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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

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Courts of Exchequer & Exchequer Chamber,

FROM

EASTER TERM, 5 WILL. IV.

TO

MICHAELMAS TERM, 6 WILL. IV. BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS:

BY

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AND
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BARRISTERS AT LAW.

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ERRATA.

Page 304, line 1, *for* debt, *read* covenant.
354, marginal note, *for* judgment was issued, *read* signed.
396, line 3 from bottom, *for* proposition, *read* proportion.
602, last line, *dele* term.

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REPORTS OF CASES

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The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, EASTER TERM, 5 WILL. IV.

STANCLIFFE *v.* HARDWICK.

1835.

TROVER for two horses. Plea—not guilty. At the trial at the last *Summer* Assizes for the county of *Lancaster*, before *Gurney*, B., it appeared that the plaintiff, a wharfinger, and the defendant, a carrier, agreed to set up a waggon in common, and that each party was to supply two horses. This was done accordingly; and on the dissolution of the concern, a dispute arising as to the two horses supplied by the plaintiff, the latter brought this action to recover the value of them from the defendant, who had seized and sold them for the alleged purpose of paying the partnership debts. For the defendant it was

Since the new rules a defendant who pleads not guilty alone in an action of trover admits thereby only that the plaintiff has *some* property in the goods in respect of which he would be entitled to recover against the defendant, and such admission does not preclude the defendant from shewing that he is tenant in common with the plaintiff; if, however, there has been a conversion in fact, as by seizure and sale, he must justify such conversion specially by way of confession and avoidance, and he cannot, under the plea of not guilty, shew that he was justified, as tenant in common with the plaintiff, in committing the conversion in fact.

The conversion which is put in issue by the plea of not guilty, since the new rules, is a conversion in fact, and not merely a wrongful conversion; and, wherever there has been a conversion in fact, and the defendant insists that such conversion was lawful, he must confess and avoid it, by pleading specially the right or title by virtue of which he was justified in the conversion.

Where the defendant has a lien on the goods, and there has been no actual conversion, but a demand and refusal only, *quære* as to the necessity of pleading the right of lien specially.

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contended, that under the general issue it was competent to him to shew that the plaintiff and he were tenants in common of the horses, and that therefore an action of trover could not be maintained by the plaintiff. To this it was answered, that the plea of not guilty admitted the title of the plaintiff to sue, by the operation of the rule of *H. T.*, 4 *Will.* 4, and that under that plea no evidence could be given to shew that the property in the horses was in any one else than the plaintiff, such a defence now requiring a special plea. The learned Judge having rejected the evidence of partnershiptend ered by the defendant, the plaintiff had a verdict for the value of the horses. In *Michaelmas* Term, *Cresswell* obtained a rule for a new trial, on the ground of this rejection of evidence; and in *Hilary* Term the case was twice argued.

Wightman shewed cause.—It is insisted on the other side, that it was competent for the defendant to give evidence of tenancy in common with the plaintiff, under the plea of the general issue, notwithstanding the new rule, which states that in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods, shall be put in issue by the plea of not guilty. It is said that the evidence does not go to controvert the plaintiff's title, but only to disprove the conversion, by showing that the act of the defendant in seizing and selling the goods, being the act of a tenant in common, could not be a conversion, under the general rule of law, that tenants in common cannot be guilty of a conversion with regard to the property held in common. The answer to this is, that the evidence does in fact go to the denial of the plaintiff's title to the sole right of property, though it may be true that the nature of that title might, if the defendant had pleaded properly, have shown that there was no conversion in point of law. It was held

by Lord *Holt*, in *Hartfort* v. *Jones* (*a*), that a plea of detainer for a lien was bad in trover, because it did not confess a conversion; the plea above suggested would, however, confess a conversion in fact, but would shew that the defendant was justified in so dealing with the goods. [*Alderson*, B.—That is a point which the Court wish to have argued—whether this defence ought not to have been pleaded in confession and avoidance.]—One mode of arriving at a proper conclusion upon that point is, to consider whether the defendant could, for the purposes of this defence, have pleaded any other plea than the general issue, and whether any such plea would not amount to the general issue. If such a valid plea could be framed, it was incumbent upon him to have pleaded it. Now there are two forms in which such a plea might be shaped. It is a general rule of law that a tenant in common cannot be guilty of a conversion of the property held in common, unless he destroy it. A plea, therefore, stating in substance that the defendant at the time of the supposed conversion was tenant in common with the plaintiff, and that he did not destroy the chattel held in common, would be in law a good answer to the action; and it may even be contended that such a plea would be good without the averment as to non-destruction, for as the general rule is, that a tenant in common cannot be guilty of a conversion, it would lie in the plaintiff to shew that there had been a destruction of the property. At all events, a plea negativing the destruction would be good.

In trover, two circumstances must concur to entitle the plaintiff to recover, property in himself, and a conversion by the defendant. If the defendant disproves either of these circumstances, it is an answer to the action. Evidence of a tenancy in common shews that the plaintiff has not such a title as will enable him to recover; and this,

(*a*) 2 Salk. 654; 1 Ld. Raym. 393, S. C.

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therefore, might have been pleaded. [*Parke*, B.—The Court wish to have the question argued upon the new rules, whether, there having been an actual conversion, and not merely a demand and refusal, which are only evidence of a conversion, the defendant was not bound, under the rule which directs that all matters in confession and avoidance shall be pleaded specially, to have justified specially the act of conversion. Is not this analogous to the case of a licence, which must be specially pleaded? It might be otherwise where there is no actual conversion. *Alderson*, B.—If there had been merely a demand and refusal, it might not be necessary to justify, for then evidence of the tenancy in common would have explained the refusal, and shewn that in fact there was no conversion.]

