was, whether the letters which were given in evidence in this cause amounted to a disclaimer of the title of the lessor of the plaintiff. It appeared that the premises had been held under such circumstances as that it became necessary for the lessor of the plaintiff to shew a determination of the tenancy; and it was
[*401] contended on his behalf that the *letters in question amounted to a disclaimer, which put an end to any tenancy which subsisted between the parties. The learned Judge who tried the cause thought that the letters did amount to a disclaimer, but in that opinion the Court does not concur. We think that the letters did not amount to a disclaimer; and, even if they did, such disclaimer would not be sufficient; because the letters were written after the day of the demise; and if they are put as an admission of a previous disclaimer, it is clear that they ought to amount to a recognition of a disclaimer antecedent to the date of the day of the demise. Besides, there was nothing in evidence in the cause to shew that Mr. Farrer had any authority, or was competent to bind Lord Cawdor by any disclaimer on his part.

The action, therefore, was not maintainable, unless the lessor of the plaintiff can make out in some other way that something had passed which amounted to a determination of the tenancy. It has been argued that the facts of the case shewed that the tenancy was one strictly at will only, and therefore that it was determined by the death of the late Mr. Lewis. That point, however, was not taken at the trial; if it had, *non constat* but that the defendant might have given evidence of circumstances which amounted to a new tenancy. The result is, that the rule must be absolute for a new trial, not for a nonsuit, because it may turn out that the death of the late Mr. Lewis finally determined the tenancy.

Rule absolute for a new trial.

DOE D. BRIDGMAN, Esq. *v.* DAVID AND OTHERS.

1834.

Exch. of Pleas.

[405]

(1 Cr. M. & R. 405—409; S. C. 5 Tyrwh. 125; S. C. nom., at Nisi Prius, *Doe* d. *Williams* v. *Davis*, 6 Car. & P. 614.)

Lease for twenty-one years to A. B., his executors, administrators, and assigns. Proviso, that if A. B., his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. A. B. died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt: Held, that the lessor's right of re-entering thereupon accrued.

EJECTMENT for the recovery of a mansion-house and lands called Manor Court, situate in the county of Carmarthen.

At the trial before Parke, B., at the last Assizes for the county of Carmarthen, it appeared that the premises in question were demised by the lessor of the plaintiff by lease bearing date the 30th December, 1816, to Joseph Waters, Esq., his executors, administrators, and assigns, for the term of twenty-one years from Michaelmas, 1816, at a yearly rent of 88*l*. The lease contained various covenants, and, amongst others, a covenant for payment of the rent; and after these followed a proviso, that, if the rent should be in arrear for a certain time, or any of the covenants should not be performed, the lease should be void. Then followed the proviso, upon which it was contended for the lessor of the plaintiff that the forfeiture of the lease had been incurred—"Provided also, that, if the said Joseph Waters, his executors, administrators, or assigns shall become bankrupt or bankrupts, insolvent or insolvents, or suffer any judgment or judgments to be entered against him or any of them the said Joseph Waters, his executors, administrators, or assigns, by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability may arise of the said herein and hereby demised estate, or any part thereof being extended or taken in execution; that then and in any or either of the said cases in this proviso mentioned happening, this present indenture of lease and the estate and interest hereinbefore and hereby granted, and every grant, clause, and thing herein contained on the part and behalf

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of the said Orlando Lloyd Harris, or his assigns, and the person or persons for the *time being entitled to the perception of the rents and profits of the said hereinbefore and hereby demised estate shall cease, determine, and be utterly null and void to all intents and purposes, as if this present indenture had never been made, and that then and in any or either of such cases of forfeiture happening, it shall and may be lawful to and for the said Orlando Lloyd Harris, or his assigns, or the person or persons for the time being entitled as aforesaid into and upon the said demised estate, lands, and premises, or any part or parcel thereof, in the name of the whole to re-enter, and the same and every part and parcel thereof to have again, re-possess, and re-enjoy, as in his and their former estate; and the said Joseph Waters, his executors, administrators, and assigns thereout to expel, remove, and put out, this indenture, or any thing herein contained to the contrary thereof in anywise notwithstanding."

Joseph Waters, the lessee, entered upon the premises, and died in the year 1823, leaving Robert Waters and John Waters, his brothers, executors of his will. By this will the property in question was bequeathed to them, their executors, administrators, and assigns upon trust to raise an annuity for the benefit of the testator's widow, and, subject to such annuity, in trust for the benefit of his son. Robert Waters died in 1827, leaving John Waters sole executor and trustee, and in 1832 John Waters became a bankrupt, and a fiat was issued against him. Upon this the present action was brought, and it was contended that John Waters having become bankrupt, the lease was rendered void by the proviso set forth. The learned Baron directed a verdict for the plaintiff, but gave leave to the defendants to move to set that verdict aside and have a nonsuit entered.

E. V. Williams now moved accordingly:

[*407] The question is, whether the bankruptcy of John Waters, the executor *of Joseph Waters, the original lessee, operated under the terms of the proviso as a forfeiture of the term. In strict construction the case comes within the words of the clause which declares that the bankruptcy of the lessee or of his

executors shall render the lease void. But, in construing a proviso of this nature, imposing the forfeiture of an estate, the Court will not give a larger operation to the words than they require; and, if it can be shewn that the terms of the proviso may be satisfied without extending them to a case like the present, the Court will favour the more lenient construction. To bring the case within the proviso, it must appear to be within the spirit of that clause. Now, the object of the lessor in framing that clause, was, to guard against involuntary alienations, or alienations *in invitum* by the tenant. This appears from the subsequent part of the proviso relating to extents &c., "whereby any reasonable probability may arise of the estate or any part thereof being extended or taken in execution." The lessor was anxious to preserve the estate in the hands of the original lessee and his representatives, and to prevent any alienation of it unless with his consent.

(LORD LYNDHURST, C. B.: The executor would be liable on the covenants, and was it not the object of the lessor to have a substantial person as tenant; otherwise he might lose the benefit of his covenant?

PARKE, B.: The lessor wished to have a solvent tenant, and not an insolvent one.

LORD LYNDHURST, C. B.: A very strong case must be made out to prevent the operation of the express words of the proviso.)

John Waters being at the time of his bankruptcy a mere trustee of the property, it would not pass to his assignees, and therefore the object of the testator, viz. that it should remain with the lessee or his representative was not defeated by his bankruptcy. This construction will not render the words of the proviso inoperative, because the word "executors" may have been inserted to provide against the bankruptcy of the executor as such. An executor *may become a bankrupt in his representative capacity, as, where by the directions of the testator he carries on his business, and in the course of that trading commits an act of bankruptcy (1). [*408]

(1) See *Ex parte Garland*, 7 R. R. 352 (10 Ves. 110); Eden's Bankrupt Law, 5, 3rd edit.; *Thompson* v. *Andrews*, 1 Myl. & K. 116.

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(LORD LYNDHURST, C. B.: Does Joseph Waters, the testator, direct his executors to carry on the business?)

The will "authorises, empowers, and directs" the executors to carry on such of his different concerns as they may deem prudent or advisable.

(LORD LYNDHURST, C. B.: The words of the proviso being clear and definite, are to be taken in their ordinary sense, and are not to receive a restricted meaning unless it be shewn that they bear that meaning and that meaning only.)

The Court will not lean to such a construction of the clause as will induce a forfeiture of the estate of a legatee who has no power over the acts of the executor, and though the argument of hardship cannot be urged alone, yet it may be made use of as leading to the proper construction of the proviso.

(LORD LYNDHURST, C. B.: The lessor could have no knowledge of the nature of the will which the lessee would make; he looked only to the executors.)

LORD LYNDHURST, C. B.:

There is no ground for granting a rule in this case. The words of the proviso with regard to bankruptcy are general, "Provided that if the said Joseph Waters, his executors, administrators, and assigns, shall become bankrupt or bankrupts," the lease shall become void. It has been argued that the word "executors" is used in a particular and restricted sense; but there appears to be no ground for that presumption. The proviso in question follows immediately after another proviso, where no such restricted sense could be intended to attach to the word executors as there used, and there is [*409] *nothing to shew that the word was not meant to have the same sense in both the provisoes. There is quite sufficient reason for construing the word in its ordinary acceptation. The object of the lessor was to guard against having an insolvent tenant imposed upon him. He was aware that the obligation to perform the various covenants in the lease would, on the death of

the lessee, devolve upon his executor, and he was desirous that the executor, when he became his tenant, should not be insolvent or bankrupt, and so deprive him of the benefit of the covenants. There appears therefore not only to be no reason for a restricted sense, but, on the contrary, strong grounds for taking the words in their ordinary sense.

ALDERSON, B.:

I am of the same opinion. The rule of construction is, that words are to receive their natural meaning, unless some strong reason can be shewn to give them another sense. The words here are, that, if the executor becomes bankrupt, the lease shall be void. Why should not that consequence follow? It is very improbable that the parties should have contemplated the executor becoming bankrupt as such.

PARKE, B.:

I see no reason to change the opinion I entertained at the trial. It is clear that the lessor did not wish to have an insolvent tenant.

GURNEY, B., concurred.

Rule refused.

RIDGWAY *v.* PHILIP AND BROADHURST.

1834.

Exch. of Pleas.

[415]

(1 Cr. M. & R. 415—417; S. C. 5 Tyrwh. 131; 4 L. J. (N. S.) Ex. 14; 3 Dowl. P. C. 154.)

A., the patentee of an engine, and B. were partners under the firm of A. & Co. C. purchased the licence of erecting such engines in Cornwall. D. contracted with A. & Co. to erect an engine in Cambridgeshire. A. informed D. that B. and C. were his partners, and C., on being applied to, said it was correct. During the making of the engine, C. frequently came to inquire how the work went on. D. sued B. and C. for a breach of the contract, when C. proved his limited interest in the patent. The jury having found that C. was not a partner, the Court refused a new trial.

ASSUMPSIT upon an agreement by the defendants to build an engine according to their patent, called a Gas Vacuum Engine. The defendants pleaded separately, and by different attornies, the general issue, and certain special pleas, upon which

RIDGWAY v. PHILIP.

ultimately no question arose. At the trial before Gaselee, J., at the last Assizes for the county of Cambridge, the defence was, that the defendant Broadhurst was wrongly joined in the action. The following were the principal facts of the case: The plaintiff being desirous of draining an extensive tract of land in Cambridgeshire, applied to a person named Brown, the patentee of a new invention called a Gas Vacuum Engine, to build one of those machines for his use. On the 27th April, 1830, the draft of an agreement was shewn by Brown to the plaintiff. The agreement purported to be between the plaintiff and "Brown & Co.," and on the plaintiff requiring to know what other persons than Brown composed that firm, Brown made on the back of the draft the following indorsement: "John Broadhurst, Esq. and Dr. Wilson Philip." The contract being broken, the plaintiff resolved to commence proceedings for the breach, and, previously to the action being brought, his son called on the defendant Broadhurst, and, informing him of his father's intention, and of the indorsement made by Brown upon the draft of the agreement, begged to know if Brown had been correct in doing so. The defendant Broadhurst replied, that Brown was correct in doing so, and stated that he had bought his original interest from the other defendant Dr. Philip. In order further to fix Broadhurst as a partner, evidence was given, that, while the engine was in progress he attended very frequently at the manufactory to inquire how it was going on, and that he gave advice, and made suggestions, with regard to its construction. In answer to this evidence, an agreement or licence from Brown

[*416] and the other *parties interested in the patent, to Broadhurst, was given in evidence on the part of the latter, authorizing Broadhurst to use the patent for the erecting of engines in certain parts of Cornwall only, and it was contended that the admissions of Broadhurst were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation either in the patent generally or in the particular transaction in question. The learned Judge left it to the jury to say whether Broadhurst, at the time he made the admission, was under a mistake, and whether the acts he was proved to have done did or did not afford a sufficient ground for

supposing it to be a mistake; and, with regard to those acts, he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction, or whether they were done by Broadhurst to satisfy himself as to the licence he had obtained for erecting the same engines in Cornwall, being likely to be productive to him or not. The jury found a verdict for the defendants, on the ground that Broadhurst was not a partner.

Kelly now moved for a rule to shew cause why that verdict should not be set aside, and a new trial had, on the ground that the verdict was against the weight of evidence:

The question turned solely upon the liability of Broadhurst as a partner, and the weight of evidence was in favour of a partnership. At the time of the making of the contract his name was written by Brown upon the back of the draft as one of the partners in that particular transaction, and subsequently he expressly recognizes the act of Brown in thus representing him as a partner, and says that it was correct. This declaration was strengthened by his conduct; for, during the whole course of the making of the engine, he was in the habit of attending and taking that interest in the progress of the work which a partner might be supposed to take. By this conduct he held himself out as a partner to all the world. The licence from the proprietors *of the patent to [*417] use it in certain parts of Cornwall was no answer to this evidence, for it was perfectly consistent with such an interest that Broadhurst should also be interested as a partner in the erection of the engine in question.

PARKE, B. (1):

It frequently happens in cases where the liability of persons as partners comes in question, that juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, so far as regards his own interest, to contradict it by evidence. It was incumbent upon the plaintiff to shew something like a declaration by Broadhurst before the contract that he was a

(1) Lord Lyndhurst had left the Court during the argument.

RIDGWAY v. PHILIP.

partner in the transaction. Whether the admission made by him, and his conduct during the erecting of the engine, were or were not referable to the limited interest which he possessed in the patent, was a question for the jury. It was not sufficient for the plaintiff to give in evidence acts which might be referred to such limited interest.

* * * * *

Rule refused.

1834.

Exch. of Pleas.

[418]

COCKER *v.* COWPER (1).

(1 Cr. M. & R. 418—421; S. C. 5 Tyrwh. 103.)

A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water; and such licence may be revoked, though it has been acted upon.

In 1815, A. cut a drain in the land of B., to a spring, the water from which he appropriated as it ran through his own land. In 1833, B. stopped the drain: Held, that B. was entitled so to do, no right having been acquired by user or length of possession.

THIS was an action on the case. The declaration stated, that the plaintiff was possessed of a brewery and premises, and that by reason thereof he was entitled to the benefit of certain water arising or flowing in or from a certain well or spring of water, in a certain close of the defendant, and which water ought to have run and flowed along a certain drain to the plaintiff's brewery, but that the defendant prevented the plaintiff from using the same. Plea, not guilty. The cause came on to be tried at the last Assizes, for the county of Lancaster, before Gurney, B., when a verdict for the plaintiff was taken by consent, subject to the opinion of this Court upon a case to be stated by Robert Brandt, Esq., barrister-at-law. Mr. Brandt, accordingly, stated the following case: "I do award and find, that, from the year 1799, up to and beyond the year 1815, the public-house, brewhouse, and premises, now held by the plaintiff, and mentioned in the declaration, were occupied by one Paul Cowper, under a lease thereof for 999 years, granted to him in 1799, by the then owner in fee, one John Cowper, the brother of the said Paul Cowper, and that the well of the plaintiff, also mentioned

(1) Referred to by STIRLING, J., *Aldin* v. *Latimer Clark & Co.*, '94, 2 Ch. 437, 448, 63 L. J. Ch. 601; and see note to *Hewlins* v. *Shippam*, 31 R. R. 757.—R. C.

in the declaration, was made by the said Paul Cowper, long before the year 1815, and was originally supplied with water, conveyed from an underground spring by a covered drain, through the adjoining close of one John Dunkerley; and that, in the year 1815, the said John Dunkerley prevented the water from running any longer from his said close to the said well, in consequence whereof the said Paul Cowper, in order to obtain another supply of water from his said well, in the same year made a drain, and cut a deep funnel into and through a close (in the declaration mentioned as the close of the defendant), which was part of the estate of the above-mentioned John Cowper, and is now in the occupation of the defendant and her two daughters, *Betty Cowper and Sarah Cowper. By those [*419] means, an underground spring was found in the said close, by which the well was supplied with water through the said drain and tunnel until May, 1833. The said drain and tunnel were made by Paul Cowper, at an expense of about 15*l.*, with the verbal consent of Benjamin Cowper, who was the brother of Paul Cowper, and who was tenant of the said close from 1796 to 1830. The verbal consent of the defendant was also obtained at the time when the drain and tunnel were made. In the year 1815, the above-mentioned John Cowper was not living. He died, seised in fee of the said close, in 1809, intestate, leaving the defendant, his widow, and Joshua, his eldest son, his heir-at-law, and several other children surviving him. Joshua died intestate in March, 1814, at the age of thirteen years; William, the second son of John, was the heir of Joshua, and he also died intestate, in 1824, at the age of twenty years, being in the year 1815, when the drain and tunnel were made, of the age of eleven years. Henry, the third son of John Cowper, was the heir of the last-mentoned William Cowper, and he died intestate in 1827, at the age of nineteen years. On his death, the only surviving children of the said John Cowper were Betty Cowper and Sarah Cowper, who are still living. From the death of John Cowper, in 1809, until 1831, the defendant has ever lived with the children of such as survived, as the head of the family, but not on the estate of the said John Cowper, and has received the rents of that estate as the head of that family, from the

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death of John Cowper, until 1830; and in May, 1831, the defendant, and the said Betty and Sarah, went to reside on the said close. In May, 1833, the said Betty Cowper applied to Mr. Lees, the landlord of the plaintiff, for a remuneration for the supply of water issuing from the close above mentioned, and, on his refusal to make any, the said Betty Cowper, in the same month, ordered the drain and tunnel to be stopped up, so that [*420] the water *should not run down them, which was accordingly done, with the knowledge and approval of the defendant. A guardian of the infant children of John Cowper was not appointed by any deed or testamentary disposition of John Cowper, nor in any other way unless by operation of law. The defendant, as the widow of John Cowper, was entitled to dower in her husband's estates, but dower has never been assigned to her. And (if under these circumstances the decision of the Court shall be in favour of the plaintiff), I do award, that the damages occasioned to him by the said defendant amount to the sum of 50*l.*"

Alexander, for the plaintiff:

The facts found by the arbitrator amount to a licence to the plaintiff to make the drain in question, and such licence having been acted upon could not be revoked: *Winter* v. *Brockwell* (1), *Tayler* v. *Waters* (2), *Liggins* v. *Inge* (3), *Mason* v. *Hill* (4).

(PARKE, B.: You cannot support this point without denying *Hewlins* v. *Shippam* to be law (5).)

In *Winter* v. *Brockwell* it was held that a licence of this kind, when executed, was not revocable.

(PARKE, B.: *Hewlins* v. *Shippam* does not interfere with *Winter* v. *Brockwell*. In the latter case, the licence was to put a skylight overthe defendant's own area.)

If the plaintiff cannot be considered as entitled by a licence to the enjoyment of the water, the facts found by the arbitrator

(1) 9 R. R. 454 (8 East, 308).
(2) 18 R. R. 499 (7 Taunt. 384; 2 Marsh. 551).
(3) 33 R. R. 615 (7 Bing. 682).
(4) 39 R. R. 354 (5 B. & Ad. 1).
(5) 31 R. R. 757 (5 B. & C. 221; 7 Dowl. & Ry. 783).

shew a right in him, by reason of his having been the first person who found the spring, and who first appropriated it to a beneficial use. Such appropriation continued for the space of eighteen years, from 1815 to 1833. The person who first appropriates to his own use a stream of water, has a right to it against all others; and although the water arose in the close of the defendant, yet that circumstance could not prevent the plaintiff from first *appropriating it, as it flowed through his own lands, or justify the defendant, after such appropriation, in diverting its course.

[*421]

Wightman, for the defendant, was stopped by the COURT.

Per CURIAM:

The plaintiff is clearly not entitled to recover. With regard to the question of licence, the case of *Hewlins* v. *Shippam* is decisive to shew that an easement like this cannot be conferred unless by deed, nor has the plaintiff acquired any other title to the water. In order to confer a title by possession, it ought to appear that he has enjoyed it for twenty years, but the original appropriation was only in the year 1815. The mere entry into the close of another, and cutting a drain there, and conveying water from a spring rising there, cannot confer a title; there must be

Judgment for the defendant.

PENNY, SURVIVING PARTNER OF ROBERT BROOKES, *v.* INNES (1).

1834.

Exch. of Pleas.

[439]

(1 Cr. M. & R. 439—442; S. C. 5 Tyrwh. 107; 4 L. J. (N. S.) Ex. 12.)

The payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement, the defendant indorsed the bill, and then the plaintiffs indorsed it: Held, that the defendant's indorsement was equivalent to a new drawing by the defendant, and that he was liable to be sued upon the bill by the plaintiffs: Held, also, that a fresh stamp was not necessary.

ASSUMPSIT on a bill of exchange. The first count stated that one William Wilson made his bill of exchange, and thereby

(1) See Bills of Exchange Act, 1882, s. 56; *Steele* v. *McKinlay* (1880) 5 App. Cas. 754, 767; and compare *Macdonald* v. *Whitfield* (1883) 8 App. Cas. 733, 52 L. J. P. C. 70.—R. C.

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requested Henry Wilson & Co., twelve months after date, to pay to his (W. W.'s) order, the sum of 200*l*. It then stated an indorsement by W. W. to the defendant, and an indorsement by the defendant to the plaintiff and Robert Brookes. The second count stated the making of the bill as in the first count, and an indorsement by the defendant to the plaintiff and Brookes, (omitting the statement of the indorsement by W. W.) The third count stated, that the defendant drew the bill upon the same drawees, payable to his own order, and that he indorsed it to the plaintiff and Brookes. The fourth count stated, that the defendant drew the bill upon the same drawees, payable to the order of W. W., and that W. W. indorsed it to the plaintiff and Brookes. The fifth count stated, that W. W. drew the bill upon the same drawees, payable to his own order, and indorsed it to the plaintiff and Brookes, who delivered the bill to the defendant, who then and there indorsed and delivered the same
[*440] to the plaintiff and *Brookes. The declaration also contained a count for goods sold and delivered, and the usual money counts. Plea, the general issue. On the trial before Parke, B., at the London sittings after last Trinity Term, the bill upon which the action was brought appeared to be in the following form:

"£200 0*s*. 0*d*. 9th Sept. 1829.

"Twelve months after date, pay to me, or my order, the sum of two hundred pounds, for value received.

"WILLIAM WILSON.

"Messrs. HENRY WILSON & Co.
Pedlar's Acre, Lambeth."

(Indorsed,)

"Pay Messrs. Brookes and Penny, or order. WM. WILSON.

"JOHN ROSE INNES,
"BROOKES AND PENNY."

It appeared in evidence, that the defendant had indorsed his name upon the bill after the special indorsement by William Wilson, the payee, to the plaintiff and Brookes, and before the indorsement by the latter, and it was objected that this indorsement gave no title to the plaintiff and Brookes to sue the defendant on the bill; but the learned Baron thought that the

indorsement amounted to a fresh drawing, and the plaintiff had a verdict. No question arose with regard to the consideration for the defendant's indorsement.

PENNY v. INNES.

Platt now moved for a rule to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, or a new trial had:

The question is, whether the defendant, by putting his name on the back of the bill immediately after the special indorsement, and before the *indorsement by the special indorsees, rendered himself liable as a new drawer; and if so, whether the bill did not require a fresh stamp. The defendant conveyed no interest in the bill by his indorsement. Had it been indorsed by the plaintiff and Brookes to the defendant, and by him indorsed again to the plaintiff and Brookes, they could not have sued the defendant as indorsee, because he in his turn might have sued them in the same character. In what capacity is the defendant liable upon the bill? He is a mere stranger to it, and has neither property nor the power of transferring the property in it. He puts his name upon it. That act confers no title upon any one, and imposes no liability upon the defendant.

[*441]

LORD LYNDHURST, C. B.:

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. This would not have prejudiced any other party. The bill was their property, and the indorsement, whether general or special, might be struck out.

PARKE, B.:

Every indorser of a bill is a new drawer; and it is part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him. Still it remains the same instrument as before, and does not require a fresh stamp, for it is not a fresh instrument. It is urged that the defendant when he indorsed

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the bill had no property in it; but that is not necessary in order to render him liable to be sued upon the bill. Suppose that a *man steals a bill and indorses it for value, might it not in pleading be stated that he drew the bill? The indorsement by the defendant was equivalent to the drawing of a new bill, and was intended to transfer that new bill to the plaintiff and Brookes. It has been argued that the case may be treated as if the defendant was the indorsee of the plaintiff and Brookes, and as if he had again delivered the bill to them; and it is said that in such a case, to avoid circuity of action, the plaintiff ought not to be suffered to recover. But the fact was not so. The defendant never was the indorsee of the plaintiff and Brookes, nor was it ever intended to convey the property in the bill to him.

ALDERSON, B.:

The indorsement only operates as against the party making it, and then as a fresh drawing. It has no operation with regard to the other parties to the bill.

GURNEY, B.:

I am of the same opinion.

Rule refused.

1834.

Exch. of Pleas. [471]

SLOMAN *v.* COX.

(1 Cr. M. & R. 471—472; S. C. 5 Tyrwh. 174; 4 L. J. (N. S.) Ex. 7.)

The holder of a bill for 18*l.*, which had been dishonoured, agreed to take 8*l.* in cash and another bill for 10*l.* from the drawer. The drawer accordingly drew another bill upon the same acceptor for that amount; while in the hands of the drawer, the acceptor, without the knowledge of the drawer, altered the date and vitiated the bill: Held, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it.

ASSUMPSIT upon two bills of exchange. The first bill, dated the 16th March, 1833, and payable three months after date, for the sum of 18*l.*, was drawn by the defendant upon and accepted by a person named Jones, and indorsed to the plaintiff. The second bill, dated the 20th of June, and payable two months after date, was also drawn by the defendant upon and accepted by Jones,

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and indorsed to the plaintiff. At the trial before Lord Lyndhurst, C. B., at the last sittings for Middlesex, it appeared that the first bill having been dishonoured, the plaintiff agreed to take 8*l.* in cash, and another bill for 10*l.*, and accordingly the second bill was drawn and indorsed to the plaintiff, and the bill for 18*l.* was given up to the acceptor. After the acceptance of the second bill, and before it became due, Jones, the acceptor, without the concurrence of the defendant, but while the bill was in his hands, altered the date of the bill from the 20th of June to the 24th. The bill for 18*l.* was subsequently obtained by the plaintiff from the acceptor. The jury found that the bill of the 20th June had been altered without any fraudulent intention. A verdict was found for the plaintiff upon the count on the first bill, and the learned Judge gave the defendant leave to move to enter a nonsuit. A rule having accordingly been obtained by *R. V. Richards*—

Platt now shewed cause:

The first bill having been dishonoured, the plaintiff claimed the amount from the defendant, the drawer; but an agreement was entered into that the defendant should not be sued upon that bill on condition of his paying 8*l.* and giving another bill for the residue. Another bill meant another good bill; but the defendant gave the plaintiff only a piece of waste paper. The bill had been vitiated by the alteration; and it is quite immaterial whether that alteration was or was not made *with the concurrence of the [*472] defendant. He was bound to give a good bill, and has not done so; and the condition upon which the former bill was given up not having been performed, the plaintiff is remitted to his right to sue upon that bill, and the verdict is correct.

R. V. Richards and *Ball, contrà:*

The jury have found that Cox, the defendant, was no party to the alteration. He, therefore, has done all that, according to his engagement with the plaintiff, he was bound to do. He has drawn a valid bill, which he delivered over to Jones, the acceptor, who acted as agent for both parties, and this must be regarded as a delivery to the plaintiff. It was the duty of the plaintiff to see that he got an unaltered bill. The defendant himself was

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injured by the alteration; for, instead of receiving notice on the 23rd June, he would not, according to the altered bill, receive it until the 27th.

PARKE, B.:

The question in this case is a simple one. The defendant is liable to the plaintiff as the drawer of a bill for 18*l.* Being sued upon that bill, he shews, in order to prove payment, that, in consequence of an agreement with the plaintiff, he gave him 8*l.* in cash and a bill for the remainder. That bill turns out to be, in fact, of no value, having been vitiated by an alteration. The defendant, therefore, not being liable on the second bill, still remains liable upon the first.

ALDERSON, B.:

The case resembles that of a bill given and subsequently dishonoured, which is no payment. The plaintiff was entitled to repossess himself of the former bill, upon which he still retained his right to sue.

The rest of the COURT concurred.

Rule discharged.

1834.

Exch. of Pleas.

[495]

TALBOT *v.* LEWIS.

(1 Cr. M. & R. 495—497; S. C. 5 Tyrwh. 1; 4 L. J. (N. S.) Ex. 9.)

In trespass by the lord of a manor for wreck, a document, dated in 1639, was offered in evidence, purporting to be the answer of certain persons, tenants of the manor, to a commission, issued by the lord of the manor for surveying the same, in which document it was stated that the lord was entitled to wreck: Held, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the jurors having no peculiar means of knowledge.

TRESPASS for breaking and entering the close of the plaintiff, and digging for and carrying away certain dollars. Pleas, first, negativing the title of the plaintiff to the close; second, negativing his title to the dollars. At the trial before Parke, B., at the last Summer Assizes for the county of Glamorgan, it appeared that the plaintiff was lord of the manor of Landymere, in Glamorganshire, which he claimed as mesne lord, under the Duke of

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Beaufort, who possessed certain royalties there, as lord paramount of the honour of Gower. As lord of the manor of Landymere, the plaintiff claimed by prescription a right to all wrecks of the sea happening upon Rossilly Sands, allowed to be within the boundaries of the manor. In order to establish this right, the plaintiff tendered in evidence, from amongst his own muniments, a document, dated in the year 1639, purporting to be the answer of certain persons, some of whom were tenants of the manor, to commissioners appointed by the Earl of Pembroke, then lord of the manor, wherein the limits of the manor were set forth; this answer having been read, the following answer to the 9th article proposed by the commissioners was tendered in evidence. "To the 9th article we say, that all wayfes, estrayes, wrecke of sea, and fealons goods, treasure-trove, or such like, within the precincts of this *manor, doth belong to the lord of this manor, [*496] and how the law hath heretofore been answered thereon we know not." The learned Judge admitted the former evidence for the purpose of proving the boundaries; but rejected the answer to the 9th article, as inadmissible for the purpose of proving the right of the lord to wreck. A verdict having been found for the defendant—

Wilson now moved for a new trial on the ground—first, that the evidence in support of the claim to the wreck was improperly rejected; and, secondly, on the ground that the verdict was against the weight of evidence:

Where the subject-matter to be proved is a matter of a public nature, evidence of general reputation is admissible; and the declarations of every person, in such a situation as to possess competent means of information, may be received. The sea and all navigable rivers are public highways, and any person using the Bristol Channel may be supposed cognizant of the title to wreck upon its shores. So, persons living along the coast, and in the neighbourhood of this manor, must have enjoyed opportunities of obtaining information upon that fact, which would entitle their evidence to credit. An argument in favour of the reception of the evidence may be drawn from the statute 3 Edw. I. c. 4, concerning wrecks, which

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enacts that "goods shall be saved and kept by view of the sheriff, and by view of such as are of the town where the goods were found." Thus the inhabitants of the town, no doubt, upon the principle now contended for, were constituted a sort of jury for the purpose of ascertaining the question of wreck or not—the very point to which the document in question goes. The persons making answer are called in the document jurors; and many of them who signed it were inhabitants of the place in question. The extent of their local information appears from the circumstance of their being summoned to answer under this commission; [*497] *and it is submitted, that their answer to the 9th article ought to have been received, upon the same principle as their answers with regard to the extent of the manor, viz. that it was a matter of public concern, upon which they possessed competent means of knowledge, and which they had no interest to misrepresent.

LORD LYNDHURST, C. B.:

The plaintiff in this case claims the wreck as lord of the manor, and he may entitle himself to it either by grant or by prescription, which supposes a grant. But the right is a private right, with which neither the tenants of the manor nor the inhabitants of the town have any concern. Those persons cannot be presumed to be better acquainted with it than any other of the King's subjects. I therefore think that the presentment, or answer of the jurors, was not evidence to prove such right.

PARKE, B.:

I rejected the evidence, because, as it was not possible that the wreck could belong to the tenants of the manor or the inhabitants of the town, their declarations could have no more weight than those of any other persons.

ALDERSON, B.:

I am of opinion that the evidence was rightly rejected. Is evidence of this kind sufficient to deprive the Crown of its rights, the King being *primâ facie* entitled to all wrecks of the sea? Here, however, it is quite clear that it was not admissible, for

the parties making the declarations possessed no peculiar means of knowledge.

GURNEY, B., concurred.

Rule refused upon the first point, but granted on the second.

MINTER *v.* WELLS AND ANOTHER.

1834.

(1 Cr. M. & R. 505—507; S. C. 5 Tyrwh. 163; 4 L. J. (N. S.) Ex. 2.)

Exch. of Pleas.

[505]

Where, in summing up his invention, a patentee stated it thus: "My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described:" Held, that this was not a claim to the principle of the lever, but to an application of that principle to a certain purpose by certain means, and that the patent was good.

THIS was an action on the case for an infringement of a patent obtained by the plaintiff. The trial took place at the sittings after last Trinity Term, before Alderson, B., when a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, on an objection taken to the specification. The patent had been obtained for an invention called "Minter's Patent Reclining Chair," which was thus described in the specification: "My invention of an improvement in the construction, making, or manufacturing of chairs, consists in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, and whereby a person, sitting or reclining on such chair, may, by pressing against the back, cause it to take any inclination, and yet at the same time the back of such chair shall, in whatever situation it is placed, offer sufficient resistance and give proper support to the person so sitting or reclining in such chair." The specification then set forth the mode of making and using the chair, and concluded thus: "Having now described the various parts represented *in the drawing, and the manner of their action, I would have it understood that I lay no claim to the separate parts of a chair which are already known and in

[*506]

MINTER v. WELLS.

use, neither do I confine myself to making them in the precise shapes or forms represented. But what I claim as my invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."

Godson now moved to enter a nonsuit:

The claim of the plaintiff is either to the principle itself, in which case his patent is bad; or to the mode of applying that principle, which has not been infringed by the defendant, who has not made his chair in the manner described by the specification. What the plaintiff claims is the application of a self-adjusting leverage, that is to say, he claims the principle of the common lever; he therefore claims a mere principle of mechanics, which cannot be appropriated, and the patent is invalid. Where a patentee sums up his claim as for a mere principle, the case of *Rex* v. *Cutler* (1) is an authority to shew that the patent cannot be supported. There Lord ELLENBOROUGH says: "The defendant has confined himself, by thus summing up the extent of his invention, to the benefit of the principle;" and there was a verdict for the Crown. Two patents founded upon the same principle may be good, if neither claim the principle, as in *Hullett* v. *Hague* (2), where the principle of evaporating sugar at low temperatures was applied in two distinct patents, by distinct methods and apparatus, and both patents were sustained.

LORD LYNDHURST, C. B.:

Every invention of this kind must include the application of some principle; and here the application of the principle of the lever to the construction of a reclining chair constitutes the
[*507] machine, the *invention of which the plaintiff claims. He does not, as it is asserted, claim the principle in the summing up of his specification; but he claims the invention of applying that principle in a certain manner and by certain machinery. He says, what I claim is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat

(1) 18 R. R. 780 (1 Stark. 354). (2) 36 R. R. 587 (2 B. & Ad. 370).

acts as a counterbalance to the pressure against the back of such chair, as above described. The claim is not for the lever only, but for a self-adjusting lever; he does not confine it to any particular form, but claims the chair constructed on this principle in whatever shape or form it may be.

PARKE, B.:

It was proved by all the witnesses at the trial that a self-adjusting lever was never before applied to the construction of chairs. The claim of the plaintiff is not to the principle, but to the combination of the principle and the machine—the application of the self-adjusting lever to the construction of a chair. His summing up shews this—"I claim as my invention the application of a self-adjusting leverage to the back and seat of a chair." This is not claiming a principle.

The rest of the COURT concurring—

Rule refused.

FENNELL *v.* TAIT.

1834.

Exch. of Pleas.

[584]

(1 Cr. M. & R. 584; S. C. 5 Tyrwh. 218; 3 Dowl. P. C. 161.)

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up.

MANNING applied for a writ of *habeas corpus ad testificandum* to bring up the body of a person who was confined as a lunatic, for the purpose of giving evidence in this cause.

PARKE, B.:

If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, a *habeas corpus* should be granted. You can apply to a Judge at Chambers.

1834.

Exch. of Pleas.

[599]

LANE *v.* DRINKWATER.

(1 Cr. M. & R. 599—613; S. C. 5 Tyrwh. 40; 4 L. J. (N. S.) Ex. 32; 3 Dowl. P. C. 223.)

In consideration of the sum of 300*l.* T. D. and R. D. by deed, severally and respectively, and for their several and respective heirs, executors, and administrators, granted, covenanted, and agreed, to and with L. and B., their heirs, executors, administrators, and assigns, to pay to L. and B., their executors, &c., one annuity, or clear yearly sum of 30*l.*, in the shares and proportions following, viz. the sum of 15*l.*, being one moiety of the annuity, unto L., his executors, &c., and the sum of 15*l.*, the remaining moiety, unto B., his executors, &c., to be respectively paid quarterly. The powers for better securing the payment of the annuity contained in the deed were all given to L. and B. jointly, and the deed also contained a joint power of attorney to them to enter up a joint judgment; and a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; and the annuity was redeemable, on seven days' notice in writing being given, by the payment to L. and B. of the sum of 307*l.* 10*s.* and all arrears of the annuity. In an action brought by L. against T. D. to recover arrears of the annuity: Held, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that L. could not sue alone.

DEBT. The first count of the declaration stated, that, on the 30th October, 1828, at &c., by a certain indenture then and there made between the said defendant and one Robert Drinkwater of the one part, and the said plaintiff and one Allen Billing of the other part, he the said defendant and the said Robert Drinkwater, for the consideration therein mentioned, did for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree,

[*600] to and with the said plaintiff and the said Allen Billing, *their executors, administrators, and assigns, that the said defendant and the said Robert Drinkwater, their heirs, executors, administrators, and assigns, or some or one of them, should and would, from time to time, and at all times during the term of ninety-nine years thenceforth next ensuing, if the said plaintiff, and Edward Lane his son, and the said Allen Billing, and James Edward Billing his nephew, or the survivors or longest liver of them, should so long live, at or in the Guildhall of the city of London well and truly pay unto the said Thomas Lane and the said Allen Billing, and their executors, administrators, and assigns, one annuity or clear yearly sum of 30*l.* of lawful money,

current in Great Britain, in the shares and proportions following; that is to say, the sum of 15*l.*, being one moiety of the said annuity or yearly sum, unto the said plaintiff, his executors, administrators, or assigns, and the sum of 15*l.*, the remaining moiety thereof, unto the said Allen Billing, his executors, administrators, or assigns, and the said moieties to be respectively paid by equal quarterly payments, on the 30th January, the 30th April, the 30th July, and the 30th October, in every year, clear of any deductions for taxes, rates, assessments, or any other matter whatsoever, the first payment of the said annuity or yearly sum to become due and be made on the 30th day of January then next ensuing, provided the said term should be then continuing; and in case the said term should determine by the death of the said plaintiff, and Edward Lane, Allen Billing, and James Edward Billing, or the survivors or longest liver of them, between or in the interval of any two of the said quarterly days of payment, or before the said 30th day of January then next, then that, in either of such cases happening, the said defendant and the said Robert Drinkwater, their heirs, executors, and assigns, should and would, in like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said plaintiff, *and the said Allen Billing, their executors, administrators, and assigns, such part of the said annuity or yearly sum of 30*l.*, as should be in proportion to the number of days which should have elapsed prior to the day of the decease of the survivors or longest liver of them, the said plaintiff, and the said Edward Lane, Allen Billing, and James Edward Billing, and after the day of payment next or immediately preceding that event, if such event should happen after the said 30th day of January then next ensuing. Breach, in non-payment of 50*l.* for the plaintiff's share for four years and two quarters of the annuity.

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The second count was upon another indenture dated 30th July, 1830, granting an additional annuity of 10*l.*, in moieties of 5*l.* each, in like manner as in the first indenture.

The defendant pleaded to the first count, after craving *oyer* of the indenture, first, that the defendant and Drinkwater had well and truly paid to the said plaintiff the sum of 15*l.*, being

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one moiety of the said annuity, by equal quarterly payments, according to the indenture.

Secondly, that theretofore, and after the making of the indenture in the first count mentioned, to wit, on &c., to wit, in the county aforesaid, the defendant and the said Robert Drinkwater became and were desirous of redeeming and repurchasing the said annuity or yearly sum in the said first count mentioned, and did for that purpose, by and with the consent of the said plaintiff and the said Allen Billing, who then and there dispensed with the seven days' notice in writing for that purpose required by and specified in the said indenture in the said first count mentioned, pay to the said plaintiff and the said Allen Billing, for the repurchase and redemption of the said annuity, the said sum of 307*l.* 10*s.* in the said indenture mentioned, as and in full for the repurchase and redemption of the said annuity in the said first count mentioned; and the said plaintiff and the said Allen Billing did then and there accept, receive, and take the
[*602] said sum of 307*l.* 10*s.* *as and in full for the repurchase and redemption of the same; and the said defendant and the said Robert Drinkwater did then and there pay to the said plaintiff and the said Allen Billing all arrears of the said annuity then due and payable, and all costs and charges theretofore paid and incurred by the said plaintiff and the said Allen Billing in respect of the said annuity, and then and there repurchased and redeemed the same annuity according to the proviso in that behalf contained in the said last-mentioned indenture.

To the second plea the plaintiff, after protesting that the said seven days' notice in writing was not dispensed with as in the said last-mentioned plea alleged, replied that the said plaintiff and the said Allen Billing did not accept, receive, or take the said sum of 307*l.* 10*s.*, in the second plea mentioned, as and in full for the repurchase and redemption of the said annuity in the said first count mentioned; nor did the said defendant and the said Robert Drinkwater, or either of them, pay to the said plaintiff and the said Allen Billing, or either of them, the arrears of the last-mentioned annuity; nor did the said defendant, nor the said Robert Drinkwater, repurchase or redeem the same annuity, according to the indenture in the first count mentioned, in

manner and form as the said defendant hath above in his said second plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c. There were the same pleadings also to the second count.

The first indenture, as set out on *oyer*, was made between Thomas Drinkwater (the defendant) and Robert Drinkwater of the one part, and Thomas Lane (the plaintiff) and Allen Billing of the other part; by which, after reciting amongst other things that the said Thomas Drinkwater and R. Drinkwater had contracted and agreed with the said Thomas Lane and Allen Billing for the sale to them of an annuity or yearly sum of 30*l.*, to be secured *and payable to them for the term of ninety-nine years, [*603] determinable as thereinafter mentioned, but to be repurchasable under the proviso thereinafter contained for that purpose, and that the true consideration to be paid for the purchase of the annuity was the sum of 300*l.*, and that in pursuance and part performance of the agreement the said T. Drinkwater had that day executed a warrant of attorney, authorizing certain attornies to confess a judgment against them in an action of debt, at the suit of the said Thomas Lane and Allen Billing, for the sum of 600*l.*, and costs of suit, with a defeazance, &c.: it was witnessed, that, in pursuance of the agreement, and in consideration of the sum of 300*l.* by the said Thomas Lane and Allen Billing paid to the said Thomas Drinkwater and Robert Drinkwater, they the said T. Drinkwater and Robert Drinkwater did thereby, for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree, to and with the said Thomas Lane and Allen Billing, their heirs, executors, administrators, and assigns, that they the said Thomas Drinkwater and Robert Drinkwater, their heirs, &c., should and would, from time to time and at all other times during the said term of ninety-nine years thence ensuing, if the said Thomas Lane and Edward Lane his son, and the said Allen Billing and James Edward Billing his nephew, or the survivors or longest liver of them, should so long live, at or in the Guildhall of the city of London, well and truly pay unto the said Thomas Lane and Allen Billing, their executors, administrators, or assigns, one annuity or clear yearly sum of 30*l.*, in the shares

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and proportions following: that is to say, the sum of 15*l.*, being one moiety of the said annuity or yearly sum, unto the said Thomas Lane, his executors, administrators, or assigns, and the sum of 15*l.*, the remaining moiety thereof, unto the said Allen
[*604] Billing, his executors, administrators, or assigns, *and the said moieties to be respectively paid by equal quarterly payments, on the 30th of January, the 30th of April, the 30th of July, and the 30th of October, in every year, the first payment of the said annuity or yearly sum to become due and be made on the 30th of January then next ensuing, provided the said term should be then continuing; and in case the said term should determine by the death of the said Thomas Lane and Edward Lane, Allen Billing and James Edward Billing, or the survivor of them, between or in the interval of any two of the quarterly days of payment, then, that the said Thomas Drinkwater and Robert Drinkwater should and would in like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said Thomas Lane and Allen Billing, their executors, &c., such part of the said annuity or yearly sum of 30*l.*, as should be in proportion to the number of days which should have elapsed prior to the day of the decease of the survivor of them the said Thomas Lane, Edward Lane, Allen Billing, and James Edward Billing, and after the day of payment next or immediately preceding that event.

The indenture then further witnessed, that, in further performance of the agreement, and in consideration of the sum of 30*l.*, paid by the said Thomas Lane and Allen Billing to the said Thomas Drinkwater and Robert Drinkwater, they the said Thomas Drinkwater and Robert Drinkwater did (according to their respective rights, estates, and interests therein,) grant, bargain, sell, release, and confirm, assign and transfer, unto the said Thomas Lane and Allen Billing, their heirs and assigns, a certain close of meadow or pasture ground therein mentioned, and also the several parts or shares of them the said Thomas Drinkwater and Robert Drinkwater, and each of them, of and in a certain sum of 2,800*l.* Three per cent. Consolidated Bank Annuities, and a certain residuary estate of one Thomas
[*605] Drinkwater, deceased, bequeathed to them respectively *by the

will of the same Thomas Drinkwater, subject to the life estate of his widow therein, and all other the estate of the testator, to which the said Thomas Drinkwater, party thereto, and Robert Drinkwater, or either of them, were or might become entitled under or by virtue of the testator's will; to hold the said close of meadow ground and premises thereby granted, with the appurtenances, unto and to the use of the said Thomas Lane and Allen Billing, their heirs and assigns, for ever; and to hold the said parts and shares of them the said Thomas Drinkwater and Robert Drinkwater, and each of them, of and in the said Bank Annuities and other residuary estate secondly thereinbefore described, unto the said Thomas Lane and Allen Billing, their executors, &c., upon the trusts thereinafter mentioned. And for enabling the said Thomas Lane and Allen Billing to recover and receive the several parts and shares of them the said Thomas Drinkwater and Robert Drinkwater, and each of them, of and in the said Bank Annuities, residuary estate, and premises thereby assigned, the deed contained a power of attorney to the said Thomas Lane and Allen Billing, and the survivor of them, his executors, &c., to demand, sue for, recover, and receive of and from the executors for the time being of the therein recited will, or the person or persons liable to pay the same, the said parts and shares of them the said Thomas Drinkwater and Robert Drinkwater, and each of them, of and in the said Bank Annuities, residuary estate, and premises thereinbefore assigned, and on payment thereof to give and sign receipts, &c.; and, on non-payment thereof, to commence, carry on, and prosecute any action, suit, or other proceeding for recovering and compelling payment thereof respectively. And it was thereby declared, that the said Thomas Lane and Allen Billing, their executors, &c., should stand possessed of and interested in the said close of land, parts and shares of Bank Annuities, and other residuary personal estate and premises, *upon trust for better securing to [*606] the said Thomas Lane and Allen Billing, their executors, &c., the due and punctual payment of the said annuity or yearly sum of 30*l.*, with a power to the said Thomas Lane and Allen Billing, their executors, &c., in case the annuity, or any part thereof, should be in arrear for twenty-eight days, by distress or sale

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of the close of land, or by transfer of the Bank Annuities and residuary estate, to obtain payment of the annuity and all arrears thereof. The deed also contained the following proviso: That in case the said Thomas Drinkwater, party thereto, and Robert Drinkwater, their heirs, executors, or adminstrators, or either of them, should at any time thereafter be desirous of redeeming or repurchasing the said annuity, or yearly sum of 30*l.*, and of such their or his intention should give unto the said Thomas Lane and Allen Billing, their executors, administrators, or assigns, seven days' notice in writing, then, that the said Thomas Lane and Allen Billing, their executors or administrators, should and would, at the expiration of the said notice, on receiving all arrears of the said annuity, and all costs and charges paid or incurred by them in the premises, accept, receive, and take the sum of 307*l.* 10*s.* as and in full for the repurchase or redemption of the said annuity, and, on receipt thereof and of all arrears of the said annuity as aforesaid, deliver up the said indenture to be cancelled, and at the costs and charges of the said Thomas Drinkwater and Robert Drinkwater, their executors or administrators, acknowledge, or cause to be acknowledged, on record, satisfaction of the judgment which should be entered up upon the warrant of attorney, and release and re-assign the said close of meadow ground, stocks, parts and shares of Bank Annuities, residuary estate and premises, or such part thereof as should not have been disposed of under the trusts aforesaid, unto the person or persons so redeeming or repurchasing the said annuity, as he or they should direct; and in such case *the said annuity thereby granted, and all remedies for enforcing the same, should cease, determine, and be void.

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The indenture mentioned in the second count was the grant of an additional annuity of 10*l.*, to be paid in moieties of 5*l.* each, exactly as in the first grant, with the like powers and proviso for redemption.

At the trial before Alderson, B., at the London sittings after last Trinity Term, it was proved that the defendant, Thomas Drinkwater, had paid the arrears of the annuity and the purchase money to one Blayney; but the defendant failed in proving Blayney's agency and authority to receive the

money; whereupon the jury found a verdict for the plaintiff on both issues.

On an early day in this Term, *F. N. Rogers* obtained a rule to shew cause why the judgment should not be arrested, or why a repleader should not be awarded, or why the judgment should not be entered for the defendant *non obstante veredicto* on the second issue.

[After argument, the COURT took time for consideration.]

The judgment of the COURT was afterwards delivered by [611]
PARKE, B., who, after stating the pleadings and the annuity deed, proceeded as follows:

Upon this record three objections were made. First, that, notwithstanding the finding on the second issue, the replication admitted a sufficient part of the plea to bar the action; and, therefore, that the defendant was entitled to judgment *non obstante veredicto;* secondly, that, if this was not so, there was an immaterial issue; and, thirdly, that the action could not be brought by this plaintiff alone, and therefore the judgment ought to be arrested. The last objection is, in the opinion of the Court, well founded, and it is, therefore, unnecessary to give any opinion on the others, though we have no difficulty in saying that they would not have *prevailed. The rule is clearly established, that, [*612]
though a man covenants with two or more persons, using words which *primâ facie* import a joint covenant, yet, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage: *Eccleston* v. *Clipsham* (1). The question is, whether the interest in the money covenanted to be paid in this case is in the plaintiff and Billing, or an interest in a moiety in the plaintiff only; if in both, the covenant is joint, and the action cannot be brought by the plaintiff alone.

Upon referring to the deed set out on *oyer*, it appears to us, that it is a grant of and covenant to pay one entire annuity

(1) 1 Saund. 154.