Cresswell, and *Baines*, *contrà*.—The ground upon which the defendant contends for the admissibility of the evidence in question is, not that the plaintiff was not entitled to the property, which he does not deny, but that he was himself a partner with the plaintiff, and as such had a right to dispose of the partnership property, and could not, with regard to it, be guilty of a conversion. [*Parke*, B.—The defendant, by pleading the general issue only, admits that the plaintiff has a title as against him under some circumstances. All that the declaration states is, that the plaintiff has some interest, not that he has all the interest.] The effect of the plea is to admit that the plaintiff has sufficient property to maintain this action against the defendant; but the defence is, that there has been no conversion, which is the matter put in issue by the plea. [*Alderson*, B.—The new rule says, that all matters in confession and avoidance shall be specially pleaded. Why might not the defendant have pleaded specially that he was tenant in common with the plaintiff, and that as such he took the chattels and converted them to the partner-

ship use?] Such a plea would not be good. The new rules have made no alteration in the principles of pleading, and a plea which before the making of those rules was bad, is not now valid. Such a plea would be bad, because it would not confess a wrongful conversion, which is essential to constitute a good special plea in trover, as it was held in *Ascue* v. *Saunderson* (*a*), where in trover a plea of justification under a writ was held ill. [*Parke*, B.—That case is not law. The contrary was decided in *Kennicot* v. *Bogan* (*b*). Most of the cases relating to special pleas in trover turn upon the question whether the facts stated amount to the general issue.] *Agar* v. *Lisle* (*c*) was a case of trover for a cow. The defendant pleaded in justification the taking and detaining it as a distress for toll; but, upon demurrer, the plea was held bad, because no conversion was confessed. So in *Salter* v. *Butler* (*d*), where the justification was taking the cattle as a distress for a rent charge, it was held bad on the same ground. *Dee* v. *Bacon* (*e*), *Allen* v. *Harris* (*f*), and *Hartfort* v. *Jones* (*g*), are to the same effect. With regard to the case of *Kennicot* v. *Bogan* (*h*), the objection there was, that the defendant, though he admitted a conversion, had not avoided it. That decision, therefore, is no authority upon the point in question, to which the attention of the Court was not drawn. [*Parke*, B.—The question comes to this, whether the words "the conversion only" in the new rules mean a wrongful act, or whether they merely mean the actual dealing with the property, and leave the defendant at liberty to shew, under the general issue, that he has not been guilty of any wrongful act with regard to the property, but that he has dealt with it, without being guilty of any wrongful

(*a*) Cro. Eliz. 434.
(*b*) Yelv. 198.
(*c*) Hob. 187.
(*d*) Noy, 46.
(*e*) Cro. Eliz. 435.
(*f*) 2 Lutw. 1537.
(*g*) 2 Salk. 654.
(*h*) Yelv. 198.

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conversion. Lord *Abinger*, C. B.—The spirit and object of the new rules were that the parties should be brought to a precise issue. In the present case, to permit the defendant to give this defence in evidence under the general issue would be at variance with the object of the rules. *Parke*, B.—It is extremely doubtful whether, according to the old rules of pleading, the defendant could have confessed and avoided in this case.] The new rules have made no difference in that respect. The meaning of the words "that all matters in confession and avoidance shall be specially pleaded" is, that all matters which might before those rules have been specially pleaded, shall now be so pleaded. In using the word *conversion*, the rule does not intimate that it is used in any other than its ordinary sense, which is that of a *wrongful* act, a *wrongful* conversion; and, if there be a plea of confession and avoidance, it must be of a confession of a *wrongful* conversion, which the proposed plea does not amount to. On referring to the first part of the rule in question, it will be seen that it was intended to leave the question of the committing of a wrongful act under the general issue. The rule says, "In an action on the case, the plea of not guilty shall operate as a denial only of the breach of duty or *wrongful* act committed by the defendant." In trover, the conversion is the "wrongful act;" and the general issue operating as a denial of it, the defendant may shew under it any matter which proves that act not to be wrongful. Nothing can be clearer than that the rule intended to distinguish between the title of the plaintiff and the conversion, and to leave the latter, as formerly, to be controverted under the plea of not guilty. The rule does not say that there shall be a special denial of the conversion. [*Alderson*, B.—In an action on the case for diverting a watercourse, will the plea of not guilty put in issue any thing beyond the mere fact of diverting the water?] The defendant, under such a plea, might shew that there

was no wrongful diverting, as that he did it by the directions of the plaintiff. [*Alderson*, B.—Should not such a defence be pleaded specially?] That under not guilty the defendant may shew not only that he did not commit the act, but that such act was not wrongful, appears from the case of nuisance put in the same rule. It is said, "In an action on the case for a nuisance in the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade *in such a way as to be a nuisance to the occupation of the house*, and will not operate as a denial of the plaintiff's occupation." [*Parke*, B.—The immediate antecedent to the clause of the rule respecting trover relates to obstructions, and mentions the word "obstruction" generally; can that be held to mean *wrongful* obstruction?] That conversion signifies *wrongful* conversion appears from what fell from the Court in *Bromley* v. *Coxwell* (*a*), where *Heath*, J., says, "to support an action of trover there must be a positive wrongful act;" and *Rooke* and *Chambre*, Js., concurred. The defendant cannot, it is true, either deny the plaintiff's property or give in evidence any thing which might have been pleaded in confession and avoidance; but here the property is not denied, nor could the matter in question have been pleaded by way of confession and avoidance. [Lord *Abinger*, C. B.—The case has been strongly put by the learned counsel for the defendant upon the terms of the rule itself, but the construction at present appears to me to be at variance with the object and spirit of the new rules.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—To a declaration in trover the defendant

(*a*) 2 Bos. & Pul. 438.