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of 30*l.* per annum to the plaintiff and Billing, one moiety of which is to be received by each, and not a grant of or covenant to pay two several annuities of 15*l.* to the plaintiff and Billing respectively. Throughout the deed it is called one annuity; it is granted in consideration of a sum paid by both; it is secured by a warrant of attorney to confess a joint judgment at the suit of both, by a grant to both of the reversion of a close of land and of a sum of money in the funds, with a joint power of attorney to recover it; and on seven days' notice to both, both covenant to receive one entire sum in full for the annuity, and, on receipt thereof and of the arrears, to deliver up the deed to be cancelled. We, therefore, think that it is but one annuity, and the covenant with two to pay it in moieties is a joint covenant. We do not mean to say, that, if the deed had contained two distinct grants of two several annuities to the plaintiff and Billing, the circumstance of these annuities being collaterally secured by joint grants and authorities, or even redeemable by
[*613] one joint payment, would *have made the covenant with both to pay these annuities a joint covenant; but, when we find express words describing it as one annuity, coupled with these provisions, we cannot doubt as to the effect of the deed. We, therefore, think that the interest in this case is in effect a joint interest in one entire annuity; and, consequently, the words of the covenant with the plaintiff and Billing must be taken in their ordinary sense, and constitute a joint covenant, on which the plaintiff alone cannot sue, and the judgment must therefore be arrested.

Judgment arrested.

1834.

Exch. of Pleas.

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THE COMPANY OF PROPRIETORS OF THE MONMOUTHSHIRE CANAL COMPANY *v.* HARFORD AND OTHERS (1).

(1 Cr. M. & R. 614—634; S. C. 5 Tyrwh. 68; 4 L. J. (N. S.) Ex. 43.)

Trespass for breaking and entering, on the 1st January, 1830, and on divers other days and times, &c., one close, called the Railroad, and one other close formerly used as a railroad, &c. Pleas (amongst others), that A., B., and C. were owners of the closes on each side of the *locus in*

(1) Cited and applied in judgment of the Court of Appeal in *Hollins* v. *Verney* (1884) 13 Q. B. D. 304, 307, 53 L. J. Q. B. 430, 432.—R. C.

quo, which was a railway made by the plaintiffs under the authority of an Act of Parliament; that the adjoining closes contained minerals, and that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railroad across the *locus in quo*. The plea then justified the trespasses for that purpose, and for the convenient and necessary occupation of the adjoining closes. Replication, protesting the soil and freehold, *de injuriâ absque residuo causæ*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, as of right, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, &c., and laying down railroads across the plaintiffs' railroad. Replication to this plea, traversing the claim of right. New assignment of other and different purposes, to which there was judgment by default.

The particulars complained of trespasses committed by the defendants in April and May, 1830, in a close "which now is or heretofore was a rail or tramroad," and destroying the plates of the same, and laying down others. The evidence was, that the defendants, in February, 1829, took up some of the plates of the plaintiffs' railway, and altered the course of part of it, carrying it over their own land, and made a transverse railroad, which crossed the site of the old railroad, and also the new railroad: Held, that the particulars were sufficient.

Upon the issue with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides, the plaintiffs giving evidence to shew, that, in constructing the transverse railroad, the defendants had an ulterior object in view. The Judge left it to the jury to say, whether the transverse railroad was constructed *bonâ fide* for the more convenient occupation of the closes, or for some other object: Held, that this direction was right.

Upon the issue with regard to the twenty years' enjoyment of the easement: Held, that the defendants were bound to shew an uninterrupted enjoyment, as of right, during that period; and that the plaintiffs might prove, under that issue, applications by the defendants during the twenty years for leave to cross their railroad, and that it was not necessary for them to reply such licence specially under 2 & 3 Will. IV. c. 71, s. 8.

TRESPASS for breaking and entering, on the 1st January, 1830, and on divers days and times, two closes of the plaintiffs, viz. one close called the Railroad, and the other close abutting &c., and which said last-mentioned close was formerly used as a railroad or railway; and damaging the earth and soil of the said closes respectively, and tearing up the roads, &c., and converting and disposing of the materials. Second count for an *asportavit*. Pleas—First, the general issue. Second, soil and freehold. Third, that the closes in which &c. were and are certain closes made and maintained by the plaintiffs as part of a railway, under the provisions of a certain Act of Parliament made in the 32nd year of King George III., for making and

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maintaining a navigable cut or canal from &c., and a collateral cut or canal from &c., and for making and *maintaining railways or stone roads from such cuts or canals to several iron works or mines in the counties of Monmouth or Brecknock, and that the said closes in which &c. then and there formed and were a part and used as a part of such railway under and by virtue of the said Act of Parliament, and of certain other Acts of Parliament, &c. (for extending the road); and before, and at the said times when &c., the plaintiffs were in possession of the several closes in which &c., without having at any time obtained or taken from the person or persons who were or are seised thereof as of fee, or otherwise entitled thereto, any conveyance of the freehold estate or interest of such person or persons. And the said defendants say, that, before the several times when &c., certain persons, to wit, Richard Summers Harford, John Harford, and William Weaver Davis, were and still are seised in their demesne as of fee of and in certain, to wit, twenty closes next adjoining the said closes in which &c., on one side &c., and twenty other closes next adjoining &c., on the other side, and that before and at the time of the passing of the said Acts of Parliament, and before and at the said several times when &c., the said closes so adjoining &c. were closes containing large quantities of minerals of a valuable nature, and were chiefly valuable on that account; and the owners and occupiers thereof were and are in the habit of digging and obtaining therefrom divers large quantities of minerals, and that it was and is usual and proper, in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram carts, and in and along a tramroad constructed for the purpose, and that the same could not conveniently or properly be carried or conveyed in any other manner, nor could such closes so respectively adjoining &c. be otherwise conveniently occupied; and thereupon, before and at &c., it became and was necessary, reasonable, and proper that the *said R. S. H., J. H., and W. W. D. should make and erect certain tramroads across the said closes, in which &c., in different parts thereof, for the purposes of carrying and conveying from their said closes on one side thereof, to their said closes on the other side thereof, minerals

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dug and gained by them from such their said closes, and for the necessary and more convenient occupation and use of their said several closes respectively for the said purposes; wherefore the said defendants, as the servants and by the command of the said R. S. H., J. H., and W. W. D., at &c., for the purpose of making the said tramroads across the said closes in which &c., broke and entered &c., and made across the same such tramroads, for the purposes aforesaid, from the said closes of the said R. S. H., J. H., and W. W. D., on one side of the said closes in which &c., to their said closes on the other side thereof. And the defendants, as such servants, and by such command, at the said times when &c., used the said tramroads, so by them made, in carrying and conveying in tram carts, from and to such respective closes of the said Richard Summers Harford, John Harford, and William Weaver Davis, divers minerals, their property, and by them dug and gained from such their closes respectively, and in so doing the defendants, at the said times when &c., necessarily and unavoidably, with feet in walking, a little trod down, trampled upon, consumed, and spoiled the grass of the plaintiffs growing on their said closes in which &c., and tore up, subverted, damaged, and spoiled the earth and soil of the said closes in which &c., and tore up, prostrated, and destroyed a small part of the said roads and paths of the plaintiffs, and the materials thereofcoming, to wit, the said iron, earth, and rubbish in the first count mentioned in that behalf, and the said goods and chattels in the second count, seized, took, and carried to a small and convenient distance, and there left the same *for the use of the plaintiffs, and also then [*617] and there cut, dug, and made in and upon the closes in which &c. the said excavations and the said roads and paths so alleged to have been cut, dug, and made by them; and the defendants, as such servants, and by such command, on these occasions, and for the purposes aforesaid, also then and there necessarily put, placed, and laid, and caused to be put, placed, and laid, in and upon part of the closes in which &c., the iron, stones, earth, and rubbish in the said first count lastly mentioned, the same being materials necessary and proper for making such tramroads so made across the closes in which &c., and there kept and continued

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the same from thence hitherto, as the defendants lawfully might, for the cause aforesaid, doing no unnecessary damage to the said plaintiffs, and the use and enjoyment of the said closes in which &c., for the purposes of a railway, under the said Acts of Parliament, not being thereby hindered or obstructed, and this the defendants are ready to verify. Wherefore they pray judgment, &c. The fourth, fifth, sixth, and seventh pleas were similar to the third in substance, but varied in the mode of stating the purposes for which the way was claimed. The eighth plea claimed a way similar to that claimed in the third plea, by virtue of a reservation in a grant of the *locus in quo*, made by one Glover to the plaintiffs; this plea became immaterial. The ninth, tenth, and eleventh pleas were variations of the eighth. The twelfth plea was of a grant of the way (by lost deed) from the plaintiffs to certain persons, under whom the defendants justified. The thirteenth plea was similar, stating the way to be for the convenient occupation of the adjoining lands. The fourteenth plea stated, that, for twenty years and upwards next before the commencement of this suit, and before either of the said times when &c., the occupiers for the time being of certain,

[*618] to wit, twenty *closes adjoining the closes in which &c., on one side thereof, being also the occupiers of divers, to wit, twenty other closes adjoining to and on the other side of the close in which &c., of right and without interruption have had and used, and have been used and accustomed to have and use, and of right during that time and at the said times when &c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., in such parts thereof as should be necessary and convenient, from and to such respective closes so adjoining and being on each side of the closes in which &c., on foot and with horses and carts, for the purpose of carrying minerals, the produce of such respective lands, and other things, from and to such respective closes so adjoining the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes on one side of the closes in which &c., being also the occupiers of the said other closes on the other side of the closes

in which &c., to do and perform in and upon the said closes in which &c., all such things as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, and as should not obstruct or be inconsistent with the use and enjoyment of the said closes in which &c., as a railway, under the said Acts of Parliament. And the defendants further say, that long before, and at the said times when &c., the said R. S. H., J. H., and W. W. D., were occupiers as well of the said last-mentioned closes on one side of the closes in which &c., as of the said last-mentioned closes on the other side thereof. And the said defendants further say, that, during the times last-mentioned, and before and at the said several times when &c., the said closes so adjoining the *said several closes in which &c., [*619] were and are lands or closes containing divers large quantities of minerals of a valuable nature, and were valuable chiefly on that account, and the owners and occupiers thereof were in the habit of digging and obtaining therefrom divers large quantities of minerals. And the defendants further say, that it was and is usual and proper in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram carts, and in and along a tramroad constructed for the purpose; and that the same could not conveniently or properly be carried or conveyed in any other manner, nor could such closes so adjoining the closes in which &c. be otherwise conveniently used and enjoyed for the purposes last aforesaid, and thereupon before, and at the said several times when &c., it became and was necessary, reasonable, and proper, and did not obstruct, and was not inconsistent with such use and enjoyment of the said closes in which &c., as a railway, under the said Acts of Parliament, that the said R. S. H., J. H., and W. W. D. should make and erect certain tramroads across the said closes in which &c., in different parts thereof, for the purposes of carrying and conveying from their said closes on one side thereof, to their said closes on the other side thereof, minerals dug and gained by them from such their said closes respectively, and for the necessary and more convenient occupation and use of their said several closes respectively, for the said last-mentioned purposes.

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Wherefore the said defendants, as the servants, and by the command of the said R. S. H., J. H., and W. W. D., at the said several times when &c., for the purpose of making such tramroads across the said closes in which &c., and of using the last-mentioned way, broke and entered the said closes in which &c., and then and there made across the same such tramroads, for the purposes aforesaid, from the said closes of the said R. S. H., [*620] *J. H., and W. W. D., on one side of the said closes in which &c., to their said closes on the other side thereof; and the defendants, as such servants, &c. The fifteenth plea was similar to the fourteenth, claiming the easement for the purpose of carrying earth, &c., from the adjoining closes. The sixteenth plea stated, that, for fifty years and upwards next before either of the said times when &c., the occupiers for the time being of certain, to wit, twenty closes, near the closes on which &c., on one side thereof, being also occupiers of divers, to wit, twenty other closes, on the other side of the closes in which &c., of right and without interruption have had and used, and have been used and accustomed to have and use, and of right during that time, and at the said times when &c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., on foot, and with horses and tram carts, for the purposes of the convenient occupation of such respective closes, so being near the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes, on one side of the closes in which &c., being also the occupiers of the said other closes, on the other side of the closes in which &c., from time to time, when necessary, to make tramroads across such parts of the closes in which &c., as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, so as they should not obstruct or do any thing inconsistent with the use and enjoyment of the said closes in which &c., as a railway, under the said Acts of Parliament; and the defendants further say, that long before and at the said times when &c., the said R. S. H., J. H., and W. W. D. were occupiers, as well

of the said last-mentioned closes on one *side of the closes in which &c., as of the said last-mentioned closes on the other side thereof; and the defendants aver, that, before and at the said several times when &c., it became and was necessary, reasonable, and proper that the said R. S. H., J. H., and W. W. D. should make and erect certain tramroads across the said closes in which &c., in different parts thereof, for the purpose of using and enjoying the said last-mentioned liberty, easement, and privilege. Wherefore the said defendants, as the servants and by the command of the said R. S. H., J. H., and W. W. D., at the said several times when &c., for the purpose of making such tramroads across the said closes in which &c., for the said purposes, broke and entered the said closes in which &c., and then and there made across the same such tramroads for the purposes last aforesaid; and the defendants as such servants &c. The seventeenth plea was similar to the sixteenth, but claiming the right for the occupiers of land on one side only. The eighteenth plea was similar to the sixteenth, except in claiming the way to exist at the free will and pleasure of the occupiers. The four remaining pleas became immaterial. Replications to the third, fourth, fifth, sixth, and seventh pleas—The plaintiffs, after protesting the seisin of R. S. H., J. H., W. W. D., replied *de injuriâ absque residuo causæ*. To the twelfth and thirteenth they replied by traversing the grant. To the fourteenth plea they replied as follows: that although true it is, that the said R. S. H., J. H., and W. W. D. were occupiers, as well of the said last-mentioned closes on one side of the close in which &c., as of the said last-mentioned closes on the other side thereof, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged; protesting, nevertheless, that, for twenty years and upwards next before the commencement of this suit, and before either of the said *times when &c., the occupiers for the time being of the said twenty closes adjoining the closes in which &c., on one side thereof, being also the occupiers of the said twenty other closes adjoining to and on the other side of the closes in which &c., of right and without interruption have not had and used, and have not been used and accustomed to have and use, nor of right during that time, or at the said times when

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&c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., in such parts thereof, as should be necessary and convenient, from and to such respective closes so adjoining, and being on each side of the closes in which &c., on foot, and with horses and carts, for the purpose of carrying minerals, the produce of such respective lands and other things, from and to such respective closes so adjoining the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes, on one side of the closes in which &c., being also the occupiers of the said other closes on the other side of the closes in which &c., to do and perform in and upon the closes in which &c., all such things as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, and as should not obstruct or be inconsistent with the use and enjoyment of the said closes in which &c., as a railway, under the said Acts of Parliament, in manner and form as the said defendants have in their said fifteenth plea in that behalf above alleged. Protesting also, that the said closes, so adjoining the said several closes in which &c., were not nor are lands or closes containing minerals of a valuable nature, nor valuable chiefly on that account; neither were [*623] the owners and occupiers thereof in the habit *of digging and obtaining therefrom minerals, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged. Protesting also, that it was not, nor is usual or proper, in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram carts, and in and along a tramroad, constructed for the purpose, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged. Protesting also, that the said defendants, at the said several times when &c., were not the servants, nor acted by the command of the said R. S. H., J. H., and W. W. D., as in that plea mentioned: For replication, nevertheless, in this behalf to the said fourteenth plea, the said plaintiffs say, that the said defendants,

at the said several times when &c., of their own wrong, and without the residue of the cause by them in their said fourteenth plea alleged, committed the said several trespasses in the said declaration mentioned, in manner and form as the said plaintiffs have above in their said declaration complained against them the said defendants, and this &c. To the sixteenth plea the plaintiffs replied, that, for twenty years and upwards next before the times when &c., the occupiers of the said twenty closes, near the closes in which &c., on one side thereof, being also the occupiers of the said twenty closes on the other side &c., of right and without interruption have not had nor used, and have not been used and accustomed to have and use, nor of right during that time &c. were entitled to have and use the liberty, easement &c. There were similar replications to the seventeenth and eighteenth pleas. As to the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 20th pleas, the plaintiffs new assigned that the trespasses were committed on other and different occasions, and for other and different purposes *&c., and in a greater degree and quantity, &c., and to a greater extent &c., than was necessary. To this new assignment the defendants suffered judgment to go by default.

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The following were the particulars of the trespasses alleged to have been committed :

This action is brought by the above-named plaintiffs, to recover from the above-named defendants damages for the following trespasses, the first of which trespasses was committed by the defendants in the months of April and May, 1830, by breaking and entering into or upon a certain close, which is or was heretofore a rail or tramroad, situate and being in the parish of Bedwelty, in the county of Monmouth, running across a certain common or close there called Pen Mark, and turning up, subverting, pulling to pieces, and destroying a certain part of the first-mentioned close, and the plates and other materials of the first-mentioned close, and carrying away and converting the said plates and materials to the defendants' own use; and laying down other plates and other works in and upon the first-mentioned close, in, upon, over, and across the first-mentioned close,

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and making or laying down a transverse tram or railroad across and over the said last-mentioned close, and rendering it altogether unfit for use; and for other trespasses of a similar nature and description to those hereinbefore mentioned, committed by the said defendants in and upon another part of their said first-mentioned close, in or about the month of June last; and also for other trespasses of a similar nature or description, committed by the defendants on the said last-mentioned part of the said close, at two several times, and on two several occasions, in the month of July last. And for continuing the said several trespasses, so by the defendants committed, from the respective times of committing the same hitherto.

[*625] The cause was tried before Alderson, B., at the last *Assizes for the county of Hereford, when the following appeared to be the facts of the case: The plaintiffs, who were incorporated by the stat. 32 Geo. III. (amended by the 37 Geo. III.) soon after the passing of those Acts, completed the canal which they were thereby authorized to make. The defendant S. Harford was the managing agent of a large iron manufactory, called the "Selhowy Estate;" the defendant, C. H. Harford, of a similar manufactory, called "Ebber Vale;" and the two other defendants were workmen employed by the defendant S. Harford. The plaintiffs also constructed a railway, in pursuance of a power to that effect in the Act, from their canal to the Selhowy works. That railway intersected the Selhowy estate, and consisted merely of the usual iron plates laid down on the surface of the land, without being fenced in on either side. For the use of this railway the proprietors of the works paid a large sum of money as tonnage to the plaintiffs.

By an Act passed in the 33 Geo. III. another canal company was established in the same neighbourhood, and another canal, called the Brecon and Abergavenny Canal, was constructed. That Act contained a clause, (commonly called the eight-mile clause), authorizing the owners or occupiers of mineral lands, &c., within the distance of eight miles from such canal, to call upon the Company to make railways therefrom to such lands, and, in case of omission, authorizing the owners of the lands to make the same. In the year 1831, the proprietors of the

Selhowy estate called upon the Company, under this clause, to make a railway from the canal to a colliery on their estate, called the Pen Mark Colliery. Before the time had expired for the Brecon and Abergavenny Company to make their election with regard to the proposed railway, the proprietors of the Selhowy estate caused a railway to be laid down in the same line as that proposed to the Brecon and Abergavenny Canal Company, and crossing the railway of the plaintiffs, *being from one part to another part of the Selhowy estate. This was effected by taking up one or two plates of the plaintiffs' railway on each side, and laying down others in their stead, constructed in such a way as to answer the double purpose of crossing and travelling along the line.

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In the month of February, 1829 (1), the defendants, without the knowledge of the plaintiffs, took up a considerable part of the plaintiffs' railroad, and turned the course of it in a different direction, to enable them, as they alleged, to work away some minerals under the former site. The crossing railroad ran over both the old and the new line.

The plaintiffs, to prove their ownership, gave in evidence a conveyance in 1795 (2), the notices given by the owners of the Selhowy estate to the Brecon Canal Company, in which the railway was called the Railway of the Monmouthshire Canal Company, and also an admission of their title by the defendants' attorney at the time of a view, which was made of the premises. The plaintiffs contended, that the railroad of the defendants was not, as alleged in the pleas, constructed for the purpose of the more convenient use of their closes on each side of the plaintiffs' railroad, but for an ulterior object, viz. that of opening a communication with the Brecon Canal (3). In answer to the case of the defendants, upon the issue on the 16th plea, the plaintiffs tendered evidence of applications made on behalf of the defendants, within the last twenty years, for leave to put down

(1) The particulars stated that these trespasses were committed in April and May, 1830. The taking up of the railroad was in fact the trespass for which the action was brought.

(2) Nothing turned upon this. It appeared that the deed had not been inrolled according to the provisions of the local Act.

(3) This evidence is particularly noticed in the judgment, *post*, p. 667.

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railways across that of the plaintiffs. This evidence was objected to by the defendants, on the ground that the issue joined was only whether *the defendants had exercised the right without interruption for twenty years, and that it was, therefore, not competent to the plaintiffs to give evidence to shew that the enjoyment was only permissive, which, it was contended, ought to have been made the subject of a special replication.

The defendants contended, first, that the plaintiffs must be nonsuited, on the ground that they had not proved the trespass as stated in the particulars, which confined the trespass to the new road, to the ownership of which there was no proof that the plaintiffs were entitled. That all that they could claim on the new road was an easement, in respect of which trespass could not be maintained, the soil and freehold being clearly in the parties named in the second plea; and even with respect to the old road, the defendants contended that there was no evidence to shew that the plaintiffs were entitled to more than an easement. Secondly, with regard to the issues upon the pleas involving the question of obstruction, the defendants urged, that there was no evidence to shew that their merely crossing the railroad was any obstruction to the occupation of it by the plaintiffs. Thirdly, they produced a considerable body of evidence to shew that their railway was necessary and useful for the proper enjoyment and occupation of the property on each side of the plaintiffs' railroad; and that it had not been constructed with the view suggested on the part of the plaintiffs, but *bonâ fide* for the purposes above mentioned.

The learned Judge refused to nonsuit the plaintiffs, on the ground of the variance between the evidence and the particulars; but gave the defendants liberty to move to enter a nonsuit on that ground. He left four questions to the jury: first, whether the soil and freehold of the old railroad was in the plaintiffs; secondly, whether there was any general right in the defendants to put down crossings on the plaintiffs' railroad where they [*628] pleased; *thirdly, whether there had been any obstruction of the plaintiffs' railroad by the defendants; and, lastly, whether what had been done by the defendants was what a reasonable man would have done for the convenient occupation of the

closes on each side of the plaintiffs' railroad. That, with regard to the latter point, it was for them to say, whether the acts of the defendants were done for the *bonâ fide* occupation of the land; that the defendants undertook to prove that the crossing was made for that purpose, and if the jury doubted whether the land could be conveniently occupied without it, they should find upon those issues for the defendants. (The learned Judge then commented on the evidence given on behalf of the defendants on this point). He said, that the plaintiffs, on the contrary, insisted that the crossings were made for a totally different purpose than the convenient occupation of the closes, viz. for the purpose of effecting a junction with the Brecon Canal. He then remarked upon the evidence for the plaintiffs; and told the jury, that the question was, whether the railroad made by the defendants was reasonable, necessary, and proper for the occupation of the closes. The jury found for the plaintiffs upon all the points submitted to them by the learned Judge.

Maule now moved for a nonsuit, or for a new trial:

The first point for the defendant is, that the plaintiffs ought to have been nonsuited on the ground of a variance between the declaration, and the particulars, and the evidence. The declaration states, that the defendants broke and entered, on the 1st January, 1830, and on divers other days and times, &c., a close called the Railroad, and another close (describing it) formerly used as a railroad. The particulars confine the trespasses to a close which is, or heretofore was, a railroad, and refer only to one close. The only close which is a railroad is the new or substituted railroad, while all the evidence given applied to the old railroad.

(ALDERSON, B.: It was admitted *that the soil and freehold of the land on which the substituted railroad was constructed were the soil and freehold of Harford and the others; the plaintiffs, therefore, were obliged to rest their case upon the trespasses committed on the old railroad.) [*629]

With regard to the latter trespasses, there is a material variance between the particulars and the evidence in the dates. The

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particulars state those trespasses to have been committed in April and May, 1830; while, upon the evidence, it appears that they were committed in February, 1829.

(LORD LYNDHURST, C. B.: The words in the particulars, "which is or was heretofore a rail or tramroad," shew that the plaintiffs did not intend to confine the trespasses to the new railroad. The evidence was, that the defendants broke and entered a close which was theretofore a railroad, and that trespass was within the particulars.

PARKE, B.: There was no doubt as to which close the particulars applied. The defendants could not be misled.)

The next objection is, that the plaintiffs did not prove their right to the soil and freehold of the old railroad.

(ALDERSON, B., had reported that he was not dissatisfied with the finding of the jury upon this point, and it was not pressed.)

Another objection is, that the question with regard to the obstruction of the railroad was left to the jury, when, in fact, no issue upon that point was raised by the pleadings, except upon the new assignment, on which judgment had been suffered by default.

(ALDERSON, B.: In the third plea the defendants, after justifying the trespasses, and alleging no unnecessary damage, proceed thus: "the use and enjoyment of the said closes in which &c., for the purposes of a railway under the said Acts of Parliament, not being thereby hindered or obstructed." I directed the jury, upon this part of the case, to consider first, whether the defendants had proved the first part of the third plea, viz. whether the acts done by the defendants were for the more convenient occupation of the closes; that, if they found
[*630] they were not, their verdict should be for the plaintiffs; *but if, on the contrary, they should be of opinion that the acts done were for the more convenient occupation of the closes, then they should find whether or not there had been any hindrance or

obstruction by the defendants, that question only becoming material upon the former question being found in favour of the defendants. The jury having found against the defendants on the former question, the latter has become immaterial.)

The next point is, that the learned Judge admitted improper evidence upon the issue joined on the sixteenth plea. That issue is, that the occupiers of the closes have not of right used, and been accustomed to use, the railroad for twenty years without interruption, for the convenient use and occupation of their closes. The plaintiffs traversed the mere enjoyment; and there was abundance of evidence on the part of the defendants to shew that enjoyment for twenty years. But, under this traverse of the enjoyment only, the plaintiffs were permitted to give evidence of a fact which was not in issue, viz. that the enjoyment had been with their licence and permission. The licence and permission were quite consistent with the fact of the simple enjoyment, and ought, according to the provisions of the statute 2 & 3 Will. IV. c. 71, s. 5, to have been specially replied.

(PARKE, B.: The issue is, whether the occupiers of the closes, [631] of right and without interruption, have had the use and enjoyment for twenty years, as they insist, under this issue, therefore they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright* v. *Walker* (1), lately decided in this Court, it was held, that the claimant must shew that he has enjoyed the way for the full period of twenty years, and that he has done so as of right and without interruption, and that such claim might be answered by proof of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years. In the present case, the permission asked for and given shews that the occupiers of the closes did not enjoy the way "as of right," and also that they did not enjoy it uninterruptedly.

LORD LYNDHURST, C. B.: The simple issue is, whether there has been a continued enjoyment of the way for twenty years,

(1) P. 536, *ante* (1 Cr. M. & R. 211).

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and any evidence negativing the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken.)

[*632] The last *point is, that the learned Judge misdirected the jury, in leaving it to them to consider, whether the defendants made the railroad *bonâ fide* for the convenient use and occupation of their closes, on each side of the plaintiffs' railroad, or for some ulterior object.

(ALDERSON, B.: There was a great body of evidence on both sides with regard to this part of the case; and the way in which I left it to the jury was this, whether they believed that the acts in question were done with the view taken by the witnesses for the plaintiffs, or with that taken by the witnesses for the defendants—whether the acts were done with a view to the proper and necessary use and enjoyment of the closes, or with a view to some ulterior object, not referable to such use and enjoyment.)

It was left to the jury as a question of *bona fides*.

(ALDERSON, B.: My direction was intended to contrast the evidence on both sides, so as to enable the jury to say, whether, upon the whole of the evidence, it appeared that the acts were done for the purpose of the occupation and enjoyment of the closes.)

The question as to any ulterior object which the defendants might have had in view ought not to have been left to the jury at all. There was no evidence given that this was a railroad which would serve any ulterior purpose; nor, if it had appeared that the defendants had some ulterior object, was that any ingredient in the case for the consideration of the jury? The question was, whether the circumstances authorized the defendants to make the railroad, not what purposes they might possibly put it to when made. Even had they admitted some ulterior object, it would not have rendered the act illegal, if in

other respects they were entitled by law to do it; in the same manner as a man may distrain for one cause, and avow for another (1). It is true, that the case *of *Lucas* v. *Nockells* (2) may be cited as an authority against the objection now contended for; but one of the learned Judges dissented from the judgment.

(LORD LYNDHURST, C. B.: The real question is, did the defendants require this railroad for the proper occupation of their close? if they did, any ulterior object was immaterial; but it was not immaterial to shew an ulterior object, with the view of proving, that in fact the defendants did not require the road for the occupation of their closes, but that that was merely done colourably, for the purpose of effecting an ulterior object.

PARKE, B.: Suppose the defendants had said in words, "We do not require the railroad for the convenient occupation of our closes;" would not that have been admissible evidence upon this issue; and how does it differ from giving their conduct in evidence, which amounts in fact to a declaration?

LORD LYNDHURST, C. B.: We will consider whether there ought to be a rule on this point.)

The judgment of the COURT was delivered on a subsequent day by—

PARKE, B.:

In this case the Court, after giving their opinion on the other grounds of the motion for a new trial, took time to consider one of the points suggested by *Mr. Maule*, viz. that the learned Judge, in summing up to the jury, directed them to consider whether the defendants *bonâ fide* intended the two tramroads, which crossed the railway of the plaintiffs, (and which formed the subject of the trespass complained of), for the convenient and beneficial occupation of their lands *inter se*, or whether their *sole object in making [*634]

(1) *Butler* and *Baker's* case, 3 Co. Rep. 26 a; Fitz. Ab. Avowry, pl. 232; *Groenvelt* v. *Burwell*, 1 Ld. Ray. 454; *Anon.*, Godb. 110; *Crowther* v. *Ramsbottom*, 4 R. R. 540 (7 T. R. 654).

(2) 29 R. R. 721 (10 Bing. 157).

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them was to carry into effect another and different plan, totally unconnected with such occupation; and we think that in so doing he was right, and that there ought not to be a new trial on this ground. The issue for the jury was, in substance, whether the defendants' closes could not be conveniently occupied without making a tramroad across the plaintiffs' railway; and whether it was reasonable and proper for the defendants so to do, for the purpose of carrying the minerals across from the one close to the other. On the part of the plaintiffs, Mr. Mushett and Mr. Bevan, as witnesses, were called, men well acquainted with the management of such concerns, who stated that it was by no means necessary, or even advantageous for the defendants, so to conduct their works. In addition to this evidence, the plaintiffs adduced the testimony of a surveyor, Mr. Davis, who deposed to the fact, that, in 1825, he had made a survey for the defendants, for the purpose suggested by the plaintiffs as the real and sole purpose of the defendants; and that the point where the then projected tramroad crossed the plaintiffs' railway very nearly, if not exactly, coincided with that subsequently adopted by them in 1830, for the alleged purpose of the convenient occupation of their lands. He also stated, that negotiations, connected with the same ulterior object, were even yet going on, on the part of the defendants. There was evidence also, that the tramroad in question was of larger dimensions than could properly be required for the mere occupation of the lands *inter se*; and that in another part of the works, whence much larger quantities of materials were derived, and larger masses of rubbish deposited, but which was unconnected with the ulterior object, a plan nearly agreeing with that suggested by Messrs. Mushett and Bevan had been actually adopted by the defendants themselves. It is [*635] undoubtedly true, that, in answer to this, a large and *important body of evidence was laid before the jury by the counsel for the defendants. The two men, by whom the tramroads were laid out and made, negatived any intention of carrying into effect the supposed ulterior object of the defendants, or any orders from the defendants to that effect; and many ironmasters of high respectability and great experience also testified, that, in the management of the defendants' estate, they should have

adopted for its convenient occupation alone, the very plan carried into effect by the defendants. Upon this issue the *bonâ fide* intention of the defendants seems to us admissible for the consideration of the jury. We think that it tends to shew that the making a tramroad across the plaintiffs' railway was not, in the opinion of the defendants themselves, necessary or convenient for the occupation of their closes; for it shews that their sole object was different from that stated by them in their pleas. The circumstances referred to, as demonstrative of their real intention, may be considered as equivalent to a declaration by the defendants, that, in making the tramroad, their sole purpose was to go to the Trevill Quarry and the Brecon Canal, and that they did not really want such tramroads for the convenient occupation of their lands at all. Now such a declaration would undoubtedly have been evidence on this issue against the defendants; and, under the circumstances of the conflict of evidence in this case, we think this a circumstance which might properly weigh with the jury when they deliberated on their verdict. We are also of opinion, that, as the facts from which such intention was sought to be inferred were opened by the counsel for the plaintiffs and relied on, and afterwards adduced in evidence without any objection to their admissibility on the part of the counsel for the defendants, and, as their counsel made observations on that evidence in opening their case to the jury, and called witnesses to explain and contradict it, it does not lie in the mouth of either of the parties now to object to the effect of that evidence *being commented on by the learned Judge, and considered by the jury. We think, therefore, that there should be no rule in this case.

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Rule refused.

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1834.

Exch. of Pleas.

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(1 Cr. M. & R. 645—647; S. C. 5 Tyrwh. 180; 3 Dowl. P. C. 259.)

The wife of a publican, living sixty miles from Lancaster, was subpœnaed to give her evidence at the Assizes there, and 2*l.* 2*s.* was given to her for expenses. She did not make any objection to the amount, as being insufficient. On shewing cause against a rule for an attachment against her, it appeared that she had an infant in bad health at the

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breast; and that the inside fare of the coach from Liverpool (the road through which town was the most convenient route to Lancaster from the place where she resided) was 1*l.* 1*s.* The Court thought that she might reasonably require an inside place, and that the money was insufficient, and they refused to make the rule absolute for an attachment against her. *Semble*, that the affidavit for an attachment for not appearing as a witness, in pursuance of a *subpœna*, need not shew that the witness was called in Court on the *subpœna*, especially if the witness never did attend the Assizes.

ALEXANDER had obtained a rule *nisi* for an attachment against Anne Dixon, for not attending as a witness on the trial of this cause at the last Lancaster Assizes.

Cresswell shewed cause, and objected that it did not appear on the affidavit, upon which the rule was obtained, that the
646] witness had been called upon her *subpœna*. In **Malcolm* v. *Ray* (1), it was held that the affidavit, upon which the rule for an attachment is moved, must distinctly state that the witness was called upon his *subpœna*. There the crier had indorsed upon the *subpœna* that he had called the witness; but the Court held such indorsement not sufficient, and that the fact must appear on the affidavit.

(PARKE, B.: Since the case of *Barrow* v. *Humphreys* (2) that case cannot be quoted as an authority.

GURNEY, B., referred to *Mullett* v. *Hunt* (3).

ALDERSON, B.: There might be this distinction between *Malcolm* v. *Ray* and the present case. In *Malcolm* v. *Ray* the witness had been in Court, and therefore the Court might have thought it necessary to call upon him when he was wanted. Here the witness never went to the assize town. There may be a distinction between the case of a witness who does attend, and a witness who does not attend, in pursuance of the *subpœna*. In the one case it might be of use to call him; in the other, there can be no object in doing so.)

(1) 3 Moore, 222. [The case reported as *Malcolm* v. *Day*, 21 R. R. 730, 3 Moore, 579, was a subsequent stage of the same case after a fresh affidavit had been made.—R. C.]

(2) 3 B. & Ald. 598.

(3) 38 R. R. 750 (1 C. & M. 752).

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Cresswell then stated, that, seeing the impression of the Court, he would not press that objection; but he submitted, upon the affidavits which he produced, that the present was not a case in which the Court, in the exercise of their discretion, would make the rule for an attachment absolute. It appeared that the witness was the wife of a publican, living at Rainhill, about sixty miles from Lancaster and eleven miles from Liverpool; that the road which she would have taken as most eligible would be by going round by Liverpool, from whence to Lancaster the inside fare in a coach was 1*l.* 1*s.*; that she would have had to remain at Lancaster three days, and that she had an infant at the breast, which infant was in a bad state of health, and it appeared that the money left with her was *only 2*l.* 2*s.* He submitted that the [*647] party wishing for the attendance of a witness should, previously to the witness setting out, supply her with sufficient to go, remain, and return.

Alexander, *contrà*, contended that, if the sum were insufficient, the witness ought so to have stated when it was paid to her; and, at all events, that she ought not to have kept the money if she did not intend to attend.

The COURT intimated that the witness ought to have stated that the sum was insufficient when it was paid to her; but they said, that, in her situation in life, and under the circumstances in which she was placed, it was not unreasonable that she should require an inside place; and, that the money furnished not being enough for her expenses, they thought that the present was not a case in which an attachment ought to issue; and that the rule should be discharged without costs.

Rule discharged without costs.

1835.

Exch. of Pleas.

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ADAMS *v.* G. BANKART AND G. T. BANKART.

(1 Cr. M. & R. 681—686; S. C. 5 Tyrwh. 425; 1 Gale, 48; 4 L. J. (N. S.) Ex. 69.)

One partner has no implied authority to bind his co-partner to a submission to arbitration, respecting the matters of the partnership.

It is in the discretion of the Judge whether he will permit a witness to be recalled.

ASSUMPSIT on an award. The declaration stated, that certain differences had arisen between the plaintiff and certain other persons, theretofore his partners, to wit, one John Pares and one James Heygate, since deceased, and the defendants; and that for putting an end to the same, the plaintiff and the said J. P. and J. H. and the defendants submitted themselves to the award of one Samuel Miles; and it then stated the award, &c. Plea, the general issue. At the trial before Taunton, J., at the last Summer Assizes for the county of Leicester, it appeared, on the evidence of Miles, the arbitrator, that the submission was by parol; that the arbitrator had been requested by Pares only to undertake the reference, in the course of which, however, he saw Heygate, but that the defendants had never attended the reference. The plaintiff Adams attended the reference in person. Miles stated that the defendants were represented at the reference by their attorney, Frederick Bankart. It was objected on behalf of the defendants, that the submission of all parties to the award had not been proved; that there was no assent on the part of the plaintiff or of Heygate to the reference; and that one partner had no power to bind another partner to submit to arbitration. The fact of the arbitrator having seen Heygate during the reference being called in question at the trial by the counsel for the defendants, the notes of the learned Judge were appealed to, and it did not appear from them that the arbitrator had seen Heygate; whereupon the counsel for the plaintiff proposed to recall Miles, for the purpose of ascertaining the exact evidence he had given on this point; but the learned Judge said, that he could not allow a witness, after it had been seen where the shoe pinched, to be re-examined; and he inquired from the

[*682] counsel for the *defendants whether he objected to the witness being recalled; and on his stating that he did so object, he

refused to recall him. The learned Judge told the jury that the fact of the plaintiff having attended the reference, was sufficient evidence of a submission on his part; and that Frederick Bankart having acted as the attorney of the defendants, they must be taken to be bound by his acts. But, in consequence of the submission of Heygate not being proved, the plaintiff was nonsuited. In Michaelmas Term, *Hill* having obtained a rule to shew cause why the nonsuit should not be set aside and a new trial had—first, on the ground of the refusal of the learned Judge to recall the witness Miles; and secondly, on the ground that Pares was entitled to bind his co-partner by submitting to the reference—

Goulburn, Serjt., and *Mellor*, now shewed cause:

With regard to the first point, it is clear that it was in the discretion of the learned Judge whether he would recall the witness; he exercised that discretion, and the Court will not now question it.

(PARKE, B.: When the rule was moved for, it was understood that Mr. Justice TAUNTON had stated that he had no power to recall the witness without the consent of the defendants; but as this does not appear upon the report, it must be taken that he did exercise his own discretion.

LORD ABINGER, C. B.: The learned Judge says, "the objection being made, I refused to recall the witness;" the meaning of which is, that, in the exercise of his discretion, he refused, on the objection being made, to permit the witness to be recalled. It is quite clear that it is merely matter of discretion.)

Then, upon the second point, *Stead* v. *Salt* (1) is an express authority to shew that one of several partners cannot bind the others by a submission to arbitration, although relating *to partnership matters. That case was decided on the ground that the entering into a submission to arbitration is no part of the ordinary business of a trading firm, and that an authority from one partner to another can only be implied for what is necessary to carry on the trade in which the partners are concerned. The

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(1) 28 R. R. 602 (3 Bing. 101).

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case of *Ferrer* v. *Oven* (1) shews that it is necessary that the submission of all parties should be proved, the submission of one being the consideration for the submission of the others. The extent of the implied authority of one partner to bind another was much discussed in the case of *Dickinson* v. *Valpy* (2). It was there held that an authority to draw bills exists only "where it is necessary for the purpose of carrying on a trading partnership." The rule is stated by Mr. Justice PARKE in the following terms: "Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged." It cannot be said that the authority of submitting to a reference is either necessary for carrying on the trade, or that it has been usually exercised by partners. From these authorities it appears that one partner has no power to bind another, except with regard to matters which are essential to the proper management and carrying on of their mutual trade, and that a submission to reference is not one of such matters. The point has been considered as decided since the case of *Stead* v. *Salt*, and this rule cannot be made absolute without overthrowing that decision.

Hill and *Humphrey*, *contrà*, abandoned the first point:

[684] The text writers on the law of partnership still continue to treat this as an open question; and upon principle there is no reason why one partner should not possess the power of binding his co-partners by a submission to arbitration. It cannot, indeed, be contended that one partner possesses authority to bind another by deed; but that rests upon particular reasons, referred to by Lord KENYON, in the case of *Harrison* v. *Jackson* (3), viz., that one partner shall not have power by such an act to bind the lands of his co-partners. Upon an examination of the powers vested in one partner with regard to another, they will

(1) 31 R. R. 239 (7 B. & C. 427; 1 Man. & Ry. 222). See also *Brazier* v. *Jones*, 8 B. & C. 124; 2 Man. & Ry. 88.

(2) 34 R. R. 348 (10 B. & C. 128; 5 Man. & Ry. 125).

(3) 4 R. R. 422 (7 T. R. 207).

appear to be of a nature quite as extensive as that of submitting to arbitration. One partner may release a debt after action brought, and, consequently, the action itself; he may likewise stay proceedings in the action; he may give a note under the Lords' Act, which shall bind his co-partner; he may give a notice to quit, for himself and his partners; he may give a guarantie; he may sue out a fiat, vote in the choice of assignees, and sign the bankrupt's certificate; he may receive payment of a debt, and give a discharge for it.

(PARKE, B.: Here you contend that he may impose a fresh liability upon his co-partner, which is very different from the case of a discharge upon payment.

LORD ABINGER, C. B.: If he should improperly release a debtor to the firm, the question would still remain open between him and his co-partners.)

So, if he should improperly submit to arbitration, it would not conclude the matter as between himself and the other members of the firm. It is an anomaly to say that a partner who has power to bind his co-partners by making a contract with regard to partnership matters, and by payment in pursuance of that contract, should not have power to bind them with regard to what may be a most necessary intermediate step, viz. ascertaining the *liability, or the extent of the liability, of the firm under the contract so made. In former times, the policy of courts of law was to discountenance arbitrations; but latterly they have leaned to this mode of terminating disputes; and such also has been the disposition of the Legislature, as is apparent from the Act for the further amendment of the law (1). [*685]

(LORD ABINGER, C. B.: I have always thought that policy is the last guide to which the Judges of the courts of law ought to resort. If, indeed, there be no decisions which can govern them, and no principles which can lead them on their way, then, and then only, according to the light of their own imperfect minds, they

(1) 3 & 4 Will. IV. c. 42 (Repealed by the Arbitration Act, 1889).

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must endeavour to discover and lay down such rules as they conceive best adapted to promote the good of the public.)

The case which has been relied upon of *Stead* v. *Salt* was the case of a partnership in a particular transaction, and not of a general partnership, as here; and upon that circumstance Mr. Justice BAYLEY, before whom the cause was tried, appears to have founded his opinion that the instrument of submission was insufficient. In *Strangford* v. *Green* (1), which was an action for non-performance of an award, the COURT said—"The defendant may undertake for his partner."

(LORD ABINGER, C. B.: The Court did not say that the undertaking would bind the partner, but merely the defendant who gave it.)

LORD ABINGER, C. B.:

I think we have sufficient authority for saying that one partner cannot bind another by a submission to arbitration, without the assent of the latter. I do not mean to say that such assent must be given in any particular form of words, or that it requires to be under the hand of the copartner; all that is necessary is, that there should be some evidence of an actual authority conferred. Such a power does not arise out of the [*686] relation *of partnership, and is not, therefore, to be inferred from such relation. The case of *Stead* v. *Salt* is in point, and I think there is no ground for the distinction which has been taken between a general partnership, and a partnership in a particular transaction.

PARKE, B.:

I am entirely of the same opinion. The authority to bind a partner to submit to arbitration does not flow from the relation of partnership, and where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. The case of *Stead* v. *Salt* shews that the

(1) 2 Mod. 228.

relation of partnership does not communicate any such power as that which has been contended for.

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The rest of the COURT concurred; but in consequence of an arrangement between the parties, the COURT directed the rule to be made absolute.

Rule absolute.

MOZLEY AND ANOTHER *v.* TINKLER (1).

1835.

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(1 Cr. M. & R. 692—696; S. C. 5 Tyrwh. 416; 1 Gale, 11; 4 L. J. (N. S.) Ex. 84.)

Guaranty in the following form: "F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." Signed "G. T." B. wrote this memorandum, and added "Witness to G. T.—J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guaranty: Held, that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover.

ASSUMPSIT upon the following guarantie, which was in the form of a letter addressed to the plaintiffs.

"DONCASTER, July 5, 1833.

"GENTLEMEN,—Mr. France informs me, that you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For my reference, apply to Messrs. Brooke & Co. of this place.

"I am, Gentlemen, your most obedient servant,

"GEO. TINKLER."

"Witness to Mr. Tinkler,

J. BROOKE."

"To Messrs. MOZLEY & SON, Derby."

The defendant pleaded—First, the general issue; secondly, that the promise was a special promise to answer for the debt of another, and that there was no agreement in writing, or memorandum, wherein the consideration for the promise was stated, signed by the defendant, &c.; and, thirdly, that the plaintiffs

(1) Explained by WILLES, J. in *Reuss* v. *Picksley* (Ex. Ch. 1866) L. R. 1 Ex. 342, 352, 35 L. J. Ex. 218, 224.—R. C.

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did not proceed in the printing and publishing of the book on arithmetic, &c. To the second plea the plaintiffs replied, that there was an agreement in writing, &c.; and took issue on the last plea.

At the trial before Vaughan, B., at the last Summer Assizes for the county of Derby, it appeared that a person named France, being desirous of publishing a work on arithmetic, applied to the plaintiffs, who were printers and publishers in the town of Derby, to publish the same. The plaintiffs did not reply directly to France, but addressed themselves to Brooke, a bookseller in Doncaster, through whose intervention the publication of the
[*693] book by *the plaintiffs was arranged, and the guarantie in question given. To Brooke the guarantie referred as a voucher for the respectability of the defendant. The memorandum was written by Brooke, and read over by him to the defendant; and the words at the foot of it, "Witness to Mr. Tinkler, J. BROOKE," were also in his hand-writing. The guarantie having been forwarded to the plaintiffs through Brooke, the work was proceeded with, and the bill was made out to France. In the month of October, a person named Cunningham, who was joint editor of the work, made application to the plaintiffs for nine copies of it, when the following letter was received by him in reply:

"DERBY, October 29, 1833.

"SIR,—In answer to yours of the 27th, we beg to state, that we shall be very glad to supply you with the Arithmetic; but, considering that we must look to what we have in hand as our security, and also, as Mr. France is the only person who is responsible to us for the payment, and we are responsible to him for what copies we part with, we must decline parting with any, without having cash for them, &c.

(Signed) "HENRY MOZLEY & SON."

"P.S.—You say you are happy to find we are safe in the books already delivered. We do not know how we are safe; but, we assure you, we have not yet received any money at all from Mr. France, or any one else."

No communication was made by the plaintiffs to the defendant after the receipt by them of the guarantie; and it was objected,

on the authority of *M'Iver* v. *Richardson* (1), that, as there had been no acceptance of the guarantie by the plaintiffs proved, they were not entitled to recover. A verdict was, however, found for the plaintiffs; but the learned Judge gave the defendant liberty to move to enter *a nonsuit. *Hill*, accordingly, in Michaelmas Term, obtained a rule *nisi* to that effect; against which,

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Amos and *Humfrey* now shewed cause:

The acceptance of the guarantie was a matter of fact to be left to the jury, and they have determined it by finding a verdict for the plaintiffs. Brooke may be said to have been the agent of both parties; of the defendant, for the purpose of forwarding, and of the plaintiffs for the purpose of accepting the guarantie; and after the instrument had been read over by him to the defendant, the latter could not doubt that there was an acceptance of it by the plaintiffs through the instrumentality of Brooke.

(PARKE, B.: The difficulty is this, whether the plaintiffs ought not to have communicated to the defendant that they were satisfied with his security; but no evidence was given to that effect.)

If Brooke was satisfied, it was equivalent to the plaintiffs being satisfied; and the defendant knew that he was satisfied, by his permitting the reference to himself, and forwarding the guarantie to the plaintiffs.

(PARKE, B.: The transaction is in fact this: "I will give my guarantie, provided you shall be satisfied of my solvency." Then it was incumbent on the plaintiffs to give notice to the defendants, that they were satisfied.)

The act of Brooke is the act of the plaintiffs.

(PARKE, B.: Upon Brooke's approval the plaintiffs might still have exercised their own discretion, and have rejected the guarantie. The simple question is, whether they ought not to have communicated their satisfaction?)

There was sufficient evidence to go to the jury upon that question. Immediately upon receiving the guarantie, the plaintiffs

(1) 1 M. & S. 557.

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proceeded with the publication of the work; and the jury might reasonably infer, that the defendant was aware of the plaintiffs thus proceeding upon the credit of his engagement.

Hill, in support of the rule:

[*695] The question is, was there *a contract binding upon the defendant? Until an acceptance of the contract by the plaintiffs, notified to the defendant, the instrument did not become binding; and there was no evidence of such a notification. In the words of Lord ELLENBOROUGH, in *M'Iver* v. *Richardson*, this was only "a proposition tending to a guarantie," and not a full and perfect guarantie until accepted by the other party. The distinction through all the modern cases is between a proposition or overture towards a guarantie, and the guarantie itself, when perfect by the assent of both parties. *Hill* was then stopped by the COURT.

LORD ABINGER, C. B.:

The case of *M'Iver* v. *Richardson* is not so strong as the present to shew that there was intended to be a suspension until something further should be done. That case has never been impugned, and the present comes clearly within the principle there established. The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice; and, with regard to the agency of Brooke, there is nothing to shew that the plaintiffs might not have been dissatisfied with his opinion of the defendant's solvency.

PARKE, B.:

I am entirely of the same opinion. It is not necessary in a contract of this nature that both the parties should be bound; it is sufficient if the party sued is shewn to be liable. If the guarantie had stopped at the words "50*l*." I should still have been inclined to think, on the authority of *M'Iver* v. *Richardson*, that the plaintiffs ought to have given notice to the defendant, that they had accepted his guarantie. But the subsequent words render the point quite clear, that the defendant only intended to be bound by the instrument, in case, upon inquiry, the plaintiffs should be satisfied with regard to his solvency.

Now, according to the principles of law, that satisfaction being a matter peculiarly within the plaintiffs' *own knowledge, they ought to have given evidence of it. Suppose the fact had been averred in pleading, the proof of the averment would have been upon them. In Com. Dig. Pleader (C. 73), it is said, "that in an action to deliver so much corn, if the plaintiff approve of it at the fair, the plaintiff ought to give notice if he approved of it" (1). So, here the satisfaction of the plaintiffs, being within their personal knowledge, ought to have been proved by them, the whole matter being open under the general issue. But it is said, that the plaintiffs appeared to be satisfied, because Brooke was satisfied, of which the defendant was aware; but that is not so, for Brooke merely acted in his character of referee, and communicated his opinion to the plaintiffs, in order that the latter might form their own judgment upon the question. After they had done so, they ought to have communicated the result to the defendant. This not appearing to have been done, the rule for entering a nonsuit must be made absolute.

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The rest of the COURT concurring,

Rule absolute.

HORSFORD *v.* WEBSTER AND DEACON.

1835.

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(1 Cr. M. & R. 696—703; S. C. 5 Tyrwh. 409; 1 Gale, 1; 4 L. J. (N. S.) Ex. 100.)

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A tenant gave a bill of sale to a creditor, under which his goods (including certain eatage) were about to be sold, and the landlord, before the sale took place, put in a distress; whereupon it was agreed that the sale by the creditor should proceed, and that the landlord should be paid his arrears out of the proceeds of the goods and eatage. The plaintiff having purchased the eatage at the sale, put in his cattle to depasture it; and the amount of the sale not being sufficient to cover the arrears of rent, the landlord distrained again, and took those cattle as a distress: Held, (PARKE, B. *diss.*) that a contract was to be implied on the part of the landlord not to distrain the cattle of the purchaser of the eatage.

TRESPASS for taking the plaintiff's cattle: Plea, the general issue. At the trial before Taunton, J., at the *last Assizes for the county of Northampton, the following facts were proved. A

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(1) Cro. Eliz. 249, 250.

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person named Kingston, being tenant to the Earl of Winchilsea of a farm, certain rent became due at Michaelmas, 1833, for which, in the month of November in that year, his Lordship distrained. Amongst the property distrained was a close of growing grass (called eatage). In the same month of November, but previously to the distress being made, Kingston executed to the plaintiff a bill of sale of all his farming stock and goods, including the eatage. The defendant, Webster, who was the agent of Lord Winchilsea, was present at the sale, and permitted the goods to be sold under the bill of sale, upon condition that the proceeds should be paid into the hands of the defendant, Deacon, in discharge of the landlord's rent. The sale accordingly proceeded, and the plaintiff became the purchaser (amongst other things) of the close of eatage; and it was stated at the time of sale, that he should have liberty to consume the grass in the close until the 25th February, that being the termination of Kingston's interest in the premises. The proceeds of the sale were paid over according to the agreement; but there being a deficiency of about 40*l.* in the payment of the rent, the defendant, as the agent of Lord Winchilsea, made a second distress for that amount, and seized the cattle of the plaintiff, the subject of this action, which were at the time depasturing in the close of eatage, purchased by him under the circumstances above stated. The learned Judge being of opinion that the landlord was justified in making the second distress for the arrears of rent remaining unpaid, directed a nonsuit, with liberty to the plaintiff to move to enter a verdict for 17*l.*, being the value of the cattle taken. *Hill* having in Michaelmas Term obtained a rule accordingly,

Adams, Serjt., and *Amos*, now shewed cause:

The general rule of law is, that until the landlord is satisfied
[*698] his *arrears of rent, he may enter upon any part of the premises demised, and take as a distress the goods, either of the tenant or of a stranger, there found; and there is nothing in the circumstances of the present case to take it out of the general rule. The most extensive construction has been given to this rule; and it has been held, that, where the cattle of a stranger have been put into land for the purpose of agistment, though with the

consent of the landlord, they may yet be distrained by him (1). So it has been decided that cattle going to market, put into a close for one night only, by the assent of the landlord, and with the leave of the tenant, are subject to the landlord's distress, &c.: *Fowkes* v. *Joyce* (2). There was no evidence to shew that the landlord had waived his right of distress, or that the plaintiff put his cattle upon the premises, under the faith, and in the presumption, that the landlord would not distrain; on the contrary, the presumption would be, that if there was any rent in arrear, the tenant would pay it, and that no distress would take place. Is there any fact in the case to shew, that if the tenant himself had put his cattle to depasture in the close in question, the landlord would have been tied up from distraining for the rent remaining unpaid? The plaintiff merely stands in the place of the tenant, and has no protection against the distress but such as the tenant himself had.

Hill and *Waddington*, *contrà*:

The plaintiff was a creditor of the tenant, and took from him a bill of sale. The landlord had distrained, and could not sell until after the expiration of the usual time; but, by an arrangement amongst the parties, the sale takes place under the plaintiff's bill of sale, and the landlord receives the proceeds at an earlier period than he otherwise would have done. The landlord, through his agent and bailiff, sanctions this *arrangement, and [*699] thereby, as against the parties to the transaction, waives his right of distress. Here, then, is a contract on the part of the landlord, and a sufficient consideration to support that contract. The situation of the plaintiff was entirely altered by this arrangement, without which, he would have taken care, that the proceeds of the sale should never have reached the hands of the landlord.

(PARKE, B.: The landlord had no power to take the eatage (3); that part of the tenant's effects was not distrainable. But suppose the landlord had recovered a judgment against his tenant, and,

(1) *Read* v. *Burley*, Cro. Eliz. 549. 1161.
(2) 2 Ventr. 50; 3 Lev. 260; 2 Lutw.
(3) See Gilb. Repl. 39.

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upon the plaintiff being about to sell the goods, had said, "I will not enforce the judgment, if you will pay over to me the proceeds of the sale;" would that have prevented him from making a subsequent distress?)

It would, if in consequence of that arrangement the plaintiff had, as in the present case, been induced to put his cattle to depasture upon the premises. With regard to the presumed contract not to distrain, it is said, that the fact of rent being in arrear was not in the contemplation of the parties; but it was extremely probable that the proceeds of the sale would not cover the rent, and in fact they did not cover it by the sum of 40*l*. The right of the landlord in all cases to distrain the cattle of strangers is not so unqualified as it has been supposed on the other side. The authority of *Fowkes* v. *Joyce* has been denied, in a case cited by Professor Christian, in his notes to Blackstone's Commentaries (1); and Serjeant Williams observes, that it should seem at this day a court of law would be of opinion, that cattle belonging to a drover being put into a ground, with the consent of the occupier, to graze only one night, in their way to a farm or market, will not be liable to the distress of the landlord for rent (2). Besides, the present case is very different from that of *Fowkes* v. *Joyce*. *There was no consideration there for the landlord forbearing to distrain, but here he had a good consideration, not only in receiving the proceeds of the eatage, which he could not have obtained under his distress, but likewise in anticipating the fruits of that distress. That the power of a landlord to distrain is by no means so universal as has been supposed, appears also from the note to the case of *Poole* v. *Longuevill* (3). It is there said, that the settled distinction seems now to be, that if cattle escape through defect of fences, which the tenant of the land is bound to repair, they cannot be distrained by the landlord for rent, though they have been *levant* and *couchant*, for the landlord shall not take advantage of his own wrong; and the case of *Poole* v. *Longuevill* is denied to be law.

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(1) *Tate* v. *Gleed*, C. B. H. T. 24 Geo. III.; 3 Bl. Com. 8, 15th edit.

(2) 2 Saund. 290, *n.*

(3) 2 Saund. 290.

LORD ABINGER, C. B.: HORSFORD v. WEBSTER.

It appears to me, that there was evidence to go to the jury of a contract on the part of the landlord, that the purchaser of the eatage should be allowed to put his cattle into the close in question without being subject to a distress for rent. The plaintiff and the defendant Webster, the agent of the landlord, come together, and between them the arrangement is made that the sale shall proceed, and that the landlord shall have what the eatage produces, to which under the distress he would not have been entitled. This I think a sufficient consideration for a promise not to take the cattle of the person who, under the sale, becomes the purchaser of the eatage. The plaintiff becomes the purchaser. He is to have the eatage, and the landlord is to receive the money. The question is, whether, upon this state of facts, there was not sufficient ground for a jury to infer, that the party purchasing understood that he was to enjoy what he bought; and whether in fact the transaction did not amount to an undertaking on the part of the landlord that he would not deprive him of that enjoyment. It seems to me that there were sufficient grounds for such an inference.

PARKE, B.: [701]

I am of opinion that this rule ought not to be made absolute. If, as my Lord thinks, there was evidence from which a contract not to distrain might be inferred, then a new trial, and not the entering a verdict for the plaintiff, would be the proper course; but, in my opinion, there was no evidence from which a jury could presume the existence of such a contract. Suppose that the case had arisen upon the pleadings—that instead of pleading the general issue, and giving the justification in evidence under it, according to the statute, the defendant had pleaded the distress specially—what must the plaintiff have replied? I put this case to the learned counsel for the plaintiff during the argument, and his answer was, that the plaintiff must have replied the contract; that is, that in consideration that the plaintiff would pay over to the landlord the proceeds of the sale of the eatage, the landlord promised that he would not distrain the cattle put into the close for the purpose of depasturing that eatage. But what evidence

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is there to maintain the statement of such a contract? The case was this. Rent became due at Michaelmas to the amount of about 200*l.*, and a distress was made upon all the distrainable effects of the tenant. Previously to the distress, however, there had been a bill of sale executed to the plaintiff, not only of all the tenant's distrainable effects, but likewise of the close of eatage. The sale under the bill of sale being about to take place, Webster, the bailiff of the landlord, interposes, and says: "I will not proceed with the distress, provided you will pay over the amount received from the sale of the eatage in discharge of the rent." It is said that this furnishes evidence of a contract; but I do not think so. At the time of this arrangement neither party contemplated the necessity of a second distress. The case appears to me to be no stronger than if the landlord had undertaken not to proceed with his distress, provided the amount arising from the sale of goods on a particular part of the estate should be [*702] applied *in discharge of a debt due from the tenant to himself. Or suppose there had been a sub-demise of part of the land, and it had been agreed that the rent due from the sub-lessee should be applied in discharge of the rent in arrear from the lessee to the landlord, could a waiver of his right of distress be implied from such an agreement?

BOLLAND, B.:

I am of the same opinion as the LORD CHIEF BARON. The eatage is about to be sold, when the defendant, Webster, interposes, and warns the parties of the distress which he was about to enforce. An arrangement is then entered into, and that arrangement holds out to the parties that they will be protected in the enjoyment of the property of which they become the purchasers under the sale. At first I was struck with the case of *Fowkes* v. *Joyce* (1). The point there was, whether the plaintiff

(1) *Ante*, p. 681. Upon this case C. B. GILBERT observes, "Note, the grazier was afterwards relieved in equity, it being deemed a fraud in the lessor, 2 Vern. 129; Prec. Ch. 7."—Gilbert on Repl. In 2 Vern. (p. 131), a case of *Brodon* v. *Pierce* is mentioned, where, there being twenty years' arrear of a rent-charge, and cattle coming by escape out of the next ground, and being distrained, Lord NOTTINGHAM decreed against the distress.

had any right to the privilege of having his cattle unmolested. There was in fact no consideration to support the grant of any such privilege; but, suppose the landlord there had by agreement taken a portion of the rent from the owner of the cattle, could he afterwards have distrained?

GURNEY, B.:

I also am of the same opinion. The landlord received the proceeds of the sale upon condition that he should not distrain. Any other construction would render the transaction merely a trap for the cattle of any person who purchased the eatage sold under the sanction of the landlord himself. The landlord received as a consideration *the proceeds of effects not distrainable by himself; and it was a breach of faith afterwards to take as a distress the cattle of a person who put them upon the close on the faith of the landlord's engagement.

[*703]

Rule absolute.

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(1 Cr. M. & R. 703—708; S. C. 5 Tyrwh. 239; 4 L. J. (N. S.) Ex. 65; S. C. nom. *Foster* v. *Sibley*, 1 Gale, 101.)

Where a note is made payable fourteen days after date, parol evidence cannot be given to shew that it was not to be paid, in case a verdict was obtained in an action brought between other parties.

A motion for a new trial in an action brought in the Common Pleas at Lancaster, must be made in the Court in which the Judge sits who presided at the trial.

ASSUMPSIT by the payee against the maker of a promissory note for 12*l.*, payable fourteen days after date. Plea, the general issue. At the trial before Gurney, B., at the last Assizes for the county of Lancaster, it appeared that Samuel Milnes, the brother-in-law of the defendant, being agent for a co-operative society, and having ordered goods for the society from a person named Walker, which had not been paid for, the plaintiff, as the attorney of Walker, sued Milnes for the amount. Milnes then gave the names of certain members of the society, who were also sued for the debt, and a verdict obtained. Milnes also gave a

(1) Followed in *Abrey* v. *Crux* (1869) L. R. 5 C. P. 37, 39 L. J. C. P. 9; and see Bills of Exchange Act, 1882, s. 21, sub-s. 2, (*b*).—R. C.

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cognovit, and, judgment being entered up, he was taken on a *ca. sa.*, and while in prison, the defendant gave the note in question for the amount of the demand against Milnes. The defendant now proposed to shew, that the note was given under an agreement that it should not be enforced, in case Walker should obtain a verdict in the action against the members of the co-operative society. On the part of the plaintiff, it was objected that parol evidence of the agreement was inadmissible to vary the terms of the written instrument, and also that the agreement was that the note should not be put in suit, only in case Walker obtained the fruits of his verdict. The learned Judge, however, admitted the evidence, giving the plaintiff leave to move to enter
[*704] a verdict for 12*l.*, if the Court should be *of opinion that the evidence was inadmissible. In the course of last Term, *Wightman* accordingly obtained a rule (1), and—

Alexander now shewed cause:

The evidence was admissible. Though the terms of a note be absolute, parol evidence may be given to shew that the holder agreed not to sue a party to it. This evidence was admitted in *Pike* v. *Street* (2), which was an action by the indorsee against the indorser of a bill; and Lord TENTERDEN permitted the defendant to shew a parol agreement by the plaintiff to sue the acceptor only. In summing up, he left it to the jury to say, whether or no the plaintiff took the bill on the terms and conditions that he should have recourse to the acceptor, and to the acceptor only, and not sue the defendant at all; and, if so, he directed them to find for the defendant, such an agreement being a good bar to the action.

(PARKE, B.: The effect of that case only is, that the defendant may deny the *primâ facie* evidence of consideration.)

(1) This action was brought in the Common Pleas at Lancaster, and the motion to enter a verdict was made under the statute 4 & 5 Will. IV. c. 62, s. 26. By that statute, the application may be made to any of the superior Courts of common law at Westminster, and accordingly *Wightman* moved, in the first instance, in the Court of King's Bench; but Lord DENMAN, Ch. J., said, that the Judges had resolved that the motion should be made in the Court in which the Judge sits who presided at the trial.

(2) Moo. & Mal. 226; and see also *Hall* v. *Wilcox*, 1 Moody & Rob. 58.

The case is cited for the *dictum* of Lord TENTERDEN, that a parol agreement of this kind is a good bar to the action. The agreement in this case is of a similar nature. It is not a universal rule that parol evidence may not be given to contradict the terms, express or implied, of a bill or note. Where a bill purports to be "for value received," it is competent to the party sued upon it to shew, that, in fact, no value has been received; *so, it is every day's practice to contradict, by oral evidence, the implied consideration which every bill or note carries with it. In moving for this rule, the case of *Moseley* v. *Hanford* (1) was mentioned; but that decision is distinguishable. The agreement there, that the note should be payable on the delivery up of the possession of certain premises, was directly at variance with the terms of the note, which was payable on demand; but no such necessary contradiction exists in the present case. The proposed evidence tends rather to negative any consideration, than to impugn the terms of the instrument.

[*705]

Wightman, contrà:

The decision of the Court of King's Bench in *Moseley* v. *Hanford* goes the whole length of the present case.

(Lord ABINGER, C. B.: Does not the question arise, whether the note was given as a collateral security in case Walker should not obtain the fruit of the verdict? That would go, not to vary the terms of the note itself, but to affect the consideration only.)

The note was not given as a collateral security, but was, by the terms of the parol contract, made defeasible in a certain event. Now that, according to all the authorities, is such a variation of the written contract as cannot be introduced by parol. There was no evidence to shew that it was given as a collateral security.

(GURNEY, B.: The jury found that it was given upon the agreement relied on by the defendant.

PARKE, B.: The question is, whether parol evidence was admissible in this case to contradict the averment or inference of value which every note bears.

(1) 10 B. & C. 729.

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LORD ABINGER, C. B.: You may give in evidence any facts to affect the consideration.)

It is true that the defendant is at liberty to deny the consideration, but that is not what he has done here. He sets up an [*706] independent collateral fact, uncertain with *regard to the time of its happening, yet upon the happening of which, the note is to cease to have any operation. He does not say that the note had not originally a good consideration, he does not say that such consideration ever failed, but he imports by parol a contingency into the note, which does not appear on the face of the instrument. Suppose a note made on the 1st of September, and payable in fourteen days, subject to be defeated upon a given uncertain event, as in this case, and suppose such event not to happen until after the day of payment—the holder would undoubtedly be entitled to recover upon the note becoming due; and how could the happening of the event defeat that right, unless by altering the terms of the contract?

(ALDERSON, B.: If the evidence attempted to be given would render it uncertain, whether on a particular day the maker would or would not be liable, it is a variation of the contract. A note payable upon a contingency, as upon the arrival of the ship *Juno*, would not be a good note; but the note in question is not contingent, and to allow parol evidence of its being so would be to vary the contract.)

The cases put by way of illustration on the other side shew that there must be a good defence when the note becomes due, as in the case of want of consideration. The question comes to this: suppose that on the note being dishonoured, an action is brought upon it, can the defendant shew that it is not payable upon the day on which it purports on the face of it to be payable? In *Free* v. *Hawkins* (1), which was an action by the indorsee against the indorser of a note, the defendant attempted to prove by parol evidence that the plaintiff knew that the note was not to be enforced until after certain property of the maker was sold, and

(1) 8 Taunt. 92; Holt, N. P. 550.

then only in the event of the proceeds not being sufficient; that this was the agreement upon which the note was given, and that *it was only a collateral security; but GIBBS, Ch. J., rejected the evidence; and the Court of Common Pleas held it rightly rejected. *Woodbridge* v. *Spooner* (1), and *Rawson* v. *Walker* (2), are to the same effect; and these cases have been confirmed by *Moseley* v. *Hanford*. [*707]

LORD ABINGER, C. B.:

At the commencement of the argument, I felt some doubt whether this might not be regarded as a question of consideration; but the reasoning of *Mr. Wightman* has placed it in another light, and I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration, or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defence attempted to be established was in direct contradiction of the terms of the note. The maker of a note payable on a day certain cannot be allowed to say, "I only meant to pay you upon a contingency" that is at variance with his own written contract. The case must be governed by that of *Rawson* v. *Walker*.

PARKE, B.:

At first I had some doubts upon the point, but I am now satisfied that this evidence ought to have been rejected. Every bill or note contains two things—value either expressed or implied, and a contract to pay at a specified time. The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time. Here the event upon which the defendant contends that the note was payable was contingent, and might never happen, which is a clear contradiction of *the contract contained in the note. *Rawson* v. *Walker* is in point; *Pike* v. [*708]

(1) 22 R. R. 365 (3 B. & Ald. 233; 1 Chitty, 661).

(2) 1 Stark. 361.

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Street falls within the other class of cases in which the consideration has been contradicted. There the agreement was, that the plaintiff should sue the acceptor of the bill only, and should not sue the indorser (the defendant). That, as between the plaintiff and the defendant, negatived any consideration, and so was admissible.

ALDERSON, B.:

Parol evidence is admissible to contradict the consideration or value of a bill or note, but not the terms of the instrument itself. Here the note contains an engagement to pay at a specified time, namely, in fourteen days, and evidence is offered to shew, that this means that the note should be paid upon the occurrence of an event which may happen either before or after the expiration of fourteen days. Such evidence falls within the general rule, that matters in writing shall not be contradicted by parol.

GURNEY, B. concurred.

Rule absolute.

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[709]

TURQUAND *v.* DAWSON.

(1 Cr. M. & R. 709—710; S. C. 5 Tyrwh. 488.)

Where a material witness for the plaintiff is prevented from attending by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the Judge to put off the trial, or ought to withdraw the record. If he proceeds to trial and is nonsuited, the Court will not grant a new trial.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before Taunton, J., at the last Assizes for the county of Derby, the plaintiff was nonsuited, owing to the absence, as it was contended, of one Bosworth, a material witness. It appeared that previously to the trial, which took place on Thursday, the last day of the Assizes, there had been a negotiation between the parties for the settlement of the action, but that such negotiation went off on the Wednesday, and that the plaintiff on that day was aware that the evidence of Bosworth would be required. He was accordingly sent for, but his residence being at Manchester, he did not arrive until after

the trial had taken place, and the Assizes terminated, on the Thursday. In Michaelmas Term, *Whitehurst* obtained a rule to shew cause, why the nonsuit should not be set aside and a new trial had, on the ground, amongst others, that by the fraud and practice of the defendant's attorney, the plaintiff had been prevented from securing the attendance of Bosworth at the trial.

Hill and *Bourne* now shewed cause:

No application has ever been made for a new trial upon grounds like these. The proper mode of redress for such an injury is, a special application to the Court. Can a party be permitted to say, "If I had brought such or such a witness I should have recovered a verdict." He is bound to secure the attendance of such witnesses as are necessary for the proof of his case, and ought not to speculate upon the chances of his cause being settled. The plaintiff was aware that the negotiation had gone off on the Wednesday; and after sending for Bosworth, he might have made an application to the Court to postpone the trial, or might have withdrawn the record.

Whitehurst, *contrà*, contended, that as the absence of [710] Bosworth had been caused by the representations of the defendant's attorney, and that as there had not been time to procure his attendance before the Assizes terminated, the plaintiff was entitled to a new trial.

LORD ABINGER, C. B.:

The plaintiff, under the circumstances stated, should have applied to the Judge to postpone the trial of the cause; and the rule that such an application shall not be granted at the request of the plaintiff, is not so inflexible but that, under peculiar circumstances, it may be departed from. If the learned Judge had refused to grant the application, the plaintiff might then have withdrawn the record. But he cannot be permitted to take his chance of success by trying the cause first, and then obtaining a new trial in case of failure.

The rest of the COURT concurred.

Rule discharged (1).

(1) The general rule is, that a new trial will not be granted, on the ground that evidence has not been given, if it might have been given at

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[711]

OWENS *v.* DENTON.

(1 Cr. M. & R. 711—712; S. C. 5 Tyrwh. 359; 4 L. J. (N. S.) Ex. 68.)

Where malt had been sold by B. to A. by an illegal measure, and after such sale a settlement of accounts took place between the parties, in an action by A. against B. for work and labour: Held, that the latter was entitled to set off his demand for the malt.

THIS was an action of assumpsit for work and labour, to which the defendant pleaded *non assumpsit*, and a set-off. At the trial before Vaughan, B., at the last Summer Assizes for the county of Denbigh, the defendant gave evidence, under his plea of set-off, of malt sold and delivered by him to the plaintiff; but it appeared that the malt had been sold by the hobbit; and not by the legal measure. It appeared, however, that, after this sale, the plaintiff and defendant had stated and settled an account, in which the claim for the malt formed a part. The learned Judge summed up in favour of the defendant; but the jury having found a verdict for the plaintiff, *Welsby*, in the course of the last Term, obtained a rule for a new trial.

John Jervis now shewed cause:

The only point for the consideration of the Court is, the effect of the sale of malt by the illegal measure. The question arises upon a plea of set-off, but it is precisely the same as if it had occurred in an action brought to recover the value of goods sold by this illegal measure. All sales by measures varying from

the trial: *Cooke* v. *Berry*, 1 Wils. 98. And the Court will not, on a motion for a new trial, hear affidavits of any facts which might have been brought forward at Nisi Prius: *Hope* v. *Atkins*, 1 Price, 143. The plaintiff ought, if unprepared with his evidence, to withdraw the record, and not to take his chance of a verdict: *Harrison* v. *Harrison*, 9 Price, 89.

The present action was brought by a tailor, to recover the amount of a bill for clothes supplied to the son of the defendant. One of the points argued was, whether there was authority from the defendant to the son, enabling the latter to bind him. It having been stated that it had been made a question, whether the clothes were necessaries or not, Lord ABINGER, C. B., said, that question could only arise in an action against the son. *Whitehurst* observed, that it might arise if the father turned his son out into the streets: but PARKE, B., said, that the case was different from that of a wife, all whose property becomes vested in her husband: but that the son in such case might provide for himself, and retain any property as against his father, which the wife could not do.

those directed by the statute (1) are illegal; and in furtherance of the intent of the statute the Courts have held, that such contracts are void, and cannot be enforced: *Law* v. *Hodson* (2), *Little* v. *Poole* (3). In *Tyson* v. *Thomas* (4), it was held, that a contract for the sale of corn by this measure of the hobbit could not be enforced in an action at law.

(LORD ABINGER, C. B.: Suppose that the plaintiff had paid the defendant for the malt, could the former have recovered the money from him on the ground that the contract was void?)

It must be admitted *that he could not. [*712]

(LORD ABINGER, C. B.: Then is not the settlement of accounts between the plaintiff and the defendant equivalent to a payment?)

That argument, without doubt, presses strongly upon the defendant's case; but it has never been decided that such a settlement will have the effect of legalizing the contract. It has been decided that a bill of exchange, part of the consideration for which is the sale of spirituous liquors sold in less quantities than 20*s*., contrary to the provisions of the statute 24 Geo. II. c. 40, s. 12, is void: *Scott* v. *Gillmore* (5). In that case the giving of a bill for the amount is a much more deliberate settlement of the account than that which was given in evidence here.

Atcherley, Serjt., and *Welsby*, *contrà*, were stopped by the COURT.

LORD ABINGER, C. B.:

The general proposition may be admitted, that a sale of this kind cannot be enforced by action, or taken advantage of on a plea of set-off; but the question here is, whether there has not been such a settlement of accounts between these parties as is equivalent to a payment. I think there has been such a settlement; and that the parties are in the same situation as if

(1) 5 Geo. IV. c. 74, amended by 6 Geo. IV. c. 12. [See now 41 & 42 Vict. c. 49; 52 & 53 Vict. c. 21.]
(2) 10 R. R. 513 (11 East, 300).
(3) 32 R. R. 630 (9 B. & C. 192).
(4) M'Cl. & Y. 119.
(5) 12 R. R. 641 (3 Taunt. 226).

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payment in cash had been made. The rule must, therefore, be made absolute.

The rest of the COURT concurring,

Rule absolute.

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[713]

JONES *v.* WATERS.

(1 Cr. M. & R. 713—724; S. C. 5 Tyrwh. 361; 4 L. J. (N. S.) Ex. 109.)

A custom that the town crier of a corporate town shall have the exclusive privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction, is a good custom.

CASE. The first count of the declaration stated that the borough of Brecon, otherwise Brecknock, is an ancient borough, and the burgesses thereof have been a body politic and corporate, and for divers years have been such body politic and corporate, by the name of the bailiff, aldermen, and burgesses of the borough of Brecon, to wit, in the county of Brecknock.

That the bailiff of the said borough for the time being, for divers years before the committing of the grievances by the said defendant hereinafter mentioned, hath been, and of right ought to have been, and still ought to be, and is, the lord of the manor of the said borough and the town of Llywell, to wit, in the county of Brecknock. That also, for all the time aforesaid, the said bailiff of the said borough for the time being, so being lord of the manor of the said borough and town of Llywell, hath been used and accustomed to appoint, and of right ought to have appointed, and still ought to appoint, such person as to him, the said bailiff, hath seemed fitting, to the office of town crier of the said borough and town of Llywell, to wit, in the county aforesaid.

That heretofore, to wit, on the first day of May, in the year of our Lord 1833, at Brecon, in the county aforesaid, Lancelot Morgan, Esquire, then and there being bailiff of the said borough, and lord of the manor of the said borough and town of Llywell, under his hand and seal, duly nominated and appointed the said plaintiff to the said office of town crier of the said borough and town of Llywell, to have and to hold the said office of town crier

to him, the said plaintiff, for and during the term of three years, and for the execution of the said office; and then and there gave and granted unto the said plaintiff, all and every the fees, profits, and perquisites, belonging to the *said office of town [*714] crier within the said borough and town of Llywell. That by reason of the premises, the said plaintiff before, and at the time of the committing of the grievances by the said defendant hereinafter mentioned, was possessed of the said office of town crier for the term last aforesaid, to wit, in the county aforesaid, and that office, for a long space of time, to wit, one month next following the said appointment and grant, well and truly had exercised, and the wages, fees, and profits belonging to the aforesaid office of town crier for that time had and received, to wit, in the county aforesaid; yet the said defendant, contriving and intending to injure the said plaintiff, and to disturb him in the exercise of the said office of town crier, and to deprive the said plaintiff of the wages, fees, and profits belonging to the said office of town crier as aforesaid, to wit, on the first day of June, in the year of our Lord 1833, and on divers other days and times between that day and the commencement of this suit, at Brecon, in the county aforesaid, of his own wrong, and without any right or lawful authority, exercised the said office of town crier, and received and took divers fees and profits belonging to the said office of town crier within the said borough and town of Llywell, and then and there thereby hindered and disturbed the said plaintiff in and from exercising the said office of town crier within the said borough and town of Llywell, and prevented him from receiving the said last-mentioned fees and profits belonging to his said office of town crier as aforesaid. There were several other counts, in all of which the plaintiff claimed in right of his office. The defendant pleaded the general issue.

At the trial before Parke, B., at the last Summer Assizes for the county of Brecon, it appeared that as far back as living memory went, there had been a person filling the office of town crier or bellman within the borough of Brecon, and that his duty or employment had been to attend the corporation upon certain days, and to make proclamation by the *sound of the [*715]

JONES v. WATERS.

bell, of certain matters; and, amongst others, of sales of goods, brought to be sold by auction within the limits of the borough. When making proclamation for the corporation, he was paid the sum of 1*s.*; and for proclamation of turnpike meetings, 2*s.*; but no certain sum was proved to be payable for the proclamation of sales by auction. It appeared that no one else proclaimed sales by auction. Evidence was given to shew, that the plaintiff had been in possession of the office. No evidence was offered on behalf of the defendant; for whom, it was contended, that there was no proof to go to the jury that the office was an ancient office, which had existed from time immemorial, or that the plaintiff had the exclusive right of proclaiming sales by the bell; but the learned Baron was of opinion that there was evidence to go to the jury upon both these points, and directed a verdict for the plaintiff, with liberty for the defendant to take the opinion of this Court, whether such an office as that claimed by the plaintiff could legally exist, and whether the right claimed of excluding others from proclaiming sales by bell within the borough, was good in law. The jury having found a verdict for the plaintiff, *J. Evans*, in the course of last Term, obtained a rule pursuant to the permission of the learned Judge.

Maule, and *E. V. Williams* and *Powell*, now shewed cause:

The first question is, whether the office of town crier of Brecon, as claimed in the declaration, can have a legal existence. That it has existed in point of fact, from time immemorial, is found by the verdict of the jury. That the office of town crier or bellman is a legal office appears from the case of *Rex* v. *The Inhabitants of St. Nicholas, Hereford* (1), in which it was held to be a public annual office within the statute of 3 W. & M. c. 11. So, from *Hill* v. *Hawkes* (2), it appears that the bailiff
[*716] of Lichfield had *been accustomed from time immemorial to appoint a person to the office of bellman. The next question is, whether the prescriptive right claimed by the plaintiff of excluding all others from proclaiming by the bell within the borough the sale of goods by auction, can be sustained in law.

(1) 10 B. & C. 834.

(2) Moore, 835; Roll. Ab. Customs, (G.).

It is not necessary for the plaintiff to shew the origin or grounds of this particular custom. Many customs are good, founded upon reasons which have long since ceased. It is sufficient if, in their origin, they were reasonable and legitimate. If a legal commencement of the custom was possible, it will be presumed: *Drake* v. *Wiglesworth* (1), *Cocksedge* v. *Fanshaw* (2).

(PARKE, B.: You contend that a bye-law, to the effect of the custom in question, would be good.)

Undoubtedly; and *à fortiori* a custom. The law of custom, as applicable to offices, is laid down in Bacon's Abridgment (3); and there are numerous cases there cited in which customs like the present have been held, notwithstanding the objection that they were in restraint of trade, to be legal. Thus in *Player* v. *Jones* (4), a bye-law restraining the number of carts in the city of London was held to be good. So, in *Fazakerley* v. *Wiltshire* (5), a custom in the city of London that none but free porters should carry corn, &c., was sustained. The CHIEF JUSTICE there says: "A custom to restrain trade in a particular place is good; and surely much more so, where the restraint is only from bodily labour in one instance, than where it prevents a man from exercising an art he has long been learning. I think the custom is good, as it is a convenience to the public, and as there is an equivalent by the obligation the city *is under to provide porters; [*717] if they do not, I am of opinion that an action will lie, as in the common case of a ferry." Mr. Justice FORTESCUE says: "If this was an inconvenient custom, it would have been complained of before so long an enjoyment." The enjoyment there had been from the 18 James I. to the 17 Geo. I., but in the present case it has existed from time immemorial. In *Bosworth* v. *Hearne* (6) it was held, that a bye-law that no drayman or

(1) Willes, 666.

(2) 1 Doug. 132. "The rule of law is, that wherever there is an immemorial usage, the Court must presume every thing possible which could give it a legal origin." Per Lord MANSFIELD, *ibid.*

(3) Offices (A.)

(4) 1 Vent. 21; 1 Sid. 284, nom. *Player* v. *Jenkins*.

(5) 1 Str. 462; 10 Mod. 338; see also *Robinson* v. *Webb*, 1 Barn. K. B. 76.

(6) 2 Str. 1085; Rep. temp. Hardw. 405; Andr. 91.

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brewer's servant should be abroad in the street with his cart or dray at certain periods was good; it appearing that there was a custom in the city for the regulation of carts. In that case the COURT said, it was enough if the bye-law did not appear unreasonable in itself. So, in *Bradnox's* case (1), the COURT said, that it had often been resolved that custom may create a monopoly, as the case in the Register is, where the custom was that none should exercise the trade of a dyer in Rippon, without the Archbishop of York's license (2). There is also another class of cases which shews, that restrictions of the same nature as that now in question are not contrary to law. It has been held in many cases, that a custom for the servants and inhabitants of a certain district to grind their corn at a certain mill, or to bake their bread at a certain bakehouse, may be sustained in law. In *Mosley* v. *Walker* (3), the exclusive right of Sir Oswald Mosley, as lord of the manor of Manchester, to exclude all persons from selling in their own houses all such commodities as were usually sold in the market, was established. So, it has been held to be a good custom for all the householders and occupiers of dwelling-houses in the parish of A. to grind at the plaintiff's mill all their corn which shall be used by them within the parish, although the inhabitants are not tenants (4). [*718] Nor can it be *said that this custom is unreasonable or inconvenient. That it is neither inconvenient nor unreasonable may be inferred from the length of time during which it has been suffered to exist without being questioned. Many customs productive of much more inconvenience, as, for instance, the office of hog-ringer in a parish, have been considered legal. Had the custom been unreasonable, there was nothing to prevent its being questioned; and yet, until the present action, its legality has been unimpeached.

John Evans and *James, contrà:*

Before entering upon the inquiry, whether such an office as that claimed by the plaintiff can legally exist, or whether a custom

(1) 1 Vent. 195.
(2) Reg. Br. 186.
(3) 31 R. R. 146 (7 B. & C. 40; 9 Dowl. & Ry. 863).
(4) 1 Roll. Ab. 559, pl. 4; 2 Saund. 117, *n.* See *Richardson* v. *Walker*, 2 B. & C. 827; 4 Dowl. & Ry. 498.

to the effect of that set up in the declaration is legal, there is a preliminary question to be disposed of; viz. whether in fact any office whatever, in the legal sense of the term, was shewn in this case to have existed. That the plaintiff exercised the employment of bellman was proved; but there is a clear distinction in law between an employment and an office. Throughout all the counts of the declaration, the plaintiff claims in respect of an office; and unless he proves that a legal office existed, he must fail in this action. There are several cases in which the distinction between an office and a mere employment has been taken. In *Field* v. *Boethsby* (1), it is said by GLYNN, Ch. J., "Mes pur explane mon diversity parenter un office et un employment, jeo die, que coment chescun office soit un employment, uncore e converso chescun employment n'est un office: come si jeo grant al' un pur make mon hay, ou pour arer mon terre, ou pour heard mon flock, ceux sont employments, et differ del esteant steward de mon manor, &c. queux sont offices"(2). The distinction between an office and an employment was likewise taken in the case *of *Ripon* v. *Streater* (3), [*719] which was an action brought to try the validity of the King's patent for the exclusive printing of law books; and there the House of Lords held, that it was not the grant of an office, but rather of an employment. In *Lee* v. *Drake* (4), which was an action for disturbing the plaintiff in his office of parish clerk, it was objected, that it was rather a service or employment than an office; but no decision seems to have been come to on the point. In *Boyter* v. *Dodsworth* (5), it was held, that an action for money had and received would not lie to recover the perquisites of an office, unless such perquisites were known and accustomed fees. Hence Lord KENYON says, "If there had been costs and fees annexed to the discharge of certain duties belonging to the office, and the defendant had received them, an assize would have lain." This shews, that to constitute an office in law, there ought to be both certain duties and certain fees attached

(1) 2 Sid. 140.
(2) See Bac. Abr. Office (A.).
(3) Bac. Ab. Prerog. Grant, (5) vol. 5, p. 595, 6th edit.; Skin. 234; 2 Show. 260; 10 Mod. 106.
(4) 2 Salk. 468.
(5) 3 R. R. 315 (6 T. R. 681).

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to it, neither of which is the case here (1). But admitting that this is an office, and not a mere employment, the custom attempted to be supported is bad, as being in restraint of trade, unreasonable, and inconvenient. It is bad as being in restraint of trade, because it not only prevents others from exercising a lawful calling, by which they might maintain themselves, but it restrains those who come to the borough of Brecon, for the [*720] purpose of selling their *goods, from giving notice of their sales in as full and public a manner as they might otherwise do. The cases which have been referred to, in order to shew that bye-laws and customs in restraint of trade have been held good, do not prove that position. These were cases of bye-laws for the regulation and not in restraint of trade (2): as in the instance of the bye-laws to regulate the number of carts in London, and to limit the number of free porters. The object of those bye-laws was the public convenience, and the furtherance of the interests of trade in general. Had they been in restraint of trade, they would have been bad.

(PARKE, B.: Bye-laws in restraint of trade are good, if made in pursuance of an ancient custom (3). Such bye-laws exist in many places, as in London and York. The legality of such bye-laws was questioned in the case of *The Mayor of York* v. *Welbank* (4); but they were held to be good.)

The case of London is very different. In London there are many guilds, consisting of a great number of individuals, and

(1) It is said that the word *officium* principally implies a duty, and in the next place, the charge of such duty; and that it is a rule, that where one man has to do with another man's affairs against his will, and without his leave, it is an office, and he who is in it is an officer. Bac. Abr. tit. Office (A.) citing *Dr. Burrel's* case, Carth. 478, 5 Mod. 431. The office of searcher in the customs was said to be rather an employment than an office: *R.* v. *Kemp*, Carth. 352; Vin. Ab. Office (B.); but see 14 Ric. II. c. 10.

(2) That bye-laws, excluding all but certain persons from carrying on a trade, are in restraint of trade, see *Harrison* v. *Godman*, 1 Burr. 12; *Clark* v. *Le Cren*, 32 R. R. 568 (9 B. & C. 52).

(3) See *R.* v. *Harrison*, 3 Burr. 1322; *Harrison* v. *Godman*, 1 Burr. 12; *Clarke* v. *Compton*, 7 D. & K. 597; *Clark* v. *Le Cren*, 32 R. R. 568 (9 B. & C. 52).

(4) 4 B. & Ald. 438.

the public at large are not injured by the tradesmen of London being compelled to become free of these companies; but here a monopoly is claimed in the person of a single individual.

(PARKE, B.: In York there are no guilds; there, none but freemen are allowed to exercise a trade.)

That case also is distinguishable from the present. There a sufficient number of persons exist in a body to carry on the trade of the city; but here there is only a single individual; and if he should become incapable of performing the duties of his office, what is the remedy to which the public are to resort? In those cases, the obligation only exists in regard *to inhabitants [*721] and resiants, but here the claim is against strangers.

(PARKE, B.: It is only claimed to be enforced against such persons as come into the borough for the purpose of having their goods sold by auction.)

Player v. *Jones*, and *Fazakerley* v. *Wiltshire*, proceeded upon the grounds, that the matters restrained were nuisances. FORTESCUE, J., in the latter case, says, "The case of carts was allowed to prevent nuisances, and we may put this upon the same foot." *Bosworth* v. *Hearne* appears to have been decided upon the same principle. Lord HARDWICKE there says, "Where the subject-matter of a bye-law is the prevention of nuisances, the consideration must be upon the convenience in general, taking in the Crown, the party, and the people" (1); and the decision there is likewise placed, according to the report in Strange (2), on the ground of its being a regulation of trade. With regard to the cases of mills and bake-houses, they depend upon the relation between the lord and his tenants. *The Archbishop of York's* case was held to be good, because the Archbishop had it *ratione dominii et tenuræ* (3); and although the obligation may not now be confined to tenants, yet, doubtless, it was originally connected with tenure. In the case of *Sir George Farmer* v. *Brooke* (4),

(1) Cas. temp. Hardw. 408.
(2) 2 Str. 1087.
(3) See Owen, 67.
(4) Owen, 67; 1 Leon. 142; Cro. Eliz. 203; 8 Co. Rep. 125 b. The reporters differ as to the judgment in this case.

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the plaintiff declared, that by custom he and his ancestors had a bake-house in the town of B. to bake white bread and household bread, and that he had served all the town with bread, and that no other could use the trade without his license, and that the defendant had used the trade without his license; but it was adjudged that the action did not lie: "God forbid," it was said, "that bread, and the baking of it, should be restrained to any special person, especially in a market town." Independently [*722] of *the objection that the custom is bad as being in restraint of trade, it is bad as being unreasonable. It is unreasonable in the first place, because there is no consideration. In *The Bellman of Lichfield's* case (1) there was a consideration for the restriction, the party being bound to keep the market clean; but here there is no adequate compensation. It is unreasonable, also, because there are no defined duties attached to the office, and because there are no certain fees payable to the officer. What duty is the plaintiff bound to perform? Is he to make proclamation once or ten times, at what hours, and in what streets? What would constitute an intrusion into his office? May another person proclaim sales by the sound of a trumpet or of a drum, or by the voice? Or does the claim extend to prohibit every notice of a sale by whatever means conveyed, as by exhibiting a placard, or sending circulars? These considerations shew that the custom is void, on account of uncertainty. Then what remuneration is he to receive? May he make his own claim, and refuse to proclaim a sale until his demand is satisfied? Neither his duties nor the compensation for them are defined. Again, the custom is bad on account of the inconvenience which it occasions. Suppose the person appointed to the office should not be qualified to perform its duties, that his voice is weak, or that he becomes incapable by reason of age or infirmity. Even should he wilfully refuse to perform his duty, what is the remedy of the party, or how is the officer to be removed (2)? Another great inconvenience

(1) *Hill* v. *Hawkes*, Moor, 835.

(2) In *Fazakerley* v. *Wiltshire*, 1 Str. 468, the CHIEF JUSTICE says, "The custom is a convenience to the public, and there is an equivalent by the obligation the city is under to provide porters. If they do not, I am opinion, that an action will lie.

in the custom under which the plaintiff claims is *that it makes no provision whatever for those changes which the course of time and the alteration in the state of society may require. Suppose the borough to have been situated in Lancashire, and to have grown up, like Manchester, into a large and populous commercial town; still this single officer must have enjoyed the monopoly of advertising sales, there being no power of appointing others. This is a case of the first impression; and it is a strong argument against the plaintiff's claim, that there are no traces of any action of this kind having been brought. [*723]

(PARKE, B.: That actions resembling the present have been seldom brought, may be explained in this way. The right is in general vested in a class of persons, all of whom, as in the case of *The Dippers of Tunbridge Wells* (1), being jointly interested in any intrusion upon their rights, would be required to join in an action. This would render such a suit highly inconvenient.

LORD ABINGER, C. B.: The case has been extremely well argued on both sides, and we shall take time to consider our judgment.)

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the COURT:

This is an action brought by the bellman of Brecon to enforce an exclusive privilege, claimed by him, of proclaiming by the sound of the bell all sales by auction of goods which take place within the borough of Brecon. The case was very fully argued; but the only point to be decided is this, whether the custom under which the plaintiff claims is a good custom in law. The plaintiff states in his declaration, that he was possessed of the office of town crier, and that the defendant disturbed him in that possession. The particular duties of the office were matter of evidence, and evidence was given, and the jury accordingly so found, that it was the exclusive privilege of the town crier, appointed *by the corporation, to make public proclamation of sales by auction, and that the defendant had infringed that privilege. No objection is [*724]

as in the common case of a ferry; neither is the merchant obliged to rely on an action only, for he certainly may employ whom he pleases, if the free porters do not attend."

(1) *Weller* v. *Baker*, 2 Wils. 414.

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taken to the evidence upon which that verdict proceeded, and therefore the only point is, whether the custom is good in law. After a consideration of the arguments on both sides, it appears to us, that there are no grounds upon which we can say that such a custom is necessarily bad. It may have had a good commencement; and, existing probably long before the art of printing was known, must have been formerly a much greater convenience to the public than at present. There is nothing to prevent the corporation of Brecon from appointing a town crier; and we cannot say, that a custom giving him the exclusive privilege of proclaiming, by the sound of the bell, all sales by auction within the borough, is not maintainable in law.

Rule discharged.

1835.

Revenue.

[726]

REX *v.* THE MAYOR, JURATS, AND COMMONALTY OF THE TOWN AND PORT OF DOVER (1).

(1 Cr. M. & R. 726—737; S. C. 5 Tyrwh. 279; 4 L. J. (N. S.) Ex. 94.)

By a charter of Edw. IV. the Crown granted to the corporation of Dover "all penalties forfeited and to be forfeited, &c. of all and every the barons, &c. in whatsoever Courts the same barons, &c. should happen to be adjudged." By a charter of Charles II., "all fines, forfeitures, &c. in the Courts aforesaid arising, &c.," were also granted to the corporation: Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of misdemeanor pass to the corporation.

JOHN MUIRHEAD, being charged with a misdemeanor before his Majesty's justice of the peace for the town and port of Dover, was admitted to bail, himself in a recognizance of 300*l.*, and two sureties of 150*l.* each. Muirhead having failed to appear according to the terms of the recognizances, they became forfeited, and were estreated into the Exchequer. To these forfeitures

[*727] the corporation *of Dover made claim, and proceedings were instituted similar to those in the case of *Rex* v. *The Mayor of London* (2). The claim set forth a charter made by Edw. IV. bearing date at Westminster, the 23rd day of March, in the fifth year of his reign, which contained, amongst other things (3), the

(1) Cited and followed in *In re Nottingham Corporation*, '97, 2 Q. B. 502, 66 L. J. Q. B. 883.—R. C.

(2) P. 468, *ante* (1 Cr. M. & R. 1).

(3) The other parts of the charters essential to the case are referred to in the judgment of the Court.

following grant: "That the corporation and their successors might have all and all manner of fines for trespasses, offences, misprisions, extortions, negligences, ignorances, conspiracies, concealments, regratings, forestallings, maintenances, ambidextries, champerties, falsities, deceits, contempts, and other offences whatsoever; and also fines for license of concords, and all amerciaments, redemptions, issues, and penalties forfeited and to be forfeited, year, day, waste, strepe, and all things which to his said Majesty or his heirs might appertain, of such year, day, waste, and strepe of all and every the barons, and other the resciants aforesaid, their heirs and successors wheresoever, as well within the parts and members aforesaid as without, in whatsoever Courts of his said Majesty and his heirs the same barons and other resciants, should happen to be adjudged to make such fines, and to be amerced and forfeit such issues, penalties, year, day, waste, strepe, and forfeitures, which fines, amerciaments, redemptions, issues, penalties, year, day, waste, strepe, and forfeitures, might appertain to his said Majesty and his heirs, if the same had not been granted to the aforesaid barons and good men, and their successors; so that the said mayor and jurats, bailiff and jurats, and also jurats in every port, and member of the ports, and members aforesaid, as is aforesaid chosen by themselves or their ministers, such fines, amerciaments, redemptions, issues, penalties, and forfeitures, and all things which to his said Majesty, his heirs and successors, might *appertain, of the year, day, waste, strepe and forfeitures aforesaid, might levy, perceive, and have, to the common profit and use of the said barons, and their heirs and successors, without impediment to his said Majesty or his heirs, his justices or their bailiffs, or his ministers whatsoever."

[*728]

By the charter of Charles II. it was granted that the corporation and their successors "might have and perceive, and should have and perceive, to their proper use and commodity, respectively, all and singular fines, amerciaments, redemptions, issues, forfeitures, and other profits whatsoever, of and in the Courts aforesaid, respectively growing, arising, happening, or contingent; and all and singular those fines, forfeitures, redemptions, amerciaments, issues, forfeitures, and profits, to their own use and commodity, respectively, from time to time, by their

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ministers, to levy, perceive, seize, and retain, by action or actions of debt, or such other suits, actions, means, ways, and process in any court or courts of record within the Cinque Ports, or ancient towns aforesaid, or members of the same aforesaid, or any of them, to be had and prosecuted, by which such fines, amerciaments, redemptions, issues, forfeitures, and profits, in any court of him his said Majesty, his heirs and successors, through his whole kingdom of England were wont or might be levied, perceived, or recovered, without impediment of him, his heirs, or successors, or any of his ministers whatsoever."

The replication to this claim set forth the recognizances, and the condition for the appearance of John Muirhead. It then averred that Muirhead did not appear in pursuance thereof, and that the recognizances thereupon remained and were in full force; that thereupon Muirhead and his sureties became and were indebted to the King in the sums, &c., making together the sum of 600*l.*, which had been estreated, and was owing to the Crown, by virtue of the recognizances. To this replication the mayor, jurats and commonalty of Dover demurred generally.