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pleaded not guilty, since the new rules came into operation. On the trial, he proposed to shew that the plaintiff and defendant were in partnership together; and jointly interested in the goods specified in the declaration, and that the defendant took them from the plaintiff's possession and sold them, in order to pay an outstanding partnership debt. My Brother *Gurney* thought the evidence inadmissible under this plea, and rejected it, and the plaintiff had a verdict. A rule *nisi* for a new trial was granted, and the case has been since twice argued; once on the question, whether the defendant was precluded by the plea from disputing the plaintiff's sole right of property in the goods, and afterwards, at the suggestion of the Court, on the question whether the defendant ought not to have confessed the conversion, and pleaded, by way of avoidance, his right as a partner. Upon the first question, the Court is of opinion in favour of the defendant; upon the second, against him. [The learned Baron here stated the rule *H. T.* 4 *Will.* 4.] The plea of not guilty is therefore now equivalent to a plea of not guilty of the conversion; and such a plea undoubtedly admits the plaintiff's property or right of possession. The first question is, what is the extent of that admission? For the plaintiff it was, upon the first argument, insisted that the sole property or right of possession is thereby admitted to be in the plaintiff, and that it is also admitted that he was entitled to succeed, if he proved any act done by the defendant which would be a conversion, if the sole property was in the plaintiff. For the defendant it was insisted that nothing more was admitted than that the plaintiff had *some* property or right of possession as between him and the defendant, and that the defendant was not precluded on the trial from giving any evidence to disprove a conversion, which was consistent with the admission of such a property. It was, therefore, contended that he had a right to prove that the plaintiff had an undivided interest

only, and that he himself had a similar interest, as partner with the plaintiff, by virtue of which he was authorized to do all that he did, that is, to seize and sell the goods in order to pay the partnership debts. And we are of opinion that the defendant is right in this respect, and that he ought not to have been prevented, on this ground alone, from giving the proposed evidence. That an undivided property in a chattel is a sufficient title to maintain trover against a stranger who has wrongfully dealt with it as his own, or against another tenant in common who has destroyed it, does not admit of a question. But a stranger has always a right to prevent several actions being brought against him by different part-owners for the same conversion, and may for that purpose plead in abatement the non-joinder of another part-owner as co-plaintiff. If he omit to do so, the plaintiff may recover, for any injury to his undivided interest, damages co-extensive with that injury. The authorities on this subject are to be found in the case of *Addison* v. *Overend* (*a*).

If then the defendant before the new rules, instead of pleading the general issue, had suffered judgment to go by default, he would have admitted no more than *some* property and right of possession in the plaintiff, in respect of which he was entitled to recover against the defendant, because the plaintiff would not have been bound to prove more than such an interest, on the general issue, in order to maintain his action. The same would have been the case upon an assessment of damages on a special plea found against the defendant, or decided to be bad on demurrer; and no greater effect can be attributed to the admission on the record, by pleading to the conversion only. It is but in the nature of a judgment by default as to the remainder, and admits the plaintiff's right to recover something against the defendant, if he can prove what the law would deem a con-

(*a*) 6 T. R. 766.

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version by him of the plaintiff's property in the goods in question. Such, and such only, being the effect of this admission, it follows that the defendant may give any evidence in his defence relevant to the issue and *consistent* with that admission, though he cannot be allowed to go into a case which is contradictory to it. Thus, he could not be permitted to shew that the plaintiff was the finder of the goods, and that himself, or some one by whose order he acted, was the real owner, and therefore had a right to dispose of them to his own use; for that would be inconsistent with the admission which he has made, and a denial that the plaintiff had *any* property as against himself. Again, he could not give evidence that the sole property was in another, by whose directions he did the act complained of, for that also is inconsistent with his admission that the plaintiff had some property; but there is no reason why he should not be allowed to prove that another has the same interest as the plaintiff, and that he lawfully acted by the authority of that other; or to make any other defence to the action, which is not inconsistent with the admitted fact that the plaintiff has some property in the goods, as between him and the defendant. For these reasons, we think that the defendant's admission of the plaintiff's property did not preclude him from the defence which he proposed to make.

And the next question is that which was discussed on the second argument, whether it was competent for him to do so under the plea, which is, in effect, a plea of not guilty of the conversion alleged.

By the new rule, the plea of not guilty in actions on the case operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant; and under the head of examples is given the action of trover, in which it is said to operate as a denial of the *conversion* only. Does this mean a denial of the fact of the conversion of the property to the defendant's use only, or a denial of the *wrongful* conversion, that is,

of the fact of conversion, and also that such conversion was tortious?

A reference to the context enables us to discover the meaning of this term. It is intended to confine the operation of the plea to a denial of the fact of conversion only, and not to allow the defendant to give evidence of its legality, any more than in a plea of not guilty to an action on the case for obstructing a right of way, the defendant could be allowed to shew that the obstruction was lawful, or under the like plea to an action for diverting a watercourse, to give evidence that such diversion was justifiable by licence or prescription. The latter point was decided in the case of *Frankum* v. *Earl of Falmouth*, *K. B.*, in last *Hilary* Term; and the effect of the new rules is, therefore, to alter the previous operation of the plea of not guilty, not merely by preventing it from involving a denial of the inducement, as it did before, but also by confining it to a simple denial of the breach, and by excluding all matters in confession and avoidance. In all cases, therefore, in which there has been a conversion of the property in question by the defendant, and the defendant insists that such conversion was lawful, he ought, since the new rules, to confess it, and avoid, by pleading specially, the right or title by virtue of which he converted it; as, for instance, the leave and licence of the plaintiff, or, as in the present case, the authority given by law to one part-owner or tenant in common to take possession of the joint property, or to one partner to sell it. But a question still remains as to the meaning of the term "conversion." No doubt, however, occurs in this case; for the seizure of the chattel by the defendant, or its subsequent sale, is undoubtedly a conversion by the defendant, and he must therefore confess and avoid that conversion, by pleading specially the title by which he did it. A doubt may, however, arise, as to the proper course to be pursued, where the defendant has a lien on the goods, and there has been only a refusal to deliver on demand by

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the plaintiff, which demand and refusal, it is well established, is not a conversion of itself, but only evidence of it, and may therefore be explained. The Court are not under the necessity of pronouncing any judgment upon this question at present; but nothing that has been said is to be taken to be an intimation of an opinion, that in such a case, where there has been a refusal to deliver, on the ground of lien, the right of lien need be specially pleaded.

Rule discharged.

BISHTON and Another *v.* EVANS.

Debt on bond for the penal sum of 12,000*l.* The declaration set forth the condition, which was for the payment of 6000*l.*, *with interest*, and assigned as a breach the nonpayment of the 6000*l.*, (omitting interest). Plea, that the defendant paid the 6000*l.*, *with interest*, according to the form and effect of the condition:—*Held*, ill on special demurrer.