[729] *Jervis*, for the mayor, jurats, and commonalty of Dover:

The question raised by this demurrer for the decision of the Court is, whether a recognizance entered into before justices of the peace for the town and port of Dover, for the appearance of a party upon a charge of misdemeanor, to be tried at the Sessions there, being forfeited by the non-appearance of the party, passed to the corporation, by virtue of both or either of the charters set forth in the claim put upon the record. For the corporation, it is contended, that the words of either charter are sufficient to pass the forfeitures; but they place their chief reliance upon the clause in the charter of Charles II. With regard to the power of the Crown to make such a grant, the authorities are numerous and conclusive, and may be found collected in the Digests: Com. Dig., Grant and Prerogative; 17 Vin. Ab. Prerog. 91. So the King may grant a chose in action: Com. Dig. Grant (G.1); or a thing not *in esse*, 17 Vin. Ab. 91.

(*Wightman:* The power of the Crown to make such a grant will not be disputed.)

Then the question is, whether the words of the charters, taken in connexion with the context, are sufficient to pass forfeited recognizances. The words of the later charter must be understood as passing something more than those of the earlier charter. The King may grant issues and amerciaments by general words, 17 Vin. Ab. 136, where the following case from the Year Book of Hen. VI. 27, is cited: "The King granted to the Duchess of E., insulam de B. et castrum cum pertinentiis, habendum, &c., simul cum omnibus exitibus, finibus, amerciamentis proficuis omnium gentium, tenentium, residentium, et non-residentium, advocationibus, wardis, et relieviis, wreckis maris, et aliis de et infra insulam prædictam in quibuscunque curiis nostris emergentibus;" and the sheriff demanded allowance upon his account of certain issues forfeited in Banco at Westminster. And the best opinion there was, that he shall not have allowance of them, nor the duchess shall not *have them; for [*730] those words, *emergentibus infra insulam*, shall be intended of such fines, &c. which are forfeited in any court in the isle, but not of fines and amerciaments forfeited at Westminster or elsewhere, extra the isle; but the case is not ruled. The definitions of the word "forfeiture" support the construction put upon the charters by the corporation. In Cowell's Interpreter it is said, "Forfeiture, *forisfactura*, cometh of the French word *forfaict, id est, scelus;* but in our language signifieth rather the effect of transgressing a penal law, than the transgression itself: as forfeiture of escheats, 25 Edw. III. c. 2, stat. de Proditionibus. How goods forfeited and goods confiscate differ, see Stamf. Pl. Cor. fol. 186, where those seem forfeited that have a known owner, having committed any thing whereby he hath lost his goods; and those confiscate, that are disavowed by an offender as not his own, and claimed by any other: but we may rather say that forfeiture is more general, and confiscation more particular to such as forfeit only to the King's Exchequer. Read the whole chapter, lib. 3, c. 24. Full forfeiture, *plena forisfactura*, otherwise called *plena vita*, is forfeiture of life and member, and all else that a man hath: Manwood, c. 9. The canonists use also this word—forisfacturæ sunt pecuniariæ pœnæ delinquentium." In Ducange, *voce* "Forisfactura," the following definition is given: "Forisfactura,

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mulcta vel emenda ob forisfactum seu delictum, amende des forisfactures, apud Froissart, vol. 1, c. 116. Leges Edwardi Confessoris, c. 36. Inveniant plegios tales qui possunt reddere forisfacturam, id est *were* (1) suum nisi possint disrationari. Forisfactura, eodem significatu, litteræ Philippi, Fr. Regis, anno 1290, inter Anec. Marten, tom. 1, col. 1234. Emendam vero seu forisfacturam quam *petebamus occasione homagii hactenus per eundem nobis non empensi . . . eidem (Comiti Hannoniæ) remisimus." Carpentier, in his supplement to Ducange, says, "Forfaitura mulcta vel emenda ob forisfactum, Lit. Ricardi Regis Angl., tom. 5, Ordinat. Reg. Franc. p. 317. Prohibemus ne aliquis eos inde desturbet super forfaituram decem librarum Turon." Johnson's definition is, "The thing forfeited, a mulct, a fine." That the word "forfeited" is properly applicable to the case of recognizances appears from the stat. 22 & 23 Car. II. c. 22, where the term "forfeited" is applied to recognizances (2). That Act is intitled, "An Act for the better and more certain recovery of fines and forfeitures due to his Majesty." The preamble of the statute only mentions fines, issues, amerciaments, and other forfeitures, without specifying recognizances, but it must be intended to include recognizances, which are specifically mentioned in the 5th and 9th sections of the Act. In the 10th section recognizances are omitted in words, but included, as in the preamble, under the general word "forfeitures." This, therefore, is a legislative exposition of the word "forfeiture," and shews that it is applicable to and includes forfeited recognizances. If there be any doubt with regard to the construction of these charters, the Court will lean in favour of the grantees; for the grants are made "of the King's special grace, certain knowledge, and mere motion." The effect of these words is explained in the case of *Alton Woods* (3), where it is said, "This grant is made *de gratiâ speciali* (which implies bounty), and *ex*

[*731]

(1) Capitis estimatio, sive pretium quo vita cujusque apud Anglo-Saxones pro vario suo statu, ordine, et conditione censebatur. Lexicon Saxon.

(2) So the preamble of the 3 Geo. IV. c. 46, recites that great delays occur in the return of fines, issues, amerciaments, and forfeited recognizances; and the same terms are used in other parts of that statute. See *Ex parte Pellow*, 28 R. R. 683 (M'Clel. 111); *Rex* v. *Hankins*, M'Clel. & Y. 27.

(3) 1 Co. Rep. 51 b.

certâ scientiâ (which imports science and knowledge), and *ex mero motu* (which manifests that it was not made upon the suggestion or suit of the party); but all these are not of any effect or operation *if the King be deceived." There is no pretence here for saying that the King was deceived in his grant. In the same case it is said (1), "As to the rule put by STARKEY, that the King's patents shall be taken in such sense and to such intent as that they shall be good, and as to the said rule likewise taken, that the King's patent, *ex certâ scientiâ, ex mero motu*, shall be taken as strong against the King as if a common person had made the grant, it was answered that there is another rule in law, that when the King is deceived in his grant, the grant is void, and that the King's letters patent shall be construed secundum intentionem domini regis, et non in deceptionem domini regis, as Brian saith, 1 Hen. VII. 13 a. So, the best exposition is, to make all these rules agree together; and therefore both the said rules put by the other party are true, with this limitation, viz. unless the King be deceived." In the *Earl of Rutland's* case (2), the rule for the construction of the King's grants is thus laid down: "His grant ought to be construed secundum intentionem regis et non in deceptionem regis; and when a literal and strict construction is made to make his grant void, it sounds in deceit of the King, and is a great indignity to him, *propter apices juris*, to make his charter under the great seal of things which he may lawfully grant void and of non-effect, *quià apices juris non sunt jura*." The case of the claimants lies within a small compass. They say that the King has power to make a grant of forfeited recognizances; that in the grant to the corporation of Dover he has not been deceived; and that under the word "forfeitures" in that grant forfeited recognizances pass.

[*732]

Wightman, for the Crown:

It is not necessary to dispute the propositions of law which have been advanced on the other side, or to deny the correctness of the definitions *of the word "forfeiture" which have been cited. The question simply is, whether a recognizance of this nature, the condition of which has not been complied with, is to

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(1) P. 46 a. (2) 8 Co. Rep. 112.

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be regarded as a forfeiture. It was for the purpose of raising this question that the recognizances were set out in the replication. A recognizance is the acknowledgment of a debt due to the King, defeasible upon the happening of a certain event, viz. the appearance of the party in Court, pursuant to the terms of the condition. In this respect a recognizance resembles a bond in its nature, and the argument urged on the other side would go the length of shewing that all the custom-house bonds given to the King in the Cinque Ports would, when the conditions are broken, pass to the corporation under this grant. By a recognizance a debt is created in the first instance. The party acknowledges a personal debt to the Crown, and it is by the performance of the condition of the recognizance only that it ceases to be a debt. It is therefore inaccurate to say that a recognizance becomes forfeited. It is not a legal term when applied to a recognizance (1). The correct expression is, that the condition of the recognizance has not been performed. Should the Crown put the recognizance in suit, the party must make his defence by pleading, according to the condition, that he duly appeared, &c. If forfeiture means, according to the authority of Cowell, "the effect of transgressing a penal law," it will not be intended that the Crown meant to use the word in another sense, and to grant its interest in instruments, the conditions of which have not been performed. In grants of the Crown, all doubtful expressions are to be construed in favour of the King, as in the case of *Rex* v. *Sutton* (2), where a grant of the goods of felons was held not to pass the goods of a felon of himself.

[734] (PARKE, B.: The corporation cannot claim under the words "penalties forfeited" in the charter of Edward IV., because those are such as only the barons shall be adjudged to make.)

This is not the case of a forfeiture in Court. There is no judgment upon the recognizance. It must be put in suit. Suppose the condition to have been simply that the party should

(1) *Ante*, p. 708, *n*.
(2) 1 Saund. 269; 1 Sid. 420; 1 Ventr. 32; 2 Keb. 526, 533; 2 Roll. Ab. 194, C. pl. 2.

pay a certain sum of money to the prosecutor, at the castle of Dover, would such a recognizance as that pass? Yet it is equally forfeited. There is no locality in the forfeiture of a recognizance. It is forfeited to the King every where, and may be put in suit by him any where. The forfeitures alluded to in the charter of Charles II. are forfeitures for offences, and not recognizances, which merely create a debt or duty.

Jervis was heard in reply.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the COURT:

After stating the pleadings, the learned Judge said: The only question arising on these pleadings is, whether the recognizance, which was in ordinary parlance forfeited by the non-appearance of John Muirhead at the Sessions, was comprised within the grant of the Crown by the charter of Edw. IV. or Car. II. to the Cinque Ports, of which Dover is one; and we are of opinion that it was not. Both the charters are stated to be of the "more abundant special grace, certain knowledge, and mere motion of the King;" but whatever the precise effect of these words may be upon the construction of charters, it is clear that they do not operate to make those things pass to the grantee for which there are not apt and proper words of description in the grant; instances of which are to be found in the case of *Mines* (1), in which case the word "mines" was held not to pass a royal mine; and in Dyer (2), where the *grant of the advowson was [*735] decided not to convey the present avoidance; and in the case of *Rex* v. *Capper* (3) it was laid down that the words "ex mero motu et certâ scientiâ "do not reduce a Royal grant to the same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor. Upon referring to the charters in question we cannot find any words apt and proper to convey the King's interest in recognizances of this kind, nor indeed any which would induce us to think that they were intended to be granted; certainly none which, in the ordinary mode of construction of a Royal grant,

(1) Plowd. 337.
(2) P. 300.
(3) 19 R. R. 568 (5 Price, 217).

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could have that effect. These recognizances are nothing more than debts of record to the Crown, with a defeazance in a particular event; and on the happening of that event, they become absolute debts. The words relied upon by the claimants as conveying such debts in the charter of Edw. IV. are, "all amerciaments, issues, and penalties forfeited:" but the context clearly shews, that only such penalties are meant to be granted as are imposed by a judgment of some Court; for the words are "in whatsoever Courts of his said Majesty and his heirs the same barons and resiants should happen to be adjudged to make such fines, and to be amerced, and forfeit such issues, penalties, &c.;" but in this case there is no judgment of any Court by which a recognizance is adjudged to be forfeited. Indeed, little reliance was placed on this charter by the learned counsel for the claimants. The other charter is that of Charles II., which is a charter of confirmation and grant of new privileges to the Cinque Ports. It establishes a civil court of record in each Cinque Port, and grants fines, amerciaments, redemptions, issues, forfeitures, and other profits whatsoever of and in those Courts, growing, arising, happening, or contingent. It then appoints corporate justices of the peace and justices *to hear and determine all felonies, &c.; and those delinquents and every of them, for their crimes, by fines, ransoms, amerciaments, forfeitures, and otherwise according to law, to chastise and punish. It then appoints corporate justices of gaol delivery, and grants to each corporation all and all manner of fines, issues, redemptions, amerciaments, forfeitures, and profits whatsoever, before the aforesaid justices (that is, the justices of the peace, oyer and terminer, and gaol delivery), from time to time for ever thereafter to be assessed, forfeited, adjudged, growing, happening, or arising. It is contended that the recognizance in question is comprised under the term "forfeiture" in the latter charter. But the proper signification of that term, as appears from the citations in the argument from Cowell's Interpreter and Ducange, is, a "mulct or fine—a punishment for an offence;" and it is quite clear that it is used in that sense in the immediately preceding part of the charter, when the justices are empowered to punish delinquents by fines, ransoms, amerciaments, and forfeitures. The term

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"forfeit" is indeed ordinarily applied to the penalty of a bond with a condition, or to an estate held on condition; but the penalty of the bond when it is forfeited, or the estate itself, is never termed "a forfeiture," even in common parlance; and it is therefore impossible to suppose that a recognizance with a condition broken, could be intended to be described by such a term in a legal instrument. It is very true that in a statute, 22 & 23 Car. II. c. 22, the term "forfeiture" is used in the title of the Act as a general term; and the Act itself, after enumerating fines, issues, amerciaments, forfeited recognizances, sum and sums of money paid or to be paid in lieu or satisfaction of them, speaks of all "other forfeitures;" but there the context clearly explains the meaning of the term "forfeitures." In the present case, the context affords no such aid; and in its proper sense, especially in a grant from the Crown, we are of opinion that it does not apply *to a debt of record rendered indefeasible by non-compliance with the condition. Our judgment must therefore be for the Crown. [*737]

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(1 Cr. M. & R. 744—753; S. C. 5 Tyrwh. 268; 1 Gale, 54; 4 L. J. (N. S.) Ex. 57; S. C. at Nisi Prius, 6 Car. & P. 700.)

Where a customer of the Bank of England was in the habit of making his acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonoured for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose, it was held, that the Bank, although they had before six o'clock received assets, were not bound to pay the bill, it being after the usual hours of business.

Semble, that it was the duty of the Bank to have informed the notary that they had received assets, and that the bill would be paid the following day.

ACTION on the case. The declaration stated, that heretofore, and before the committing of the grievance by the defendants as hereinafter mentioned, the plaintiff exercised, used, and carried

(1) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (3). —R. C.

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on the trade or business of a corn and flour factor with punctuality and integrity, always well and truly and punctually paying and discharging his just debts, and until the time of the committing of the grievance by the defendants as hereinafter mentioned, had never been suspected of being unable or unwilling to pay and discharge the same. That also long before, and until and at the time of the committing of the grievance by the defendants as hereinafter mentioned, certain persons, using the style and firm of Cooke and Gambling, and certain other persons, to wit, one Arthur Bayfield, and one Samuel Cooke, and certain other persons, had been and were respectively in the habit of employing, an had been and were used and accustomed to employ the plaintiff in his said trade and business, and to make large consignments of corn and flour to the plaintiff, to be by him sold and disposed of as such corn and flour factor as aforesaid, for certain reward and commission to him, the plaintiff, payable in that behalf, to the great gain of the plaintiff, and the increase of his said trade and business, and the comfortable support of himself and family. That long before and at the time of the committing of the said grievance by the defendants as hereinafter mentioned, the defendants were bankers, and the trade and business of bankers used, exercised, and carried on; and the plaintiff long before, and until and at the time of committing of the grievance by the defendants as hereinafter mentioned, had been and was a customer of and employed the defendants in the way of their said *trade and business of bankers as aforesaid, upon (amongst others) the terms following, to wit, that they, the defendants, would honour and pay for and on behalf and on account of the plaintiff, out of any cash balance of and payable to the plaintiff that might be in the hands of the defendants as such bankers as aforesaid, any bill or bills of exchange which might be accepted by the plaintiff, payable at the Bank of England, upon the same being duly presented there for payment thereof by the person or persons respectively being entitled to the same, and to receive the monies therein mentioned, notice having been left by or on behalf of the plaintiff at the drawing office in the Bank of England aforesaid, for the payment thereof, previously to the same becoming due; such cash balance being

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sufficient for that purpose over and above any claim or lien of the defendants thereon, and independently of any right which the defendants might have to retain the same or any part thereof in their hands, and such cash balance having then been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the defendants, and that the same was sufficient for the purpose of paying such bill or bills over and above any claim or lien of the defendants thereon, and independently of any right that the defendants might have to retain the same or any part thereof in their hands. And the plaintiff further saith, that heretofore, and whilst the plaintiff was such customer of and retained and employed the defendants, as such bankers as aforesaid, to wit, on the 15th day of December, in the year of our Lord 1832, the said persons so using the style and firm of Cooke and Gambling as aforesaid, made their certain bill of exchange in writing, and directed the same to the plaintiff, and thereby required the plaintiff to pay, six weeks after the date thereof, to one Samuel Bignold, Esquire, or order, 425*l.* value received; and the plaintiff then and there accepted *the said bill, and thereby made the [*746] same payable at the Bank of England; and the said Samuel Bignold then and there indorsed the same to Messrs. Masterman & Co., who at the time when the said bill became due and payable were the persons entitled to the same, and to receive the amount thereof. And the plaintiff further saith, that afterwards and when the said bill became due and payable, according to the tenor and effect thereof, to wit, on the 29th January, 1833, the said bill of exchange was duly presented at the Bank of England aforesaid, for payment thereof, by and on the part of the said Messrs. Masterman & Co.; but that the defendants not regarding their duty as such bankers as aforesaid, nor the terms upon which they were so employed by the plaintiff as aforesaid, but contriving and wrongfully intending to injure, prejudice, and aggrieve the plaintiff, did not, when the said bill of exchange was so presented and shewn to them for payment thereof as aforesaid, honour and pay the said bill; and on the day and year last aforesaid dishonoured and wholly refused to pay the same, although they, the defendants, then had in their hands as

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such bankers as aforesaid, a cash balance of and payable to the plaintiff, amounting to a large sum of money, to wit, 426*l.* 13*s.* 8*d.*, which was then and there sufficient for the purpose of paying the said bill, over and above any claim or lien of the defendants on the said last-mentioned sum of money, and independently of any right which the defendants had to retain the same, or any part thereof, in their hands. And although such cash balance had then been in the hands of the defendants a sufficient and reasonable time to enable them and their clerks and servants to know that the defendants then had the same in their hands, and that the same was sufficient to pay the said bill over and above any claim or lien that the defendants then had on the said sum of money, and independently of any right that the defendants had to retain the same, or any part thereof, in their hands, [*747] and *although notice had theretofore, to wit, on the 1st day of January, 1833, been left by and on the behalf of the plaintiff at the drawing office, in the Bank of England aforesaid, for the payment of the said bill, for a reasonable time previously to the same becoming due; by means and in consequence of which said premises, notice of the dishonour of the said bill was then and there given to the said Messrs. Masterman & Co., and also to the said Messrs. Cooke and Gambling; and by reason and in consequence thereof the plaintiff was greatly injured and wholly ruined in his credit and circumstances, and was then and there suspected by the said Messrs. Cooke and Gambling, and by the said Arthur Bayfield, and the said Samuel Cooke, and the said other persons who then and there had been and were in the habit of employing and dealing with him in his said business, to be in bad, failing, and insolvent circumstances, and, by reason and in consequence of the premises, then and there refused, and from thence hitherto have ceased and refused, to employ or deal with the plaintiff in the way of his said trade and business as a corn and flour factor, as they otherwise would have done, and thereby the plaintiff hath lost and been deprived of divers large gains and profits which he might and otherwise would have gained and acquired, by reason of being so employed and dealt with by the said Messrs. Cooke and Gambling, and by the said Arthur Bayfield, and the said Samuel Cooke, and the said other persons,

amounting to a large sum of money, to wit, the sum of 5,000*l.*; and also, by means and in consequence of the premises, divers persons, being creditors of the plaintiff for divers large sums of money, respectively amounting together to a large sum of money, to wit, 10,000*l.*, then and there pressed the plaintiff for the payment of their respective debts; and the plaintiff was then and there forced and obliged, in order to endeavour *to pay [*748] the same, to sell and dispose of divers goods and chattels of him, the plaintiff, for a much less sum of money than he might and otherwise would have obtained for the same, to wit, 5,000*l.* less than he might and otherwise would have obtained for the same; and the plaintiff was then and there forced and obliged to compound with his said creditors, and hath been by means and in consequence of the premises wholly ruined in his credit, character, and circumstances; and hath lost his connexion and business, and been hindered and prevented from gaining any profits or emoluments therefrom as he otherwise might and would have done.

Pleas—First, That at the time when the said bill of exchange in the said declaration mentioned was presented and shewn to them, the defendants, for payment thereof, they, the defendants, had not then in their hands a cash balance of and payable to the plaintiff, sufficient for the purpose of paying the said bill of exchange in the said declaration mentioned, in manner and form as the plaintiff hath above in his said declaration in that behalf alleged. Secondly, That at the time when the said bill of exchange in the said declaration mentioned was presented and shewn to them, the defendants, for payment thereof, the supposed cash balance in the said declaration mentioned had not been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the defendants, and that the same was sufficient for the purpose of paying the said bill of exchange.

The replication took issue on these pleas.

At the trial before Parke, B., at the sittings for Middlesex after last Michaelmas Term, the following appeared to be the facts of the case. The plaintiff kept an account with the Bank of England, and the bill mentioned in the declaration was accepted by him, payable there. It was presented there by

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a clerk of Messrs. Mastermans, the *bankers, on the morning when it became due, the 29th January, at a quarter past nine o'clock, and was left there till eleven o'clock, when it was returned to him with an answer, of "not sufficient effects." The state of the account between the plaintiff and the Bank at this time appeared to be as follows. On the evening of the 28th January the plaintiff's cash balance amounted to 33*l.* 13*s.* 8*d.*, and in the afternoon of the same day, a cheque for 200*l.* was paid in, and, according to the custom of the Bank, not having been paid in before four o'clock, was entered short; but on the following morning, before eleven o'clock, credit was given for this sum as cash. On the morning of the 29th, another sum of 195*l.* in cash was paid in by the plaintiff, to the credit of his account. The evidence, with regard to the precise period of time when this latter sum was paid in, was contradictory. One of the witnesses stated, that happening to be at the Bank that morning, he saw the plaintiff a little after ten, paying in the money, and that they left the Bank together. For the defendants, several of the clerks of the Bank were called, and, according to their evidence, the money could not have been paid in by the plaintiff before twelve o'clock. The bill was presented again at the Bank, at six o'clock the same evening, by a notary, and the same answer given as in the morning. On the morning of the 30th January, a message was sent by the Bank to Messrs. Masterman & Co., in consequence of which the bill was taken to the Bank, where it was paid, together with the sum of 1*s.* 6*d.* for the noting. It was proved that it was not the custom of the Bank to pay bills after five o'clock, but that a person was stationed to give answers, in case any bills were presented after that hour. The learned Judge, in summing up, told the jury, that the substantial question for them was whether the plaintiff had a sufficient balance at the Bank, at a reasonable time before eleven o'clock on the morning of the 29th January. That the bill was in a course of presentment *all the time during which it was in the hands of the Bank, viz. from a quarter past nine to eleven; but that the presentment after banking hours was not sufficient to charge the defendants, who were not bound, as between principal and agent, to pay the bill after five o'clock.

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That the issues raised by the pleadings were, whether the Bank had sufficient funds, and whether the cash balance had been in their hands a sufficient time to enable them to know of the same; and therefore the jury must be satisfied, not only that there were funds at eleven o'clock, when the bill was returned, but that such funds had been in the hands of the defendants a reasonable time before that hour, so as to have enabled them to have knowledge of the fact. That, with regard to the payment of the 1*s.* 6*d.* for noting, by the Bank, it might be referred to the omission of the defendants to inform the notary that the bill would be paid the following day, which might induce the defendants to think it proper in them to pay that charge. His Lordship concluded with telling the jury, that the simple question was, whether the plaintiff had sufficient funds at the Bank a reasonable time before eleven o'clock. The jury having found a verdict for the defendants—

Thesiger moved for a new trial on the ground of a misdirection, and also on the ground that the verdict was against evidence:

The learned Judge ought to have directed the jury, that it was the duty of the defendants to have paid the bill on the evening of the day when it was presented by the notary; and according to the weight of evidence there was a sufficient balance in the hands of the defendants a reasonable time before the bill was presented for payment on the morning of the 29th January. It must be admitted that a distinction exists between a presentment at the house of a private individual and a presentment at a banker's. In the latter case, the bill must be presented within the usual banking hours: **Parker* v. *Gordon* (1), [*751] *Elford* v. *Teed* (2); while in other cases it must be presented within reasonable hours, which must depend upon the circumstances of each case. In *Morgan* v. *Davison* (3), a presentment

(1) 8 R. R. 646 (7 East, 385).

(2) 1 M. & S. 28.

(3) 1 Stark. 114. See also *Barclay* v. *Bailey*, 11 R. R. 787 (2 Camp. 527), and *Wilkins* v. *Jadis*, 2 B. & Ad. 188. In the latter case, a bill presented between seven and eight o'clock in the evening, in Godliman Street, London, was held in time, and PARKE, J., said, he thought eight in the evening was a reasonable time.

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between six and seven o'clock in the evening, at a counting house in London, was held good. The general rule, that in order to render a presentment good, it must be made within the customary or reasonable hours, is to be taken subject to this qualification, that though the bill be presented not within those hours, yet if the drawee or acceptor has stationed a person for the purpose of giving an answer out of those hours, and the bill is presented to that person, such presentment is good. In *Henry* v. *Lee* (1), Lord ELLENBOROUGH says, "It is not sufficient, in general, if nobody is there to receive; but if somebody is there, and the person presenting the bill gets an answer, it is sufficient;" and BAYLEY, J., adds, "If it is presented after the usual hours, it is at the peril of the person presenting it; for if nobody is there, it will not do, but if there is, then it is immaterial at what time it is presented." In *Garnett* v. *Woodcock* (2), the bill was presented between seven and eight o'clock in the evening, at Messrs. Denison & Co.'s, the bankers; and a boy who was stationed there, gave an answer—"No orders." It was contended that this was not a valid presentment; but it was held to be good. Lord ELLENBOROUGH, at the trial, said, "Bankers do not usually pay at so late an hour; but if a person be left there who gives a negative answer, there is no difference between such a case
[*752] and that of a *merchant. I think it is perfectly clear, that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient, if made before twelve at night." *Garnett* v. *Woodcock* precisely resembles the present case: in both instances the bill was presented out of the usual hours of business, but a person was stationed to give an answer, and an answer was given.

(PARKE, B.: It does not appear in either case that the person was stationed to pay the bill; and in this case it was proved not to be the custom of the Bank, in any case, to pay bills after five o'clock.)

In that view of the case, the presentment of a bill out of the usual hours is merely nugatory.

(1) 2 Chitty, 125. (2) 18 R. R. 298 (6 M. & S. 44; 1 Stark. 475).

(LORD ABINGER, C. B.: It is the practice in London for notaries to present bills, for the purpose of their being protested, in the evening; and it is in order that the notary may receive an answer, and so be enabled to make a protest, that persons are stationed to give answers.)

A presentment good for one purpose must be good for another.

(LORD ABINGER, C. B.: The contract between the Bank and their customers, is to pay the bills of the latter within the usual hours of business.)

LORD ABINGER, C. B.:

With regard to the application for a new trial, on the ground that the verdict was against the weight of evidence, I think that it ought not to be granted; for, in my opinion, the evidence rather preponderates in favour of the defendants. At all events, it was a question for the jury, and they have decided it. With regard to the other point, the misdirection of the learned Judge, it appears to me, that the real question is not raised upon these pleadings. Upon these pleadings, the question merely is, whether the defendants were bound to pay this bill when it was presented by the notary at six o'clock in the evening, and when it is clear that they had sufficient funds in their hands, of which they were aware. It was proved to be the practice of the Bank not to pay bills after five *o'clock; no specific [*753] contract with the plaintiff varying this practice was proved, nor could any such contract be inferred. A presentment after five o'clock for the purpose of charging the drawer, is a very different thing from a presentment for the purpose of obtaining payment. The neglect of the Bank, if any, was not in omitting to pay the bill when it was presented by the notary, but in not giving notice to him, that since the presentment in the morning they had received assets from the acceptor, and that the bill would be paid the following day. That point, however, does not arise upon the pleadings. For these reasons, I think there is no ground for disturbing the verdict.

PARKE, B.:

I am of the same opinion, and I should not have been satisfied

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if the verdict had been the other way. The plaintiff in substance complains, that his agents, the defendants, have neglected to pay a bill of exchange, which, according to their usual course of dealing, they ought to have paid. But what was the contract between them?—that the defendants should pay all bills presented at the Bank during the accustomed hours of business, provided they were in funds. There has been no breach of this contract, and therefore, I think that the verdict ought to stand.

BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

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(1 Cr. M. & R. 757—765; S. C. 5 Tyrwh. 244; 4 L. J. (N. S.) Ex. 81; S. C. at Nisi Prius, 6 Car. & P. 499.)

Trespass for assault and false imprisonment, and taking the plaintiff to a police-station. Plea, that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house; which the plaintiff refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody.

It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house.

Held, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved.

TRESPASS, for assaulting the plaintiff, and taking him to a police station-house. Pleas—first, not guilty; secondly, that

the defendant was possessed of a dwelling-house in the city of London, and that the plaintiff entered and came into the said house, and made a great disturbance and affray therein, and insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and disquieted them in their possession thereof, against the King's peace; whereupon the defendant requested the plaintiff to cease his disturbance, and depart from the said house, which the defendant refused to do, and continued in the said house, making the said disturbance and affray therein; whereupon the defendant, in order to preserve the peace, and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a policeman to take the plaintiff into custody, to be dealt with according to law. The plea then alleged that the policeman took the plaintiff into custody, and conducted him out of the said house to the police station for examination, and to be dealt with according to law.

To this there was the general replication, *de injuriâ*.

At the trial before Parke, B., at the London sittings after last Trinity Term, the plaintiff obtained a verdict on the general issue, with 15*l*. damages; but the jury found a verdict for the defendant on the issue upon the special plea, the learned Judge giving the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that the facts proved in evidence did not support that plea. *Thesiger* having, in Michaelmas Term last, obtained a rule accordingly, or for judgment *non obstante veredicto*— [758]

Bompas, Serjt., shewed cause; and *Thesiger* was heard in support of the rule, in the same Term; and the COURT took time to consider. But the facts of the case and the arguments are so fully stated in the judgment of the COURT, that it has been thought unnecessary to state them here.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the COURT:

This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity Term last, at Guildhall. The declaration was for an assault and false imprisonment;

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to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuriâ suâ propriâ absque tali causâ*. On the trial, the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him *on the special plea, if the Court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my brothers Bolland, Alderson, Gurney, and myself, last Term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

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The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise

in the shop, so that the business could not go on—many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the meantime *the plaintiff was taken hold [*760] of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door; when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police-officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10 Geo. IV. c. 44, s. 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may

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thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and *there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock* v. *Hannemer* (1); but whether he has that power, in order to take before a magistrate, that *he* may take sureties of the peace, is a question on which the authorities differ. Lord HALE seems to have been of opinion that a constable has this power: 2nd Hale's Pleas of the Crown, 89. And the same rule has been laid down at Nisi Prius by Lord MANSFIELD, in a case referred to in 2nd East's Pleas of the Crown, 306; and by BULLER, J., in two others, one quoted in the same place, and another cited in 3 Camp. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abt. Faux Impt. 6, which is referred to and adopted by Lord Coke in 2nd Inst. 52; Lord HOLT, in *The Queen* v. *Tooley* (2), expresses the same opinion. Lord Chief Justice EYRE, in the case of *Coupey* v. *Henley* (3), does the same. And many of the modern text books state that to be the law: Burn's Justice, 26th edit. Arrest, 258; Bacon's Abt. D. Trespass, 53; 2 East's Pleas of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, s. 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the *affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the

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(1) Cro. Eliz. 376, Owen, 105; S. C. nom. *Scarrel* v. *Tanner*.
(2) 2 Ld. Ray. 1301.
(3) 2 Esp. 547.

affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lambard, in his Eirenarcha, chap. 3, p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known, whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. VII. c. 1." In Hawk. P. C. book 1, c. 63, s. 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice BULLER, are to be found in 9 Went. Plead. 344, 345; and DE GREY, Ch. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed *acts of [*763] violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable: Lord Hale, P. C. (1). The defendant, therefore, had

(1) Vol. 2, p. 89.

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a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned, from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace officers, whose power of interposition on their own view appears not to differ from that of any of the King's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

[*764] This brings me to the second question, whether the *plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the Court in thinking that it was not. The plea was as follows: "And the defendant says, that before and at the said time when &c. the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when &c. entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the King;

whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove all. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment, it is necessary to prove such of the facts alleged as *would do so. The allega- [*765] tions which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed; but, as this is a case in which an amendment would

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have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion, that the plea was substantially proved, at the time, probably prevented an application to amend, we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*.

Rule accordingly.

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF EXCHEQUER.)

1835.

Exchequer Chamber.

[809]

JANE COCKRANE, ADMINISTRATRIX OF JAMES COCKRANE, DECEASED, *v.* PETER FISHER.

(1 Cr. M. & R. 809—818; S. C. 5 Tyrwh. 496.)

A policy of insurance contained a warranty "not to sail for British North America after the 15th of August." The vessel, on the morning of the 15th of August, was cleared at the Custom-house of Dublin, and ready for sea. She was then lying in the Custom-house Dock, which opens into the river Liffey, which forms part of Dublin harbour. She was afterwards, on the same day, hauled out of dock and warped down the river Liffey about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to Quebec, in North America. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for Quebec on the 15th of August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty: Held, that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty not to sail for British North America after that day, had been complied with.

THIS was an action of assumpsit upon a policy of assurance

[*810] upon the ship *Cyclops*, to recover the sum of 50*l.*, *being the amount of the defendant's subscription to the policy. At the

first trial before Denman, Ch. J., at the Lancaster Summer Assizes, 1833, a verdict was found for the plaintiff, subject to the opinion of the Court of Exchequer upon the following case:

On the 26th of February, 1831, James Cockrane, the husband of the plaintiff, caused an insurance to be made on the ship *Cyclops*, of which he was the master, and a part-owner. The policy of assurance, which is of that date, states that John Dixon, therein described as agent, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause himself and them and every of them to be insured, lost or not lost, at and from and to any port or ports, place or places, whatsoever and wheresoever, in any trade, for the space of twelve calendar months, commencing on the 27th day of March, 1831, and ending on the 26th day of March, 1832, both days inclusive, in port, and at sea, at all times, and in all places, and in all services, upon any kind of goods and merchandize, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Cyclops*, whereof was master for that present voyage James Cockrane, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof was or should be named or called, beginning the adventure upon the said goods or merchandize from the loading thereof aboard the said ship at as above, upon the said ship, &c., and so should continue and endure during her abode there upon the said ship; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandize whatsoever, should be arrived at as aforesaid, upon the said ship, &c., and until she should have moored at anchor twenty-four hours in good safety, and upon the *goods and merchandize until the same should be there discharged [*811] and safely landed; and it should be lawful for the said ship, &c., in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to that insurance; the said ship, &c., goods and merchandize, &c., for so much as concerned the assured, by agreement between the assured and

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assurer in that policy, were and should be valued at 300*l.*, on ship valued at 1,800*l.*, on account of Captain James Cockrane, &c., &c. And, by a memorandum in the margin of the said policy, the said ship was warranted not to sail for British North America after the 15th day of August, 1831.

The *Cyclops* had arrived in Dublin Harbour, from Quebec, in British North America, about the 1st of August, 1831, and on the 10th of August was chartered on a voyage back to Quebec. The vessel was at that time lying in the Custom-house Dock, and great exertions were made by the master and crew to get her ready for sea on the 15th of August, on account of the warranty. On the morning of the 15th, the vessel was cleared at the Custom-house, and was in all respects ready for sea. She was then at the Custom-house Dock, which opens into the river Liffey, which is part of Dublin Harbour, having on each side of it quays, where goods are constantly landed and discharged; and at half-past two in the afternoon of the 15th of August, which was as soon as the tide permitted, she was hauled out of the dock into the river, for the purpose of proceeding on her voyage to Quebec. The wind blew strong from the E.S.E., which being right up the river, no sail was or could be hoisted, and it was manifestly impossible for her to get out of the harbour. She was warped down the river, about half a mile, when the tide had ebbed so much that she could not get any further, and, before low water, went aground, as is unavoidable in the Liffey. On the following day,

[*812] when the tide served, the wind continuing foul, she was *warped further down the river, when she again took the ground from the falling of the tide, at a place being still ten miles from the mouth of the harbour, and remained until the tide rose on the following day, the 17th, the wind still blowing strong from the E.S.E., and it being impossible to set or use the sails with any advantage, or to proceed to sea with the wind in that direction. Vessels cannot be warped below a place called the Pigeon-house, which is about seven miles from the mouth of the harbour. On the 17th, the wind changed to the N.N.W., when they immediately set their sails, and proceeded to sea, and arrived safely at Quebec. The vessel was lost on her homeward voyage from Quebec in December, 1831, by the perils of the seas. The master and crew

fully intended to sail for Quebec on the 15th of August, if it had been possible, and did all they could, and used every means and exertion to do so, and got the vessel out of dock, and warped her down the river as far as the depth of water enabled them, as before stated.

This case was argued in Easter Term, 1834 (1), when it was ordered by the Court of Exchequer that the cause should go down to a new trial, upon the question whether the master, on the 15th of August, by hauling out of dock, and warping down the river, intended to place himself in a more favourable situation for the prosecution of the voyage, or merely and solely to comply with the terms of the warranty. The cause was accordingly again tried before Gurney, B., at the Lancaster Summer Assizes, 1834, when, in addition to the facts stated in the former case, the jury found that the master and crew, by hauling out of dock and warping down the river, intended to put themselves in a better situation for the prosecution of the said voyage, and not merely and solely to fulfil the warranty, but that at the time when the said vessel quitted the dock, they knew it was impossible to get to sea that day. Upon *this verdict judgment was given [*813] for the plaintiff in the Court below, and a writ of error was afterwards brought upon that judgment. The points stated for argument on the part of the plaintiff in error were, that the *Cyclops* did sail for Quebec after the 15th of August, and consequently that the warranty was not complied with; that hauling the vessel out of dock and warping her half a mile down the river on the 15th, when the captain knew it was impossible to proceed to sea, was not a sailing within the meaning of the warranty; for the defendant in error, that the going out of the dock, and proceeding down the river as stated in the special verdict, was a sailing on the 15th of August within the terms of the warranty.

(1) See 2 Cr. & M. 581. [The effect of the decision there was that if, at the time of moving the vessel, the captain was proceeding down the river with the *bonâ fide* intention of placing her in a more favourable position with regard to the prosecution of her voyage, there was a compliance with the warranty; but if he moved *merely* to comply with the letter of the warranty, this would not be a commencement of the voyage within the warranty.—R. C.]

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The case was now argued by

Cresswell, for the plaintiff in error:

The judgment in this case ought to be reversed, because the warranty in the policy not to sail for British North America after the 15th of August, 1831, was not fulfilled. In *De Hahn* v. *Hartley* (1), Lord MANSFIELD said, "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist, unless it be literally complied with." In this case it is submitted that the vessel did sail after the 15th, as she was in harbour after that time. It makes no difference that the party was ready to comply with the warranty, but was prevented by stress of weather from so doing: *Hore* v. *Whitmore* (2).

(DENMAN, Ch. J.: Taking it for granted that if she did not sail in due time, the warranty would not be complied with, whatever might be the cause of her not sailing, the question is, whether this was a sailing on the 15th of August.)

[*814] In *Hore* v. *Whitmore*, the policy was at *and from Jamaica to London, warranted to sail on or before the 26th of July, 1776. The vessel was ready to sail, and would have sailed, on the 25th, had she not been restrained by Sir Basil Keith, the then Governor of Jamaica. The Court were of opinion that a nonsuit ought to be entered. Sailing at a place is not sailing from the place. The first case as to that point is that of *Bond* v. *Nutt* (3). There the policy was at and from Jamaica to London, warranted to have sailed on or before the 1st of August, 1776. The vessel sailed completely laden from St. Anne's in Jamaica, on the 26th of July, for Bluefields in Jamaica, for convoy; and it was held that the warranty was satisfied, for that the vessel sailed from St. Anne's for England, *viâ* Bluefields, that being a proper course, otherwise it would have been a deviation. In that case Bluefields was not considered as the point of departure, but the vessel was considered to be no longer at Jamaica after she had left St. Anne's.

(1) 1 R. R. 221 (1 T. R. 343).
(2) 2 Cowp. 784.
(3) 2 Cowp. 601.

That case, therefore, is very distinguishable from the present. In *Moir* v. *The Royal Exchange Assurance Company* (1), it was held, that the warranty to "depart" before a certain day, did not mean merely to break ground, but fairly to set forward on the voyage. Suppose this had been a warranty to depart on or before the 15th of August, would this have been a compliance with the warranty according to that decision?

(LITTLEDALE, J.: The warranty in this case has nothing to do with the port of Dublin; the warranty is "not to sail for British North America after the 15th of August.")

In *Moir* v. *The Royal Exchange Assurance Company*, GIBBS, Ch. J., says, "To sail, is to sail on the voyage: to depart, must be to depart from some particular place." In *Thellusson* v. *Fergusson* (2), the policy was, "At and from Guadaloupe to Havre, warranted to sail on or before the 31st of December." The ship took in her complete lading and provisions for France, and all her clearances and papers, at a *port called Pointe à Pitre, in the island of [*815] Guadaloupe, and sailed from thence on the 24th of October for Basseterre, the residence of the French Governor, for the purpose of joining convoy, who would not permit her to depart until after the 31st December, there being no convoy until after that time; and it was held that the warranty was complied with. There the Court considered the sailing was from Pointe à Pitre, and BULLER, J., said, "There must be a lawful *bonâ fide* sailing, which I think there was in this case." In *Wright* v. *Shifner* (3), the policy was, "At and from Surinam and all or any of the West India islands (except Jamaica) to London, warranted to sail on or before the 1st of August, 1807." The vessel did sail from Surinam before the 1st of August, having taken in her homeward cargo for Tortola, one of the West India islands, to find convoy, where she arrived on the 4th of August. It was held that the warranty was in substance "to sail from her last loading port on or before the 1st of August," &c., and that she had done so. In none of the cases is it laid down that weighing anchor will be a compliance with a warranty to sail. In *Lang* v. *Anderdon* (4),

(1) 6 Taunt. 241; see 16 R. R. 331.
(2) 1 Doug. 361.
(3) 11 R. R. 263 (11 East, 515).
(4) 27 R. R. 412 (3 B. & C. 495).

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the policy was, "At and from Demerara to London, warranted to sail from Demerara on or before the 1st of August, 1823." The ship, with her cargo complete, sailed on the 1st of August beyond the mouth of the river; but the tide being low, she anchored under a shoal, which the ships cross without full cargo, and did not cross the shoal until the 3rd of August, when the pilot was discharged. It was there certainly held that the vessel sailed from Demerara on the 1st of August, within the meaning of the policy. There Lord TENTERDEN says (1): "It was contended that the words 'from Demerara' must have the same sense in every case, and must therefore be construed to mean 'sail from the outside of this shoal.' And if that part of the [*816] sea which lies at the outside of the shoal was, *in a popular or general sense, part of Demerara, this argument would prevail. But the fact appears to be otherwise." And again he says (2): "If the outside of this shoal had been part of the port of the ship's departure, or in any popular and general sense a part of Demerara, we should have thought the warranty not complied with." It is submitted that the warranty in the present case must be taken to mean from some port of departure; otherwise the warranty might attach upon this vessel at any time before her arrival at North America, even half way across the Atlantic. The warranty to sail means to sail from the loading port. This must mean sailing from the port of Dublin; but the vessel was safe in Dublin harbour on the 15th, and would have been protected there by the policy. She did, therefore, sail after that day. The mere warping down the river within the port of Dublin was not a compliance with the warranty. Even if she had put up sails in the Liffey, it would not have been a compliance with it. Suppose the warranty had been that the vessel should sail for British North America after the 15th of August, could it be said that, in this case, the warranty had not been complied with? Could it be said that, if in such a case they had warped the vessel down the river on the 15th, so as to be ready to set sail on the 16th or 17th, it would have been a breach of the warranty not to sail till after the 15th?

(1) 27 R. R. 415, 416 (3 B. & C. 499, 500).

(2) 27 R. R. 417 (3 B. & C. 501).

(LITTLEDALE, J.: Suppose the warranty had been that the vessel should not proceed on her voyage after the 15th of August, what would have been the meaning of such a warranty?)

That would have meant the same as if it had been not to depart after that time; and it is contended that this vessel did not "depart" until after the time specified in this warranty.

(LITTLEDALE, J.: You say that "for" means "from the port." Suppose that there had been a contract for the carriage of goods, and the vessel had been *lost in the river Liffey, on whom would the loss have fallen?) [*817]

On the master. If the contract were to carry goods from Dublin to Halifax, and there was an averment in the declaration that the goods were delivered to the master to carry, that would make him liable for them if subsequently lost.

(LITTLEDALE, J.: Would it not satisfy the meaning of the warranty here, then, that the vessel, with her full cargo, left her moorings, and proceeded down the river, for the purpose of commencing her voyage, on the 15th?

VAUGHAN, B.: Your argument is, that the word "for" and the word "from" mean the same thing.)

The word "for" renders it necessary that you should import the word "from" into the construction of this policy.

(LITTLEDALE, J.: May not sailing be at the port?)

In *Nelson* v. *Salvador* (1) it was held that a warranty to sail on or before a particular day, is not fulfilled, if the ship does not completely unmoor on that day, though she then has her cargo on board and is quite ready to sail, and is only prevented from so doing by stress of weather. Sailing at the place is not a sailing from the place. It is submitted that this vessel was at Dublin on and after the 15th of August.

(1) 31 R. R. 733 (Moo. & Mal. 309).

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Wightman, contrà, was stopped by the COURT.

LORD DENMAN, Ch. J., delivered the judgment of the COURT (after stating the case):

We have considered this question, both in the course of the very ingenious argument, and since counsel have withdrawn, and we are of opinion that this vessel must be taken, under the circumstances stated, to have been, on the 15th of August, in the prosecution of the voyage to North America; for we think that, in point of fact, she had commenced her voyage. In order to [*818] bring it within those cases in which it has been *held that the voyage had not commenced, and therefore that the policy did not attach, *Mr. Cresswell* has been obliged to assume that there was a particular *terminus à quo* contemplated in this policy; but when we look at the terms of it, we do not find that to be a term of the policy; but, being a time policy in general, the warranty is that she shall not sail for British North America after the 15th of August. If, therefore, she was in fact in the prosecution of any voyage from any place, which voyage is not proved to have commenced after the 15th of August, the warranty is not broken; and as the facts appear to us clearly to shew that she was in the prosecution of her voyage on the 15th of August, having made a movement, though in the river, for the purpose of proceeding to sea, and over the sea to North America, we think that the warranty has not been broken, and that the parties are entitled to recover. That makes the case of no very general application, and distinguishes it from all the cases that have been before the Courts on former occasions; for there is no particular point from which the voyage is contemplated as commencing. If that had been so, we should have been bound to consider the effect of the word "sailing" as contradistinguished from the word "departure," which we do not feel ourselves called upon to do on the present occasion. *Mr. Cresswell* has very properly abandoned the argument that the word "sailing" can be confined to the mere technical act of hoisting the sails, or any thing of that sort; the fair question is, as he has stated, whether, at the time of the loss, the voyage can be said to have commenced, and whether she was in truth proceeding on her voyage to North America. Now,

considering that there was no distinct point of commencement pointed out by this policy, we think that the vessel was in the prosecution of her voyage, and, consequently, within the protection of the policy.

Judgment affirmed.

BUCKWORTH *v.* SIMPSON AND BENNER (1).

(1 Cr. M. & R. 834—844; S. C. 5 Tyrwh. 344; 1 Gale, 38; 4 L. J. (N. S.) Ex. 104.)

A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent: Held, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract.

ASSUMPSIT. The first count of the declaration stated that, by an agreement dated 6th December, 1805, M. M. Buckworth, J. C. Reeding, and P. Alaboine, as trustees and testamentary guardians of the plaintiff, let a messuage, land, and premises, in the county of Lincoln, to one William Barber, to have and to hold, from the 6th day of April then next ensuing, for and during the term of one year from thence to be complete and ended, and thenceforward from year to year so long as all parties should think proper, either of them giving notice in writing to the other of his wish and intention to determine the said demise and tenancy, at least six months previous to the expiration of any one year, at the rent therein mentioned. The declaration then set out various undertakings by the said William Barber as to the management of the farm, and also a promise by him to keep the buildings and premises in complete repair, and to leave

(1) Distinguished in *Elliott* v. *Johnson* (1866) L. R. 2 Q. B. 120, 8 B. & S. 38, 36 L. J. Q. B. 44, where the landlord declined to recognise the assignee as tenant. Followed in *Cornish* v. *Stubbs* (1870) L. R. 5 C. P. 334, 39 L. J. C. P. 202. And see *Smith* v. *Egginton* (1875) L. R. 9 C. P. 145, 43 L. J. C. P. 140, where the jury found that no contract had been entered into by the assignee of the reversion with the lessee, and the Court supported this verdict.—R. C.

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them in good and tenantable repair at the end of the year when they should be quitted. It then alleged that the plaintiff came
[*835] of age 22nd December, 1815; and that, in *consideration that he had undertaken to let the premises to William Barber on the same terms as in the agreement made with his guardians, the said William Barber undertook to perform the same in all things on his behalf to be performed; that, on the 5th of January, 1821, the said William Barber made his will, and authorized and directed the defendants, together with one C. M. Edmunds, to continue his business in trust for certain persons and purposes, and died on the 2nd of March, 1821: that the two defendants proved the will, and that all the estate, right, title, and interest of the said William Barber, of, in, and to the said demised premises came by assignment to the defendants. It then further alleged, that, in consideration of the premises, and that the plaintiff would permit them to continue in possession of the demised premises as such assignees, and would omit to give them six months notice to quit at the proper time and according to the terms in the agreement mentioned, the defendants undertook to perform the agreement in all things to be performed on the behalf of the said William Barber. The declaration then averred that the said William Barber was tenant to the plaintiff until his death, and that after his death the defendants became and were the tenants, and continued as such tenants in possession to the plaintiff for a long space of time, to wit, until the 6th of April, 1833; and although the plaintiff suffered them to remain in possession, and omitted to give them six months' notice to quit at the proper time and according to the terms of the agreement, yet that the defendants, as such assignees as aforesaid, during the tenancy since the death of the said William Barber until the 6th April, 1833, did not keep the premises in repair, but delivered them up on that day in a bad and untenantable state of repair.

[There were other counts substantially similar, but with variations in the mode of stating the promise on the part of the defendants. The defendant Simpson pleaded the general issue.]