DEBT on bond. The declaration, after setting forth a bond for 12,000*l.*, stated the following condition:—that, under the said writing obligatory was written a certain condition, whereby it was recited that the plaintiffs have, on the day and year aforesaid, lent and advanced unto the therein above-bounden defendant the sum of 6000*l.*; and, by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing, or intended to bear, even date with the said writing obligatory, and made, or expressed to be made, between the defendant of the one part, and the plaintiffs of the other part, the defendant had appointed, granted, and released, or otherwise assured, certain messuages, farms, lands, tenements, and hereditaments in the said release particularly described, unto the said plaintiffs, their heirs, and assigns for ever, for securing the said sum of 6000*l.* and interest, but subject to a proviso for redemption of the same premises, on payment by the defendant, his heirs, executors, administrators, or assigns, unto the plaintiffs, their executors, administrators, or assigns, of the said sum of 6000*l.* and interest, after the rate in the said release mentioned, on the 13th day of

November then next ensuing the date thereof. And in which said condition it was further recited that, for the better securing the payment of the same sum and interest unto the plaintiffs, the defendant had agreed to enter into the therein above-written obligation, with such condition for making void the same as thereinafter was contained. And the condition of the said writing obligatory was declared to be such that, if the therein bounden defendant, his heirs, executors, administrators, or assigns, did and should well and truly pay, or cause to be paid, unto the plaintiffs, their executors, administrators, or assigns, the full and just sum of 6000*l.*, of lawful money of *Great Britain*, with interest thenceforth for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 13th day of *November* next ensuing the date of the said writing obligatory, being the same day and time as were covenanted in or by the said in part recited indenture of release for payment of the same, but subject to such proviso for the abatement of the interest as in such indenture of release contained, and did and should make the said payment without any deduction or abatement, for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said in part recited indenture of release contained, then the therein above-written obligation should be void, or otherwise should remain in full force and effect as by &c. The declaration then set forth the proviso for the abatement of interest, and concluded with the following breach:—that the defendant did not well and truly pay or cause to be paid unto the plaintiffs, or either of them, the said sum of 6000*l.*, or any part thereof, on the said 13th day of *November*, 1831, but therein made default; and, by reason of the breach of the said condition, the said writing obligatory became forfeited, &c., and thereby an action accrued to the plaintiffs to demand from the de-

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fendant the said sum of 12,000*l.*, &c. Yet &c. Plea—that the defendant did pay unto the plaintiffs the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest for the same, from the date of the said writing obligatory until the day next hereinafter mentioned, after the rate of 5*l.* for every 100*l.* by the year, on the said 13th day of *November* next ensuing the date of the said writing obligatory, and which was in the year of our Lord 1831, which said sum of 6000*l.*, with interest, as in this plea aforesaid, then amounted to a large sum of money, to wit, the sum of 6300*l.* of like money, and that he, the defendant, then made the said payment without any deduction or abatement, for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said indenture in the said condition in part recited contained, according to the form, tenor, and effect of the said condition under the said writing obligatory written, as in the said declaration is mentioned; and of this the defendant puts himself &c. Demurrer, shewing for cause that the plea offers to put in issue and to affirm a matter not denied by the plaintiffs, namely, the payment of interest to the 13th day of *November*, 1831, in the said bond in the declaration mentioned, whereas the declaration admits the payment of the interest in the said plea mentioned, and states only the nonpayment of the principal sum, and the plaintiffs therefore cannot safely join issue on the said plea; and for that, by offering to put in issue the payment of interest which is admitted, it tenders an immaterial issue, and the traverse is thereby too large; and the said plea is otherwise informal. Joinder in demurrer.

John Jervis, in support of the demurrer.—The defendant had no right to allege in his plea and to put in issue a matter not introduced by the plaintiff into his declara-

tion, and not made by him the subject of complaint. Had the plaintiff taken issue upon this plea, it would have been a departure from the declaration. The rule on this subject is clearly laid down by Mr. Serjt. *Williams*, in a note to the case of *Rex* v. *Kilderby* (*a*), "A traverse must be taken of some allegation contained in the adverse pleading, and a plea cannot conclude with a traverse of what has not been before alleged or necessarily implied, though it may affect the merits of the case." The conclusion of the plea to the country also is bad. (He was here stopped by the Court.)

Cowling, contrà.—With regard to the conclusion to the country, the plea is correct. Where in pleading there is a direct negative on one side and an affirmative on the other, or *e contrà*, then issue ought to be joined, and the latter pleading ought to conclude to the country. *Skinner* v. *Kilby* (*b*). *Com. Dig. Pleader* (*E. 32*). In point of substance, also, the plea is rightly pleaded. It was necessary to answer the whole of the plaintiffs' declaration. Now the condition of the bond, as set forth in the declaration, was to pay the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 13th day of *November;* and if the defendant should make the said payment, without any deduction or abatement, for or by reason of any taxes, charges, &c., then the obligation to be void. This is the plaintiffs' real demand; and this the defendant, as he was bound to do, has answered in his plea. The error of the plaintiffs in alleging the breach informally, ought not to prevent the defendant from pleading in a regular form. The plaintiffs ought to have denied the payment according to the terms of the condition of the bond set forth by themselves, and in that case the plea

(*a*) 1 Saund. 312 d, (n.) (*b*) Carth. 87.

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would unquestionably have been correct. [*Parke*, B.—The defendant might have pleaded the payment of the principal sum of 6000*l.* on the 13th of *November*, which would have been a good plea in answer to the breach assigned by the plaintiffs.] The defendant insists that the breach is ill assigned, and that he is entitled to plead in the form in which he ought to have pleaded, in case it had been properly assigned. The plaintiffs could have sustained no injury by this form of plea, upon which they might safely have taken issue and proceeded to trial.

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Lord ABINGER, C. B.—At first I entertained some doubts upon this subject, but I yield to the opinion of the rest of the Court, that in point of technical form the plea is bad. The rule of law is strict, and requires that no unnecessary issues should be taken, on the ground that such issues must tend to perplex the parties. It does not, indeed, appear that in this particular instance any such consequence could have ensued; and I think the plaintiffs have thrown an impediment in their own way by demurring instead of taking issue upon the plea, which they might have done with safety.