[836] The cause was tried before Gurney, B., at the Middlesex sittings after last Michaelmas Term, when it appeared that

Barber took the premises, which were situate in the county of Lincoln, under this agreement with the trustees, and had occupied them until his death; and the jury found on the evidence that the defendants Simpson and Benner had become the tenants of the plaintiff after the death of Barber; they also found that the dilapidations, according to the liability stated in the declaration, amounted to 34*l.*; but that, according to the liability of a tenant from year to year, they would amount to 5*l.* only. It was objected [*inter alia*] that there was *no evidence to [*837] shew any express agreement by the executors to hold the premises as alleged in the declaration. * * The learned Judge overruled the objections, but gave the defendant leave to move to enter a nonsuit or a verdict for the defendant, or to reduce the damages for the dilapidations from 34*l.* to 5*l.*

M. D. Hill, early in this Term, moved accordingly on all the points reserved. The Court granted a rule on the objection [*inter alia*] as to the proof of the contract alleged in the declaration.

Adams, Serjt., and *J. J. Williams*, now shewed cause:

* * With respect to the objection that the contract as alleged [839] in the declaration was not proved, it is submitted that the proof given was clearly sufficient. After the death of Barber, the original lessee, the defendants, his executors, entered into and continued in the occupation and enjoyment of the premises, and by so doing became tenants from year to year to the plaintiff upon the terms of the original tenancy; and the plaintiff not having given any notice to determine the tenancy, by refraining to do so, entered into an implied contract with the defendants, that they should become tenants on the terms of the original lease.

M. D. Hill and *Busby*, *contrà*:

* * The allegation in the declaration, that *the defendants [*841] became and were tenants to the plaintiff, was not supported by the proof. Although the defendants, being the executors of the original lessee, and having entered into the occupation of the

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premises on his death, might have been liable as assignees of the term, yet they are not charged as such in the declaration; but the allegation is, that, after the death of the lessee, the defendants became and were tenants in possession to the plaintiff, which is an averment of a personal contract having been entered into between them and the plaintiff, of which there was no proof. Where a tenancy from year to year, so long as the parties respectively please, is created, with a power to either party to determine the tenancy on giving notice to quit, and the tenant occupies for several years, it is not to be considered as a new demise from the expiration of each year, but as a continuance of the original taking. And accordingly, in *Birch* v. *Wright* (1), BULLER, J., says, "If a tenant from year to year hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years." And in *Rex* v. *Herstmonceaux* (2), the above passage is cited by Mr. Justice BAYLEY in delivering the judgment of the Court; and he adds, "This is on the principle that it is to be considered as a lease for so many years as the party shall occupy, unless in the meantime it shall be defeated by notice on the one side or the other." The defendants can only be personally responsible on the ground that the old lease has been determined, and a new contract has been entered into with them in express terms; but here there is no proof of any such contract. The defendants, by entering into the occupation of the premises on the death of their testator, and continuing in

[*842] such possession and occupation, *may be personally liable for use and occupation; but, as respects the particular stipulations and agreements contained in the original lease, the plaintiff can only be entitled to charge them in their representative character for any breach of those stipulations. The contract, as stated in the declaration, setting out a personal agreement by them to hold on the terms of the original lease, is not supported by proof.

LORD ABINGER, C. B. [after dealing with some other points raised in the case, said:]

[843] The declaration appears to me to be good. * * It states a

(1) 1 R. R. 223 (1 T. R. 378). (2) 7 B. & C. 551; 1 Man. & Ry. 426.

demise, which is to continue from year to year, unless the parties give notice to determine it; and then there is an allegation of the two facts, namely, the absence of the notice, and the continuance of the occupation, from which the promise which is alleged in the declaration may be inferred. It appears to me, therefore, that all that is necessary to be stated to raise that promise is set forth in the declaration, and therefore that this rule ought to be discharged.

PARKE, B.:

I am of the same opinion, and can add nothing to what has been urged by my Lord ABINGER on the subject of the stamp (1); but the other point is one of some importance. The declaration states the facts of the case correctly [the learned Baron here read the declaration]; and the promise alleged to have been made by the defendants was, that, in consideration of the plaintiff permitting them to continue in possession of the premises, and omitting to give notice according to the terms of the agreement, they would perform the agreement in all things to be performed on the behalf of Barber. The question is, whether this promise can be implied by law. I am of opinion that it is an implication of law, arising from the situation of the parties; and, if it were not so, great inconvenience would be felt, for this species of holding is very common. The nature of the demise is this, that the *party taking it is to hold on from year to year, so long as [*844] the parties shall please, with the power of notifying that dissent by giving a notice to quit. Suppose the land to descend to the heir-at-law, and he omits to signify his dissent to its continuance by giving notice to quit, the tenancy will continue. Again, if the tenant assigns, and the landlord do not give notice, the assignee must hold on the same terms. That contract the law will imply; otherwise the consequence would be, that no action could be brought on the original demise when there is an occupation from year to year, and the tenant assigns, for there is no contract whatever unless the original contract is transferred by operation of law. It is contended, however, that the executors of the original landlord, where he is dead, must bring an action against the personal representative of the original tenant. That would

(1) A point now obsolete.

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be very inconvenient; and therefore it is better to hold that a new relation of landlord and tenant arises by implication from the situation of the parties, where there is a continuance of the occupation, and an omission by those who represent the original parties to give notice to quit.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

1835.

Exch. of Pleas.

[849]

FOSTER AND ANOTHER *v.* PEARSON AND OTHERS. STEPHENS *v.* FOSTER AND ANOTHER (1).

(1 Cr. M. & R. 849—861; S. C. 5 Tyrwh. 255; 4 L. J. (N. S.) Ex. 120.)

W. and P., brokers in London, had in their possession bills of different customers to the amount of nearly 3,000*l.*, which had been left with them to raise money upon. They mixed these bills with others of their own to about the same amount, and deposited the whole with Fs., who were merchants and capitalists, for an advance of 3,000*l.* then made, and for a preceding advance made a few days before on a promise to bring bills. Evidence was given that it was usual and customary for bill-brokers in London to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customer who gave the bill-broker dominion over the bill.

In an action brought by Fs. on one of the bills against one of the customers who was a party to the bill, the Judge left it to the jury to say whether Fs., the plaintiffs, took the bills from W. and P., the bill-brokers, with due care and caution and in the ordinary course of business; and the jury, being of opinion that they had so taken the bills, found a verdict for the plaintiffs: Held, that the defendant, the customer, could not complain of such summing up, and that the Court would not disturb the verdict.

In another action arising out of the same transaction, an action of trover brought by one of the customers (who was himself also a bill-broker) against Fs. to recover the value of some of the bills,

(1) This case, and the case of *Haynes* v. *Foster*, reported at p. 755, *post*, must be read in the light of the recent decisions of the House of Lords in *Sheffield* v. *London Joint Stock Bank* (1888) 13 App. Cas. 333, 57 L. J. Ch. 986, and *London Joint Stock Bank* v. *Simmons*, '92, A. C. 201, 61 L. J. Ch. 723, 66 L. T. 625. It will be seen that in *Sheffield's* case Lord WATSON cites the decision of the Court of Exchequer in *Foster* v. *Pearson* as having applied the same principles as those upon which the decision of the House in *Sheffield's* case proceeded. The principle of the decision in *Haynes* v. *Foster* appears to be the same in point of law; but the two cases in the Exchequer, as well as the two cases in the House of Lords, illustrate the difficulties in determining the inference of fact.—R. C.

the Judge directed the jury that the principle laid down in *Haynes* v. *Foster*, that a bill-broker who receives a bill from a customer to procure it to be discounted, had no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and that still less had he a right to deposit such bill as a security or part security for money previously due from him, was to be taken by them as the general law; but that, notwithstanding such general rule of law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill-broker himself, had contracted with reference to that usage; and the jury having found for the defendants, the COURT refused to disturb the verdict.

A bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.

Semble, that the old established rule of law, "that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them *bonâ fide* for value," is not to be qualified by treating it as essential that the person so taking them should take them with due care and caution; but that the person taking them *bonâ fide* for value, has a good title, though he take them without care or caution except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction.

THESE two cases arose out of the same transaction which gave rise to the case of *Haynes* v. *Foster* (1).

Foster v. *Pearson* [assumpsit for bills of exchange] was tried at the London sittings after Trinity Term, 1832, before Bolland, B., when a verdict passed for Messrs. Fosters, the plaintiffs; and in Michaelmas Term ensuing, *John Williams*, for the defendants, obtained a rule for a new trial or for reduction of damages, on the grounds stated in the judgment of the Court.

Stephens v. *Foster* [an action of trover to recover value of certain bills of exchange], which also arose out of the same *transaction, was tried at the London sittings after Hilary Term, 1834, before Lord Lyndhurst, C. B., when a verdict passed for Messrs. Fosters, the defendants; and in Easter Term following, a rule for a new trial was obtained by *Bompas*, Serjt. [*850]

In Trinity Term last, *Wilde* and *Coleridge*, Serjts., and

(1) 2 Cr. & M. 237 (reported at p. 755, *post*).

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R. V. Richards, for the plaintiffs in *Foster* v. *Pearson*, were stopped by the COURT.

Erle and *Crompton*, for the defendants, were called on to support the rule; and the COURT, after hearing them, said that they would hear *Stephens* v. *Foster* before they pronounced their judgment.

In Michaelmas Term last, *Stephens* v. *Foster* came on to be heard, when *Wilde* and *Coleridge*, Serjts., and *R. V. Richards*, for the defendants, were stopped by the COURT; and,

Bompas, Serjt., *Crompton*, and *Dayman* were heard in support of the rule. The COURT said they would take time before pronouncing their decision, not from any doubt which they entertained, but for the purpose of delivering a deliberate judgment on a question of importance.

It is deemed unnecessary to state the facts and arguments, as they appear in the judgment.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the COURT:

These two cases were argued before Lord Lyndhurst, my brothers Bolland, Gurney, and myself, in Trinity and Michaelmas Terms last, and stood over, not on account of any doubt that we felt at the time, but in order that the judgment of the Court upon a subject of much importance might be pronounced with due deliberation.

[851] The facts of these cases, both of which, as well as that of *Haynes* v. *Foster*, arise out of the same transaction, may be stated in a few words. Messrs. Fosters, who are merchants, had large transactions with Wood and Poole, bill-brokers in the city of London. On Monday, the 14th November, 1831, Wood and Poole applied to them for an advance of 2,000*l*., offering bills as a security. Messrs. Fosters refused the bills offered, but advanced on that day the sum required, on an engagement by Wood and Poole to give bills to an adequate amount as a security, in a short time. On the 15th or 16th, a further sum of 550*l*. was lent on the same terms; and on Saturday, the 19th of

November, Wood and Poole, in consequence of Messrs. Fosters requiring them to fulfil their engagement, placed bills to the amount of 5,928*l.* 7*s.* as a security for the previous advance, and a further loan of 3,000*l.* then made by Messrs. Fosters to them. There was contradictory evidence as to the time of this transaction. The jury found it to have taken place on the Saturday; and, as my LORD CHIEF BARON was satisfied with that finding, we must assume that it took place on that day. Among the bills so handed to Messrs. Fosters were some to the amount of 502*l.* 18*s.*, the property of Mr. Pearson, the defendant in the last-named action (comprising one for 192*l.* drawn upon one Buck); and also a bill belonging to Mr. Stephens, the plaintiff in the first-named action, and other bills, the subject of the suit in *Haynes* v. *Foster*, formed a part of the same deposit. The whole of the bills belonging to others were less than 3,000*l.* in amount, and they had been previously placed by their respective proprietors in the hands of Wood and Poole, to be dealt with in their character of bill-brokers for the benefit of their employers. There was evidence on the trials of both the cases now under consideration, from numerous witnesses, that it was the usage of bill-brokers in the city of London, not merely to discount or pledge the bills of *each customer by themselves for an advance on those bills only, [*852] but also to pledge bills of various customers together for an advance upon all of one gross sum; or even to pledge them as a security for antecedent advances made to the bill-brokers; and it was deposed that such was the known course of dealing in that city.

In the first case, in which the principal defence was that Messrs. Fosters had taken all the bills of Mr. Pearson under such circumstances as did not entitle them to sue upon them, the learned Judge, my brother BOLLAND, left it to the jury to say whether the plaintiffs took the bills from Wood and Poole with due care and caution and in the ordinary course of business; and the jury were of opinion that they did. A rule *nisi* was moved for and obtained, on the ground that the verdict was against the evidence, and also on two other grounds—one, the receipt of improper evidence—the other, that the plaintiffs had, at all events, no title to the bill for 192*l.*, and that the verdict therefore ought to be reduced by that amount.

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In the second case, in which Mr. Stephens, who was himself a bill-broker, was the plaintiff, and sought to recover the amount of a bill from Messrs. Fosters, on the ground that they had acquired no title to it by the deposit by Wood and Poole, Lord LYNDHURST told the jury, that a bill-broker (being an agent for the purpose of getting bills discounted) has, by the general law, no right to mix a bill which he receives from one customer with bills which he receives from another, and pledge all for a gross sum: nor to pledge a bill which he receives for the purpose of discount, as a security for a past debt; but that, notwithstanding the general law, the parties might contract in any way they thought proper, and the customer give to the bill-broker more extended power. The defendant having in that case insisted that there was a known usage or course of dealing in the city of London, that, when a bill is put into the hands of a bill-broker, [*853] the customer gives him an *absolute dominion over the bill, to do with it as he likes, looking to the credit of the bill-broker only as the person responsible, either for the money, or for the return of the bill; his Lordship told the jury that they were to consider whether that usage was proved to their entire satisfaction to be universally prevalent in the city of London; and, if so, whether they thought that the plaintiff contracted with Wood and Poole according to that usage; that is, whether, in delivering the bill to them, he intended to give them an entire dominion over it, to do with it as they thought proper, looking to Messrs. Wood and Poole, and their responsibility, for their security, either to have the money from them or the bill back if they had not the money. The learned counsel for the defendants tendered a bill of exceptions to the summing up of the LORD CHIEF BARON, so far as it related to the general law, on which it became unnecessary to proceed, as the jury found a verdict for the defendants. A rule *nisi* was obtained on the part of the plaintiff for a new trial, on the ground that this verdict was against the evidence; and, on shewing cause against this and the rule in the other case, the questions in both were ably and elaborately argued.

With respect to the first action, the COURT has already given some intimation of its opinion upon two of the grounds upon which the rule *nisi* was obtained. It will now be best to dispose

of them altogether, and thus reduce the questions to one, which is nearly the same in both cases.

As to the receipt of improper evidence, it appears that the learned Judge admitted a note written by Wood and signed by Poole, addressed and sent to the defendant Pearson, and containing an account of the transaction similar to that which Wood gave on the trial; but it was admitted, not as proof of the facts therein stated, nor as confirmatory of Wood's testimony (for either of which purposes it would have been inadmissible), but only as *proof of notice of those facts to the defendant, in order to found [*854] an argument upon it, that he, by receiving a sum of money from Wood and Poole, and afterwards arresting them for another sum, had sanctioned and adopted their deposit of the bills in question, as stated in the letter: for this purpose the document was legally admissible, and therefore this objection cannot prevail.

Another of the grounds upon which the rule *nisi* was obtained, was, that the verdict ought to be reduced by the amount of the bill for 192*l.* on Buck, to which it was contended that the plaintiffs had at all events no title. This bill it appeared was part of those delivered to the plaintiffs on the 19th of November. On the following morning, Monday the 21st, this and all the other bills were delivered back by the plaintiffs to Messrs. Wood and Poole, in order that a list might be made by them. Wood withdrew the bill in question from the rest, and, without the consent of the plaintiffs, pledged it with Robarts & Co., and he informed the plaintiffs on the same day that he had substituted another bill for it. The plaintiffs complained, and Wood promised to get the bill back, and he did so from Messrs. Robarts & Co., by satisfying their claim, and he redelivered the bill to Messrs. Fosters on the Thursday after the stoppage of Wood and Poole.

It was argued for the defendant that the plaintiffs' title to the bill commenced on the re-delivery; and, if so, at that time he could not be a *bonâ fide* holder for value, as Wood and Poole had then become notoriously insolvent. But it is quite clear that the plaintiffs' title did not commence on the second, but on the first delivery of the bill to them; and, when it was returned by the plaintiffs to Wood for a special purpose, his possession was theirs; and though the act of pledging the bill by Wood with Robarts & Co.

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was a conversion by Wood, it was only a conversion by election. The plaintiffs had a right thereupon, either to consider Wood as a wrong-doer, and recover *damages from him for the wrong; or to waive the tort, and treat the property in the bill as still being their own. Messrs. Robarts & Co. might certainly have held the bill, if they, as no doubt they did, obtained the bill under such circumstances as gave them a right to hold it; but, as their title was at an end by the redelivery to Wood, that no longer interposed any difficulty in the way of the plaintiffs' title to the bill. On the removal of that difficulty the plaintiffs were remitted to their original rights.

[*855]

These objections being disposed of, I now come to the principal question in each case, viz. whether the verdict was against the evidence. In the case of *Foster* v. *Pearson* the learned Judge, as has been before stated, left it to the jury to decide whether the plaintiffs took the bills with due care and caution, and in the ordinary course of business; and the jury found that they did.

Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict had been in his favour, it would have become necessary to consider whether the learned Judge was correct in adopting the rule first laid down by the Court of Common Pleas in the case of *Snow* v. *Peacock* (1), and which was founded upon the *dicta*, rather than the decision, of the Judges of the King's Bench in the case of *Gill* v. *Cubitt* (2), more especially since the opinion of the latter Court has been so strongly intimated in the late cases of *Crook* v. *Jadis* (3), and *Backhouse* v. *Harrison* (4). The rule of law was long considered as being firmly established, that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bonâ fide* holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in *which care and caution in the taker of such securities has been treated as essential to the validity of his title besides and independently

[*856]

(1) 3 Bing. 406; 11 Moore, 286.
(2) 3 B. & C. 466; 5 Dowl. & Ry. 324.
(3) 5 B. & Ad. 909; 3 N. & M. 257.
(4) 5 B. & Ad. 1098; 3 N. & M. 188.

of honesty of purpose. It is unnecessary, however, to decide that question at present; when it arises, as it will probably do under the new rules of pleading, on the record itself, it will be proper that it should be considered and finally decided with due deliberation.

Assuming, then, that the direction of the learned Judge was proper, the objection is, that on the evidence it was not established that the transfer of the bills to the plaintiffs was made to them in the ordinary course of trade, and that they exercised due care and caution.

The argument for the defendants was founded on the authority of *Haynes* v. *Foster* (1), which case, it was contended, established this proposition as a rule of law—that a bill-broker who receives a bill merely for the purpose of getting it discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass; still less to deposit such bills as a security for money previously due from him. It was insisted that it was dangerous to permit this rule of the general law to be varied by proof of a custom, or, more properly speaking, an usage in a particular place, and that the usage set up by the plaintiffs was at variance with the relation of the parties, and therefore void; that it was either too large or too narrow; that, if it went the length of allowing the broker to pledge for his own prior debt, it was bad in point of law, as being inconsistent with his character of agent; and, if it did not go so far, it was not sufficient for the purposes of this case, and did not authorize the transactions in question. And it was further urged, that, if the usage was not invalid, at all events it was not proved by clear and satisfactory evidence.

In answer to this argument it is to be observed, that, so far as it relates to the power of a bill-broker to pledge the *bills of his [*857] customers for an antecedent debt of his own, it is beside the present case, that of *Foster* v. *Pearson*, for two reasons; first, because, although the deposit of all the bills was made for the double purpose of securing the past debt and the present advance, yet the amount of customers' bills pledged was less than the actual advance made. Therefore, assuming for the sake of

(1) 2 Cr. & M. 237 (p. 755, *post*).

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argument that the plaintiffs, who knew that Wood and Poole were bill-brokers, ought to have inquired which were customers' bills and which not, and that, having neglected to do so, they are to be held to be in the same situation as if they knew the real state of the facts, the result would be the same as if they had knowingly taken a pledge of bills the property of Wood and Poole to the amount of 4,000*l.*, and the property of their customers to the amount of 2,000*l.*, expressly to secure an old debt of Wood and Poole of 2,500*l.*, and a fresh advance of 3,000*l.*; and, on that supposition, there could not be any doubt but that they would have had a lien on all for their advance, and on Wood and Poole's own bills for the old debt. In such a case there would not have been any such fraud or illegality as would have vitiated the whole transaction with respect to the customers' bills, but the customers would have had a right jointly to redeem them on payment of the sum advanced only.

A second reason why it is unnecessary to decide in this case upon the validity of the usage for a bill-broker to pledge for his antecedent debt, is this, that, assuming the broker to have no such power between him and his employer, or as to third persons, who receive the bills with knowledge of all the facts, it by no means follows that in the present case Messrs. Fosters would not have a right to hold the bill; for, the question here is, whether they took the bills with due care and caution and in the ordinary course of business. The jury have found that they did, and can we say that they did not, even though we should think that
[*858] the broker had not a right so to *pledge the customers' bills? Messrs. Fosters might have supposed that Wood and Poole were acting rightly in pledging their customers' bills, even if they knew them to be such, for their prior advance, because Wood and Poole might have given to those very customers a part of the 2,500*l.*, the amount of that prior advance. Were Messrs. Fosters, as men of business using due care and caution, bound to ask Wood and Poole, not only whether any and which were the customers' bills, but whether they had made any advances out of the loan to them or otherwise, and to what amount, on any of those bills? Whether such a course ought to have been pursued by men of business was entirely a question for the jury.

The validity of the alleged usage, so far as it relates to the power to pledge for an antecedent debt, being therefore out of the question in this case, it remains to consider whether there is any objection to the verdict on the ground that the residue of the alleged usage was either invalid in point of law or defectively proved.

The judgment in the case of *Haynes* v. *Foster* is treated in the argument for the defendant as establishing that it is a sort of legal incident to the character of a bill-broker, that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connexion with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill-broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, a bill-broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; what is the *nature of its powers and duties in any instance is a [*859] question of fact, and is to be determined by the usage and course of dealing in the particular place. A great body of evidence was adduced in the present case to prove that it was the course of dealing in the city of London for bill-brokers to raise money for their employers, by pledging the bills of different proprietors for one entire advance; and there is nothing unreasonable in such a practice. On the one hand, it is attended with inconvenience, because one proprietor may have to answer for the nonpayment of another's bill; but, on the other hand, it may give facilities to the raising of money on negotiable paper, for it may well happen that a great capitalist would advance money in this way who would not discount each particular bill; but at any rate it is found to be the ordinary usage and practice so to dispose of bills; and the question in the case being, whether Messrs. Fosters acted with due care and caution and in the ordinary course of business in receiving these bills, how can

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it be said that the jury were wrong in finding what they did, when there was such a body of evidence to shew that they acted precisely in the same way that bankers and other merchants of respectability were in the habit of acting, men who must be presumed to conduct their affairs with ordinary care and with due circumspection? What greater caution can be required from any man of business? What different conduct can be expected than that which other men of business, of character, and of intelligence, employ in similar transactions? What better criterion can be found of ordinary care, than that measure of care ordinarily used by other persons in the same department of trade similarly situated?

This was a question entirely for the consideration of the jury. They have decided upon it; and we cannot say their decision is wrong. It is true that it is at variance with the conclusion to [*860] which the jury came in the case of **Haynes* v. *Foster*; but in that case there was no such evidence of the ordinary course of dealing as there was in this.

It remains to consider whether there is any difference between the case of *Foster* v. *Pearson* and that of *Stephens* v. *Foster*.

The question was not left to the jury in the same way in the latter as in the former case. It was put on the ground that the jury might infer from the usage proved, and its general notoriety, that the customer employed the bill-brokers with reference to that usage, and therefore authorized them to deal with the bills as they in fact did; and the jury were satisfied with the evidence, and did draw the inference that Messrs. Wood and Poole had authority as between them and their employers to pledge the bills in the manner in which it appears that they did. It was argued for the plaintiffs, that the usage given in evidence was not sufficient to prove such a right as between bailor and bailee, and more particularly to deposit bills of the bailor as security for an antecedent debt due from the bailee. This was the principal objection, and it may be removed from this case as well as from the other, for it has been shewn to be unnecessary to the title of Messrs. Fosters to establish the usage to that extent; because an advance was made at the time to an amount exceeding that of the customers' bills. So far as the usage tends to

shew an authority to pledge bills in a mass, and not separately, its reasonableness is hardly disputed; and that question has also been already disposed of. It was proved to be the prevailing practice, and it is enough for us to say the jury were warranted in drawing the inference which they did, especially as the plaintiff was himself a bill-broker.

Indeed, the question in this case was left to the jury in a manner which gives the plaintiff no right to complain; if the verdict had been the other way, the defendants might possibly have done so with success; for, whether the plaintiff actually or by implication authorized the brokers *so to deal with the bills [*861] or not, still, if the defendants took the bills for value, and honestly and with due care and caution, in the ordinary course of business (and even that is probably an unnecessary qualification), they would have a good title to hold them; and less evidence of the practice of men of business would most likely have satisfied the jury if this had been the question left to them, than was necessary to raise the inference of an authority as between principal and agent. We are therefore of opinion that both these rules must be discharged.

Rules discharged.

HAYNES *v.* FOSTER (1).

1833.

(2 Crompton & Meeson, 237—240; 4 Tyrwh. 65; 3 L. J. (N. S.) Ex. 153.)

Exch. of Pleas.

A bill broker, who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of monies to himself; still less has he a right to deposit bills which are received merely for the purpose of discount as a security or part security for money previously due from him. If the pledgee of bills under such circumstances receive them from the bill broker, with knowledge or reasonable ground of suspicion, he cannot hold them as against the customer.

[2 Cr. & M. 237]

DEBT for money had and received. Plea, the general issue.

At the trial before Gurney, B., at the London sittings after Trinity Term, 1832, the plaintiff had a verdict. Much contradictory evidence was given at the trial, but the state of facts upon which the Court gave their judgment being fully stated in the judgment, it is unnecessary to detail them here.

(1) See note, p. 744, *supra*.—R. C.

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In the Michaelmas Term following, *Wilde*, Serjt., obtained a rule to set aside the verdict, and for a new trial; against which, cause was shewn in Hilary and Easter Terms, 1833, by—

John Williams, and *Crompton*, for the plaintiff.

Wilde, Serjt., *Coleridge*, Serjt., and *R. V. Richards*, were heard in support of the rule.

[238] The judgment of the COURT was now delivered by—

LORD LYNDHURST, C. B.:

Messrs. Wood and Poole carried on the business of bill brokers in the city of London. The bills in question were placed in their hands by the plaintiff, in order that they might, in their character of bill brokers, procure them to be discounted. Messrs. Wood and Poole had had extensive transactions in business with the defendants. They owed the defendants a balance of some amount, and, in the early part of the week in which the bills in question were delivered to the defendants, Messrs. Wood and Poole had applied to them for assistance, and Messrs. Fosters had lent them a considerable sum of money upon an undertaking that bills should be deposited in their hands to secure them for their advances. Some bills were on that occasion produced by Wood and Poole, but the defendants excepted to them; and it was arranged, that, in the course of the week, further bills to the satisfaction of Messrs. Fosters should be delivered. Application was made to Wood and Poole by one of the partners on the Saturday, requiring them to fulfil their undertaking; and, in the course of that day, Wood delivered to the defendants bills to the amount of 6,000*l.* and upwards, including the bills in question, and the defendants advanced them a further sum of 3,000*l.* The bills on the Monday were re-delivered to Messrs. Wood and Poole, in order they might take the particulars of them, and they remained in their possession during that day; they were returned in the evening to the defendants, and within a day or two afterwards, Messrs. Wood and Poole stopped payment.

The question is, whether, under these circumstances, Messrs. Foster & Co. can retain the bills against the plaintiff; and the

first point to be considered is, what was the duty of the bill brokers in this case.

We are of opinion that, according to the general law, *a bill broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass as a security for an advance of money; for the consequence of this would in many cases be, that the bill of one customer might be detained for a loss arising from the dishonoured bills of other customers. Still less has the bill broker, as we think, a right to deposit bills, which are received merely for the purpose of discount, as a security or part security for money previously due from him. We are of opinion, therefore, in this case, that Wood and Poole acted inconsistently with their duty to the plaintiff, by depositing the bills in question, with a large amount of other bills belonging to other persons, for an advance of money, and as a security in part for previous advances. [*239]

The next question is, whether this affects the claim of the defendants, Messrs. Fosters. In general, a person who advances money on the deposit of bills has by law a lien on them against the owner, although the party making the deposit may have had no authority to pledge them. This is clearly established; but the rule is subject, we think, to this condition, viz., that the party with whom the bills are pledged is ignorant of the limited authority of the person making the pledge, and has no reason to suspect that such authority is of a restricted character. The question, therefore, in the present case, resolves itself into this—Did Messrs. Fosters know that these bills were received from the customers of Messrs. Wood and Poole for the purpose of discount, or had they good reason to believe it? Because, if they either knew, or had good cause to suspect it—in the one case, they had no right to receive the bills as a security; and in the other case, they had no right to receive them without previous inquiry; and if they chose to take the bills by way of deposit, without making such inquiry, they took them at their peril, and, not having exercised due caution, they must abide by the result.

Now, what was the relative situation of these parties? Messrs. Wood and Poole had carried on business as bill brokers in the city [240]

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of London for a considerable time, they had in fact been assisted in commencing business by Messrs. Foster & Co.; they were in no other trade. In the course of their business they had had money and bill transactions to a considerable extent with Messrs. Foster & Co. These circumstances lead us to the conclusion that Messrs. Foster & Co. must have had good reason at least to suspect that a portion of the bills to so large an amount as 6,000*l.* must have been deposited with Wood and Poole by their customers for the purpose of discount. They, however, made no inquiry, but received the bills as a security, partly for a past advance, and in part for an advance then made. We agree with the jury, that due caution was not exercised in this transaction. We think that Messrs. Foster & Co. took the bills at their peril, and that they cannot hold them against the plaintiff. The verdict therefore must stand for the plaintiff.

Rule discharged.

1835.

RUSSELL *v.* COWLEY AND ANOTHER.

Exch. of Pleas.

(1 Cr. M. & R. 864—877; 1 Carp. P. C. 532, 557.)

[1 Cr. M. & R. 864]

A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril: Held, that the Court, taking the whole of the latter specification together, would infer that the maundril was not to be used, and that the latter patent was good.

CASE for the infringement of a patent. Plea, the general issue. At the trial before Lord Lyndhurst, at the sittings after Hilary Term, 1834, it appeared that in the year 1825, one Cornelius Whitehouse took out a patent for certain improvements in manufacturing tubes for gas and other purposes, and in

[*865]

the course of the same year *assigned the patent to the plaintiff. A great mass of evidence was given on both sides upon the facts of infringement, but upon this point ultimately no question arose. On the close of the defendants' case, they put in evidence a patent granted in the year 1812, to Henry James and John Jones, for "an improvement in the manufacture of barrels of all descriptions of fire-arms and artillery;" which, it was contended, included the principle of the plaintiff's patent. The

question turning upon the construction of the two specifications, they are both stated. That of Whitehouse, assigned to the plaintiff, was in the following terms—

"To all to whom these presents shall come: I, Cornelius Whitehouse, of Wednesbury, in the county of Stafford, whitesmith, send greeting: Whereas his present most excellent Majesty, King George the Fourth, by his letters patent under the great seal of Great Britain, bearing date at Westminster, the twenty-sixth day of February, in the sixth year of his reign, did for himself, his heirs, and successors, give and grant unto me, the said Cornelius Whitehouse, his especial licence, that I the said Cornelius Whitehouse, my executors, administrators, and assigns, or such others as I, the said Cornelius Whitehouse, my executors, administrators, and assigns should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend within England, Wales, and the town of Berwick upon Tweed, my invention of 'certain improvements in manufacturing tubes for gas and other purposes:' in which said letters patent there is contained a proviso obliging me, the said Cornelius Whitehouse, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention, and in what manner the same is to be performed, and to cause the same to be inrolled in his Majesty's *High Court of Chancery within six calendar months [*866] next and immediately after the date of the said in part recited letters patent, as in and by the same, reference being thereunto had, will more fully and at large appear. Now know ye, that, in compliance with the said proviso, I, the said Cornelius Whitehouse, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are particularly described and ascertained in and by the drawing hereunto annexed, and the following description thereof, that is to say: My improvements in manufacturing tubes for gas and other purposes consist in heating the iron of which such tubes are to be made, in a blast furnace, and, immediately after withdrawing them from the furnace, passing them through swages or other such like instruments in manner following: I prepare a

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piece of flat iron, commonly called plough plate iron, of a suitable substance and width, according to the intended calibre of the tube; this piece of flat iron plate is prepared for welding by being bent up on the sides, or, as it is commonly called, turned over, the edges meeting or nearly so, and the piece assuming the form of a long cylindrical tube. This tube is then put into a hollow fire heated by a blast, and when the iron is upon the point of fusion it is to be drawn out of the furnace by means of a chain attached to a draw-bench, and passed through a pair of dies, of the size required, by which means the edges of the iron will become welded together. The apparatus which I employ for this purpose is shewn in the drawing at fig. 1, which is a side view of the furnace *a*, and of the draw-bench *b*, with its spur wheel *c*, which may be put in operation by a hand winch, or by attaching its axle to the moving part of a steam-engine; *d* is a screw-press, in which the dies are placed for swaging and uniting the edges of the iron tube *e*, as it passes through. A front view of this screw-press with its dies is shewn at fig. 2, and one of the

[*867]

dies removed from *the press is shewn at fig. 3. The iron tube *e*, having been heated to the point of fusion in the blast furnace *a*, is drawn out by the chain of the draw-bench, and the screw of the press *d* being turned so as to bring the dies to their proper point of bearing, the two edges of the iron become pressed together, and a perfect welding of the tube is effected. The screw-clamp or other fastening, *f*, by which the end of the tube is held and attached to the chain, is now opened, and the tube removed: the reverse end of the tube is then grasped by it, and that part which has not been welded is introduced into the furnace, and after being heated is drawn through the dies and welded in the manner above described. The process of welding these tubes may be performed without the screw-press and dies above described. A pair of pincers, as shewn at fig. 4, may be employed instead, having a hole for the tube to pass through similar to the dies; one arm and chap of these pincers is shewn at fig. 5, for the purpose of exhibiting the conical figure of the hole which the tube is to pass through. As the tube *e* is drawing out of the furnace by the chain of the draw-bench, a workman brings the pincers and takes hold of the tube, resting the pincers

against the standard *d* as a steadying place; and as the tube passes through the hole of the pincers, the welding of the edges of the iron is effected. I have thus described the modes which I have employed and found fully to answer the purpose in welding tubes of iron; but I do not confine myself to the employment of this precise construction of apparatus, as several variations may be made without deviating from the principles of my invention, which is to heat the previously prepared tubes of iron to a welding heat, that is, nearly to the point of fusion, and then, after withdrawing them from the fire, to pass them between dies or through holes, by which the edges of the heated iron may be pressed together and the joint firmly welded. The advantages of this tube compared with those *made in the ordinary way are [*868] these: the iron is considerably improved by the operation of the hollow fire, the heat being generally diffused; the length of the pieces of tube thus made is likewise a great advantage, as by these means they may be made from two to eight feet long in one piece; whereas, by the old modes, the length of tubes cannot exceed four feet without considerable difficulty, and consequently an increased expense. These tubes are likewise capable of resisting greater pressure, from the uniformity of the heat throughout at which they have been welded; and, lastly, both their internal and external surfaces are rendered smooth and greatly resembling drawn lead pipes. In witness," &c.

James and Jones's specification ran as follows:

"To all to whom these presents shall come: We, Henry James and John Jones, of Birmingham, in the county of Warwick, send greeting. Whereas his most excellent Majesty King George the Third did, by his letters patent under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the 26th day of July, in the fifty-first year of his reign, give and grant unto us, the said Henry James and John Jones, our executors, administrators, and assigns, his special licence, full power, sole privilege and authority, that we the said Henry James and John Jones, our executors, administrators, and assigns, during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, within England, Wales, and the town of Berwick upon

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Tweed, and also in his Majesty's colonies and plantations abroad, our invention of 'an improvement in the manufacture of barrels of all description of fire-arms and artillery,' in which said letters patent there is contained a proviso, that if we the said Henry James and John Jones, or one of us, shall not particularly describe and ascertain the nature of our said *invention, and in what manner the same is to be performed, by an instrument in writing under our hands and seals, or the hand and seal of one of us, and cause the same to be inrolled in his Majesty's High Court of Chancery, within six calendar months next and immediately after the date of the said letters patent, that then the said letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, as in and by the said letters patent, relation being thereunto had, may more fully and at large appear. Now know ye, that in compliance with the said proviso, we the said Henry James and John Jones do hereby declare that our said invention is described, ascertained, and performed in manner following, that is to say: Take a skelp or piece of iron adapted for the purpose of making barrels for muskets or any other fire-arms; let it be turned or brought into a form proper for welding; heat it in an air or reverberatory furnace, or a hollow fire, or any other fire proper for the purpose, and which is to be so constructed as to give a regular welding heat to one half of the barrel at a time, or to any other given proportion desired; when it is heated to a proper welding heat, the maundril or stamp is to be expeditiously put into it, and the barrel placed or held on an anvil or swage grooved to fit the form of it, upon which several hammers, worked by steam, water, or any other mechanical power, are caused to fall or strike with great velocity upon such portion of the barrel desired to be welded; and when sufficiently welded and hammered, which would be well known to a person accustomed to weld gun barrels, the stamp or maundril is to be quickly struck out, before the hot barrel has time to contract too close or adhere upon it, to prevent the stamp or maundril from being got out while the barrel is hot: but should that be the case, the barrel must be left until it is cold, when it should be lightly hammered, which will cause the barrel to expand a

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little round the stamp or maundril, *and loosen it sufficiently to come out; and for the purpose the better to facilitate the getting out of the stamp or maundril from so large a portion of the barrel welded at a time, let the stamp or maundril be made of as regular smooth and perfectly round form as possible, and of a gradual gentle taper from heel to point. The number, weight, and velocity of the hammers may be varied according to the description of barrel desired; but for musket barrels, which are generally from three feet three inches to three feet six inches long, when it is wished to weld them at two heats, we recommend six hammers: the hammers should be ranged in a straight line, side by side, as true and as close together as they will work free, and covering a space in length of about twenty inches, and in width about four or five inches. They should work very true upon the swage or anvil, and rise and fall together, or nearly together, or alternately; the faces of the hammers may be either even or hollowed out a little in those parts which fall upon the barrel when welding. The hammers may be fixed, connected, and worked by machinery, according to any of the well-known methods of working hammers. Or, instead of welding the barrels by hammers as before described, they may be welded between a pair of rollers grooved to fit the form of the barrel, the rollers having either an alternate or rotatory motion, and worked by steam, water, or other mechanical power; but we consider the hammers to be the best method, as making the soundest and most perfect barrels: in either way, care should be taken to have the edges, seams, or points of the skelp or piece of iron placed true together, to give the iron a regular welding heat, and to put in and take out the stamp or maundril as quick as possible. The advantages of our aforesaid method of heating barrels in a hollow fire, or an air or reverberatory furnace, and welding them by hammers or rollers worked by machinery, is, that *we are enabled to make them much sounder, and more accurately and expeditiously than they are at present made: we prevent cinders, ashes, or dirt, from getting into the inside of the barrels, or between the welding seam or joint, which now often happens, and which causes the barrels to bore black, or otherwise prove unsound. Our invention also extends

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to the turning of all kinds and descriptions of barrels for muskets or other fire-arms, in an improved turning machine or lathe, with cutters or sharp steel instruments or tools, worked by machinery with steam, water, or any other mechanical power. The turning machine or lathe is constructed and worked as follows."

The specification then proceeds to set out a new mode of turning gun barrels claimed by the patentees, but not material to the consideration of the question of welding.

The jury having found a verdict for the plaintiff, the learned Judge gave the defendants leave to move to set aside the verdict and enter a nonsuit; in pursuance of which a rule to that effect was obtained in Easter Term, which came on to be argued in Michaelmas Term, 1834, when

Sir James Scarlett, *Rotch*, and *Follett*, shewed cause, and argued, at considerable length, the question of infringement, but ultimately the judgment of the COURT did not turn upon that point:

The matter for the consideration of the Court is this, whether James and Jones's patent, upon mere inspection, without a single witness, or any evidence whatever tendered in explanation of it, necessarily shews that the invention claimed by the plaintiff is not new. It is contended that the plaintiff's method of welding, by passing the tubes through a die, is the same as that of welding by rollers, described in James and Jones's specification: [*872] "or instead of welding the barrels by hammers *as before described, they may be welded between a pair of rollers grooved to fit the form of the barrel, the rollers having either an alternate or rotatory motion, and worked by steam, water, or other mechanical power; but we consider the hammers to be the best method." Shall the plaintiff's patent be defeated by what is a mere speculation, as to the possibility of pipes being welded by passing them through a roller? Suppose that in some old treatise on the manufacture of iron a suggestion were found that pipes might by possibility be welded by passing them through rollers, could it be contended that this would invalidate the patent? and yet nothing more is done in James and Jones's

specification. To substantiate the defence the rollers themselves ought to have been produced at the trial, and shewn to be the same in effect and power as the die. There is a great difference between the operation of the roller and the die. In using the roller, all parts of the tube have not an equal pressure at the same time; and the larger the tube, the greater the imperfection in its manufacture. The use of the maundril, also, is another important distinction between the two methods. It was proved that the maundril could not be used in the manufacture of a tube of any length, and the reason is that the instrument is obliged to be withdrawn while the tube is still very hot. It is impossible, consequently, to manufacture tubes with the maundril of greater length than a fowling-piece. In another particular, also, the die differs from the roller. The dies have a conical or bell mouth to admit the tube being of larger dimensions when it goes in than when it comes out. This cannot be effected by means of rollers. The pipe in passing through the die assumes a diminished form. This is an essential part of the principle of the plaintiff's patent, and the operation of the roller in revolution cannot embrace any part of that principle.

(LORD LYNDHURST, C. B.: Suppose a patent had been taken out for welding tubes by means of rollers, *could there not have been another for effecting that object by means of fixed dies?) [*873]

Certainly there could.

(PARKE, B.: The plaintiff's patent is for drawing tubes through fixed dies without the use of the maundril. If so, it is not the same as James and Jones's patent.

LORD LYNDHURST, C. B.: It is the same as if the specification had stated that the operation was to be effected without the assistance of a maundril. If the words "without a maundril" had been inserted in the specification, would not that have shewn the invention to be perfectly new?)

The *Attorney-General*, *Platt*, and *Richards*, *contrà*:

The specification claims too much, and the plaintiff seeks to appropriate to himself what is not a new invention. The real

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question is this, is the invention claimed that of welding tubes by means of circular pressure? It is perfectly immaterial whether that pressure is applied by drawing an instrument through the tube, or the tube through an instrument. At the trial it was assumed that the two modes were the same in effect, and the question made was whether there had been an infringement. The defendant's mode of welding was that by means of rollers. That circular pressure in general is the principle claimed by the plaintiff appears from the following part of the specification: "I do not confine myself to the employment of this precise construction of apparatus, as several variations may be made, without deviating from the principles of my invention, which is to heat the previously prepared tubes of iron to a welding heat, that is, nearly to the point of fusion, and then, after withdrawing them from the fire, to pass them between dies or through holes, by which the edges of the heated iron may be pressed together, and the joint firmly welded."

(LORD LYNDHURST, C. B.: "Them" means the prepared tubes of iron, that is, tubes without a maundril.)

The operation, as described, depends upon the drawing of the [*874] tube, whether there be a maundril or *not. In the operation of the rollers it is the same as if the tube passed through a hole, and this specification in fact claims the system of the roller, which produces a hole through which the tube is passed. According to the specification, what is there to prevent the plaintiff from using the roller to effect the welding instead of the die?

The principle, then, claimed by the specification being that of welding by means of concentric pressure, is the same as that of James and Jones's patent. Their specification states that "instead of welding the barrels by hammers as before described, they may be welded between a pair of rollers grooved to fit the form of the barrel, the rollers having either an alternate or rotatory motion, worked, &c."

(LORD LYNDHURST, C. B.: The material point for you to establish is that James and Jones's patent included welding

without the use of the maundril. If the maundril is inserted, where is the difference between producing it by pressure and producing it by the hammer?)

James and Jones, in their specification, shew a method according to which, by passing the tube through a hole, the welding is complete, and, according to the plaintiff's own evidence, the effect of the roller and of the die is the same in producing the welding.

(PARKE, B.: The question is, whether the plaintiff claims the invention of welding without the assistance of any internal substance. It is quite clear to me that any man of intelligence, reading the specification, must see that the patentee claims to effect his invention without the application of any internal substance, and the only point is, whether the general words at the end of the specification include too much.

LORD LYNDHURST, C. B.: It is obvious that the patent excludes the use of the maundril. This appears from the latter part of the specification, in which the effects of the new invention are stated. The greater length of the tubes shews that the maundril is not intended to be used. The particular *description excludes [*875] the use of it, and the general description, taking it in connexion with the effects stated, likewise excludes it.)

After all, the question amounts to this, whether James and Jones's patent does not come within the large principle claimed by the plaintiff's specification. Suppose James and Jones's patent had been posterior to that of the plaintiff, would it not have been contended to be an infringement?

LORD LYNDHURST, C. B.:

Without any question this invention is ingenious and useful; and the point upon which the validity of the patent depends is, whether it claims to manufacture the pipes without the use of the maundril, in which case it would be a new invention. Does it claim to make the pipes without a beating or pressure on any hard substance? It is said, on behalf of the defendants, that

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the specification includes too much, and that the principle of the invention claimed is in fact not new; but it appears to me, as I have already stated, that the specification claims the invention of welding tubes without the use of the maundril. As I read the specification, the maundril is excluded both in the particular and in the general description. The particular description states that "as the tube is drawing out of the furnace, a workman brings the pincers and takes hold of it, resting the pincers against the standard as a steadying place; and, as the tube passes through the hole of the pincers, the welding of the edges of the iron is effected." Here, then, the manufacture of the tube is complete, and this description precludes the idea that internal support is afforded. The distinction between this and the former mode of manufacture is, that according to the former mode, there was some substance inserted in the tube to support the external pressure. Then is the meaning of this clause altered by the general description at the conclusion of the specification? The patentee there states his principle to be to
[*876] *heat "the previously prepared tubes." He then describes the effects, and in pointing out the advantages of his invention, as in the length of the tubes, &c., those advantages appear to be inconsistent with the use of the maundril. I think, therefore, that the plaintiff's patent is good, as being limited to the welding of tubes without the use of internal support. He has not extended his claim to any thing which is not in fact his own invention.

PARKE, B.:

I am of the same opinion. It appeared to me throughout the argument that this is merely a question of construction, arising upon the specification. If, as contended by the *Attorney-General*, the patent claims the invention of welding by circular pressure, then it is clearly void; but if the plaintiff only claims a limited and particular mode of effecting that object, then it is certainly new. It appeared to me, on reading the specification, that it only claimed the limited mode, viz. that of welding pipes, by passing them through a circular die without the application of the maundril. In the construction of a patent, the Court is

bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril. I am happy that the Court is enabled to come to this conclusion, so as to secure to the plaintiff the fruits of an ingenious and useful invention.

ALDERSON, B.:

I also concur in the opinions which have been delivered. The plaintiff's claim is confined to the invention of drawing a hollow tube through a die for the purpose of welding it. The description of the mode of manufacture commences by stating the heating of the iron, from which the tubes are to be made, in a furnace. The iron plate is prepared for welding by being bent upon the sides, the edges meeting or nearly so, and the tube is *then put into a hollow fire, &c. Now, in this statement there [*877] is nothing whatever said of the introduction of a maundril, while in James and Jones's patent, on the contrary, it is expressly said that when the tube is heated to a proper welding heat, the maundril or stamp is to be expeditiously put into it. The question is, whether a person of due experience, on reading the plaintiff's specification, would not know that the claim was intended to be confined to the making of tubes without the use of the maundril. We ought not to be astute to deprive persons of the benefits to be derived from ingenious and new inventions. I concur in the construction put upon the specification by the LORD CHIEF BARON and my brother PARKE.

GURNEY, B., also concurring—

Rule discharged.

JENKINS *v.* HARVEY (1).

1835.

Exch. of Pleas.

[877]

(1 Cr. M. & R. 877—895; S. C. 5 Tyrwh. 326; 1 Gale, 23; 5 L. J. (N.S.) Ex. 17.)

The corporation of Truro in 1795 made a lease of the office of meter with all fees, emoluments, &c. arising from the measuring of coal, &c. imported. It was proved that they had been accustomed for nearly

(1) Cited and followed in *Bryant* v. *Foot* (1868) L. R. 3 Q. B. 497, 37 L. J. Q. B. 217; and in *Duke of Norfolk* v. *Arbuthnot* (1879) 4 C. P. D. 290, 48 L. J. C. P. 737; affirmed by C. A. (1880) 5 C. P. D. 390, 49 L. J. C. P. 782.—R. C.

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sixty years to receive these payments upon all coal imported into the port. The learned Judge told the jury that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them that they ought to make such presumption, unless some evidence to the contrary appeared, neither did he explain to the jury the nature of a port duty, and state, that as such the claim in question might be referred to a modern grant. The COURT granted a new trial.