PARKE, B.—The plaintiffs, in this case, need not certainly have been under any difficulty with regard to their taking issue and proceeding in the action, but they have chosen to take an objection to the plea in point of form; and I am of opinion that, upon the ground stated, the plea is bad. This is an action upon a bond conditioned for the payment of a principal sum of 6000*l.* and interest. The plaintiffs might, had they so pleased, have declared upon the bond only; and then a plea like the present, shewing the condition of the bond, and pleading payment according to the terms of the condition, would have been perfectly correct, provided also that it had concluded to the Court. But, instead of declaring generally upon

the bond, the plaintiffs set out the condition in their declaration, and choose to assign a breach of one part of the condition only, the nonpayment of the principal sum of 6000*l.*, omitting to mention the interest. For the purposes of this action, then, there appears to be no other breach of the condition. Then is the plea a proper answer to the plaintiffs' demand? It ought to contain an issue taken upon some averment in the pleadings on the other side, and such issue ought not to include any other matter. That being the principle upon which the plea ought to have been constructed, what is the present plea? It includes a fact, of which no averment is to be found in the declaration. It states that the defendant paid to the plaintiffs the sum of 6000*l.*, with interest for the same, &c., without any deduction or abatement for or by reason of any taxes, &c., thus averring a payment both of principal *and interest*, a fact to which no corresponding averment is to be found in the declaration. The issue, therefore, is improperly offered, and the plea is bad.

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BOLLAND, B.—I am of the same opinion. The only breach is the nonpayment of the principal; but the plea tenders an issue on the payment of the interest.

ALDERSON, B.—The introduction of unnecessary matter into issues is forbidden, in order to prevent the parties from being embarrassed. In this case certainly the plaintiffs have been embarrassed, and the evil exists. Had the simple rule of pleading been observed, no difficulty could have arisen. The plea is bad, and there must be

Judgment for the plaintiffs.

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HARLEY and Another *v.* KING.

The assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises.

COVENANT by the plaintiffs as assignees of the reversion, against the defendant as assignee of the lessee. The declaration, after stating the making of the lease, and the title of the plaintiffs, and the conveyance to the defendant, assigned, by way of breach, the non-performance of a covenant in the lease to repair, alleging it to be "after the assignment to the defendant, and during the continuance of the demise, and whilst he was possessed of the demised premises with the appurtenances." Plea, that after the defendant became the assignee of the demised premises as in the declaration mentioned, and before the commencement of the suit, to wit, on the 28th day of *August*, in the year 1834, he the defendant, by a certain indenture of assignment then made and duly signed by him the defendant, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto one *William Plunkett*, his executors, administrators, and assigns, all and singular the premises in the declaration mentioned, together with the said indenture of lease and the several assignments thereof, and the full benefit and advantage thereof, respectively, to have and to hold the said premises unto the said *William Plunkett*, his executors, administrators, and assigns, from the date thereof, for all the residue then to come and unexpired of the said term of years demised by the said indenture of lease, subject, nevertheless, to the payment of the yearly rent thereby reserved, and to the performance of the covenants therein contained, and which on the lessee's or assignee's part were to be observed and performed: by virtue of which said indenture of assignment the said *William Plunkett*, afterwards, to wit, on the day and year last aforesaid, entered into the said de-

mised premises, with the appurtenances, and became, and was thereof possessed, for the residue of the said term then to come, and unexpired, whereof the plaintiffs, on the day and year last aforesaid, had notice; (concluding with a verification). Replication—That the said breach of covenant alleged and complained of in the said declaration was committed by the defendant after the said assignment to him in the said declaration, and whilst he continued such assignee, and before the making or signing of the said supposed indenture of assignment in the said plea mentioned; (concluding to the country). Demurrer—That the replication is not sufficient in law, because it does not traverse any matter alleged in the plea or put in issue thereby, or confess and avoid the allegation therein, or admit or deny that the said assignment in the said plea mentioned was before the commencement of the suit or otherwise, and leaves the traversable fact tendered by the plea wholly unanswered, &c. &c. Joinder.

Petersdorff, in support of the demurrer.—The question in this case is, whether the assignee of a lease containing a covenant to repair is liable, after an assignment by him, for a breach incurred before such assignment; and it is submitted that he is not liable. The liability of an assignee depends upon the privity of estate between him and the assignor, and with the ceasing of that privity the liability also ceases. One of the earliest and principal cases on this subject is that of *Pitcher* v. *Tovey* (*a*), which was an action of covenant against an assignee for rent due after the assignment. The Court there said, that cove-

(*a*) 1 Salk. 81; Holt, 73; 4 Mod. 71; 12 Mod. 23; 1 Show. 340, S. C.; see also Bac. Ab. Cov. (E. 4); Woodfall's Landlord and Tenant, 278, 6th ed., and the observations upon *Pitcher* v. *Tovey*, in Platt on Cov. 502; see also *Morly* v. *Polhill*, 2 Ventr. 56.

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nant would lie against the defendant "for rent due in his own time, but not after." This expression, it must be observed, is ambiguous, and may signify either that the action is not maintainable for rent not due in his own time, or that it is not maintainable if brought after his own time. There appears to be no other authority at common law with regard to the liability of an assignee after assignment for a cause of action accruing before assignment. There are, however, several cases in equity from which it may be collected that the liability of the assignee at law ceases with the assignment over. The first of those cases is that of *Treackle* v. *Coke* (*a*). There, an assignee of a lease, rendering rent, having enjoyed the land for six years, assigned over. The bill was to account for the time he had enjoyed. The defendant pleaded a judgment upon a demurrer at law, but the plea was overruled; for though in strictness of law there was no privity of contract (*b*) to charge the assignee, yet in equity he must certainly be chargeable for such time as he received the profits. From this decision, therefore, it appears that the plaintiffs had failed in an attempt to establish the liability of the assignee at common law. Upon the authority of this case, that of *Philpot* v. *Hoare* (*c*) was decided. There it was assumed, by the counsel in argument, that an assignee, after assignment, was discharged at law from arrears of rent accruing in his own time; and Lord *Hardwicke* says, "as to the arrears of rent" (those accruing in the assignee's time), "I am clear of opinion, that the plaintiff has a remedy for them *in this Court*," implying, that at law the remedy was lost. [*Parke*, B.—*Philpot* v. *Hoare* is no authority to shew that in a case like the present it was

(*a*) 1 Vern. 165; 1 Eq. Ca. Ab. 47, S. C.

(*b*) Quære *estate*. The word *estate* is used by the Vice-Chancellor in referring to this case, in *Onslow* v. *Corrie*, 2 Madd. 341.

(*c*) Amb. 480; 2 Atk. 219, S. C.

necessary to resort to the assistance of a Court of equity. There the assignee having paid the rent incurred in her own time, assigned the premises on the 25th *March*, 1739, and the rent in question became due after the assignment, *viz.* at *Lady-Day*, 1740; so that the question there was, whether or not the assignment was fraudulent.] In a subsequent case, Lord *Hardwicke* again uses expressions shewing that his opinion was, that the lessor in these cases had lost his remedy at law. In *Valliant* v. *Dodemeed* (*a*), he says, "as he (the assignee) has made an assignment to *Lomax*, *Valliant* has no remedy for these arrears at law, and is under a necessity for coming into this Court for its assistance." [*Parke*, B.—In that case also the lessor sought to render the assignee liable for rent accruing after the assignment. It seems in these cases to have been doubted whether the assignee is liable at law for a breach in his own time; but it is quite clear that he is so liable. Are there no stronger authorities than these?] There is a judgment of Sir *T. Plumer's* to the same effect as those already cited, in which he says, "equity gives relief to a landlord for his rent in cases of assignment; first, where the assignment is merely colourable and fictitious, the possession remaining with the assignor; or secondly, where, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due after breaches of covenant *incurred previous to the assignment.*" *Onslow* v. *Corrie* (*b*). In this case the Vice-Chancellor cites a decision of Lord Chancellor *Cowper* to the same effect:—"In a manuscript note of a case in *Michaelmas* Term, 12 *Geo. 2*, furnished me by Mr. *Maddock*, Mr. *Fazakerley* cited a case which was before Lord Chancellor *Cowper*, in which it was agreed, that, when a lease is assigned to one, and he assigns to a third person, *that though the lessor has strictly no remedy*

(*a*) 2 Atk. 546. (*b*) 2 Madd. 330, 341.

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against the first assignee, the privity of estate being determined, yet if it appear that the second assignment was made in order to exonerate and discharge the assignor of rent due to the lessor, this Court will look upon it as a fraud, and oblige such assignor to pay the rent *accrued in his own time*, notwithstanding the privity of estate being determined, and there being no covenant from such second assignor."

Lord ABINGER, C. B.—This is an action brought by a lessor against an assignee of the lease, upon a covenant running with the land, for a cause of action accruing in the time of the assignee, and before the assignment made by him. The defence is, that the assignment by the defendant took place before the action was brought, and that, in order to render an assignee liable, it must appear not only that he is sued upon a cause of action arising in his own time, but likewise that the suit was commenced before the assignment, for that by such assignment the privity of estate upon which only the lessor can proceed, is determined. By the neglect of the assignee to repair, a breach was incurred in his own time, and a right of action thereupon vested in the plaintiffs. What is there, then, to divest that right of action, and to deprive the party of his remedy, his right to which was complete before the assignment? The argument for the defendant would establish the position that all assignees, by a secret assignment to an insolvent, may divest themselves of all liability for any breach of covenant which they may have incurred. The principle of law is, that so long as the privity of estate continues, the assignee is liable upon all covenants running with the land. If, upon the breach of any such covenant, the lessor may sue him during the continuance of the assignment, what is there to prevent him from bringing his action after the assignment? There may be cases of specific breaches of covenant, where to

hold the contrary would be to commit great injustice. A covenant may exist with regard to maintaining machinery or other valuable property, the omission to perform which by the successive tenants of the premises nothing could repair. If the assignee can free himself by assignment from the liability to make good his own default, is his assignee to be charged with the whole amount, or to whom is the lessor to resort? It can never be contended, that, by an assignment to a beggar, an assignee shall be allowed to free himself from his vested liabilities.

The rest of the Court concurred.

Judgment for the plaintiff.

DOE *d.* JOSEPH ASHBY and Others *v.* BAINES.

THIS was an ejectment for recovering possession of a messuage and six acres of land situate in the township of *Laverton* in the county of *York*. By an order of Mr. Baron *Gurney*, pursuant to the stat. 3 & 4 *Will.* 4, c. 42, s. 25, the following case was stated for the opinion of this Court:—*Thomas Ashby*, being seised in fee simple of the premises mentioned in the declaration, made his last will and testament, which was duly signed and attested, so as to pass real estates: it was in the following words:—"In the name of God, amen, I, *Thomas Ashby*, of *Belforth*, in the township of *Laverton*, in the parish of *Kirby Malzeard*, in the county of *York*, yeoman, being of sound and disposing mind and memory, do make and ordain this my last will and testament, in manner and form following, that is to say, I will that all my just debts and funeral charges be paid and discharged *by my executrix hereinafter named*. I give and bequeath unto *Thomas Ashby*, my son, the

A testator, after giving a pecuniary legacy to his heir-at-law, directed his debts and funeral expenses to be paid and discharged by his executrix hereinafter named. He afterwards gave to his daughter, *E. S.*, whom he made, constituted, and ordained his executrix, all and singular his lands, tenements, and messuages, by her freely to be possessed and enjoyed:—*Held*, that the executrix took only a life estate.