ASSUMPSIT. The first count in the declaration stated, that the borough of Truro in the county of Cornwall is an ancient borough, and the port of the said borough is an ancient port, and that the mayor and burgesses of the said borough and their predecessors for the time being, from time whereof the memory of man is not to the contrary, have had and exercised, and been used and accustomed to have and exercise, and still of right ought to have and exercise, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the [*878] *said mayor and burgesses for the time being, or their deputy or deputies, servant or servants, a certain ancient office or place of meter, for (amongst other things) the measuring of all coal imported by sea and brought within the limits of the port aforesaid to be there unloaded, delivered, or disposed of. And also that from time whereof the memory &c., there hath belonged, and still doth belong, to the said mayor and burgesses of the said borough, and their predecessors, or their lessee or lessees, farmer or farmers, for the time being, by reason of the said office, a certain ancient fee, reward, perquisite, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, and other machines and conveniences, for the purpose of measuring, *i.e.* the fee, reward, or toll of 4*d.* for the chaldron to be had and received for the measuring, or being ready and willing to measure by measure, each chaldron of coal aforesaid imported by sea and brought within the port aforesaid, and deliverable, or to be unloaded, delivered, or disposed of by measure, and the fee, reward, or toll of 8*d.* by the three tons to be had and received for the weighing, or being ready and willing to weigh, each three tons of coal imported and brought as aforesaid, deliverable, or to be unloaded, delivered, or disposed of as aforesaid by weight: the said fees, rewards, or tolls to be received and taken by the said mayor of the said borough for

the time being, or the lessee or lessees, farmer or farmers, of the said mayor and burgesses for the time being, or his deputy or deputies, servant or servants thereof. That heretofore, and before the making of the promise and undertaking therein after mentioned, to wit, on the 25th day of November, 1795, in the county aforesaid, the said mayor and burgesses, &c. being so entitled to the said fee, reward, or toll, and the said office as aforesaid, by a certain indenture then and there made between Edward Lawrence, gent., then being mayor of the said borough of Truro, and the burgesses of the said borough, *of the one [*879] part, and the said Silvanus Jenkins of the other part, (the counterpart of which indenture, sealed with the common seal of the said borough, the plaintiff's executrix as aforesaid brings into Court), the said mayor and burgesses, for the considerations therein mentioned, did grant, demise, lease, set, and let unto the said Silvanus Jenkins, his executors, administrators, and assigns, the said office or place of meter of the said borough, together with all advantages, profits, emoluments, fees, perquisites and rewards whatsoever arising or accruing from the measuring of all corn and grain, coals, culm, and other such like commodities, that should be exported or imported within the limits of the port of the said borough, in such sort and manner as the same was then or had been formerly paid and enjoyed, and all the rights and privileges thereunto belonging or appertaining, to have and to hold, exercise, and enjoy the said office or place of meter of the said borough, with the appurtenances as aforesaid, unto the said Silvanus Jenkins, his executors, administrators, and assigns, for and during and unto the full end and term of ninety-nine years fully to be complete and ended, if Louisa Bowen Jenkins, then aged four years or thereabouts, daughter of the said Silvanus Jenkins, should so long live. The said term to commence from and immediately after the death of one Peter Tippet and Edward Tippet his brother, or the surrender, forfeiture, or other sooner determination of the then term, &c. of the said Peter Tippet of and in the same, determinable on their death; he the said Silvanus yielding and paying therefore as in the said indenture mentioned, 3*l.*, payable quarterly. That afterwards, and during the said term of ninety-

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nine years by the said indenture granted, and during the life of the said Louisa Bowen Jenkins, to wit, on the 1st of January, 1820, in &c. the said Peter Tippet and the said Edward Tippet died, and that thereupon, by virtue of the said demise, the
[*880] plaintiff as executrix as aforesaid, afterwards *and during, &c. to wit, entered into and upon the said demised premises, with the appurtenances, and became and was possessed thereof, as executrix as aforesaid, for the residue of the said term, so to the said Silvanus and his executors thereof granted as aforesaid, he the said Silvanus having previously and during, &c., to wit, on the 1st of January, 1804, in the county aforesaid, died, and having theretofore, to wit, on &c., duly made and published his last will and testament in writing, and appointed the plaintiff executrix thereof, to wit, &c. That the said Louisa Bowen Jenkins is in life, to wit, &c. That afterwards and during the continuance of the said term, and the interest of the plaintiff as executrix as aforesaid, and before the making of the promise and undertaking hereinafter in that count mentioned, to wit, on the 1st October, 1832, in the county aforesaid, divers, to wit, 9,000 chaldrons, and 9,000 tons of coal, had been and were by the defendant imported by sea in a certain ship or vessel, and brought within the limits of the port aforesaid, there to be unloaded, that is to say, the said chaldrons by measure, and the said tons by weight.

The second count made claim to the same fee and reward, as the perquisite of an office of meter generally, without stating it to be an ancient office from time immemorial. Third count, reasonable fee. Fourth count, *quantum meruit*. Fifth count, borough of Truro an ancient borough; port of Truro an ancient port. That the mayor and burgesses of Truro were on the 26th November, 1795, and long before, and hitherto have been, used and accustomed to receive as of right a certain duty or toll (4*d*. per chaldron), called metage, of and from every merchant importing amongst other things coal by sea, and bringing the same within the limits of the port aforesaid. That the said mayor and burgesses, being so entitled, did on that day grant and demise unto the said Silvanus Jenkins the said office and
[*881] place of meter, with all advantages *and profits &c., as before.

Title to present plaintiff, as before. Importation of chaldrons of coal by the said defendants to be unloaded within the limits of the port; by reason of which the defendants became liable to pay to the plaintiff the aforesaid duty or toll of 4*d.* upon every chaldron so imported; and that the defendants, being so liable, promised to pay the sum of 150*l.* Sixth count—claims for toll of coal imported and unladen within the limits of the port of Truro, in which port the plaintiff had kept certain measures for the purpose of measuring the coal of such as were disposed to use them. Seventh count—for tolls, in respect of the defendants' having used the said weights and measures. Eighth count—for toll called metage, for and upon divers coals imported. Ninth count—for weighage, portage, and bushelage. Tenth count—for port duties upon goods and merchandize. Eleventh count—for tolls upon goods, &c. Twelfth count—for petty customs. With counts for work done and materials provided, the money counts, and a count upon an account stated. Plea, the general issue.

The plaintiff in this case claimed, as the representative of a lessee under the corporation of Truro, to be entitled to a toll of 4*d.* per chaldron, under the name of metage, upon all coal discharged in that port. At the trial before Williams, J., at the Spring Assizes for the county of Cornwall, the plaintiff gave in evidence the following documents: An extract from Doomsday for the purpose of shewing that Truro was at that period in the possession of William Earl of Morton, the brother of the Conqueror, and Earl of Cornwall. A charter of Reginald Fitzroy, Earl of Cornwall, son of Henry I., addressed to his subjects "tam Anglicis quam Cornubiensibus," and granting to his free burgesses of Truro "sac et soc," toll, &c. An *inspeximus* charter of 13 Edw. I. confirming prior grants. A charter of the 31st Elizabeth, the governing charter of the borough, reciting that the port of Truro was part of the *port of Falmouth, and that [*882] the inhabitants of Truro endeavoured by all means to preserve the port, by cleansing and repairing the same, reciting also the enjoyment by them of ancient prescriptions and privileges; and confirming all ancient liberties, privileges, jurisdictions, franchises, granted as well by the Earls of Cornwall, lords of the borough, as by the Crown, &c. A lease dated 21st February,

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1752, from the corporation of Truro to Stephen Tippett, granting and demising, in consideration of the sum of 631*l.*, the office or place of meter of the borough, together with all advantages, profits, emoluments, fees, perquisites, and rewards whatsoever arising or accruing from the measuring of all corn, grain, coal, &c., which should be exported or imported within the limits of the port of the borough, for a term of ninety-nine years. This lease contained a covenant to indemnify the lessee from all charges incurred in defending any action brought against him on account of his demanding or taking any of the usual and accustomed dues belonging to the office of meter. A lease dated the 26th November, 1795, from the corporation of Truro to Sylvanus Jenkins (the testator), of the office or place of meter, &c., together with all advantages, &c., for the term of ninety-nine years. This lease also contained a similar covenant, to indemnify the lessee against actions. The dues to be levied were indorsed on the lease, and amongst them were "coals by the chaldron 4*d.*" It was proved, that, from the year 1772, the lessee had been rated to the relief of the poor in respect of the metage, and also to the church rate from the year 1779.

Parol evidence was given of the payment of the dues from the year 1772 down to the period when the claim was disputed, in 1828. The mode of measuring the coals appeared to be as follows: One person measured for the merchant, and another for the captain, the corporation meter, who was also the officer [*883] of the customs, appointed *to collect the duties on coals carried coastwise, standing by and keeping an account. If the officers assisted in measuring, there was an extra payment on that account. Evidence was also given of the receipt of anchorage by the corporation; that they cleansed the channel of the river from time to time; and that the bounds of the port were perambulated every seventh year by their officers; that poles had been fixed in the rock to mark the boundaries; and that the letters "T. B." had been sometimes cut on the surface of the rock. It appeared also that the borough coroner had from time to time held inquests in different parts of the port.

It was admitted that the defendant's wharf was within the limits of the port; that the coal in question had been imported;

and that an offer had been made on the part of the plaintiff to measure it, which had been rejected by the defendant.

The learned Judge, in summing up, left it to the jury to say, whether the office of meter was an immemorial office—informing them, that, in order to establish that fact, the plaintiff was bound to satisfy them that it had existed from before the time of legal memory; that, with regard to this question, they might take into consideration the amount of the toll claimed, as shewing whether or not a toll of such an amount would be reasonable at such period; that, with regard to the origin of the claim by grant, he was not aware of any rule of law which precluded the jury from presuming, from the parol evidence only, a grant of the right, and that they might presume such grant from some person entitled to make it, before the time of legal memory, or before the charter of Elizabeth. It did not appear that the learned Judge put it to the jury, that the claim might be supported as a port duty, payable in respect of the franchise or ownership of the port, and referable to a modern grant. A verdict having been found for the defendant, the *Solicitor-General* obtained a rule for a new *trial, on the ground of misdirection, and also on the ground, [*884] that, in consequence of the learned Judge omitting to direct the jury with regard to the application of the evidence, the jury had been misled into giving a verdict against the weight of evidence.

[After argument:]

PARKE, B.: [893]

It appears to me that there ought to be a new trial in this case, on the ground that the claim of the plaintiff may be supported as a port duty in the corporation, through whom she derives her title. Now it appears that the learned Judge did not leave it to the jury, whether or not the plaintiff was entitled to recover as for port duty, although there certainly was evidence to support such a claim. That a port duty may be created within time of memory there can be no doubt. The King may grant to a subject the franchise of creating a port, and may confer upon the person who thus dedicates his land to the public, and incurs the obligation of repairing the port, a compensation

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from those who use the port, in the dues paid in respect of the various commodities imported. It *is well-established law, that
[*894] it is unnecessary to shew that these payments have been made from time immemorial.

It is difficult to say, after looking at the report of the learned Judge, that there has been a misdirection; though, from the statement of counsel, the mode in which this question was left to the jury is not precisely that in which it has been the practice to leave to them the consideration of such rights. The correct mode of presenting the point to them would have been, that, from uninterrupted modern usage, they should find the immemorial existence of the payment, unless some evidence is given to the contrary. That is the ordinary mode in which such questions are left to a jury; and it is very important that the rule should be observed, not only with respect to claims like the present, but also with regard to various public exemptions, depending upon usage, such as a modus, and similar rights. The learned Judge, however, did not so leave the case to the jury. He told them merely that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not advise them that they ought to make such presumption, unless some evidence to the contrary appeared. It likewise appears that the learned Judge did not call the attention of the jury to the fact that the claim in question might have had its origin within time of memory; and that with a view to this being an immemorial payment he pointed out to them the amount of the sum claimed for the metage of each chaldron of coals. This argument may probably have had a very material influence on the minds of the jury, when considering the claim as one necessarily dependent upon immemorial usage. Upon the correctness of the reasoning drawn from the fact of the value of money, great doubt may be entertained; and the jury might not have
[*895] come to the same conclusion had they not been *told that the payment was from time immemorial. For these reasons, and principally because the learned Judge did not inform the jury that the claim of the plaintiff might be maintained as a port duty, but confined the case to a question of ancient immemorial

usage, I think, without giving any opinion upon the weight of the evidence, that this case ought to go down for the consideration of another jury.

BOLLAND, B., was of the same opinion.

ALDERSON, B.:

I also am of the same opinion. The summing up of the learned Judge appears to me to have had the effect of misleading the jury. It represented the plaintiff's claim to them as being against common right; but that is not the case, inasmuch as every person making the payment in question receives a compensation for such payment. Had it been left to the jury to say whether or not the sum claimed was payable as a port duty, it would not have been considered as a claim against common right. I am also of opinion that too little stress was laid by the learned Judge upon the usage of modern times. If an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, is not sufficient to establish a right like the present, there are innumerable titles which could not be sustained.

Rule absolute without costs.

[Upon a second trial (2 Cr. M. & R. 393—408), the jury found for the plaintiff and "that the corporation of Truro have from time immemorial been possessed of and have exercised the office of meter, and have from time immemorial received for the performance of the duties of the office the sum of 4*d.* a chaldron on coal and culm." A rule for a new trial was discharged. On the question of prescription, the judgment of the COURT, delivered by PARKE, B., was as follows:]

The proof of the immemoriality of the corporation is slight, for no ancient charters or documents were produced, shewing that it existed some centuries ago. Where a prescription may be expected to be proved, if it exists, by more than living memory, the absence of such proof is no doubt a strong point for the jury. There however was proof that there was a corporation in 1630; and that, uncontradicted, is certainly evidence from which *a jury may presume that it had existence beyond

[2 Cr. M. & R. 406]

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time of legal memory. This point is one which was hardly in dispute in the cause.

A similar observation applies to the office, which was proved to exist in 1752, and to be then worth 600*l*., for the term for which it was granted; and that is abundant evidence, from which the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved; especially, accompanied with the circumstance that no early documents belonging to the corporation were to be found.

The objection as to the rankness of the toll is untenable, if it be a toll due to the corporation for the use of the port, as well as for the measuring of the coals: and we have before intimated, that the claim can be supported on that ground alone; and that the jury must be considered as having so found.

The last objection is, that the evidence does not support the claim to a toll for coals not actually meted.

There was very satisfactory proof that the lessee received the dues now claimed, from the year 1772, under a lease granted in 1752, on all coals imported; it was equally clear that the meter never actually measured them, and yet received the fee of 4*d*. a chaldron, as if he had. It is true, indeed, that all the coals imported were always measured by some one, but that measurement was one that originated in the statute of Anne, imposing a duty on coals; it was for fiscal purposes, in order to ascertain the amount of a tax; and with such a species of measurement, the ancient meter, whose duty it was to mete between one party and another, could have nothing to do, and was under no obligation to perform it. If, therefore, the lessee of the toll received 4*d*. a chaldron on all coals, no otherwise measured than for the customs, it is in truth the same for the present purpose as if he received on all coals imported, though never measured at all.

[408] It appears, also, that the tolls were paid to the meter on bags of flour, and these were never measured by any one, for any purpose. And a clear usage, from the year 1777, for the lessee to receive a toll on goods imported, though never measured, coupled with the proof of this being a valuable right in 1752, is amply sufficient to warrant the jury in presuming the practice

to have existed time out of mind, and in referring it to a legal origin, which cannot well be, without connecting the right to the toll with the ownership of the port, which ownership was fully proved. * * *

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1835.

(1 Cr. M. & R. 919—933; S. C. 5 Tyrwh. 458.)

Exch. of Pleas.

An entry by a deceased person charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. [1 Cr. M. & R. 919]

Ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, are admissible in evidence even against the freeholders of the manor; but, if they state facts only, *e.g.* that "the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*, as by the records thereof remaining with the auditor of the Duchy appeareth; unto which, for the more certainty, we refer ourselves" —they are not admissible in evidence.

Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible in evidence; *aliter*, if spoken of the extent of the wastes only.

Reputation is admissible in evidence, though unsupported by usage.

A lease of tin mines and toll tin was surrendered in 1810, and another lease taken, on payment of a fine, part of which was a compensation for the surrender of a former lease. A statement in a lease of the surface, made by the same lessor, during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll.

Where evidence has been improperly rejected, the Court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence (1).

THIS was an action on the case. The first count in the declaration was trover for tin and tin ore. The second stated that, before and at the time of the making of the indenture thereinafter mentioned, his late Majesty, King George the Fourth, then his Royal Highness George Augustus Frederick, *was Duke of Cornwall, and as such was seised in fee, in right of his dukedom, of and in all manner of tin in under and belonging to the manor of Tewington, in the county of Cornwall, the said manor being one of the ancient Duchy assessionable [*920]

(1) This point referred to by GROVE, J. in *Mors-le-Blanch* v. *Wilson* (1873) L. R. 8 C. P. 227, 238, 42 L. J. C. P. 70, 75.—R. C.

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manors; that, within that manor there is an ancient immemorial custom, viz. "that any tinner may bound any wastrel lands within the said manor that are unbounded or void of lawful bounds, and also any several and inclosed land within the said manor that hath been anciently bounded and assured for wastrel by delivering of toll tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the Prince's several and inclosed customary land within the said manor as hath been anciently bounded with turfs, according to the ancient custom and usage within the said manor, by the said tinner marking out by bounds a certain part of such land within or under which he was desirous of working for tin; and that, after such marking out, the said tinner forthwith gave due notice thereof at the proper stannary court for the said manor; and that if, after due proclamation thereof at the said court, the owner of the said tin mines within the said manor did not work for tin within or under the said land so marked out by bounds, it thereupon became and was lawful for the said tinner to work for tin within or under the said bounds, paying and rendering therefore to the owner of the said mines a certain dish or part, to wit, one tenth dish or part of the tin that might from time to time be worked, raised, or procured by the said tinner within or under the said bounds, (the said tinner keeping the residue thereof), as and for a toll, for the privilege of working, raising, and procuring the same;" that, on the 1st August, 1815, his Royal Highness, by indenture, demised to Edward Smith all the toll and farm of tin or tin ore which should be gained, arise, or be due in any place or places whatsoever within Tewington, [*921] amongst *other manors, and also all the tin mines found or to be found within the several inclosed lands of those manors, to hold for a term of years depending on lives. The plaintiff then deduced title under that lease, and alleged as a breach, that the defendant, claiming to work under and by virtue of the said custom a certain tin mine within the said manor, worked, raised, and got therefrom large quantities of tin, tin ore, and tin stuff; and that, although it was the duty of the defendant to pay the toll above mentioned, yet he neglected &c., and wrongfully converted the whole of the tin, tin ore, and tin stuff to his own

use. There were several other counts, varying from this in matters immaterial to the present purpose, excepting that in some the toll was laid to be one fifteenth. Plea, general issue.

The cause was tried before Lord Lyndhurst, C. B. and a special jury, at Westminster, at the sittings after last Trinity Term. The plaintiff by this action claimed the toll of tin raised from a vein or mine under a place called Buckler's Bounds, within a piece of ground called Boscundle Common, in the manor of Tewington, in the county of Cornwall. He claimed under the lease from the Duke of Cornwall mentioned in the second count, and contended, that Boscundle Common was parcel of the waste of the manor, and that therefore the mines within it belonged to the Duke, who had been lord of the manor, until it was sold under the Land Tax Redemption Act, 38 Geo. III. c. 60, s. 56, &c. with a reservation of the mines. Tewington is one of the seventeen ancient assessionable manors of the Duchy of Cornwall, and the nature of the tenures in it was settled in *Rowe* v. *Brenton* (1). Boscundle Common contains about 122 statute acres. On the east, it adjoins a piece of anciently inclosed land, called also Boscundle, or Boscundle estate, of about 101 statute acres; on *the other three sides, it adjoins [*922] the admitted waste of the manor. The defendant was one of several adventurers who were working the mines of that district. They took the mine in question from the Rev. Mr. Carlyon, Sir J. C. Rashleigh, and Mr. Tremayne, as being the owners of the mine. The defendant's case was, that Boscundle Common and estate together composed one free tenement, and therefore that the common was parcel of the waste of that free tenement, and not of the manor; that the whole surface of that tenement was now the sole property of Mr. Carlyon, but that the persons under whom Sir J. C. Rashleigh and Mr. Tremayne claimed, having formerly been part proprietors of it, and having reserved the mines within its commons and wastes, the actual property in the mine in question was now vested in Mr. Carlyon, Sir J. C. Rashleigh, and Mr. Tremayne. The plaintiff also claimed one tenth of the toll in Tewington instead of one fifteenth, which was admitted to be the usual toll in the Stannaries, and was the

(1) 32 R. R. 524 (8 B. & C. 737; 3 Man. & Ry. 133).

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only toll that within the recollection of the witnesses had been received in Tewington. The usage as to entering lands and paying toll is contained in the presentment of a parliament of tinners, held at Lostwithiel, 11 Car. I., and is as follows: "We present and affirm that by common prescribed Stannary right, any tinner may bound any wastrel lands within the county of Cornwall that is unbounded or void of lawful bounds, and also any several and inclosed land that hath been anciently bounded and assured for wastrel, by delivering of toll tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the Prince's several and inclosed customary land within the ancient Duchy assessionable manors as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several Duchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the Stannaries, that is, the
[*923] fifteenth dish or quart; saving in *such places where a special custom hath limited another rate of toll" (1).

The plaintiff proved, that the toll tin belonging to the Duke had been in lease from the time of Queen Elizabeth to different persons; that the Rev. Mr. Donnithorne, and, after his death, certain trustees for his family, had been lessees for several years immediately preceding the present lease; that the present lease was granted in consideration of the surrender of the lease preceding it which had been granted in 1797, and a fine of 18,500*l.* (11,942*l.* of which was paid for the surrender). He put in several ancient documents, purporting to be answers of conventionary tenants to interrogatories put to them by certain commissioners; which interrogatories, however, were lost. The 9th and 10th answers, which were objected to, but received in evidence, were as follows:

"To the 9th article, further we say, we know no tin works within the said manor but such as are kept under bounds, which do belong to the owners thereof; and when any tin is wrought, the tenth part thereof ought to be paid to the lord of the manor for toll thereof.

"To the 10th article, we say, that the commons of the said

(1) Pearce's Laws of Stannaries, p. 37.

manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*, as by the records thereof, remaining with the auditor of the Duchy of Cornwall, appeareth; unto which, for the more certainty, we refer ourselves."

In order to prove that Mr. Donnithorne, when lessee, had received toll from this mine, by Puckinghorne, his toller, a weighing-book was produced from a blowing house at St. Austell, in the handwriting of a deceased clerk. It was proved, that tin is brought there generally by captains of mines or tollers, who are usually, though not always, known there, and who are asked from whence it is brought; that, when brought, a part is selected, and from the produce of *that sample the fineness and weight [*924] of the whole is calculated and entered into the book, and the value is paid to the person bringing it upon such calculation at fixed rates. The delivery is always public, and the book is open for inspection. The clerk is also chargeable for the amount of tin he enters as received. By the stannary laws (1) it is directed, that "Every such buyer of block tin shall enter in the blowing-house book where he shall blow such block tin so by him or them bought, the quantity of such tin and the names of the person or persons of whom he bought the same; and it shall be free for any person whatsoever to inspect such blowing-house books." The following and one or two similar entries were admitted after objection.

The Executors of the Rev. Mr. Donnithorne, per Mr. Jno. Puckinghorne.

1782. *July 5.*

		Cwt.	qrs.	lbs.	
Pit Moor	Toll	0	3	19	at 12
Fat Work	Rough	0	3	26	at 10
Buckler's Mine	Toll	1	0	24	12¼
Down-a-foot	Toll	0	1	1	

The defendant offered in evidence a verbal declaration, by the late Mr. Rashleigh, who had purchased the manor from the Duchy, (the minerals being reserved), as to the boundary of the waste of the manor. This was objected to, and rejected. He also offered in evidence a lease between the Prince of Wales, as

(1) Pearce, 55.

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Duke of Cornwall, and the late Mr. Carlyon, dated 28th February, 1798, as evidence for the same purpose. By that lease, the Duke demised to Mr. Carlyon, for 99 years, determinable on lives, "All that piece or parcel of the common, called Tewington Common, within the manor of Tewington, parcel of the ancient possessions of the Duchy of Cornwall, in the said county of Cornwall, containing, by estimation, about 24 acres of land, separated and divided on the east side thereof from a certain [*925] common, called Boscundle Common, *the land of Thomas Carlyon, Esq., by stone posts, marked with the letter B., and numbered with the figures 1, 2, 3, 4, 5, 6, 7 and 8, bounded on the west, &c. &c.," with a reservation of minerals. This was objected to, and rejected.

The jury found for the plaintiff 614*l.* for the toll, calculated at one tenth. In Michaelmas Term following, *Coleridge*, Serjt., moved for a new trial, on the ground of the improper reception and rejection of the evidence above-mentioned. As to the weighing books, he contended, that in all the cases where entries &c. by deceased persons have been received in evidence, the persons making them have had knowledge of the facts they state; whilst here, there was no obligation by the stannary laws to specify the mine, and the clerk could only know it from the assertion of the person bringing the ore; and even sometimes he did not know who that person was. On this point, however, the COURT held that it was not necessary that the deceased person should have his own knowledge of the fact stated; that, if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight, not the admissibility of the evidence; and the COURT refused the rule on that point, and granted it as to the others.

Follett, *Bere*, and *Butt*, shewed cause:

As to the answers, they contended that they were statements made by deceased persons upon matters with which they must have been acquainted, and therefore were admissible on the ground of reputation: *Chapman* v. *Cowlan* (1). As to the

(1) 12 R. R. 294 (13 East, 10).

declarations of Mr. Rashleigh and the reception of the lease, that the interests in the surface and the mine were totally different, that Mr. Rashleigh had no interest in the latter, and that his declarations as to the extent of the waste belonging to him ought not, therefore, to bind the owner of the mine. That after the Duke had demised away the mines, *he could not by [*926] any declaration or lease derogate from or affect the interest in them; that the mines having been continually in lease should be considered as a distinct interest from the surface; and that, although a premium had been given for the renewal, yet still the new lease was to be considered as merely a continuation of the former, which was in existence at the time of making the lease to Mr. Carlyon; the more particularly that one of the lives in the former lease was admitted to be still alive. That, even if the lease were in strictness admissible, it ought to produce little effect; and therefore a new trial ought not to be granted on its account alone, unless the Court could see it would probably have altered the verdict: and they cited *Doe* d. *Lord Teynham* v. *Tyler* (1).

Coleridge, Serjt., *Talfourd*, Serjt., and *Cowling*, *contrà*, contended that the answers were in the nature of *ex parte* depositions, and therefore not admissible against freeholders, *Freeman* v. *Phillipps* (2); that the conventionary tenants were evidently interested in extending the wastes over which they claimed a right of common at a nominal rent, and therefore had an interest adverse to the freeholders; that the answers might be given, in order to make evidence for themselves; that even presentments of copyholders are not admissible against freeholders, they having no power to inquire into the rights of the latter (3); that all the cases where they have been received have been questions between copyholder and copyholder or lord, as *Roe* v. *Parker* (4), *Chapman* v. *Cowlan* (5); that the persons did not appear to have been tinners or to have sufficient knowledge of the facts stated; that the toll of one tenth, stated in the ninth

(1) 31 R. R. 496 (6 Bing. 561; 4 Moore & Payne, 377).
(2) 16 R. R. 524, 526 (4 M. & S. 486, 491).
(3) See 2 Scriv. Cop. 422, 423.
(4) 5 T. R. 26.
(5) 12 R. R. 294 (13 East, 10).

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answer, was entirely unsupported by usage, and therefore inadmissible: *Weeks* v. *Sparke* (1); and that the tenth answer was nothing more than a *statement of a particular fact, and therefore not within the rule as to reputation. That the declarations of Mr. Rashleigh and the lease were admissible on the ground of reputation: *Barnes* v. *Mawson* (2), and also as being against the interest of the parties making them; that the distinction between the mines and the surface was immaterial, the plaintiff's right to the mine having been put as dependant on that to the surface, and therefore any declaration as to the latter was admissible. That the lease might have been considered as a declaration accompanying an act done, the Duke forbearing to grant more land to the east, because it was already Mr. Carlyon's property: *Stanley* v. *White* (3). That the lease was also admissible on account of identity of interest, the plaintiff claiming under the Duke and having taken a new interest by the surrender of the old lease, for which he had paid a fine. That it was an important document; and, if the rejection of it was wrong, there ought to be a new trial, since the Court could not see, amongst the great mass of evidence produced on both sides, that it might not have made a difference in the verdict: *Doe* d. *Barrett* v. *Kemp* (4).

Cur. adv. vult.

The judgment of the COURT was now delivered by—

PARKE, B.:

On the motion for a new trial, in this case, on the ground that Lord LYNDHURST received improper evidence for the plaintiff, and rejected admissible evidence for the defendant, several points were made; all of which have been disposed of, either on the motion for a rule *nisi* or on the argument on shewing cause, except three. The first is, whether the answers of the conventionary tenants to certain articles (the 9th and 10th) were properly received in evidence for the plaintiff. The plaintiff offered in the first instance to read these answers to more of the articles; but,

(1) 14 R. R. 546 (1 M. & S. 679).
(2) 14 R. R. 397 (1 M. & S. 77).
(3) 12 R. R. 544, 551 (14 East, 332, 341).
(4) 33 R. R. 487 (7 Bing. 332; 5 Moore & Payne, 173).

it appearing that they were not signed by any freehold *tenants, Lord LYNDHURST refused to admit them. It was then stated that some were admissible as evidence of reputation, and Lord LYNDHURST said that he should admit all that were; and the two answers to the 9th and 10th articles were offered and received, on the supposition that they were so. The objection now taken is, that the answer to the 9th article is not admissible, not because reputation on such a subject is not evidence, it being a question of the custom of mining in a particular district, but because it comes from the customary tenants, who in that character have nothing to do with the mines; and it is insisted, that it is a requisite qualification of hearsay evidence on such a subject, that it ought to be derived from those who are themselves concerned in mining, or receiving the dues of the mines. That hearsay evidence on some such subjects cannot be received, unless with the qualification that it comes from persons who have a special interest to inquire, is clear. Thus, in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship: it is not admissible, if it proceeds from servants or friends: *Johnson* v. *Lawson* (1). And in this description of hearsay evidence the line is clearly defined. So, in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood, per Lord ELLENBOROUGH, in *Weeks* v. *Sparke* (2). Therefore, in *Rogers* v. *Wood* (3), a document purporting to be a decree of certain persons, the Lord High Treasurer, Chancellor of the Exchequer, and Under Treasurer, Chief Baron, and Attorney and Solicitor-General, who had no authority as a Court, was held to be inadmissible evidence on the ground of reputation, on the *question, whether the city of Chester, before it was made a county of itself, formed a part of the county palatine, because those personages had from their situations no peculiar knowledge

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(1) 27 R. R. 558 (2 Bing. 86; 9 Moore, 183).

(2) 14 R. R. 546 (1 M. & S. 679).

(3) 36 R. R. 554 (2 B. & Ad. 245).

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of the fact. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary; and in *The Duke of Newcastle* v. *The Hundred of Broxtowe* (1), justices of the peace at the Sessions of the county, within which the district was alleged to be, were held to have sufficient connexion with the subject in dispute, to make the statements in their orders admissible. Where the right is really public—a claim of highway, for instance—in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such exists. In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shewn to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value, and not the admissibility of the evidence. In the present case the alleged custom does not seem to be one in which all the King's subjects have an interest, but only such as may choose to become adventurers in mines. Therefore hearsay from any persons wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible. But those under whose estates the minerals lie, with respect to which the custom exists, and who are more likely than others living at a distance

[*930] to become adventurers, and, consequently, subject to its *operation, are in our opinion sufficiently connected with the subject to make these declarations evidence; more especially as the very form in which they are given, shews that they were consulted as persons having competent knowledge upon the matters inquired into. An observation was made in the course of the argument that all evidence of reputation was inadmissible, unless it was confirmed by proof of facts. We think that such proof is not an essential condition of its reception, but is only material as it affects its value when received; and indeed if such proof were

(1) 4 B. & Ad. 273; 1 N. & M. 601.

required, there is amply sufficient in the present case. Another objection to the admission of these documents was, that the answer to the 10th article was hearsay evidence, not of a custom but of a particular fact. And so, undoubtedly, it is; and it ought not to have been received: but it seems to have been admitted in consequence of Lord LYNDHURST'S attention not having been called to its contents, and the objection was not taken, after his offer to receive all the answers that were evidence of reputation, that this particular answer was in truth nothing more than a statement of a particular fact. We therefore think that there should be no new trial on this ground.

The remaining objections are, that two pieces of evidence offered on behalf of the defendant were improperly rejected.

1st. It was argued that certain declarations of the late Mr. Rashleigh, as to the extent of his own claim to the waste, which claim excluded the *locus in quo*, ought to have been received in evidence. We think that they were rightly excluded. Mr. Rashleigh purchased the manor of Tewington (with the exception of the minerals) from the Prince of Wales as Duke of Cornwall, in September, 1798, and died before this suit. And it was urged that his declarations were evidence on several grounds—

First, That they were against his own interest. But that circumstance alone is not enough to render such declarations admissible, though it occurs in many of the *cases which have [*931] been established as exceptions to the general rule, that no hearsay evidence can be received, viz. entries of deceased receivers, incumbents, &c. and declarations of deceased occupiers as to their own title. It is then said, secondly, that this falls within the principle of such last-mentioned declarations. But we think it does not. An occupier who is proved to be in possession of a given piece of ground is *primâ facie* presumed to be owner in fee. And his declaration has been held to be receivable in evidence, when it shews that he was only tenant for life or years. This is a well-established exception to the general rule. In this case, however, there is no proof that Mr. Rashleigh was in possession of the *locus in quo*. If he had been, and had declared that he had no title to it, but was tenant at will to Mr. Carlyon, the case would have fallen within the established exception. But this is a case

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in which a person merely declares that he is entitled as far as a certain point, but no further; and this declaration, taken altogether, can hardly be said to be against his interest, for, whilst he disclaims his right to one part, he affirms it as to another. It does not appear to us that this statement falls within the principle of those made by deceased occupiers, and therefore we are satisfied that it was properly rejected. It was then, thirdly, contended, that this was a declaration accompanying an act; but the answer is, that there was no act which it accompanied or explained. Lastly, it was urged that it was evidence of reputation of the boundary of the manor; but it was in truth only a declaration as to the extent of Mr. Rashleigh's own property. He was not speaking of the boundaries of the manor, which might, for any thing he said, have included all Mr. Carlyon's estate, but he spoke only of his own waste.

The last objection, is that the declaration of the Prince contained in a lease of February, 1798, was improperly rejected. In the description of the parcels in that lease from the Prince to [*932] Thomas Carlyon, they are described *as separated on the east side from a common called Boscundle Common, the land of Mr. Carlyon, by certain stone posts; and it was therefore contended that this amounted to an admission that Boscundle Common, the land in which the mines in question were worked, was Mr. Carlyon's. This lease was rejected on the ground that there was a lease of the mines and toll of tin then outstanding dated in 1797, which lease was surrendered to the Prince in 1810 (1), and a new one then granted, under which the plaintiff claimed; and Lord LYNDHURST thought the admission of the Prince was not receivable in evidence to affect the first lessee, or the plaintiff, who afterwards had the interest in the lease.

We, however, are of opinion that the plaintiff cannot be considered as claiming by any title prior to 1810. The first lease is entirely at an end by surrender, and the second begins in that year; and consequently any admission of the Prince made before that time, which is relative to the matter in issue, and concerns

(1) Note, the lease on which the action was founded, was executed in 1815; as stated in the second count, the one in 1810 having been cancelled in consequence of a mistake in it, and the other substituted.

the estate in the mines, is evidence against the lessee who claims under the Prince by title subsequent.

This admission certainly falls under that description, inasmuch as it is an admission that the surface of the *locus in quo* under which the plaintiff now claims the minerals, on the ground that it was part of the wastes of the manor in 1798, was at that time private property.

It may be that the supposed admission may be readily explained, and may not weigh in the least against the very strong evidence of the right of the Prince to the mines in question, from the actual perception of toll from them for a considerable period; but we cannot on this account refuse to submit the question to the consideration of another jury. The authority of *Doe* d. *Lord Teynham* *v. *Tyler* (1), was quoted to shew that the Court have a [*933] power to refuse a new trial where evidence has been improperly rejected, if in their judgment the rejected evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir JAMES MANSFIELD in 1 Taunt. 14 (*Herford* v. *Wilson*), and from Lord TENTERDEN in *Tyrwhitt* v. *Wynne* (2). But we cannot help thinking that the rule is there laid down much too generally; and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury; and besides its frequent application would cause the rules of evidence to be less carefully considered; and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence: a course productive of great delay and inconvenience. In some cases, no doubt, the Court may refuse a new trial when the witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed: *Edwards* v. *Evans* (3), or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly

(1) 31 R. R. 496 (6 Bing. 561; 4 Moore & Payne, 377).

(2) 21 R. R. 398, 401 (2 B. & Ald. 554, 559).

(3) 3 East, 451.

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against the weight of evidence, and certainly set aside upon application to the Court as an improper verdict.

We cannot say, however strong our opinion may be on the propriety of the present verdict, that, if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and therefore we think that there must be a new trial.

Rule absolute.

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DE ROSNE *v.* FAIRRIE AND OTHERS (1).

(5 Tyrwhitt, 393—408; S. C. 2 Cr. M. & R. 476; 1 Gale, 109; 1 Carp. P. C. 664, 689.)

A patent recited in its title that the patentee was the first and true inventor of certain improvements in extracting sugar and syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups. The specification stated a method of depriving syrups of every description of colour, by filtering them through charcoal produced by the distillation of bituminous schistus and used alone, or mixed with animal charcoal, or even through animal charcoal alone, when placed in thick beds. In an action for infringing the patent it was pleaded that the patentee did not, by any instrument in writing, particularly describe and ascertain the nature of his invention, and in what manner the same was to be and might be performed. On allegation that the title had claimed a larger invention than was disclosed by the specification; it was held, first, that the specification sufficiently described both branches of the invention recited in the title of the patent, viz. the refining sugar by melting it after it had granulated, and applying the patent process to it after having thus brought it into the state of syrup; and also to extract syrup from the cane-juice before it had been so far subjected to the action of fire as to granulate and become sugar: and secondly, that the word "improvements" being in the plural was of no consequence, as every part of the process might be treated as an improvement. It appeared that iron was combined with the bituminous schistus found in this country, and it was doubtful whether the charcoal produced by the schistus was not only disadvantageous, but injurious to the matter going through the process. The charcoal sworn to have answered the purpose of the patent was received from the plaintiff at Paris, where it had been made, and was declared by him to be the residuum of bituminous schistus from which the iron had been extracted. But no means existed of ascertaining in this country of what substance it actually was the residuum, nor did the specification mention any process for extracting the iron from bituminous schistus:

Held, that whether the latter omission avoided the patent or not, the patentee ought to prove, either that the presence of iron in the bituminous

(1) Compare *Bickford* v. *Skewes* (1841) 1 Q. B. 938.

schistus used in the process of filtering, was not absolutely disadvantageous to the matter going through that process, or that the method of extracting the iron from it was so simple and known that a person practically acquainted with the subject could accomplish it with ease, or that bituminous schistus, as known in England, could be used in this process with advantage; and a verdict having been found for the plaintiff, the Court set it aside on terms, and granted a new trial.

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CASE for infringing a patent. The declaration stated, that before and at the time of the making of the letters-patent, and of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff was, within the true intent and meaning of a certain Act of Parliament made and passed &c. (reciting title of stat. 21 Jac. I. c. 3) the first and true inventor of certain improvements in extracting sugar or syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups; which said improvements, others, at the time of the making of the said letters-patent, did not use, and thereupon our *lord the now King, on 29th [*394] September, 1830, by his letters-patent, bearing date, &c. (profert), after reciting, amongst other things, that the said plaintiff had by his petition humbly represented, that he the said plaintiff, in consequence of a communication made to him by a certain foreigner residing abroad, and by invention by himself, was in possession of an invention for certain improvements in extracting sugar or syrups from cane-juice, and other substances containing sugar, and in refining sugar and syrups, that the same was new in England, Wales, and the town of Berwick on Tweed, and in the British Colonies, and had never been practised therein by any other person or persons whomsoever, to his the said plaintiff's knowledge and belief, our lord the King, of his especial grace &c., did give and grant to the plaintiff, his executors, administrators, and assigns, his especial licence, full power, sole privilege and authority, that he the said plaintiff, his executors &c., and no others, during the term of years therein expressed, should and might make, use, exercise, and vend his said invention, within England &c. The declaration then set forth the patent, the inrolment thereof of record in Chancery, and assigned as a breach that the defendants had made use of the said invention, without the licence of the plaintiff. Pleas: first, not guilty of

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the grievances; secondly, that the plaintiff was not, at the time of the making of the said letters-patent, the true and first inventor of the said improvements in extracting sugar, and in refining sugar and syrups, in manner and form as alleged in the declaration; thirdly, that the plaintiff did not, by any instrument in writing, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, in manner and form &c.; fourthly, that the plaintiff did not cause any instrument in writing, particularly describing and ascertaining the nature of the said invention, and

[*395] in *what manner the same was to be performed, to be inrolled in his said Majesty's High Court of Chancery, in manner and form &c. Issues on all the pleas.

At the trial before Lord Abinger, C. B. at the Middlesex sittings, an examined copy of the specification was produced and proved. The material parts were as follow:

The grant by letters-patent, which was recited in the first part or title of the specification, was for the use, by the plaintiff, of an invention of "certain improvements to be used in the course of extracting sugar or syrup from cane-juice and other substances containing sugar, and in refining sugar and syrup, partly communicated to the plaintiff by a certain foreigner residing abroad." The specification stated the plaintiff's invention to consist in a means of discolouring (1) syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, and even of animal charcoal alone. Whatever sort of charcoal it may be it must be disposed of on beds very thick, on a filter of any suitable form. The specification then described the process; amongst other things stating, that the charcoal must be in a state of division, about the size of fine gunpowder, being found to be very fit for the operation. It then concluded, "the syrups from which it is desired to separate colouring matter can be obtained directly from the juice of cane or of beet-root, or from the saccharine matter produced by the action of sulphuric acid upon the farinaceous matters, before these juices have been baked (2) for

(1) Used in the sense of depriving of colour: "*Décolorer.*"

(2) It was admitted at the trial, and so stated by the LORD CHIEF

extracting the sugar. The *syrup may likewise be produced by the solution of all kinds of sugar, and of the products of inferior quality, which are obtained in sugar refining under the name of bastards, and other sugars. The purpose of producing of syrups may be to sell them in such a state for the ordinary consumption, or to bake them for making sugar whiter than is obtained by the common process; or these whitened syrups may be used for discolouring the refined sugar in making them filter through the loaves, for replacing the use of the earth and water; the object of the invention being to obtain discoloured syrups by the means above described. This discolouration of syrups is always proportionate to their primitive colouration and to the quantity of charcoal which is used. The carbonization of bituminous schistus has nothing particular, it is produced in closed vessels, as is done for producing animal charcoal; only it is convenient, before the carbonization, to separate from the bituminous schistus the sulphurets of iron which are mixed with it."

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Evidence was given to shew that the specification was correct, in law and in fact; but it is not necessary to detail it, in order to explain the grounds upon which the Court granted a new trial. The plaintiff proved that the invention was new and useful when applied to refining sugar; that it could be applied in the process of making sugar from potatoes and beet-root; and that it had been applied in the Colonies to the syrup coming from the canes before it had granulated into sugar. But it did not appear clear, upon the evidence, whether bituminous schistus was or was not capable of being purified from the sulphurets of iron with which it is mixed, so that it should not be prejudicial to the sugar, by colouring it in the course of the operation.

The counsel for the defendants objected that the *specification did not support the title, inasmuch as the title was a claim for two inventions, viz. the extraction of sugar from cane-juice, and the refining of sugar and syrups so extracted: secondly, that the description did not shew how the invention was to be applied to the juice as it came from the cane before boiling, and therefore

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BARON to the jury, that "baked" had been incorrectly used by the plaintiff, a foreigner. He meant before crystallization, *i.e.* before the process was complete for extracting sugar.

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did not contain a full description of the professed improvements: and, thirdly, that it was not shewn in what manner the bituminous schistus could be purified from the iron; and that, upon the whole, it was the duty of the learned Judge to direct a nonsuit. The learned Judge, however, reserved all points of law arising upon the title and specification for the consideration of the Court above, and directed the jury to find a verdict for the plaintiff or defendants, according as they found the description of the bituminous schistus to be sufficient or insufficient, so that all the world could or could not use it. The jury found a verdict for the plaintiff, saying, that it seemed to them that the bituminous schistus might be used, and was properly described in the specification.

Sir F. Pollock having obtained a rule *nisi* for entering a nonsuit, upon the grounds above stated,

Sir John Campbell, Attorney-General, Ludlow, Serjt. and *Godson* now shewed cause against that rule, and contended, first, that there was no plea that the title was bad, and that under the plea alleging the insufficiency of the specification, the defendants were not at liberty to object to it; secondly, that the title was good in all its parts, for that the extraction of sugar was not complete until the syrup had granulated, and that this process could be and was applied in the West Indies, whilst the cane-juice was in the state of syrup; and also because in extracting
[*398] sugar from beet-root *this invention was proved to have been always applied before the sugar was formed. Upon these points they cited *Bloxham* v. *Elsee* (1), *Rex* v. *Wheeler* (2), *Rex* v. *Metcalfe* (3), *Hill* v. *Thompson* (4), *Cochrane* v. *Smethurst* (5), and *Rex* v. *Cutler* (6). Thirdly, as to the application of the invention to cane-juice before it is boiled, it was answered that it was never intended to be so applied until it was boiled and became syrup, and in that state it was beneficial and useful. Fourthly, as to

(1) 30 R. R. 275 (6 B. & C. 169).
(2) 2 B. & Ald. 345.
(3) 19 R. R. 713 (2 Stark. 249).
(4) 20 R. R. 488 (8 Taunt. 375; 2 Moore, 454; Holt, 636).
(5) 18 R. R. 761 (1 Stark. N. P. 205).
(6) 18 R. R. 780 (1 Stark. N. P. 354).

the bituminous schistus, the words of the specification are,— "The carbonization of bituminous schistus has nothing particular. It is produced in close vessels, as is done for producing animal charcoal (1), only it is convenient, before the carbonization, to separate from the bituminous schistus the sulphurets of iron which are mixed with it." The schistus is mechanically, not chemically, combined with the iron; and therefore the iron could not be prejudicial to or affect the sugar; and further, it could be removed by the simple mechanical operation of breaking the schistus and taking out the nodules, in which it is generally found in it. It would therefore have been improper to have given a description of so easy an operation, *Savory* v. *Price* (2); and at all events, supposing the schistus did not completely answer the specified purpose, the process was new; now *Lewis* v. *Marling* (3) and *Haworth* v. *Hardcastle* (4), have decided, *that [*399] although every part of an invention must be new, yet every part need not be useful; and moreover, there was no evidence to shew that schistus could not be used to some extent.

Sir Frederick Pollock, *Sir William Follett* and *Crowder* in support of the rule, were stopped by the COURT.

LORD ABINGER, C. B.:

The Court has entertained doubts what rule should be pronounced in this case. My impression at the trial was strong that there was no evidence to go to the jury in support of the patent, and that it was incumbent on the plaintiff to shew, either that there was some bituminous schistus found in this country, which, after having been exposed to the process of distillation described in the specification, might be used with effect, and without detriment to the sugar, though one of its component parts, iron, was not entirely removed from it; or that there was some known process of removing that iron from it. But, when I summed up, my impression was, that the agent of the plaintiff

(1) At the trial Mr. Faraday, the eminent chemist, said, he understood this to mean charring the bituminous schistus in close vessels, letting the volatile matters arising from calcination (viz. tar, &c.) fly off, and retaining the residuum—a charcoal.

(2) 27 R. R. 723 (Ry. & M. 1).

(3) 34 R. R. 313 (10 B. & C. 22).

(4) P. 41 R. R. (1 Bing. N. C. 182).

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must have stated in his evidence something on this point which had escaped me at the time he gave his evidence; and being very anxious not to multiply trials, or to withdraw any thing from the jury, I left the case to them more on that apprehension than from any conviction I entertained that the plaintiff had made out his case. I also said, that if I was wrong in leaving the case to the jury, the defendant's counsel should have the benefit of it. Then, as the case went to the jury, who found for the plaintiff, the defendants are compelled to make this motion, whereas the plaintiff, had he been nonsuited, must, in order to obtain a new trial, have stated that he was surprised by the objection, and could have answered it by evidence, had he been [*400] fully aware of it. The question *for the Court has therefore been, on what terms we ought to direct the new trial? The verdict must be set aside and a new trial had; but in case the defendants shall finally succeed in obtaining judgment on the second trial, after obtaining a verdict, or if the plaintiff shall be nonsuited, the defendants shall have the costs of the first trial and of this application as costs in the cause; whereas if the plaintiff shall succeed upon the second trial, he is not to have the costs of the first trial, or of this application, as costs in the cause, because the new trial is granted for the plaintiff's benefit, to enable him to make out the case, which he failed in doing at the first trial; so that the costs of the last trial will in effect abide the event of the costs in the cause if the defendants succeed, but will not abide the event of the costs in the cause if the plaintiff succeeds. We think it right, however, to dispose of some of the objections that have been made. One objection to the plaintiff's specification is rested on the ground that it does not set forth that double process which one would expect from the title of the patent. It is unnecessary now to solve that difficulty, as the Court doubts whether or not, since the new rules of pleading, that objection is fairly let in by the present pleas. The objection is, that the plea states the plaintiff's specification to be insufficient; whereas it is said, that, supposing we think the title adequate, it is sufficient to describe the invention that he really had made, even if it be not sufficient to describe the second branch of the invention set forth in this patent.

The defendants may avail themselves of the objection, that the plaintiff has taken out a patent too large for his invention, by putting in an additional plea in a different form from that stated on this record. We do not think that the question necessarily arises at present, or that it calls for an *ultimate decision, because [*401] we think, on consideration, that the double process, viz. both the branches of the invention mentioned in the patent are sufficiently described in the specification. Now I have come to that conclusion in consequence of the discussion on this motion. The patent purposes to be a patent for an improvement in extracting sugar from the cane-juice, as well as in the refining of sugar subsequently. Now it appeared on the evidence, that the only attempt to use it when applied to the cane-juice before it was boiled failed; but I think, on the investigation to-day, it does appear, though it is very awkwardly expressed, that the plaintiff, who is probably not very conversant with our language, did mean in his specification to embrace both branches of the title of his invention in this way: "I mean to apply my invention to the refining of sugar by melting the muscovado (or granulated) sugar, and bringing it into syrup, and then applying the invention to it; or by applying it in the process of extracting the sugar from the cane-juice before it is baked or boiled and made into syrup." *Mr. Godson* has given a satisfactory solution of that obscure passage in his client's specification, and rendered it more satisfactory by the words immediately following: because he presented the case of extracting the sugar from the cane-juice, in opposition to that of refining the sugar after it has been boiled and manufactured into muscovado sugar; and therefore, construing it with that view, it appears to me that the plaintiff meant to use the word "extract" in the sense in which the chemists who were called as witnesses said they understood it, and that he meant also to extract sugar or syrup from the juice before it is boiled and made sugar; but it is in evidence that it is made into syrup before it comes into that degree of baking or *boiling by the action of fire as to make it granulate; it is [*402] made into syrup after it has derived a certain consistency, by passing one, two, or three coppers; but it must pass through at least two others before it is in a state to granulate and to be

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made sugar. Therefore I think the expression "extract" may be fairly understood to mean the process to be applied with advantage to the extracting of syrup from cane-juice, before it arrives at that consistency of making it granulate, so as to make it into sugar; and with that explanation I think the objection that was made is removed. Supposing the specification is good on the face of it, it must be understood in other respects as compared with the evidence to be a specification of both branches of that invention; and if so, that objection is removed. I think also the word "improvements" was relied on as being in the plural number; but that is of no consequence, because the plaintiff may mean that every part of his process is to be treated as an improvement, forming together a series. It is a phrase that may be reconciled to the fact, because syrup, in the proper meaning of the word, is not extracted from the cane-juice any more than sugar is; but in the process of what is called extracting sugar from the cane-juice, it is made into syrup, and therefore it is an improvement in extracting sugar; *à fortiori*, it may be said to be an improvement in extracting syrup. Upon the main point, however, that respecting the bituminous schistus, nothing that I have heard has removed my original impression, that there was no evidence to shew that this process, carried on with bituminous schistus in combination with any iron whatsoever, would answer at all. The plaintiff himself has declared, that in that bituminous schistus which he himself furnished, the whole iron was extracted; and it appears that it was admitted by the counsel that the presence of iron would not only be disadvan-

[*403] tageous, *but injurious. Therefore, as it appeared by the evidence, that in all the various forms in which the article exists in this country sulphuret of iron is found, and the witnesses not describing any known process by which it can be extracted, I am of opinion that the plaintiff ought to have proved one of two things, either that the sulphuret of iron in bituminous schistus is not so absolutely detrimental as to make its presence disadvantageous to the process, (in which case this patent would be good,) or that the process of extracting the iron from it is so simple and known, that a practical man may be able to accomplish it with ease. The bituminous schistus which was procured and

used was exclusively that which was furnished by the plaintiff, not in its original state, but pulverized after it had undergone distillation and been made into charcoal in a foreign country; now in that stage of its preparation, it could not be discovered by examination, whether it was made from one substance or another; the residuum, after distillation of almost every matter, vegetable as well as animal, being a charcoal, though mixed more or less with other things. Then there is only the plaintiff's statement to prove that the substance which was furnished by him and used by the witness was charcoal of bituminous schistus. It appeared, also, that he had declared to one of the witnesses, that he had extracted all the iron from the substance so sent, and that it had also undergone another process. I am therefore of opinion, that without considering whether or not the patent would be avoided by the patentee's keeping secret the means requisite to extract the iron from the bituminous schistus, he has not shewn in this case that what he has described in the patent could be used as so described, without injury to the matter going through the process. Under all these circumstances we think the plaintiff ought to have given some evidence to shew *that bituminous schistus, in the state in which it is [*404] found and known in England, could be used in this process with advantage; and as he has not done that, the defendant is entitled to a nonsuit; but, at the same time, as it is alleged that the plaintiff may, on a new trial, supply the defect of proof as to the schistus by other evidence, we are desirous that the patent, if a good one, should not be affected by our judgment, and think it right to direct a new trial, on the terms which I have stated.