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sum of 100*l.*, to be paid six months after my funeral; but if that my son *Thomas* should die before my death, or before he receives this legacy, then his wife and children shall receive it, share and share alike, that is, equally divided amongst them. I give to *Mary Beckwith*, one guinea, to be paid six months after my death. Also, I give to my beloved daughter, *Elizabeth Simpson*, whom I likewise constitute, make, and ordain the sole executrix of this my last will and testament, *all and singular my lands, tenements, and messuages, by her freely to be possessed and enjoyed;* and I do hereby utterly disallow, revoke, and disannul all and every other former testaments and wills by me in any way before named, and willed, and bequeathed, ratifying and confirming this and no other to be my last will and testament. In witness whereof I have hereunto set my hand and seal this 24th day of *January*, 1800." The testator shortly after died seised as aforesaid, leaving *Thomas Ashby*, his only son, and his daughter, *Elizabeth Simpson*, him surviving; and this will was proved by *Elizabeth Simpson*, the executrix therein named, on the 6th of *February*, 1800. The personal property of the testator consisted of goods appraised at the sum of 11*l.* 4*s.*, and of a sum of 100*l.* at interest, in the hands of a neighbour, which, after the testator's decease, was received by his executrix. The legacy of 100*l.* was paid by the executrix to the testator's son, *Thomas Ashby*, who signed the following receipt:—

"Received by me, *Thomas Ashby*, of *Bishop Monkton*, in the county of *York*, yeoman, of *Elizabeth Simpson*, the wife of *John Simpson*, and sole executrix named in and by the last will and testament of *Thomas Ashby*, late of *Belford*, in the township of *Laverton*, in the parish of *Kirkby Malzeard*, in the county of *York*, yeoman, my late deceased father, the sum of 100*l.*, being a legacy left to me by the said last will and testament of the said *Thomas Ashby*, deceased, bearing date on or about the 24th of

January, 1800; and of and from the payment of the said sum of 100*l.*, I do hereby for ever acquit, release, and discharge the said *Elizabeth Simpson*, and the said *John Simpson*, her husband, and each of them, their and each of their heirs, executors, and administrators, and his, her, and their goods and chattels, lands and tenements, and particularly the lands, tenements, and hereditaments, late the estate and inheritance of the said *Thomas Ashby*, deceased, as witness my hand this 22nd day of *July*, 1800. Witness, *George Wharton*. *Thomas Ashby* ⋈ his mark."

Elizabeth Simpson survived her husband, and died in 1829, in possession of the premises, leaving *Mark Simpson*, her eldest son and heir-at-law, who is still living. *Joseph Ashby*, a lessor of the plaintiff in this action, is the eldest son of *Thomas Ashby*, now deceased, who died intestate, and who was the only son and heir-at-law of *Thomas Ashby*, the testator above named. The question for the opinion of the Court is, whether or not *Joseph Ashby*, one of the lessors of the plaintiff, is, under the circumstances above stated, now entitled to recover the premises in question in this action of ejectment. If the Court shall be of opinion that he is so entitled, judgment is to be entered for the plaintiff by confession, with one shilling damages, and costs to be taxed. If the Court shall be of a contrary opinion, then judgment is to be entered for the defendant.

John Henderson, for the lessor of the plaintiff, was stopped by the Court.

Tomlinson, for the defendant.—The testator's daughter, *Elizabeth Simpson*, took an estate in fee. In the first place, the testator directs that his debts and funeral charges shall be paid by his executrix thereinafter named; he then gives to his son, *Thomas Ashby*, a legacy of 100*l.*; and afterwards follows the devise in question to his

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daughter *Elizabeth*—"Also I give and devise to my daughter *Elizabeth Simpson*, whom I likewise constitute, make, and ordain the sole executrix of this my last will and testament, all and singular my lands, tenements, and messuages by her freely to be possessed and enjoyed." It must be conceded that the latter words "by her freely to be possessed and enjoyed," are not sufficient in themselves to carry the fee. [Lord *Abinger*, C. B.—Nor are the words "lands, tenements, and messuages" equivalent to the word "estate," so as to effect the same object.] It must be admitted, on the authority of *Goodright* d. *Drewry* v. *Barron* (*a*), that the mere use of the words "by her freely to be possessed and enjoyed," does not of itself indicate an intention to pass the fee. But these words may, with others, shew such an intention. *Loveacres* v. *Blight* (*b*). In that case the testator charged the property with an annuity, to be paid to his widow, and then gave it to his executors "freely to be possessed and enjoyed." Upon this part of the case Lord *Mansfield* observes, that the word "freely" is a very material word; for the testator having charged his estate with the payment of the annuity to his wife, &c. he could not, by the word *freely*, mean to give it free of incumbrances: the *free enjoyment*, therefore, must mean free from all limitations, that is, the absolute property of the estate. Under special circumstances, therefore, these words may carry the fee, and in the present case the pecuniary legacy to the heir is a circumstance to shew that he was not intended to take the residue. [Lord *Abinger*, C. B.—A probability affording room for guessing that the testator intended to disinherit his heir-at-law is not sufficient.] The testator directs his debts and funeral expenses to be paid by his executrix thereinafter named. [Lord *Abinger*, C. B.—That is no more than is implied in the making her executrix.] There is a distinction

(*a*) 11 East, 220. (*b*) 1 Cowp. 352.

between a charge upon the estate generally, with a direction to executors to pay, and a charge directing the payment to be made "by my executor hereinafter named." In the latter case it has been held to be a sort of *designatio personæ*, and to impose the charge upon the individual, not in his representative capacity. In *Goodright* d. *Phipps* v. *Allen* (*a*), there was a devise of a life annuity to *A.*, "to be paid by my executor after named," with a general devise of a copyhold to *B.*, whom the testator also made executor and residuary legatee of his personal estate, charged with debts and legacies, and it was held that *B.* took a fee simple in the copyhold. The judgment of Sir *William Blackstone* was as follows:—"This is not merely a charge of the annuity on the personal estate by directing it generally to be paid by his executor; but the words are special 'by my executor after named.' This is a *designatio personæ*, and is equivalent to saying 'to be paid by my kinsman, *Thomas Allen*,' in which case there could have been no doubt." The other Judges certainly ground their judgment upon the circumstance that a fee simple was necessary to support the charge for the payment of the annuity. [Lord *Abinger*, C. B.—If land be given to *A.*, charged with the payment of an annuity to *B.* for his life, it is a reasonable presumption that the testator intended to give a fee to *A.*, otherwise, in case of the death of *A.* before *B.*, the charge would fail.] The case of *Goodright* v. *Allen* is only cited for the purpose of shewing the reasons upon which the judgment of *Blackstone*, J., is founded, which, it is submitted, are applicable to the present case.