PARKE, B.:

I entirely agree with my Lord ABINGER in respect to the construction of this patent. We cannot on the face of it say, that as comparing it with the specification, it is void. The specification does, on the whole, truly describe the nature of the invention as declared in the patent, nor does there appear to me to be sufficient obscurity in the clause with reference to the baking to avoid the patent on that ground. But it seems to me to have been clearly the duty of the plaintiff to have done one of two

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things, viz. either to have shewn that bituminous schistus, with the admixture of sulphuret of iron, as it is known to exist in England, would answer the purpose beneficially; or that the sulphuret could be removed by any practical man so as to give no colour to the syrup. Now I have certainly some doubt whether there was not evidence for the jury, that a practical man acquainted with the subject might without much difficulty effect that removal to such an extent, that it might not be sufficient to give any colour to the sugar, and therefore not be prejudicial at all; but as my Lord ABINGER, upon the evidence before him at the trial, seems to think otherwise on this last point, I entirely concur with him as to the terms on which I think a new trial ought to be granted.

[405] BOLLAND, B.:

I perfectly agree with the view that has been taken of this matter by the Court. The objection made was, that the title of this patent was too large for the specification. Now had that appeared to be the fact, I should have felt myself bound by that rule of law which I have always understood to prevail in cases of this sort, viz. that where a title is set out in the patent, it is the bounden duty of the patentee to specify the whole set out in that title; but as it appears to me, for the reasons that have been already given by Lord ABINGER, that the word "extracting," and that other part of the title which perhaps is more objectionable than the word "extracting" could be, viz. that the making of syrup is fairly to be referred to the whole of the process during the time that the juice is expressed till it is reduced into syrup, I think the objection to the title is sufficiently removed. Very early in the argument it appeared to me that justice could not be done in this case unless we granted a new trial; because on the LORD CHIEF BARON'S notes it appeared that no evidence had been given by the plaintiff that bituminous schistus, procured from whatever place in which that substance could be found, would answer the purpose intended. The only evidence given by the plaintiff that bituminous schistus, when applied to the process described, produced the desired effect, applied to a pulverized substance, which the witness had pur-

chased from the plaintiff at Paris. Now if the plaintiff had gone on to shew that that substance was bituminous schistus, to which nothing had been done, but that it had produced the effect in its natural state, a great portion of that difficulty would have been removed; but that not being done, it was left in doubt whether all bituminous schistus would produce the effect attributed to it in the patent. Without doubt the *onus* of that proof lay on the plaintiff. An authority, if wanting, may be found in the *judgment of Mr. Justice BULLER, in the early case [*406] of *Turner* v. *Winter* (1). That very learned Judge added most extensive information on the subject of patent rights to that knowledge of law in which he was at least equal to any person who before or since his time has occupied a seat on the Bench. I will, therefore, advert more particularly to his judgment in that case, in order to adopt its terms in application to the present. That patent had been taken out for producing yellow paint, to be applied in the process of painting in oil or in water-colour. The patentee attributed to this patent also another quality, viz. making white lead, and separating the mineral alkali from common salt; and Mr. Justice BULLER, in giving judgment, said, "I do not agree with the counsel who have argued against the rule, in saying that it was not necessary for the plaintiff to give any evidence to shew what the invention was, and that the proof that the specification was improper lay on the defendant; for I hold that a plaintiff must give some evidence to shew what his invention was, unless the other side admit that it has been tried and succeeds. But whenever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification." In this case the plaintiff contents himself by merely saying that bituminous schistus will answer the purpose intended; but he ought, in my opinion, to have gone farther, and shewn that any bituminous schistus fairly procured either from chemists in the habit of selling that article, or

(1) 1 R. R. 311 (1 T. R. 602).

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in any other way, would *have also sufficed for the purpose intended; whereas he has merely shewn that the preparation made by himself in Paris, with the ingredients of which we are not at all acquainted any farther than that he told the witness that the iron had been taken out of it, produced the desired effect. He was bound to have informed the public how the iron was removed from the schistus, or to shew that its presence was immaterial. On these grounds, as well as for the reasons given by my LORD CHIEF BARON, a new trial ought to be had.

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ALDERSON, B.:

I quite agree with the view the rest of the Court have taken of this case. The first objection to the validity of the patent arises upon the ground that the title of the patent is too general, and has been, I think, already answered satisfactorily from the Bench; and I certainly entertain considerable doubts whether it is open to be taken upon these pleadings. With respect to the other point, the question arises on the validity of the specification. Now a specification must state one or more methods which can be followed, for the purpose of accomplishing and carrying into effect the invention. One of the methods stated in this case is the application of a filter, composed of charcoal formed by the distillation or carbonization of bituminous schistus. It must therefore be shewn that that purpose will be accomplished by following that method. It appears, too, that there is some little doubt entertained, whether, if iron be present in the charcoal formed from the carbonization of bituminous schistus, the experiment of depriving sugar of colour in this particular manner does not altogether fail? With respect to that, on reading the notes, I should have entertained some doubt, but for the admission supposed to be made, that iron was in the schistus and detrimental; but it is much more competent for my Lord to decide *that, than for a Judge who was not present at the trial. Certainly if any admission was made that the presence of iron would be a detriment to the operation, without confining that admission to its being a less perfect mode of exhibiting the experiment, than would otherwise be the case, that undoubtedly would be a ground for a nonsuit. But had

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it been shewn, either that bituminous schistus deprived of iron could be made by a process known to ordinary chemists of skill, or that it was a substance capable of being ordinarily purchased in the market as an article of commerce, it would have been necessary to have shewn the operation of separating the iron from it; and if its presence in the bituminous schistus was a positive detriment to the process of depriving the sugar of colour, then indeed the patent would fail. Under all the circumstances, I quite concur in the view the rest of the Court have taken of the case, as well as of the terms on which it ought to go to another jury.

Rule for a new trial accordingly.

Sir Frederick Pollock applied for security for costs, but the COURT held, that the cause was in too late a stage to admit of that motion; PARKE, B. adding, that if the defendants should obtain judgment against the plaintiff, it might be enforced against him in France, the country of which he was suggested to be an inhabitant.

CASES AT NISI PRIUS.

REX *v.* FURSEY.

(6 Car. & P. 81—89.)

1833. *July* 4.

[81]

A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanor, and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence.

A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting.

INDICTMENT on the stat. 9 Geo. IV. c. 31, s. 12 (1).

[The offence charged under the statute was stabbing and

(1) Repealed by 24 & 25 Vict. c. 95, s. 1. And see 24 & 25 Vict. c. 100, s. 86; *R.* v. *Pinney*, 37 R. R. v, 599; Dicey, Law of the Constitution, 5th ed. 445.—R. C.

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wounding a constable with intent to resist the lawful apprehension of a certain person engaged in a riot. The statute, under certain circumstances, imposed the penalty of death. The evidence shewed that a public meeting had been advertised to be held in Coldbath Fields to adopt preparatory measures for holding a national convention. Evidence was given that a flag was carried at the meeting with a death's head and cross-bones, and the inscription "Liberty or Death." And there was evidence that some of the police constables behaved with great violence in endeavouring to disperse the meeting.]

[86] GASELEE, J. (in summing up):

The question for you to consider will be, whether there was sufficient provocation to reduce the offence of the prisoner below the crime of murder, if death had ensued; and although it is not mentioned in the indictment, you are at liberty to inquire whether the meeting was an illegal meeting or not; for if it was, the police would be justified in taking away the flag; but if the meeting was not an illegal one, then they would have no right to take the flag away from the prisoner. Taking it that the meeting was a legal one, this question will arise, whether the taking away of the flag was a sufficient provocation to justify the prisoner in striking with such a deadly weapon; and it makes a great difference whether a man under provocation takes up a deadly weapon on the sudden, or whether he goes out with the weapon, intending to use it to prevent the taking away of the flag. It will be for you to say whether the conduct of the prisoner shewed that malignity of purpose which would, if death had ensued, have constituted the crime of murder. If you are of opinion, that he took this deadly weapon with an intention to resist, under all circumstances, the taking away of the flag,

[*87] I feel justified in telling you, and *I believe that my learned brother will agree with me, that, if death had ensued, the crime of the prisoner would not have been less than the crime of murder; however, you ought also to consider, whether there was sufficient provocation before the blow was given, to reduce the offence, had death ensued, to the crime of manslaughter. A great deal has been said of the impropriety of sending out

policemen in plain clothes. I own that it does not strike me that there is any impropriety in it; for those who have to prevent disturbances, would not do their duty, if they did not take every means of discovering the persons who were concerned in them. For, although it would be improper, as suggested on the part of the prisoner, if persons were sent out to lead others into the commission of offences; yet when the object is to prevent the commission of crime, parties would not do their duty, if they did not take every means of finding out the parties concerned, by sending those in among them who might be able to make the discovery.

On the part of the prisoner a great deal of evidence has been given to shew that the conduct of the policemen was very violent and very outrageous. You will have, therefore, to consider whether their conduct was a sufficient provocation to the prisoner to resist as he did, or whether, from the fact of his having taken the weapon out with him, there was that malignity of purpose which would have made the offence of the prisoner amount to murder, if death had ensued.

It appears from the evidence of Mr. Stallwood that the proclamation contained in the Riot Act was not read. Now, a riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the common law offence remains, and it is a *misdemeanor; and all magistrates, [*88] constables, and even private individuals, are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force. I do not lay down this as the law, for the first time; the law has been so laid down by the Judges on the special commissions. There has also been given in evidence a proclamation issued by order of one of the Secretaries of State; and in that proclamation it is stated that printed papers have been posted up, advertising that a public meeting would be held to adopt preparatory measures for holding a national convention. Now, that proclamation is not evidence that the meeting was to be held for the purposes there mentioned.

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It is, in effect, only a notice given by the Secretary of State, and is evidence in this case in no other way; but, if placards convening the meeting were posted up, stating that the meeting was for those purposes, then it is an illegal meeting. If it was intended by force to make any alterations in the laws of the country, that would be a much more serious offence, as it would be high treason. The proclamation states it to be an illegal meeting, and commands all constables and others to disperse it. If such a notice be given, and a party chooses to treat it as of no effect, he does it at his own risk.

Clarkson, for the prisoner:

The *Solicitor-General* did not offer any evidence to shew that this proclamation was issued by the Secretary of State.

GASELEE, J.:

That is true; but, without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. There may be a difficulty in saying in what way this meeting was illegal, but it was either illegal as a misdemeanor or a higher offence; and, whichever it was, it justifies the dispersion of the meeting. One of the witnesses has stated that the purpose of the meeting was to adopt pre-
[*89] paratory *measures for holding a national convention, and that that was generally known. If you think that the meeting was held for the purpose of adopting preparatory measures for the holding of a national convention, then the police had a right to interfere, and arrest the parties. The first question will be, whether the prisoner was the person who gave the wound to the prosecutor Brooke? and the question will then be, whether there was such provocation as would have reduced the offence to the crime of manslaughter, if death had ensued? If you are of opinion that the prisoner, having taken the flag in his hand, had prepared the weapon with a view of protecting it under all circumstances, then I own it appears to me, that there are not those circumstances which will reduce the crime, so as that, if this person Brooke had died, it would not have amounted to murder. If you think that the prisoner, previous to his going

out, prepared a deadly weapon to resist any attempt to defeat the object of the meeting, or to prevent himself from being deprived of the flag which he carried, I am bound to tell you that I think the offence has been proved.

REX v. FURSEY.

Verdict—Not guilty.

BROWN *v.* WOODMAN.

1834. *Jan.* 17.

(6 Car. & P. 206.)

[206]

There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise.

ASSUMPSIT for work and labour about an engraving. Plea, general issue.

It appeared that a letter had been sent by the defendant to the plaintiff, of which the defendant had kept a copy. Notice had been given to the plaintiff to produce it, but, when called for, it was not produced.

Campbell, S.-G., for the defendant, was proceeding to cross-examine one of the plaintiff's witnesses as to the contents of this letter.

Platt, for the plaintiff:

I submit that the copy ought to be produced, as that, next to the original, is the best evidence of its contents.

PARKE, J.:

There are no degrees in secondary evidence. If there had been a duplicate original it might have been different.

The witness gave evidence of the contents of the letter.

Nonsuit.

1833.
Nov. 15.

[237]

MITCHELL AND ANOTHER *v.* KING.

(6 Car. & P. 237—238.)

A tender to be good must be unconditional, so that if the plaintiff take the money, and there be more due, he may still bring an action for the residue: Therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement": Held, not a good tender.

ASSUMPSIT to recover a balance of an account. Pleas, first, general issue; second, a tender of 35*l.* 2*s.* 6*d.* Replication, denying the tender.

It appeared, that the defendant rented the counting-house of the plaintiffs, and saw Mr. Goldie, one of the plaintiffs. The defendant produced 35*l.* 2*s.* 6*d.* in gold and silver and Bank of England notes. The defendant said, "There is your due, if you like to take it." The plaintiff said he would take it in part, or a pound in part, and give a receipt for it; and the defendant then replied: "I do not admit of its being taken in part, but as a settlement." Mr. Goldie did not take the money.

VAUGHAN, B. (in summing up):

[*238] A tender, to *be a legal tender, must be unconditional. If the money is put down only on a condition that a party will take it as a settlement, that is not a good tender. If it was not an unconditional offer, so that the plaintiff might have taken up the money, and if there was more due might still bring an action, the tender is bad. A tender clogged with the terms that the money is to be taken as a settlement is not good.

Verdict for the plaintiff on the plea of tender.

CLARKE *v.* POSTAN (1).

(6 Car. & P. 423—426.)

1834. *May* 3.

[423]

To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew that the charge was taken down in writing and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate, with a view to induce him to entertain it as a charge of felony.

THE first count of the declaration stated, after the usual introductory averments, that the defendant, on the 18th of February, 1834, appeared before Sir John Key, one of the justices of the peace for the city of London, and there falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen divers goods and chattels, to wit, a pair of pistols and a bag of trusses; that the justices refused to entertain the charge, and dismissed it; and that the defendant had not further prosecuted, but abandoned his complaint; and the same was wholly ended and determined. The second count stated, in substance, that, before the committing of the grievances, &c., one Thomas Lane was possessed of a pair of pistols, a pair of spurs, and two trusses, and died intestate on the 9th of February, 1834; and that the plaintiff and one Margaret MacMahon, by the leave of the sister and next of kin of the deceased, took possession of the pistols, spurs, and trusses, and disposed thereof for their own benefit, without any felonious or dishonest act or intent; yet the defendant, intending to injure the plaintiff, and to have it believed that she was guilty of stealing them, said of the plaintiff and Mrs. MacMahon, "I have got something here that will send them to the Old Bailey, if they do not mind what they are at; and I will spend thirty or forty pounds upon it, but I will serve them out. They have regularly robbed him (meaning the deceased)."

The defendant pleaded not guilty.

According to the testimony of the witnesses called on the part of the plaintiff, it appeared, that, in consequence of a quarrel which had taken place at the funeral of a deceased lodger of the

(1) Cited by HAWKINS, J., explained and commented on by COTTON, L. J., in *Reg.* v. *Yates* (1883) 11 Q. B. D. 750, 757; *Yates* v. *Reg.* (1885) 14 Q. B. D. 648, 661.—R. C.

CLARKE v. POSTAN.

plaintiff and her sister, Mrs. MacMahon (who jointly kept a lodging house), an assistant of the defendant (who was the undertaker employed) summoned *the plaintiff, her sister, and one of the lodgers, on a charge of assault; that the defendant attended the hearing before Sir John Key; and when the charge of assault was dismissed, the defendant stood forward and said, "I have another charge to make against Mrs. Clarke and her sister," adding that "it was a charge of felony for abstracting two pistols, a bag of trusses, and a pair of spurs, from the property of their late lodger." They stated further, that the magistrate dismissed that charge also. In support of the second count a witness was called, who was clerk to the plaintiff's attorney, and he stated, that, by desire of the plaintiff, he went with the party before the magistrate; and that, before they were called in, he saw the defendant in Guildhall Yard, and asked him if it would not be much better to let the matter drop, or that all parties should be bound over to keep the peace towards each other; and that the defendant replied, he would do no such thing, and followed up the remark by saying he was determined to serve them out; and then, pointing to a bundle which he had under his arm, used the words mentioned in the declaration. A lady, who was a cousin of the deceased lodger, and who attended at the house on behalf of his sister, to take charge of his property, was also called on the part of the plaintiff. She stated that she packed up every thing with the assistance of a servant; that there were a variety of dirty articles lying about; that she did not see either spurs or pistols, but did see some trusses on the bed; that she examined every thing, intending to take away every thing of value; that had she seen any pistols or spurs, she should have thought it right to pack them up; and that she said to the plaintiff and her sister, that all that remained in the room she considered as rubbish; and, if any thing was of use to them, they might have it.

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Prendergast, for the defendant, submitted that, with respect to the second count, there was nothing for him to *answer, as the averment that the plaintiff had the articles by gift from the deceased's sister had not only failed of proof, but had rather been negatived.

[*425]

BOSANQUET, J.:

There are the words, "They have regularly robbed him." You may reject the introductory averment, if the words set out in the count are sufficient without.

Prendergast then addressed the jury for the defendant, and called several witnesses, who denied that any charge of stealing was made by the defendant before the magistrate, after the dismissal of the charge of assault, as stated by the plaintiff's witnesses. They admitted that the defendant did say something about the trusses and pistols, but said that it was during the progress of the case of assault. They also swore that the defendant had not any bundle under his arm. One of them, a police constable, stated, in addition, that, on the Monday morning previous to the hearing of the assault case, he saw the plaintiff, and asked whether she had removed any property, or whether any property of the deceased had been given to her, either directly or indirectly; to which she replied, "No, not to the value of one farthing."

BOSANQUET, J. (in summing up), said:

This action is brought upon two grounds: first, for a malicious charge made before a magistrate; and, secondly, it is an action of slander. With respect to the second ground, no justification is put upon the record; and you will, therefore, have to consider whether the words were spoken, and spoken in the sense alleged in the declaration, viz. of taking the property feloniously. As to the first count, the first question is, whether any such charge was made before the magistrate, aye or no. It has been suggested by the defendant's counsel, that it must be taken down in writing, and acted on. I am not of that opinion. But I am of *opinion [*426] that it must be made to the magistrate, with a view to get him to entertain it. The question is, first, was the charge made seriously before the magistrate for the purpose of his entertaining it as such? and, if it was, then was it made without reasonable and probable ground—this is partly a question of law and partly of fact; and, then, thirdly, if there were reasonable and probable grounds for the charge, was it made maliciously on the part of

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the defendant? [His Lordship stated the facts to the jury, and observed:] If what the policeman said is true as to the conversation with the plaintiff on the Monday, and he communicated it to the defendant, then I cannot say that it may not be evidence of reasonable and probable cause. Then comes the question whether the charge was made maliciously? The second count of the declaration has a double aspect, as a substantive complaint, and also as shewing malice. His Lordship observed upon the contradictory evidence, with respect to the defendant's having a bundle under his arm; and left the case to the jury, who returned the following verdict:

"The jury find that there was no direct charge of felony before the magistrate. On the second count, we find the slanderous expressions have been used, for which we give damages 25*l.*"

Verdict for the defendant on the first count; and for the plaintiff on the second count. Damages, 25l.

1834.
July 3.

[501]

JOEL *v.* MORISON (1).

(6 Car. & P. 501—503.)

If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do.

THE declaration stated that, on the 18th of April, 1833, the plaintiff was proceeding on foot across a certain public and common highway, and that the defendant was possessed of a cart and horse, which were under the care, government, and direction of a servant of his, who was driving the same along the said highway, and that the defendant by his said servant so carelessly, negligently, and improperly drove, governed, and directed the said horse and cart, that, by the carelessness, negligence, and

(1) Cited and followed in *Whatman* v. *Pearson* (1868) L. R. 3 C. P. 422, 37 L. J. C. P. 156; and in *Burns* v. *Poulsom* (1873) L. R. 8 C. P. 563, 42 L. J. C. P. 302.—R. C.

improper conduct of the defendant by his servant, the cart and horse were driven against the plaintiff, and struck him, *whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, &c., and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months. Plea, not guilty. [*502]

From the evidence on the part of the plaintiff it appeared that he was in Bishopsgate Street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to have been driven at the time by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant witnesses were called, who swore that his cart was for weeks before and after the time sworn to by the plaintiff's witnesses only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the City at all.

Thesiger, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of his servants.

PARKE, B.:

He is not liable if, as you suggest, these young men took the cart without leave; he is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

His Lordship afterwards, in summing up said: This is *an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. [*503]

JOEL v. MORISON.

There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offence, he is only responsible in law, therefore the amount should be reasonable.

Verdict for the plaintiff. Damages, 30*l*.

1834.
July 19.

[548]

WOODWARD *v.* LANDER, CLERK (1).

(6 Car. & P. 548—550.)

A letter written to the Postmaster-General, or to the Secretary to the General Post Office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized, if the intention of the defendant was good.

LIBEL. Pleas, first, general issue; second, a justification as to a part of the libel. Replication, denying the justification.

It was opened by *R. V. Richards* for the plaintiff, that the plaintiff was the postmaster of Rugely, and had also been a mercer, but that he had been unfortunate in trade, although he

(1) Cited by WILLES, J., in *Henwood* v. *Harrison* (1872) L. R. 7 C. P. 606, 621, 41 L. J. C. P. 206, 214.—R. C.

still continued in the situation of postmaster, respecting which the defendant had written a letter to Sir Francis Freeling, the Secretary of the Post Office, who, after instituting an inquiry, had, by the direction of the Duke of Richmond, who was Postmaster-General, caused the letter of the defendant to be delivered to the plaintiff. This letter was the libel. It was read, and was to the following effect:

"May 6, 1833.

"SIR,—It is painful to me to make complaints, but I trust you will not think the present complaint frivolous. I reside two miles from Rugely, and send daily thither purposely for letters, and always send money enough to pay postages. On the present occasion it happened (which was very unusual) that I had three letters—one double, the postage of which was 1*s.* 8*d.* I sent 1*s.* 10*d.* only, and the postmaster or mistress would not let my servant have it without the postage being paid, though he said I should be by to-morrow, and pay for them. I have resided upwards of twenty years near Rugely, where I spend a great part of my income; and any tradesman, even *Woodward himself, would give me credit for more in pounds than this amounted to in pence. This is his retaliation for a complaint I once made against him, but I have suppressed several. His office is most negligently kept. The letter-box is closed an unreasonable time, and letters are continually denied which are there, and it is by all persons that I have heard speak of it complained of as a bad branch of your beautiful establishment. [*549]

"Is he entitled to charge a penny for a letter put in by a townsman? Is 1*s.* 8*d.* the postage of a double letter from London? I should make no inquiry of this sort if I did not think the man capable, from his conduct to his creditors, of fraud."

(Signed by the defendant).

The Defendant:

May I go through the criminal items in the declaration?

ALDERSON, B.:

You may, under the plea of the general issue, shew that you did not publish the libel, or that you published it under such circumstances as will make it a protected communication.

WOODWARD v. LANDER.

The Defendant:

Our intercourse with the post-office is compulsory; and are we not to be allowed to make complaints of even imaginary grievances?

ALDERSON, B.:

You had a right to make a complaint; and the only question is, whether in writing this letter you have exceeded the bounds of a fair and honest complaint?

The defendant addressed the jury, but did not go into any evidence in support of the plea of justification.

ALDERSON, B. (in summing up):

[*550] Even if this letter, which was written by the defendant, be a libel, it does not *follow that there should be a verdict for the plaintiff; for, if it was written as a *bonâ fide* complaint, made to obtain redress in the proper quarter, the defendant would be entitled to a verdict, although the contents of the letter may not be strictly true. The question is then, was this letter written *bonâ fide* to a person whom the defendant believed to have the power of giving him redress for a grievance that he really believed he had suffered? If the defendant believed that he had suffered an injury by the conduct of the plaintiff as postmaster, he had a right to make his complaint to the Duke of Richmond, or Sir Francis Freeling; but the defendant would not thereby be justified in introducing irrelevant matter to the injury of the plaintiff's character. This is not strictly what is called a privileged communication, but is rather a communication privileged by the occasion: and, if it was made *bonâ fide*, the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good; but if the concluding part of the letter was introduced gratuitously to injure the plaintiff's character, the plaintiff will be entitled to recover.

Verdict for the plaintiff. Damages, 10*l.*

REX *v.* BALL AND OTHERS.

1834. *July* 28.

(6 Car. & P. 563—570.)

[563]

Where an oath was administered, that the party taking it should not make buttons under certain stated prices, and should keep all the secrets of the lodge: Held, to be an administering of an unlawful oath within the statutes.

The administering an oath or engagement to any person not to reveal the secrets of any association is an offence within those statutes.

INDICTMENT for administering an unlawful oath (1). The first count charged that the prisoner, on the 27th *day of February, 1834, at &c., "did feloniously administer to Eliza Beswick a

[*564]

(1) By 37 Geo. III. c. 123, s. 1, it is enacted, "that any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy, formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person, not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which *may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years." See 39 Geo. III. c. 79; 52 Geo. III. c. 104; and 57 Geo. III. c. 19. By sect. 25 of the latter stat. it is enacted, "that from and after the passing of this Act, all and every the said societies or clubs, and also all and every other society or club now established, or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the meaning of" the 37 Geo. III. c. 123, "or within the meaning of" the 52 Geo. III. c. 104, "or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being, a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such

[*564, *n.*]

REX v. BALL. [*565]

certain oath not to inform or *give evidence against any associate, confederate, or other person belonging to a certain unlawful association or confederacy, which said oath was then and there taken by her the said Eliza Beswick." The second count stated the oath to be "not to reveal a certain unlawful combination and confederacy." The third count stated it to be "not to reveal any act done or to be done by certain

taking or assenting shall be performed, whether by words, signs, or otherwise; either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate, or delegates, representative, or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be unlawful combinations and confederacies, within the meaning of" stat. 39 Geo. III. c. 79, "and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said Act; and every person who, from and after the passing of this Act, shall become a member of any such society or club, or who, after the passing of this Act, shall act as a member thereof, and every person who, from and after the passing of this Act, shall directly or indirectly maintain correspondence [*565, n.] or intercourse *with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy, within the intent and meaning of the said Act (39 Geo. III. c. 79), and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said Act with regard to the prosecution and punishment of unlawful combinations and confederacies." And by the 26th sect. of the same stat. it is enacted, "That nothing in this Act contained shall extend, or be construed to extend, to any society or societies holden under the denomination of lodges of Freemasons, in conformity to the rules prevailing in such societies of Freemasons, provided such lodges shall comply with the rules and regulations contained in the said Act of" 39 Geo. III. c. 79, "relating to such lodges of Freemasons, nor to any declaration to be taken, subscribed, or assented to by the members of any society, the form of which declaration shall have been first approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices present at a general Session, or at a general Quarter Sessions of the peace, pursuant to the rules and regulations contained in the said Act of" 39 Geo. III. c. 79; "nor shall extend, or be construed to extend, to any meeting or society of the people commonly called Quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business

persons *belonging to a certain unlawful association." The fourth count stated the oath to be "not to reveal any illegal oath which may have been administered or tendered to or taken by certain persons belonging to a certain unlawful association, or the import of any such oath." The fifth count stated the oath to be "not to inform or give evidence against any associate or other person belonging to a certain association." The sixth count stated it to be "not to reveal a certain other unlawful combination." The seventh count charged that the prisoner did "cause to be administered" to the said Eliza Beswick an oath "not to reveal any act done or to be done by certain persons belonging to a certain other unlawful association." The eighth count was for causing to be administered an oath, the same as in the fourth count. The ninth count was for causing to be administered to E. B. an oath "to be of a certain association, society, or confederacy, formed for the purpose of disturbing the public peace." The tenth count was for causing to be administered to her an oath "to obey the orders of a certain committee or body of men not lawfully constituted, and of certain persons not having authority by law for that purpose."

The prisoners pleaded guilty, and were recommended to mercy by the committing magistrate, Dr. Greaves, and also by *F. V. Lee*, on the part of the prosecutors.

The following are copies of the depositions which were adverted to by the learned Judge in delivering his opinion:

"The Deposition of Eliza Beswick, the wife of Richard Beswick, of Flash, in the county of Stafford, traveller.

"I live in Flash, in the parish of Alstone-field, and am the wife of Richard Beswick, traveller. I make buttons, and am employed by different manufacturers. In the early part of

whatsoever shall be treated of or discussed."

By the stat. 37 Geo. III. c. 123, s. 2, it is enacted, that persons who are compelled to take unlawful oaths, &c., shall not be justified or excused, unless they disclose it in the manner there prescribed within four days. Sect. 3 of the same statute regulates the form of the indictment; and sect. 5 defines what shall be deemed an oath; and, by sect. 6, it is provided that these offences, if committed in England, abroad, or at sea, may be tried before "any court of oyer and terminer, or gaol delivery for any county" in England.

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February Mr. Isaac Brunt, of Leek, came to the 'Traveller's Rest,' a public-house where a trades' union was *kept, and
[*567] advised the button people to commence a union; and if we would convene a meeting they would attend, and put them in a way. Consequently, Joseph Coates, Thomas Malkin, William Ball, Joseph Haywood, and Henry Booth came to the 'Traveller's Rest' on the 27th of February. I was there. They all said it would be for our good to enter the union, and that we should never have cause to repent it. There were a great number of women there. We, of our own free will, declared that we would not make any buttons under 6*d.* and 10*d.* They sang and prayed, and then we took the oath, and in what they called the club-room. Previously to going into the room, a woman, whom I do not know, bound my eyes with a handkerchief, and led me to a large dining-table in the club-room. We all knelt down, and had our right hands on the left breast, and the left hands on the Bible. We solemnly declared we would not make any buttons under 6*d.* or 10*d.*; that we would keep all the secrets of the lodge, and never give our consent that any of the money should be divided or appropriated to any other purpose than the use of the union: if we did, might our souls drop into the bottomless pit. One of the prisoners then said, 'Now, sisters, you are members of our honourable society, and may you ever prove worthy of the honour conferred upon you.' Joseph Haywood gave me the words, and I repeated them after him. We kissed the Bible previous to using the words above stated. Sarah Beswick was sworn at the same time. I had hold of her hand. We were to subscribe 2*d.* weekly; and, at the expiration of a quarter of a year, we were to turn out for wages; and, while the turn out was, they would allow 6*s.* per week. All the prisoners and William Heath were present while I was initiated. Mr. Haywood gave me my oath; and William Ball, I was informed, had the whole management of the union. I paid 2*d.* for entrance money, and they came again in about three weeks, and received 6*d.* from
[*568] me. I paid the 6*d.* to John Johnson. I collected *two different sums, one was 3*l.* 5*s.* 8*d.*, and the other I do not recollect. I collected it at the request of John Johnson and Paley. Bocock Paley and John Johnson came to the Flash some time after we

had been initiated, and told us the Dorchester men had been transported for giving the oath, and begged of us to be initiated afresh. We readily consented to it, and we were initiated afresh, and John Johnson delivered me the book now produced. When we were sworn the handkerchief hurt my eyes, and I put it up, so that I could see what was going on. I saw the prisoners and William Heath present. Heath and Haywood had white dresses on, like surplices. I cannot take upon me to swear that Heath administered an oath, but he was taking an active part in other measures that went on. Haywood administered the oath to me. Two persons held a hatchet and a sword over the table during the ceremony. They then took the handkerchief off my eyes, and I left the room. It was crowded to excess. The book now produced contains an account of the different sums received by me on account of the union.

"Cross-examined by Henry Booth.—I will swear that William Ball, Thomas Malkin, Joseph Coates, Joseph Haywood, and Henry Booth were present when Haywood gave me the oath. Some of them presented the books to the persons present, and some were seeing that they repeated the words after they presented the oath. When the quarter was up we met at the Royal Cottage, at Middle Hills, and struck in form, and refused to make buttons at the old prices. I had some conversation at the 'Globe Inn,' in Leek, in an upstairs room, with Mr. Haywood, about relieving us. Mr. Ball and, I think, George Plant were present. Betty Beswick went with me. They told me the funds were so low that they could not relieve us. Some time since, and after I had been to the magistrates at Mayfield, my husband wrote an anonymous letter addressed to Mr. William Ball, requesting the unionists to come to some agreement with the people at Flash, who *had been initiated into the union. I have never received [*569] any answer back from them. I put the letter into the Leek post-office myself.

"(Signed) ELIZA BESWICK.

"Taken and sworn before me,

"W. GREAVES."

The deposition of Sarah Beswick was as follows:

"I am a button maker, and a member of the union. Some

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time ago I heard there was to be a meeting at the 'Traveller's Rest,' in Flash, to uphold the prices of the button trade. In consequence of which I went there, and saw Henry Booth and Joseph Haywood. I paid 2*d.* entrance to Booth. I was then blindfolded, just as I entered by the door, by some man; a woman then led me—she came from Leek, and told me to kneel down, and lay my right hand upon my left breast, and my left upon the Bible. I did so. Some man told me if I ever consented to make any buttons for less than the lodge price, 6*d.* and 10*d.*, and if ever I divulged any thing of the secrets, my soul might drop into the bottomless pit; and I repeated the words after him. After that I kissed the book. I considered I had taken an oath. Then the bandage was taken off my eyes, and I saw Henry Booth and Joseph Haywood. Haywood was the person who swore me. He had a white surplice on. There was two with surplices; one man had a sword and another an axe. They put it down to the bottom of the table, and said something; but I do not know what, I was frightened. We were to pay 2*d.* a week for three months to the union, and then to turn out, and receive 6*s.* a week from the union. At the expiration of three months we turned out, and I believe Mr. Beswick applied for some relief for us, but we got none. John Johnson and Mr. Beswick received money from me several times. The persons who had the surplices on, one had the blue and the other a red scarf over the shoulder. Eliza Beswick was in the room [*570] when I *was initiated, and I had hold of her by the hand, I was so frightened. There has not been any person to me to make this business up; but we were detained this morning by three or four persons, who came to stop us from coming before the magistrate.

"The mark ⋈ of
"SARAH BESWICK.

"Taken and sworn before me,
"WILLIAM GREAVES."

There were two other depositions to the same effect.

WILLIAMS, J.:

I am bound to say that, having read the depositions, I do not entertain a particle of doubt that, provided the facts there

disclosed had been proved against you, it was an offence within the statutes; and I believe that no man, who has the fairness or industry to peruse those Acts of Parliament, and to understand them, can entertain a doubt that to administer an oath or engagement not to reveal the secrets of any association is within the stat. 37 Geo. III. c. 123, as explained and modified by subsequent statutes—I say that it is within the meaning of those statutes, not as has been ignorantly supposed or represented, because it had reference to any matter respecting wages; but on the ground that every association of that kind, bound together by an oath not to disclose the proceedings of that society, is for that reason, and not for the other, an unlawful combination within the meaning of the statutes of the realm.

The prisoners were discharged on their own recognizances, to appear to receive judgment when called upon.

REX *v.* LOVELASS AND OTHERS.

1834. *March* 17.

(6 Car. & P. 596—601; S. C. 1 Moody & Rob. 349.)

[596]

An oath administered in a society, by which the members of it are sworn to secrecy, is an unlawful oath within the stat. 37 Geo. III. c. 123, which is not confined to oaths administered for the purposes of either sedition or mutiny.

INDICTMENT for administering an unlawful oath. The indictment charged that the prisoners did feloniously administer and cause to be administered a certain oath and engagement, purporting to bind the person taking the same not to inform or give evidence against any associate or other person charged with any unlawful combination, and not to reveal or discover any such unlawful combination, or any illegal act done or to be done; and not to discover any illegal oath which might be taken.

A witness named Lark, who was a labourer, said: "One of the prisoners, whose name is Brine, came to me *while I was threshing, and persuaded me to go to Tolpuddle. I went to the prisoner Thomas Stanfield's house, up stairs. While we were [*597]

REX v. LOVELASS.

there, the prisoner John Stanfield came in; he asked if we were all ready. Some one answered, that we were; and he said, then, blind your eyes. We all then tied our handkerchiefs round our eyes, and, being thus blindfolded, we were led into another room, where something was read to us by some person whom I did not know. I think, from the reading of it, it was out of the Bible; I don't recollect any part of it. We then knelt down, when a book was put into our hands, and an oath administered to us. I don't recollect what the oath was about. We then rose up and were unblinded, when the picture of death, or a skeleton, was shewn to us, upon which the prisoner James Lovelass said, 'Remember your end!' We were then blinded again, and again knelt down, when something was read out of a paper, but what that was I don't remember. I kissed a book when I was unblinded first. I saw George Lovelass dressed in white; he had on him something like a parson's surplice. Something was said about the rules of the society, and about paying one shilling on admission. I saw all the prisoners there when I was unblinded."

Another witness, named Edward Legg, said: "I went with the last witness; they told us something about striking, or that they meant to strike, and that we might do the same if we liked. There was nothing said about the time when we should strike. There was something said about our masters having notice of it, but I don't remember any thing about it. We kissed a book when we were blinded. When we were on our knees, we repeated something that was said by somebody, but who said it I don't know. I believe it was like the voice of James Lovelass. I think the words which we repeated were something about being plunged into eternity, and about keeping secret what was done by the society. I don't know what book it was that I kissed. When I was unblinded I saw a book on
[*598] the *table that resembled a Testament. They shewed us the picture of death, and one of them said, 'Remember your end!'"

It was proved, that, in a box belonging to the prisoner James Lovelass, was found a book, which was headed "General Rules." The first rule was, "That this society be called 'The General Society of Labourers.'" The substance of the rules was, that

there should be a lodge in every parish, a committee, a grand lodge, and contributions to support those who quit their work when desired by the grand lodge. That no person should turn out for an advance of wages without the consent of the grand lodge. That no member of the society should work along with any man who acted contrary to any rule prescribed by the grand lodge. That if any man divulged any of the secrets of the society, his name and description should be sent round to all the lodges, and all members should decline to work along with him. That no person should be admitted to their meetings when drunk; that no obscene songs or toasts should be allowed; and that they should not countenance any violence or violation of the laws of the realm.

Butt, for the prisoners, Brine, Hemmett, and John Stanfield:

I submit that this is not a case within the stat. 37 Geo. III. c. 123, which is confined to mutinous and seditious societies. If this society came within that statute it would equally apply to all lodges throughout the kingdom.

Derbishire, for the other prisoners:

The stat. 37 Geo. III. c. 123, was passed to protect soldiers and sailors from the seductions of persons who were then supposed to be conspiring to overthrow the British monarchy on behalf of a foreign enemy, and who were, as the preamble of the Act states, engaged in administering illegal oaths, for the purpose of binding the consciences of their victims to embark in such treasonable projects. The *case of *Rex* v. *Marks* (1) is [*599] distinguishable from the present. There, certain workmen had formed themselves into a committee to coerce and control other workmen in the same line, and compelled their fellow workmen to take an oath binding them to pursue a certain line of conduct. That was not so in the present case. The rules and regulations put in shew that the object of this society was similar to that of a friendly society, it being to form a fund, a sort of agricultural saving bank, out of which succour might come in time of need.

(1) 6 R. R. 577 (3 East, 157).

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There is no evidence of any oath. Something has been said about eternity; but the witnesses know not what. There is no evidence to shew that the society was illegal; and if it was not, could the oath be illegal?

WILLIAMS, B. (in summing up):

If you are satisfied that an oath, or obligation tantamount to an oath, was administered to either of the witnesses Legg or Lock by means of the prisoners, you ought to find them guilty. The prisoners are indicted under the stat. 37 Geo. III. c. 123, the preamble of which refers to seditious and mutinous societies; but I am of opinion that the enacting part of the statute extends to all societies of an illegal nature: and the second section of the stat. 39 Geo. III. c. 79, enacts that all societies shall be illegal, the members whereof shall, according to the rules thereof, be required to take an oath or engagement not required by law. If you are satisfied from the evidence respecting the blinding, [*600] *the kneeling, and the other facts proved, that an oath or obligation was imposed on the witnesses, or either of them, you ought to find the prisoners guilty; and if you come to that conclusion, I wish you to state whether you are of opinion that the prisoners were united in a society.

The jury found the prisoners guilty; and stated, that they were of opinion that, at the time of administering the oath, the prisoners were members of a society, and bound by an oath not to disclose the secrets of the society.

Butt and *Derbishire* asked the learned Baron to reserve the case for the consideration of the fifteen Judges on the ground that there was no evidence to shew that the society was formed for illegal purposes.

WILLIAMS, B.:

I will consider of it.

March 19.

The learned Baron said, that he had considered of the objections which had been made, and had come to the

conclusion that they were not well founded (1). His *Lordship sentenced the prisoners to be each transported for seven years (2).

REX v. LOVELASS. [*601]

REX *v.* DIXON AND ANOTHER.

1834. *July* 23.

(6 Car. & P. 601—602.)

[601]

Every person who engages in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the stat. 57 Geo. III. c. 19, s. 25.

INDICTMENT on the stat. 57 Geo. III. c. 19, s. 25 (3), for becoming members of a society, the members whereof bound themselves by an oath, in consequence of becoming members of the said society.

In some of the counts of the indictment, the purport of the oath was set forth, and others merely followed the terms of the statute, omitting to set forth the purport of the oath.

Gunning, for the prosecution, stated that, in March, *1834, [*602] there existed in Cambridge a trades' union of the operative cordwainers of that town; the object of which was to make a powerful confederacy, under the pretence of protecting labour, and the members of which were bound by an oath not to disclose

(1) In the case of *Rex* v. *Moore*, 6 East, 419, *n.*, it was held that an indictment charging that the defendants administered to J. H. an oath, intended to bind him "not to inform or give evidence against any member of a certain society, formed to disturb the public peace, for any act or expression of his or theirs," &c., is good, without alleging the tenor or purport of the oaths to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society. And in the same case it was also held, that, where the oath on the face of it did not purport to be for a seditious purpose, evidence might be given to shew that the "brotherhood" there referred to was a seditious society: Held, also, that where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said, that the prisoner held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words, yet that parol evidence of what the prisoner in fact said was sufficient without giving him notice to produce such paper.

(2) This case was afterwards the subject of discussion in the House of Commons, and much interest was made to procure a remission of the sentence; however, the sentence was carried into effect, and the prisoners were sent to New South Wales.

(3) Set forth *ante*, p. 819 *n.*

REX v. DIXON.

the secrets of the association. He further stated, that, as the union was dissolved, he should offer no evidence on this indictment.

BOSANQUET, J.:

I have no hesitation whatever in saying, that confederacies like that which appears to have existed in the present case are as decidedly in contravention of the law of the land, as they are pregnant with mischief to the community and to the working classes themselves. It is for the sake of those who belong to associations like that of the late Cordwainers' Union of Cambridge, that I now declare, that all who engage in associations, the members of which, in consequence of being so, take any oaths not required by law, are guilty of an offence against the statute, which, if clearly proved, would, upon conviction, be in every case followed by exemplary punishment. It is impossible that any well-ordered state of society could tolerate the existence of confederacies bound together by secret compacts and oaths not required by law; one of the obvious consequences of such confederacies being to deprive the state of the benefit of the testimony of those who are engaged in them—a state of things injurious to individuals, subversive of public order, and striking at the very existence of the state, by withdrawing the allegiance of the subject from the laws of the land to the secret tribunals of unlawful societies, constraining the conscience by oaths, and seeking to obtain their objects, whatever they might be, by popular intimidation.

Verdict—Not guilty.

1834.
Nov. 28.

[629]

REX *v.* JOHN GROUT.

(6 Car. & P. 629—630.)

A foot passenger was walking at lamp-light in the carriage road along a public highway, when the owner of a cart, who was proved to be near-sighted, drove along, at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot passenger, and killed him: Held, that he was guilty of such carelessness as amounted to the crime of manslaughter.

THE prisoner was indicted for the manslaughter of William Monk, at the parish of West Ham, in the county of Essex, and

within the jurisdiction of the Central Criminal Court, by driving the near wheel of a cart over his body.

From the evidence it appeared that the deceased, who was a tradesman, residing at West Ham, was walking near the three mile stone, on the Stratford road, about two feet from the footpath, on the 25th of October, about half-past six in the evening, when *the prisoner, who was the owner of a cart drawn by one [*630] horse, drove along at the rate, according to the witnesses for the prosecution, of from eight to ten miles an hour, and, according to the evidence for the defence, at the rate of six or seven miles an hour, when the horse knocked down the deceased, and the near wheel went over his body, and pressed in the ribs against the lungs, and thereby caused his death. It was proved that the prisoner sat on some sacks laid on the bottom of the cart, and that he was near-sighted. It also appeared that other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. One of them, being called as a witness, stated, on cross-examination, that the carriage-road was smoother and better walking than the footpath (1). It was after dark, but there were gas lamps at certain distances along the line of road.

BOLLAND, B. (in summing up), told the jury (*inter alia*) that there was no doubt, on the evidence, that the life of the deceased was taken away by the act of the prisoner; and the question for their consideration would be, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his Majesty's subjects. If they thought that he had conducted himself properly, they would say he was not guilty; but, if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter.

Verdict—Guilty. Sentence, one month's imprisonment.

(1) No point was raised as to the right of foot passengers to use the carriage way; but upon it see the case of *Boss* v. *Litton*, 5 Car. & P. 407, in which Lord DENMAN, C. J., said, "A man has a right to walk in the road if he pleases; it is a way for foot passengers as well as carriages."

1834.
Dec. 1.

[636]

REX *v.* CARLILE (1).

(6 Car. & P. 636—651.)

If a party having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, *semble*, that it is not necessary to shew that the crowd consisted of idle, disorderly, and dissolute persons.

Where a defendant, indicted for a nuisance, conducted his own case, the Judge, at the conclusion of the case on the part of the prosecution, warned him that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts, the counsel for the prosecution would have a right to reply.

NUISANCE. The first count of the indictment stated that the
[*637] defendant, as well on the Lord's Day, commonly *called Sunday, as on other days, between the 21st of October and the taking of the inquisition, at the windows of his messuage and shop, in and near a public highway called Fleet Street, did exhibit and cause to be exhibited two scandalous and libellous effigies, representing a Bishop and a tradesman, and certain inscriptions (describing them), near to the said highway, and in view of persons passing along it, with intent to attract the notice of the persons passing along the said highway, and thereby unlawfully did cause divers persons, as well men as women and children, and idle, loose, and disorderly people, wrongfully and injuriously to assemble in the said highway, looking at the said effigies, by means of which the highway was greatly obstructed, to the great damage and common nuisance, &c. The second count was similar, but omitted to set out the inscriptions. The third count was similar to the first, except that it described a third effigy, representing the devil, with the arm of the figure of the Bishop placed within the arm of this figure); and in this count were set forth certain placards; and the day of the commencement of the nuisance was laid to be the 8th of November. The fourth count charged that the defendant exhibited "three effigies and figures,"
[*638] (not stating them to be libellous), within view of *the persons passing along the highway, with intent to attract their notice, and did wrongfully cause persons to assemble and remain in the

(1) Cited and followed by NORTH, J. in *Barber* v. *Penley*, '93, 2 Ch. 447, 62 L. J. Ch. 623, 68 L. T. 662.—R. C.

highway, looking at the effigies, by means of which the highway was obstructed. The fifth count was similar to the third, except that it omitted to state the whole of the inscriptions and placards. The sixth count charged that the defendant wilfully and unlawfully did cause divers persons wrongfully to assemble, stand, be, and remain in a certain highway, whereby the highway was obstructed.

Adolphus, for the prosecution, in his opening said : [639]

This defendant is a bookseller in Fleet Street, and having *been assessed to the church rate, he was summoned, and [*640] shewing no sufficient cause for non-payment, he was distrained *on. After this he took out the frames of his first-floor windows, [*641] and put in one of the windows an effigy of a Bishop of the Established Church, under which was written "Spiritual Broker," and in the other window a figure of a man in ordinary dress, and under him the words "Temporal Broker;" and these figures were there on Sundays as well as during the rest of the week. These figures attracted crowds of persons to gaze at them, and the consequence was, that the trade of the neighbouring shops was much injured, and the footpaths were so obstructed that persons were obliged to walk in the carriage way. The defendant afterwards added a third figure, that of the Devil, the arm of the figure of the Bishop being tucked into that of the Devil. There can be no doubt that every man has a right to use his own premises, and do any thing he pleases there which the law does not forbid, so that he does no injury to his neighbours; but if a man does any thing on his premises in view of the public, and crowds of persons are attracted by it to the injury of his neighbours, that thing he cannot be allowed to do. If *the defendant [*642] had shewn these figures to persons in his private parlour he would not be liable, at least on this form of indictment, the complaint here being the nuisance to the public. On this indictment I do not put the case at all on the circumstance of one of the figures being that of a Bishop; I put it on the ground that the defendant has not a right to place effigies so as to attract crowds to the injury of his Majesty's subjects.

REX r. CARLILE.

To shew that the defendant was the occupier of the house at which the effigies were exhibited, the collectors of taxes and of rates were called to prove that the defendant was the person who paid the rates and taxes.

To prove the nuisance, several witnesses were called; and it was stated by one of them, who was in the City police, that the two first-mentioned effigies were put up on the 21st of October, and that the third figure was added on Sunday the 9th of November, the whole three being up on the morning of the trial. This witness stated that the people looking at these effigies caused a crowd on the pavement on both sides of the street; and that passengers, particularly old persons and females, were obliged thereby to go off the footpath and into the carriage way, as there was not room for them to walk on the foot pavement; and that during the continuance of the alleged nuisance three persons had been taken into custody at that part of the street, one for picking pockets, and two for attempting to commit that offence. In his cross-examination this witness said, that, in consequence of the crowd on the pavement, the people shoved one another about; and he also said, that he had seen caricature shops which were surrounded by people, but not to so great an extent as the present alleged nuisance; that he had been in Smithfield on a market day; and that he had seen the crowd at the Lord Mayor's show.

PARK, J.:

[*643] One nuisance does not justify another; and if every shop in London were guilty of a nuisance, that will *not justify you. I not only say this of myself, but the learned persons who sit beside me agree with me.

Another witness, named Harris, also deposed to the inconvenience to passengers going along the street, and to the neighbouring shops, which was occasioned by the crowd which was daily attracted by the effigies; and he also stated, that the crowd consisted of "the lowest of the low;" and that the cash receipts of his shop had been reduced 3*l.* per day during the time the effigies had been exhibited, and, as he believed, in consequence of their exhibition.

It was further proved by Mr. Gray, who keeps the booking-office at the "Bolt-in-Tun," Fleet Street, that he had counted at different times from fifteen to fifty persons standing on the opposite side of the street to look at the effigies, and from ten to thirty on his side of it. In his cross-examination he said, that he put placards in his windows to attract observation. And it was further proved by Mr. Chandler, the proprietor of the "Portugal" Hotel, which was opposite the defendant's house, that the crowd was such as to prevent customers coming into his house, unless the police cleared the way for them; and that the crowd continually standing over his area gratings obliged his servants to burn candles every day and all day in his kitchen.

Adolphus, at the conclusion of the case, on the part of the prosecution informed the defendant that he should claim a right to reply, if the latter called witnesses, or read any papers not already in evidence.

PARK, J.:

I had a similar case at Warwick, where a person defended himself. I gave him warning, that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts which were not proved, the counsel on the other side would have a right to reply.

The Defendant addressed the jury: [644]

The circumstance of persons being obliged to go out into the carriage way is a matter of necessity, and it occurs every day; and, with respect to the attracting of a crowd, his Majesty never goes to the theatre, or to open the Parliament, without a much greater crowd than ever were at my shop. It is only a public nuisance, for which a party is indictable; and if our neighbours are injured in their trade, that would be the subject of an action; and, with respect to the crowd being an injury to the trade of the shops, my own is injured by it as much as my neighbours. Mr. Justice Blackstone (1) defines a public nuisance to be "such inconvenient or troublesome offences as annoy the whole

(1) 4 Bl. Com. c. 13.

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community in general, and not merely some particular person; and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects." It is charged that the persons assembled to view my figures were dissolute, idle, and disorderly persons. So far from that, it is quite evident that the persons were the ordinary passengers of the street, who stopped in their way to look at these figures. There is no precedent for punishing a man for attracting persons to his shop, and care should be taken not to make one. A number of persons being attracted to a particular shop may cause no doubt some inconvenience to passengers along the street; but why do we pay for situations, and disburse large sums of money annually in high rents in Fleet Street, if it is not to have the opportunity of putting things in our windows to attract the attention of the customers. I might just as fairly indict Mr. Gray for causing an obstruction by means of his coach-office. There used to be two effigies at St. Dunstan's Church, which struck the quarters of an hour. [*645] They attracted a crowd every quarter of an *hour throughout the day, and yet I am indicted for causing seventy persons to look at my effigies. I would ask, why ought the Lord Mayor not to be indicted for the crowd that he attracts on the 9th of November every year? and if Bartholomew Fair is allowed in September, I ought not to be indicted for exhibiting effigies in October; and, so far from there being any thing necessarily improper in effigies, the figures of Gog and Magog used to be carried in the civic procession. It is said that the effigies exhibited by me are libellous. They are fair figures, and as good as I could have made: one of them is a fair representation of a Bishop; and they were meant to denote that the Church, which is represented by the Bishop, is not supported voluntarily, but by the law, which is represented by the broker. Illuminations attract a crowd; so do military movements; so do the learned Judges when they go in state to St. Paul's, and even the people coming from the churches on a Sunday morning sometimes are so numerous as to oblige persons to walk in the carriage way. A few years ago, a person named Tregear was

tried for a nuisance. He kept a caricature shop in Cheapside, at the corner of Wood Street; and he, by placing caricatures in the windows of his shop, caused an obstruction in the footway by the people standing to look at them; he was convicted at the London Sessions, but the Recorder afterwards considered that it was not an indictable offence, and no sentence was ever passed on the defendant.

C. Phillips, amicus Curiæ:

I think Mr. Carlile is in some error as to that case. The defendant was convicted, but he was never brought up for judgment, as he undertook to abate the nuisance.

R. Gurney:

I consented, on the part of the prosecution, to the respite of his recognizance.

The Defendant:

[646]

In that case, the learned counsel for Mr. Tregear said, that, if his client was indicted for putting prints in his window, the beautiful daughter of Mr. Very might equally have been charged to be an indictable nuisance (1). If the effigies were libellous, they might be indictable. No particular Bishop is denoted, and no particular broker designated. (The defendant entered into a statement of considerable length to shew that one of his servants had been improperly fined 5*l.* for a supposed offence against the London Paving Act, 4 Geo. IV. cap. xciv., and also read all the placards stated in the indictment.)

To shew the circumstances relating to the conviction of the defendant's servant, Mr. Alderman Brown and Sir John Key, Bart., were examined; and to speak to an interview between the defendant and Mr. Alderman Farebrother, the latter was

(1) Mr. Very was a confectioner in Regent Street, and he had a daughter who attended to his shop, who was considered so beautiful that a crowd of three or four hundred persons used daily to assemble and stand at his shop windows for the purpose of looking at her. Police officers were obliged to be in constant attendance before Mr. Very's house, and the inconvenience was so great, both to Mr. Very and to his neighbours, that he was obliged to send his daughter out of town.

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examined; who also stated, in answer to a question put by the defendant—whether the persons assembled were idle and disorderly? that he never saw such a set of fellows in his life, both for behaviour and conversation. The defendant also called two witnesses with a view of shewing that the obstruction in the street was very trifling; and one of them said, that there was no greater crowd looking in at the defendant's shop than at that of Mr. Waller, the stationer and printseller, a little more to the west.

PARK, J.:

If Mr. Waller makes a nuisance he may be indicted.

[647]

Adolphus, in reply:

In the case of *Rex* v. *Russell* (1), it was held that a carrier delivering his goods must do it in such a way as not to cause a nuisance. So, in another case (2), it was decided that I may shoot pigeons in my own private ground; but if persons are attracted by the shooting, and come on the outside to shoot the stray pigeons which escape from me, and that is a nuisance, I am indictable for it. So I may, if I choose, ride on horseback to the Land's End with my face to the horse's tail; but if I draw a crowd and make a nuisance by riding a skimmington, I am clearly indictable for it. The publication of a libel to occasion a crowd is wholly unlike all the cases put by the defendant. The seller of caricatures was convicted, though he exhibited his prints in the exercise of his trade. If Mr. Carlile dealt in effigies, and then put up one exhibited for sale, there might be some similarity between the cases, and compassion would follow if he had acted in error; but no compassion can be expected where a party has done a thing merely for revenge.

PARK, J. (in summing up):

The gravamen of a charge like this is not whether those effigies were libellous, but whether the defendant, by the exhibition

(1) 8 R. R. 506 (6 East, 427).

(2) *Rex* v. *Moore*, 37 R. R. 383 (3 B. & Ad. 184).

of them at his windows, caused the footway of Fleet Street to be obstructed so that the public could not pass as they ought to do; and the main question is, whether his Majesty's subjects have been annoyed in this respect. There are in substance two charges against the defendant; one for putting up the first two effigies, and the other for having on the 9th of November added the figure of the Devil, with the arm of the figure of the Bishop put through the arm of this figure. It is not necessary that it should be proved that this was a scandalous libel; but if it were, it would be for you to say whether it was not a scandalous libel to represent a Bishop *of the Church of England [*648] leaning upon a devil. The defendant says, that, if his neighbour be injured, he ought to bring his action. No doubt, if a man does an act which injures a particular neighbour he is not liable to be indicted if no one else but that neighbour be injured; but if a place is situate near a highway, and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable. It may be said, that Mr. Gray, the coach proprietor, takes up passengers at his coach-office; but if he does, he must do it in a reasonable time; and Lord ELLENBOROUGH draws this very distinction, for he says, in the case of *Rex* v. *Cross* (1), a stage-coach may set down and take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. And in another case (2), Lord ELLENBOROUGH said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance; a cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." There is no doubt that a tradesman may expose

(1) 13 R. R. 794 (3 Camp. 224).

(2) *Rex* v. *Jones*, 13 R. R. 797 (3 Camp. 230).

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his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets. In the case of *Rex* v. *Russell*, the party was merely exercising his lawful trade, and he used to let packages stand on the footpath. He was held indictable; but if he had merely carried his packages out he would not have been liable to have been prosecuted. In
[*649] the case of *Rex* v. **Cross*, Lord ELLENBOROUGH uses the words, "unauthorized obstruction." Were not these figures unauthorized? In the course of his defence the defendant has mentioned a case of a printseller named Tregear, who was found guilty of a nuisance; and he stated that no sentence was passed, as the learned Recorder was dissatisfied, and thought it an improper conviction. In the latter part of the statement the defendant has been completely misinformed. It is totally unfounded. I have seen the learned Recorder, and he desired that I would relieve him from the imputation of the bad law that is ascribed to him. He says, that he never had any doubt about the law of the case, or the perfect propriety of the conviction; but that, as the defendant submitted and abated the nuisance, no sentence was passed. In the present case, one question is, whether this act of the defendant was at all necessary for the *bonâ fide* carrying on of his trade; for if it was, and he did not take up more time in the doing of it than was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us to-day, that he considers his trade to be injured by it. The defendant has compared this exhibition to the procession of the Judges going to St. Paul's; however, in that case, the crowd who look at the procession move on with it, and do not stand obstructing the street, as they have done in this case. The defendant has also observed upon the Lord Mayor's Day; however, that is but one day in the year; and if, instead of that, the Lord Mayor's Day lasted from October to December, I should say it ought to be put a stop to. The defendant has also said that Bartholomew Fair is a nuisance, and from what I have heard of it, I very much suspect that it is so. The defendant has also said a great deal about the persons assembled not being idle, disorderly, and

dissolute; I am not prepared to say that it was necessary to shew that they were disorderly persons; *but Mr. Alderman Farebrother, who was called as a witness for the defendant, has told us, that he never saw such a set of fellows in his life, both for behaviour and conversation. The defendant has asked whether he has not a right to do what he will on his own premises? No doubt he has, but he must not do any thing there that injures his neighbours, so as to be a private nuisance; nor any thing which annoys the public, which is a public nuisance. The defendant has published placards (which have been read) complaining of a grievance inflicted on him respecting the church rate. He may do so, and so a man may publish a true and *bonâ fide* account of a trial. But if he puts a libellous heading to his account of the trial, such as "most infamous transaction," that vitiates the whole. Now here the defendant has headed one of his placards in large letters "battle of the church rates," and another, in letters larger still, "church robbery." However, in this indictment, the whole object of describing the figures, inscriptions, and placards is to shew what it was that the defendant did to cause the obstruction of the highway. If this be a nuisance, the defendant ought to be convicted; and if there were 500 other nuisances, they will not justify this. The question therefore really is, whether you think the defendant has by the acts proved caused an obstruction of the public highway to the nuisance of persons passing along that way, and to the persons residing in that neighbourhood.

[*650]

Verdict—Guilty.

Judgment was postponed by consent till the next Session, *the defendant giving bail for his appearance; and at that Session it being admitted that the three figures and all the placards were taken down on the evening of the trial, and not since put up, the Court sentenced the defendant to pay a fine of 40*s.*, and to find sureties for his good behaviour for three years, himself in 200*l.*, and two sureties in 50*l.* each, and to be imprisoned till such fine was paid and such sureties given.

[*651]

1834.
Nov. 29.

[674]

BUXTON *v.* BAUGHAN.

(6 Car. & P. 674—676.)

A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months: Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. placed it there by the authority of A.

A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorized by the owner.

TROVER for a pony phaeton. Plea, general issue.

It appeared that, in the year 1832, the plaintiff had a pony phaeton which required painting, and that he employed a person named Mackenzie to paint it, and paid him 2*l.* beforehand for so doing, which was all he was to have for the work. The phaeton was taken away by Mackenzie, and, it not being brought back, the plaintiff's servant made search for it, and, at the expiration of three months from the time at which it was taken away, he found it on the premises of the defendant.

It further appeared that, in the month of August, 1833, the plaintiff, accompanied by a witness, went to demand the phaeton, and that the defendant then said that he did not know the plaintiff, and that, as the phaeton was left with him by Mackenzie, he should require the plaintiff either to produce Mackenzie, or an order from him, and also to pay two sovereigns for the standing of it. These terms the plaintiff refused to comply with; and, on the same witness calling again upon the defendant on a subsequent day, the latter said that he was satisfied that it was the plaintiff's phaeton, and that he might have it if he paid 2*l.* The phaeton had not been painted, and no repairs of any kind had been done upon it while it stood on the premises of the defendant.

Erle, for the defendant, opened that the defendant was
[*675] *a person who was in the habit of taking carriages to stand on his premises for hire; and that, Mackenzie having brought this phaeton thither, it was agreed between him and the defendant that the phaeton should be allowed to stand there for a

fortnight without any thing being paid; but that, if it stood longer, hire should be charged. He therefore submitted that the defendant had a lien on the phaeton for 2*l*., the amount of the standing.

ALDERSON, B.:

If this was a bargain that the defendant could enforce against the plaintiff, there is no doubt that the defendant would have a lien; but, if he could only enforce it against Mackenzie, he has no lien. If it can be shewn that Mackenzie made this bargain as the agent of the plaintiff, and by his authority, the claim of lien will be made out.

A witness stated that Mackenzie called on the defendant, and left the phaeton, saying that, if it stayed more than a fortnight, the defendant should charge him for its standing; but this witness also stated, that Mackenzie often brought carriages there, and was occasionally employed by the defendant to paint carriages for him.

ALDERSON, B. (in summing up):

If the defendant has refused to deliver up this phaeton to the plaintiff, he is guilty of a conversion, unless he had a right to demand 2*l*. for the standing of it. He has a right to demand it, no doubt, if the plaintiff made a bargain with him to that effect; but of that there is no evidence. It may be that Mackenzie has made this bargain; but then you must consider whether he was authorized to make it on account of the plaintiff and by his authority. The defendant cannot set up a bargain made by Mackenzie, unless Mackenzie had authority from the plaintiff to make such a bargain. If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you *are not bound by that bargain, and may [*676] reclaim the goods. The fact that the plaintiff's servant was three months before he could find out where the phaeton was does not look much like the plaintiff's having authorized a bargain to be made for the defendant to keep it at hire. A man has no right to keep my property, and charge for the standing

BUXTON v. BAUGHAN.

of it, unless there was a previous bargain between him and me, or between him and some agent authorized by me. The defendant in this case insisted that the plaintiff should produce Mackenzie, or procure an order from him: that too was a thing that he had no right to insist upon before he delivered to a person a thing that was that person's property. The defendant's witness does not say, that, when the phaeton was left, Mackenzie said that it was Mr. Buxton's phaeton, and that he was authorized by Mr. Buxton to place it there; but he says, that it was to stand for a fortnight without any payment; and that afterwards he (Mackenzie) should be charged for it, and not Mr. Buxton. If Mackenzie bargained with the defendant for the standing of this phaeton, as and for the plaintiff, and by the authority of the plaintiff, the defendant would be entitled to detain it till the standing was paid for; but if that were not so, the defendant had no right to detain it from the plaintiff.

Verdict for the plaintiff.

1834. *Dec.* 18.

[723]

HOWELL *v.* JACKSON.

(6 Car. & P. 723—726.)

If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuse to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and, if it is seen by a peace-officer, he is justified in taking the person into custody.

So, if a person, without committing any assault, make such noise or disturbance in a public-house as would create alarm, and disquiet the neighbourhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace-officer, provided that this had occurred in the presence of the officer.

FALSE imprisonment. Pleas, first, not guilty. Second, that the defendant was possessed of a public-house, and that, at between the hours of 9 and 10 o'clock on the night of the 6th of November, 1833, the plaintiff was in the house, "and conducted himself in a riotous, quarrelsome, disorderly, and uncivil

manner" to the defendant and his servants, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused to do so, whereupon the defendant, in defence of the possession of his house, gently laid his hands on the plaintiff to remove him; and because the said plaintiff then and there forcibly and violently resisted the said removal, and because the said defendant, from such resistance, was wholly unable to remove the said plaintiff, the said defendant gave charge of the said plaintiff to one S. B. Ward, a watchman, duly assigned to keep watch and ward in the parish and ward aforesaid, during the night of the said 6th of November, ("who then and there saw and had view of the said breach of the peace so committed by the plaintiff,") and requested the said watchman to remove the plaintiff; that the watchman gently laid his hands on the plaintiff to remove him, and take him before a justice of the peace; and it being at a late hour of the night, and an unreasonable time to take the plaintiff before such justice, the watchman took the plaintiff to a certain watchhouse, to appear before John Lloyd, the constable of the night there. That the constable of the night committed the plaintiff to Giltspur Street Compter. That the next morning the plaintiff was taken before the Right Hon. Sir Peter Laurie, Knt., then being Lord Mayor of London, and by him discharged. The third plea was similar, except that it omitted all that part of the former plea which related to those matters which were *subsequent to the taking of the plaintiff to the constable of the night. Replication to the second and third pleas, *de injuriâ*.

[*724]

On the part of the plaintiff, it was proved that the defendant, who kept the "Hercules" public-house in Leadenhall Street, gave the plaintiff into the charge of a watchman, who took him away in custody. The witnesses called on the part of the plaintiff stated that they did not see the plaintiff commit any disturbance.

For the defendant, Ward the watchman was called. He stated, that, on the evening of the 6th of November, he was on duty, and, in consequence of hearing a noise, he went into the defendant's public-house, where he found the plaintiff and five or six other young men "skylarking, bonneting, and kicking up a rumption; and there was a piece-of-work." This witness explained, that,

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by the term "bonneting," he meant that the persons were striking each other upon the hat, so as to drive the hat down over the face of the wearer. Of the terms "skylarking" and "rumption," he gave no explanation. This witness stated that he took the plaintiff by the collar, and led him out of the house, and took him for about fifteen yards along the street, when he let the plaintiff go, and the latter immediately said he would go back and have his revenge, and went in a direction towards the defendant's house. This witness further stated, that he went round his beat, and that, on his return to the neighbourhood of the defendant's house, he heard a person at the door of it cry "watch," and that he in consequence went in, and there found the plaintiff sitting down, whereupon the witness sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar to resist being put out; upon which the witness, with the assistance of another watchman named Griffith, took the plaintiff into custody, and took him to the watchhouse, from which he was sent to Giltspur Street Compter.

[725] PARKE, B. (in summing up):

In order to make out this defence, and to substantiate the special pleas, you must be satisfied that the plaintiff had committed a breach of the peace, and that the watchman saw him do so. If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out. There is no doubt that a landlord may turn out a person who is making a disturbance in a public-house, though such disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him; and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and, if the watchman in this case saw such an assault committed, that would make out the pleas. There might, it is true, be a sufficient breach of the peace to justify the defendant as the landlord of the house in giving the plaintiff into custody without this assault, and even if there was no assault at all. For

if the plaintiff made such a noise and disturbance as would create alarm, and would disquiet the neighbourhood and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman. The watchman, Ward, has said that he saw the piece-of-work, and what he calls bonneting, the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighbourhood, this would justify the watchman in turning the plaintiff out and in taking him into custody, if, on his going to the house the second time, he found the plaintiff still there. You will first consider whether the defendant had hold of the plaintiff, endeavouring to put him out; and whether the plaintiff laid hands on the defendant *to resist that; for, if [*726] that were so, and the watchman saw it, that would make out the justification. But should you think that that is not made out, are you satisfied that there was on the first occasion such a disturbance, in which the plaintiff took part, as was calculated to disturb the neighbourhood, and that the watchman then saw it, as that would justify the watchman in taking the defendant into custody when he found him in the public-house on the second occasion, and, *à fortiori*, that would be so if the watchman saw the plaintiff still joining in such a disturbance as would amount to a breach of the peace; I mean on the second occasion, when the plaintiff was taken into custody.

Verdict for the defendant.

MILLS *v.* ODDY.

1834. *Dec.* 19.

(6 Car. & P. 728—736.)

[728]

A. had purchased at an auction an under-lessee's interest in a house, and refused to pay a cheque which he had given for the deposit, because the ground-rent payable to the superior landlord was greater than it was stated to be at the sale: Held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as equitable mortgagee, could also not be compelled to produce the lease

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itself; but that, if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling any person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor.

If a party has given a bill of exchange or cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque.

A party gave a cheque for the amount of a deposit on a sale by auction, which sale was void. In an action on the cheque, he pleaded that there was no consideration for the cheque; and the plaintiff replied, that there was consideration: Held, that on this issue the defendant must begin.

ASSUMPSIT on a cheque upon the Bank of England. The first count of the declaration stated, that the defendant, on the 21st of August, 1834, made his draft or order in writing for the payment of money, commonly called a banker's cheque, and directed it to certain persons, by the style and description of the cashiers of the Bank of England, and thereby required them to pay the plaintiff or bearer 39*l.* 18*s.*, which cheque the defendant delivered to the plaintiff. It then averred presentment, and that the cashiers did not pay, &c. Second count, on an account stated. Plea, as to the first count of the declaration—"That there was not at any time any consideration or value for his the said defendant's making the said draft or order, or for paying the amount thereof, and this he the said defendant is ready to verify, &c.;" and, as to the second count, *non assumpsit*. Replication to the plea pleaded to the first count, that, "at the time of making the said draft or order in the said declaration in that behalf mentioned, there was a good, valid, and sufficient consideration for the said defendant's making the said draft or order;" concluding to the country.

Thesiger, for the defendant, claimed the right to begin.

PARKE, B.:

I have considered of this matter since the trial of the case
[*729] of *Homan* v. *Thompson* (1), and I think *that, on these pleadings, the defendant is entitled to begin.

(1) 6 C. & P. 717.

Thesiger, for the defendant, opened that this cheque had been paid as a deposit on the sale of a house in the Borough Road, which was sold by auction as subject to a ground-rent of 15*l.*; but that so far from this house being subject to a rent of 15*l.* only, it was one of four houses which were liable to a ground-rent of 35*l.* a year.

PARKE, B.:

I think your case does not support your plea; you should have admitted that the cheque was drawn for value, but that you had a right to avoid the sale, on the ground of fraud; and that you did avoid it. * * *

The particulars and conditions of the sale were put in, of which the following are extracts: "Particulars, with conditions of sale, of the valuable lease held under the City, for the long term of fifty-eight years, wanting ten days, from June, 1831, at a low ground-rent, of capital premises, consisting of an excellent brick-built dwelling-house, &c., which will be sold by auction by Mr. Mills, &c. These desirable premises are held under lease for the long term of fifty-eight years, wanting ten days, from the 24th day of June, 1831, at a ground-rent of 15*l.* per annum." Then followed the conditions of sale, which were in the usual form, and contained among others the following: "Third, that the purchaser should pay a deposit, and sign an agreement for payment of the remainder of the purchase-money on the 29th of September, 1834. Fourth, on payment of the remainder of the purchase-money according to the 3rd condition, the purchaser shall have an original lease of the property from Mr. George Henry Malme, who is under agreement to grant the same according to the draft *to be produced at the time of the sale (1); [*730] the costs and charges of which lease and of a counterpart, to be executed by the purchaser, are to be borne and paid by the purchaser; and he is not to require the production of the lessor's title. Lastly, if any error or mistake shall be made in the particulars of the property above described, such error or mistake

(1) No draft was produced, but extracts of the draft of a lease from Mr. Malme to Mr. Sutton were read at the sale.

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shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require."

It was proved by Mr. Newman, the clerk of the auctioneer, that the plaintiff paid this cheque to him for the deposit on the sale. This witness stated, that it was usual for auctioneers to take the cheques of "known good men;" and that the reason why this cheque was not cashed at the Bank was, that it was not written on one of the engraved forms supplied by the Bank to their customers, and which the Bank require to be used.

To shew the amount of ground-rent at which this house was held, Mr. Brand was called. He said: "I am the principal clerk in the office of the Comptroller of the Bridge-house estates. I have the counterpart of the lease of this house from the Corporation of the City of London to a person named Longmore. I decline producing it as it is a title-deed of the Corporation."

Thesiger, for the defendant:

Is he not bound to produce it? Is it such a title-deed of the City as to enable him to decline producing it?

PARKE, B.:

I think he is not bound to produce it.

Thesiger:

Mr. Brand, are you the attesting witness of this lease?

[731]

Erle, for the plaintiff:

I must object to the witness being asked whether he is the attesting witness of a lease not produced.

PARKE, B.:

You may ask him whether he attested the instrument which he has, and which he declines to produce.

It was admitted that Mr. Brand had been subpœnaed to produce the counterpart of this lease.

Mr. Brand, in answer to further questions, said: "I am an attorney; the Comptroller of the Bridge-house estates is the

attorney and solicitor of the Corporation in all matters relating to the Bridge-house estates."

PARKE, B.:

The attorney is not to produce his client's title-deeds, nor to disclose their contents; and this witness is in fact in the same situation as the attorney. The comptroller is the solicitor of the Corporation for this purpose, and this gentleman is the principal clerk in his office.

Thesiger proposed to ask Mr. Brand this question: Is any property held of the City at the rent described in the particulars of sale?

PARKE, B.:

That he can only know by the contents of the deed.

For the defendant, Mr. Longmore was called. He said: "I have been subpœnaed to produce my lease; Mr. Malme has it. I know the house in question; I pay 60*l.* a year ground rent for that and other houses."

PARKE, B.:

What he paid the 60*l.* for is a fact, but that will not advance the case.

Mr. Malme was called. He said, "I have been subpœnaed to produce the lease; I have it, but decline to produce it." [732]

PARKE, B.:

If you have any one who has seen this lease, who does not claim under it as one of his title-deeds, and who is not privileged as attorney or solicitor, he may give secondary evidence of its contents. There is an impossibility of your producing it, as the person who has it cannot be compelled to produce it under his *subpœna*.

Mr. Longmore recalled: Mr. Malme has advanced money on the lease, and holds it as his security.

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Thesiger:

As there is no assignment to Mr. Malme, he is a mere depositary of the lease.

PARKE, B.:

He has advanced money, and he has the lease as his security.

Mr. Malme: I hold these deeds as equitable mortgagee, with a bond that Mr. Longmore will convey to me on request; I have advanced 5,800*l.* on these premises and others.

[733]

Thesiger:

Are not these premises held under a lease from the City?

Erle:

I must object to the witness being asked to disclose his title.

PARKE, B.:

You have no right to object. This gentleman may now, as against you, be legally asked the contents of the deed, the person having it making a valid objection to its production. You are not counsel for the witness; but he may object to answer if he thinks proper.

Thesiger:

Is not this house held with others under a lease you hold of the City?

Mr. Malme: I decline to answer that.

PARKE, B.:

That he may do.

The City Solicitor, Mr. Finch Newman, was sent to; and he stated that he would not, on the part of the City, waive his objection to the production of the counterpart of the lease, unless the tenants would withdraw theirs.

PARKE, B.:

Then it cannot be produced.

Thesiger:

Mr. Brand is the attesting witness of the lease. Is not he a trustee of his knowledge for all parties?

PARKE, B.:

No, he does not get his knowledge as attesting witness; no attesting witness ever does.

Mr. Brand: I have received another message from the City Solicitor, who says, that he will withdraw his objection to the production of the counterpart of the lease, if your Lordship thinks this a case in which he ought to do so.

PARKE, B.: [734]

I think that the City Solicitor acts most correctly; and I think that this is a case in which the counterpart ought to be produced, as the production cannot prejudice the City in any way.

The counterpart lease was put in by Mr. Brand, and by it it appeared that the house in question and three others were demised by the Corporation of the City of London at a ground-rent of 35*l.* a year.

PARKE, B.:

The only question is, whether this is a mistake or not. The term "ground-rent" means rent payable to the Corporation. On these particulars the purchaser had a right to expect a lease from Mr. Malme, subject to a ground-rent of 15*l.* payable to the Corporation. The purchaser had therefore a right to avoid the sale, unless the jury should think the misdescription arose from mistake. In the *Lancaster* case (1), the mistake arose from the

(1) *Wright* v. *Wilson*, 1 M. & Rob. 207. In that case it appeared that the particulars of sale referred to a map, in which a turnpike road was set out as if close to the premises, when in truth it was not a turnpike road, but a mere footpath. There was the usual condition of sale, as to "mistake of description, or other immaterial error," not annulling the sale. PARKE, B. left it to the jury to say whether the misdescription was a "wilful and designed one," or whether it "had originated in error;" and his Lordship held that the *onus* of proving the fraud lay on the defendant.

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miscopying of a map. This is a misdescription that would materially enhance the value.

For the plaintiff, Mr. Thompson, the plaintiff's attorney, was called; and he stated, that he had no information beyond that which was contained in the draft lease from Mr. Malme to Mr. Sutton, and that he was not aware that any larger ground-rent was payable than 15*l.*

PARKE, B.:

In the draft lease it is called a "yearly rent," and not a ground-
[*735] rent. If the purchaser could *have recovered back the deposit, if it had been paid in cash, that would be a good defence to an action on a cheque or bill given for the amount of the deposit; that is the criterion.

Thesiger:

That was your Lordship's opinion in the case of *Spiller* v. *Westlake* (1).

PARKE, B. (in summing up):

The question is, was this a wilful misdescription by the assignees, or by some of their agents, or was it a mistake? I should say it was a wilful misdescription, and that there is no doubt about it: but I also think, that these pleas do not let in the defence.

* * * * *

Verdict—A special finding of the facts.

[It appears from the report of the case at a subsequent stage, (1835) 2 Cr. M. & R. 103 (2), that the finding of the jury was to the effect that there had been misrepresentation; and the question was argued, whether the form of the pleadings prevented judgment being given for the defendant on this verdict. The judgment of the Court of Exchequer, delivered by PARKE, B., was to the effect that as the supposed consideration for the note was non-existent

(1) 36 R. R. 520 (2 B. & Ad. 155). 3 Dowl. P. C. 722; 4 L. J. (N. S.) Ex. 168.
(2) S. C. 5 Tyr. 571; 1 Gale, 92;

by reason of the misrepresentation, the plea might, after verdict for the defendant, be given effect to—it not being competent to the defendant to object to the pleading by saying that the misrepresentation was not innocent but a fraud. Judgment was accordingly given for the defendant.] MILLS v. ODDY.

COOK *v.* NETHERCOTE.

1835. *Jan.* 21.

(6 Car. & P. 741—745.)

[741]

To justify a constable in apprehending a party without warrant for an affray, it is essential that the party should have been engaged in the affray, and that the constable should have had view of the affray, while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension.

It is no ground for rejecting a witness's evidence, that he remained in Court after an order for all the witnesses to leave the Court, it is merely matter of observation on his evidence.

ASSAULT. The declaration, which consisted of only one count, stated that the defendant gave to the plaintiff "a most severe and violent kick" upon one of his legs, which prevented him from attending his business. Pleas—first, not guilty; second, that the plaintiff made an assault on the defendant, laid hold of the defendant, and dragged him about, and struck him, and that, to defend himself, he assaulted the plaintiff; third, that the plaintiff assaulted the defendant, and would have beaten, bruised, and ill-treated him, if he had not defended himself. Replication, to the second plea, that, just before the time when &c., at an early and unreasonable hour of the morning, the defendant and four others, in an unlawful and *riotous manner, [*742] and without any lawful or probable cause or reason, knocked loudly and violently at the doors of divers houses at Eton, and made and continued making great noise, disturbance, and affray, to the terror and alarm of his Majesty's subjects; and that the defendant was continuing such noise, disturbance, and affray, whereupon James William Needham (then being high constable of and for the division in which Eton is situate) had view of the said breach of the peace, and called upon and required the plaintiff to aid and assist him in apprehending the defendant and the other persons, in order that they might be brought

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before a justice of the peace to answer for such offence; and thereupon the plaintiff, in aid of the said J. W. N., gently laid his hands on the defendant to assist in apprehending him, but did not strike the defendant the blows in the second plea mentioned, which said laying hands, &c. was the same supposed assault as in the plea mentioned, "and thereupon the defendant, being greatly irritated and enraged at the time when &c., of his own wrong did and committed the assault and trespasses in the introduction to the second plea mentioned." This replication then went on to aver, that the plaintiff did not assault the defendant elsewhere or otherwise "than on the occasion and for the purpose in this replication mentioned." To the third plea there was a similar replication. Rejoinder to each of the special replications, *de injuriâ*.

It appeared, from the evidence of Mr. Needham, the high constable, that, on the night of the 6th of June, 1833, at about midnight, there was a disturbance at Eton, and that several officers of the regiments of guards, which were quartered at Windsor, were ringing and knocking at many of the doors at Eton; that he begged them to go home, but, instead of doing so, the disturbance continued for near three hours. It further appeared, that, at about three o'clock in the morning, as the plaintiff was looking out at an upstairs window of his house, the [*743] high constable *asked him to assist him in taking the parties into custody; and that the plaintiff accordingly came into the street, when a person named White desired the defendant to go home, and the defendant replied, "If you do not leave me alone I will knock your brains out, or give you a good ducking;" whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and that, when near the cage door, all three fell down over some rubbish; and it was imputed that at this time the defendant kicked the plaintiff on the leg, in consequence of which he was much injured, and his surgeon's bill amounted to 75*l*. 15*s*. 6*d*. Witnesses were called, with a view of shewing that the defendant, who was an officer in the Royal Horse Guards, was one of the party who had commenced the disturbance at midnight.

The defence was, that the defendant had taken no part in the

disturbance, and that he was not at the place in question till just before he was collared by the plaintiff.

The witnesses on both sides had been ordered out of Court.

On the part of the defendant the Hon. Capt. Stanley was called.

Thesiger, for the plaintiff, asked him if he had not been in Court after the order.

ALDERSON, B.:

That would be no ground for rejecting his evidence. It would be only matter of observation respecting his testimony. In one case the Judges granted a new trial, because a witness's evidence had been rejected by reason of his having remained in Court after an order for witnesses to withdraw (1).

Capt. Stanley was examined; and stated, *inter alia*, that he had not been in Court after the order for witnesses to withdraw. [744]

ALDERSON, B. (in summing up):

The questions for your consideration in this case are, whether the defendant was engaged in the affray—whether the constable had view of the affray while he was so engaged in it—and whether the affray was continuing at the time that he ordered the plaintiff to apprehend the defendant. If you are satisfied that all these points are made out, then, if the defendant

(1) The case referred to by the learned Baron is that of *Doe* d. *Good* v. *Cox*, (E. T. 30 Geo. III. in K. B., cited 1 Clifford's Southwark Election Cases, p. 114). In that case GOULD, J., would not allow a witness for the defendant to be examined, because he had remained in Court after the witnesses had been ordered to leave it. But the Court of King's Bench were of opinion that the witness ought to have been heard, and granted a new trial. However, as the defendant had been negligent in not keeping his witnesses out of Court when ordered to do so, the Court made him pay the costs of the new trial.

Upon this case Mr. Clifford adds the following note: "This case is nowhere in print, but I was favoured with it by a learned friend, whose accuracy as a reporter is too well established to need any commendation from me."

In the case of *Parker* v. *M'William*, 6 Bing. 683, 4 M. & P. 480, it was held that, where a witness remains in Court, after an order for witnesses on both sides to withdraw, it rests in the discretion of the Judge whether such witness shall be heard; except in the Exchequer, where he is peremptorily excluded.

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assaulted the plaintiff, while the plaintiff was endeavouring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray were over, then the constable had not and ought not to have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant [*745] from a *magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would materially affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray; and you think that those words shewed that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but, if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences.

Verdict for the plaintiff. Damages, 125*l.* 15*s.* 6*d.*

IN THE KING'S BENCH.

1825.

[200]

WATERHOUSE AND OTHERS *v.* KEEN (1).

(4 Barn. & Cress. 200—214; S. C. 6 Dowl. & Ry. 257.)

By a clause in a turnpike Act, it was enacted that no action should be commenced against any person for any thing done in pursuance of the Act until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed, and that every such action should be brought in the county

(1) Followed in *Midland Ry. Co.* v. *Withington Local Board* (1883) 11 Q. B. D. 788, 52 L. J. Q. B. 689; and in *Cree* v. *Vestry of St. Pancras*, '99, 1 Q. B. 693, 68 L. J. Q. B. 389. —R. C.

WATER-HOUSE v. KEEN.

or place where the matter should arise, and not elsewhere, and the defendant should and might at his election plead specially, or the general issue not guilty, and give in evidence that the same was done in pursuance and by the authority of the Act: Held, in assumpsit against a toll collector, brought to recover back money alleged to have been exacted by him improperly as toll, that twenty-one days' notice of action ought to have been given, and that the action should have been brought in the proper county. (See now The Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.)

ASSUMPSIT. The declaration contained the usual money counts, and the venue was laid in London. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings after Michaelmas Term, 1822, a verdict was found for the plaintiffs with 17*l.* 2*s.* 6*d.* damages, subject to the opinion of this Court on the following case.

The plaintiffs were the proprietors of the Birmingham Balloon coach. The defendant was the lessee of certain tolls imposed and continued by several Acts of Parliament passed for repairing the road from Dunchurch to Stonebridge, in the county of Warwick. By the 42 Geo. III. the former tolls were repealed, and it was provided that the following tolls should be demanded and taken.

"For every coach, berlin, landau, chariot, calash, chaise, chair, hearse, caravan, or litter, drawn by six horses, mares, geldings, or mules, the sum of 2*s.*; and drawn by four or more horses, mares, geldings, or *mules, the sum of 1*s.* 6*d.*; and drawn by two or three horses, mares, geldings, or mules, the sum of 1*s.*: * * * [*201]

"For every horse, mare, gelding, mule, or ass, laden or unladen and not drawing, the sum of 1*d.*: * * *"

And it was also provided, "that no more than one toll should be demanded or taken from any person or persons for passing and repassing the same day with the same horses, cattle, beasts, and carriages, through all the toll gates or turnpikes to be continued or erected by virtue of that Act, in the whole length of that part of the said road which lies between Dunchurch and the city of Coventry; but that all and every person and persons *having paid the said tolls shall pass and repass with the same horses, cattle, beasts, and carriages, toll free during such day through all other the toll gates or turnpikes within that division." [*202]

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From the 15th of March, 1819, to the 6th of November in that year, the Balloon stage coach drawn by four horses in its way from London to Birmingham passed through the Ryton gate, one of the gates erected and continued under the authority of the last mentioned Act, and situate in the county of Warwick, between Dunchurch and Coventry, at six o'clock in the morning of each and every day, when a toll of 1*s.* 6*d.* was demanded from the plaintiff's coachman and received by the collector as agent for and on account of the defendant. The same coach repassed through the same gate with the same coachman, but with different horses and passengers in its way back to London, at seven o'clock in the evening of each and every day on which the said toll has been so paid as aforesaid, when a second toll of 1*s.* 6*d.* was demanded by the defendant's agent, and paid by the plaintiff's coachman, after protesting against the legality of the demand.

By the 10 Geo. III., one of the Acts passed for repairing the said line of road, it was provided, "that no action or suit shall be commenced against any person or persons for any thing done in pursuance of this Act or the said former Acts until twenty-one days' notice shall be thereof given to the clerk to the said trustees, or after sufficient satisfaction or tender thereof hath been made to the party or parties aggrieved, or after six calendar months next after the fact committed; and every such action [*203] or suit shall be laid or brought in *the county or place where the matter shall arise, and not elsewhere; and the defendant and defendants in every such action or suit shall and may at his or their election plead specially or the general issue, not guilty, and give this Act and the special matter in evidence at any trial to be had thereupon; and that the same was done in pursuance and by the authority of this Act. And if the same shall appear to be so done, or that such action or suit shall be brought before twenty-one days' notice shall be thereof given as aforesaid, or after a sufficient satisfaction made or tendered as aforesaid, or after the time limited for bringing the same as aforesaid, or shall be brought in any other county, then the jury shall find for the defendant or defendants. By the stat. 42 Geo. III. it was enacted that the before mentioned Acts, and all and every the clauses, powers, penalties, forfeitures, provisions, matters,

and things whatsoever therein contained (except such as related to exemptions from stamp duties), should be and the same were further continued for and during the term thereinafter mentioned (twenty-one years from the 22nd of June, 1802). WATER-HOUSE v. KEEN.

Dover, for the plaintiff:

It was unnecessary to give twenty-one days' notice of action to the clerk of the trustees, or to bring the action in the county where the matter of the action arose, for the clause in the statute requiring these things to be done, applies only to actions of tort. It enacts, that the defendant is to be at liberty to plead the general issue, not guilty, and that no action is to be commenced after sufficient satisfaction, or tender thereof, hath been made to the party aggrieved. It, therefore, clearly contemplates actions of tort only. In **Irving* v. *Wilson* (1) a revenue officer having [*204] seized goods as forfeited, which were not liable to seizure, and taken money of the owner to release them, it was held that the latter might recover back the money in assumpsit for money had and received, and that a month's notice was not necessary, and the distinction was there taken by GROSE, J., that if an officer seize goods as forfeited, he does it *colore officii*; but if he take money for delivering up the goods, there is no pretence to say that that is done *colore officii*. In this case if the money taken was not due by law, the taking of it was not a thing done in pursuance of the Act. In *Greenway* v. *Hurd* (2), assumpsit was brought against an excise officer to recover duties received by him after the Act imposing them was repealed, and it was held that the officer was entitled to a month's notice before action brought. But in that case the question was not discussed, as the COURT held the action not to be maintainable on other grounds. In *Umphelby* v. *M'Lean* (3), assumpsit for money had and received was brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes, and it was held, that the defendants were not entitled to a month's notice before action brought under the statute 43 Geo. III. c. 92, s. 70, which provides that no writ

(1) 2 R. R. 444 (4 T. R. 485).
(2) 4 T. R. 553.
(3) 18 R. R. 423 (1 B. & Ald. 42).

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or process shall be sued out for any thing done in pursuance of that Act till after one month's notice. In that case the taking of the excessive charge was not an act done *colore officii*. So here the taking of the toll which was not due, was not an act done in pursuance of the Act of Parliament. In *Wallace* v. *Smith* (1) Lord ELLENBOROUGH expressed a *doubt whether, under the London Dock Act, the notice was necessary in an action of assumpsit, but the point was not decided.

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As to the other point, the defendant had no right to take the toll in respect of the same carriage and horses repassing on the same day. * * *

[206] *Reader, contrà:*

The defendant was entitled to notice, and the action ought to have been brought in the county of Warwick. Here the action is brought in consequence of an act done by the defendant in pursuance of the Act of Parliament. For the defendant demanded the toll in his character of collector, and the plaintiff paid it to him in that character, under protest. In *Irving* v. *Wilson* (2) the taking of the money by the custom-house officer to release the goods which he had seized, but which were not liable to seizure, was not a thing done in pursuance of the Act, and therefore it was clear that notice was not necessary under the 23 Geo. III. c. 70, s. 30. But in *Greenway* v. *Hurd* (3) it was held that an excise officer was entitled to a month's notice in assumpsit brought against him to recover duties received by him after the Act imposing them was repealed; and it was there contended that the defendant was not entitled to a month's notice, because that Act extended only to actions of tort. But the COURT held, that as the defendant acted as an officer of the Excise when he received the money, he was entitled to a notice. In *Wallace* v. *Smith* (4), Lord ELLENBOROUGH'S doubt was founded entirely on the case of *Irving* v. *Wilson*, which is distinguished from the present on the ground already stated. In *Umphelby* v. *M'Lean* (5), the *taking of the money (an excessive charge made

[*207]

(1) 5 East, 115.
(2) 2 R. R. 444 (4 T. R. 485).
(3) 4 T. R. 553.
(4) 5 East, at p. 122.
(5) 18 R. R. 423 (1 B. & Ald. 42).

by the defendants as tax collectors), was not a thing done in pursuance of the Act of Parliament. But here, the taking of the toll was a thing done in pursuance of the Act. In *Morgan* v. *Palmer* (1), the money was not taken by the defendant in the course of the discharge of the duty of magistrate, but for the personal benefit of the justice. Secondly, the defendant had a right to demand and take the toll. * * *

BAYLEY, J.:

There are two questions in this case: first, whether the action was properly brought; and, *secondly, whether the proprietor of [*208] the coach in question was liable to the payment of a second toll for repassing on the same day through the same gate, with the same carriage and coachman, but with different horses and passengers. Our opinion is, that the plaintiff was not bound to pay the second toll, but that he ought to have given the defendant twenty-one days' notice of action, and to have brought his action in the proper county.

[After giving reasons for his opinion on the first point, the learned Judge continued:]

As to the other question, which is one of more general [209] importance, I am of opinion that under the protecting clause of the 10 Geo. III. the defendant was entitled to twenty-one days' notice o action, and that the action ought to have been brought in the county where the subject-matter of the action arose. It is true that many of the expressions in that clause seem to point to actions of tort, but it is material to consider the substance rather than the mere form of the action. In many cases the subject-matter of the action is substantially tort, but the plaintiff may waive that tort, and bring assumpsit. If an *action be [*210] brought in consequence of a thing substantially done in pursuance of the Act of Parliament, it is a case within the Act. The words of the provision are "that no action or suit shall be commenced against any person for any thing done in pursuance of this Act, or the said former Acts, until 21 days' notice shall be thereof given to the clerk to the trustees, or after sufficient satisfaction or tender thereof hath been made to the party

(1) 26 R. R. 537 (2 B. & C. 729).

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aggrieved, or after six calendar months next after the act committed; and every such action or suit shall be laid or brought in the county or place where the matter shall arise, and not elsewhere; and the defendant or defendants in every such action or suit shall and may at his or their election plead specially, or the general issue, not guilty; and give this Act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this Act." The question is, whether that provision is confined to actions of tort, or extends to actions of assumpsit. The substantial part of the enactment is, that notice should be given to the trustees in order that they may tender satisfaction, and that the action should be brought promptly after the fact committed. If the Act of Parliament does not apply to this case, parties may be at liberty to maintain actions for all sums levied under a misconstruction of the Act within a period of six years. And thus the object of the Legislature, which was that the action should be brought promptly, will be defeated. But it is said that, in this case, there was not any thing done by the defendant in pursuance of the Act; but that expression, as used in this Act of Parliament, means that the thing done should be done by the defendant acting *colore officii;* if he did so act, he is within the *protection of the Act of Parliament. I think every thing was done in pursuance of the Act. First, the carriage probably was stopped at the gate, and the toll-gate keeper refused to let it pass until the money was paid. If trespass had been brought against the toll-gate keeper, for seizing one of the horses, that would have been an act done; or if an action on the case had been brought against the toll-gate keeper for stopping the carriage and horse until the toll was paid, the stopping of the carriage would have been an act done in pursuance of the Act of Parliament. Now can it, in substance, make any difference that the plaintiff, instead of bringing an action on the case against the agent of the defendant for wrongfully stopping the coach and horses, has thought proper to waive the tort, and to bring assumpsit? There are several authorities upon this subject. *Fletcher* v. *Wilkins* (1) does not bear on the present case, because that was an action

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(1) 8 R. R. 484 (6 East, 283).

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of replevin, and a proceeding *in rem*, and was on that ground held not to be within the 24 Geo. II. c. 44, s. 6. *Irving* v. *Wilson* (1) does not apply, because there the custom-house officer did not take the money *colore officii*; he had no right whatever to take it. *Greenway* v. *Hurd* (2) is an authority in point. The statute 24 Geo. III. had imposed duties which the 25 Geo. III. c. 24 repealed from and after the passing of that Act, and they were consequently repealed with relation to the first day of the session, which was the 25th day of January, 1785. In June, 1785, the plaintiff positively refused to pay his duties, which, however, he paid in July following; and the action for money had and received was brought to recover back *that sum. The late Lord Chief Baron THOMPSON, a very able lawyer, overruled the law as laid down by GROSE, J. in *Irving* v. *Wilson*, and this Court afterwards confirmed his decision. In the case of *Wallace* v. *Smith* (3) Lord ELLENBOROUGH expressed a doubt whether a clause of this description applied to actions of assumpsit; but *Greenway* v. *Hurd* was not overruled. In *Umphelby* v. *M'Lean* (4) the action was not in respect of any act done in execution of the office of tax-collector, but for a neglect to pay over money which he ought never to have taken. In *Morgan* v. *Palmer* (5) the question was under the consideration of the Court, and the reason why the statute did not apply was there pointed out; viz. that the money was not taken by the defendant in execution of his office. Upon these grounds, I think, that this action should have been brought in the county where the cause of action arose, and that the notice required ought to have been given. Our duty is to give effect to such a clause of an Act of Parliament, with reference not to the form of action, but to the substance of the thing done; and that being so, I think that this action is brought substantially in respect of a thing done by the defendant in pursuance of the Act, and, consequently, that he is within its protection, and ought to have had twenty-one days' notice.

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HOLROYD, J.:

I agree with my brother BAYLEY on both points. The toll is

(1) 2 R. R. 444 (4 T. R. 485).
(2) 4 T. R. 553.
(3) 5 East, at p. 122.
(4) 18 R. R. 423 (1 B. & Ald. 42).
(5) 26 R. R. 537 (2 B. & C. 729).

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laid upon carriages, and there is also a distinct toll upon horses not drawing. * * *

[213] Then, as to the other point, the case of *Greenway* v. *Hurd*, in effect and in principle, is precisely the same as the present. With reference to the meaning of the words "in pursuance of the Act of Parliament," I think that the decision in *Greenway* v. *Hurd* should be abided by. The first part of the clause requires that no action shall be brought against any person or persons, &c. until twenty-one days' notice thereof shall be given to the clerk to the trustees, or after sufficient satisfaction or tender thereof has been made to the party or parties aggrieved. That shews that the protection of the Act is not confined to actions where the party is justified in what he has done under the Act. The question therefore is, was this action brought against the defendant for an act done in pursuance of the Act of Parliament, according to the legal meaning of those terms? The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of the authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act. This is a case therefore within the words of the Act. It is a case also within

[*214] the mischief intended to be avoided by the *Act of Parliament. The duty is collected by the lessee. It is consistent, therefore, with the object of this enactment, if he improperly takes any toll, that he should have an opportunity of tendering amends. The same mischief would arise from the neglect to give the notice in such an action as this as if it were an action of tort. It is said that this clause applies to the case of tort, inasmuch as it speaks of the defendant's pleading the general issue not guilty, and tendering satisfaction; but I think these expressions by no means sufficient to restrain the language of the prior part of the clause, which are sufficiently large to comprehend any species of action against a toll collector for an act done *colore officii*. On principle therefore, as well as on the authority of the case of *Greenway* v. *Hurd*, I am of opinion that notice was necessary, and that the action was not brought in the proper county.

Postea to the defendants.

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