Lord Abinger, C. B.—In the construction of wills the Court will endeavour anxiously to discover the intention of the testator, but will not indulge in mere conjecture. The

(*a*) Sir W. Bl. 1041.

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whole context of a will must be looked to, but in the present case it furnishes nothing to shew that the testator intended to give more than a life estate to his daughter, *Elizabeth Simpson.* There is no clause in the will, and no condition imposed upon her requiring a larger estate; nor are there any words used which in themselves are capable of carrying a fee. The testator has not devised his "estate," and the devise of his lands "freely to be possessed and enjoyed," is not, it is quite clear, equivalent to a devise of the fee simple.

BOLLAND, B.—Neither the mode of enjoyment described "freely to be possessed and enjoyed," nor the description of the property itself, "lands, tenements, and messuages," is sufficient to pass a fee. In the case cited from Sir *William Blackstone's* Reports, Chief Justice *De Grey* says, "The annuity is given to *Ramsay* for her natural life, to be paid by the executor, which, being of an uncertain duration, must have a fee to support it." That is the true ground upon which that decision rests. But no such reason exists in the present case.

ALDERSON, B.—I am of the same opinion. In order to support the title of the defendant we must be satisfied that, by the words of the will itself, a larger estate than that for life passed to *Elizabeth Simpson.* That, however, does not appear; and there must therefore be

Judgment for the plaintiff.

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CHADWICK *v.* HOUGH.

Where an attorney, not an attorney of this Court, had liberty to practise here in the name of another, and signed a notice of bail, "A. B. by C. D.," it was *held* irregular; for the signature should have been in the name of the attorney of this Court only.

BUTT opposed the justification of bail in this case, upon the ground of an irregularity in the notice of bail. The irregularity was in the name of the attorney subscribed to the notice, it being signed "*John Eley*, by *Edward Cole*." It appeared that *Eley* was not an attorney of this Court, but that he had liberty to practise here in the name of *Cole*. It was contended, that in order to avail himself of this liberty, he ought to have used the name of *Cole*, and not to have signed the notice in his own name.

Heaton, in support of the bail, argued that it sufficiently appeared on the face of the notice, that *Eley* did not affect to practise in his own name.

ALDERSON, B.—The objection is, that *Eley* has not used *Cole's* name. Had he done so in the usual manner, the notice would have been right. It ought to appear, that the act was the act of *Cole*, but that is not so here. It may, however, be amended, and the bail may come up tomorrow.

Rule accordingly.

SCOTT *v.* ROBSON.

Where the defendant has neglected to deliver his demurrer books, and does not appear at the argument to support his pleadings, but has offered to give a cognovit, the Court will give judgment for the plaintiff, without requiring the delivery of the defendant's demurrer books.

DEMURRER. The plaintiff had delivered his demurrer books according to the rule of *H. T.* 4 *Will.* 4, (7), but the defendant had omitted to deliver his. The case being called on for argument, and the defendant not appearing, *Humfrey* prayed judgment for the plaintiff, and stated

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that the case was not intended to be argued by the defendant, who had offered to give a cognovit. Under these circumstances the Court gave judgment for the plaintiff, without requiring the delivery of the demurrer books on the part of the defendant.

Judgment for the plaintiff.

RIDDELL *v.* PAKEMAN.

Where in trespass for false imprisonment, the defendant justifies under process of outlawry, and the plaintiff replies that there was no affidavit of debt made and filed, &c. and the defendant rejoins that there was such affidavit, and sets out an *irregular* affidavit, and the plaintiff demurs: —*Held* that the defendant was entitled to judgment, trespass not being maintainable where the process is *irregular* merely, and not void.

TRESPASS for false imprisonment.—Plea, *First*, the general issue; *secondly*, as to the assaulting and laying hold of the plaintiff, &c. that before and at the time of the issuing of the several writs thereinafter mentioned, and also at the time of the committing, &c., the plaintiff was indebted to the defendant in a large sum of money, to wit, the sum of *20l.* And the plaintiff being so indebted to the defendant, the defendant, for the recovery of the said debt, to wit, on &c., sued out of the Court of our lord the now King, before the Barons of his Majesty's *Exchequer* at *Westminster*, a certain writ of our lord the King, called a *capias*. [The plea here set out the writ of *capias*, which was alleged to have been marked and indorsed for bail for *20l.*, the delivery of it to the sheriff, and the return by him of *non est inventus*.] Whereupon the defendant, according to the form of the statute in such case made and provided, to wit, on &c., sued and prosecuted out of the Court of our said lord the now King, before the Barons of his *Exchequer* at *Westminster*, a certain writ of our said lord the King, called a writ of *exigi facias*, directed &c. [Here the plea set forth the writ, that it was indorsed for *20l.*, and delivered to the sheriff to be executed; and that, after being four times demanded, the plaintiff appeared and rendered himself to the sheriff.] And thereupon the

sheriff and the defendant in his aid and by his command, on &c., under and by virtue of the last-mentioned writ, and before the return &c., took the plaintiff, and for default of bail seized him, &c. which are the several supposed trespasses, &c. (concluding with a verification.) Replication—That no affidavit was made and filed of record of the alleged cause of action of the defendant against the plaintiff in the said Court of his Majesty's *Exchequer* at *Westminster*, before the issuing of the said supposed writ of *capias*, according to the form of the statute, &c. (concluding with a verification). Rejoinder—That an affidavit was made and filed of record of the said cause of action, &c. as follows, that is to say, "In the *Exchequer of Pleas*, *William Pakeman*, of &c., maketh oath and saith, that *Joseph Hadley Riddell* is indebted to him in the sum of 20*l.* and upwards, on a promissory note drawn by the said *J. H. R.*, and payable to one *Charlotte Moore* or order, at a day now passed, and by her indorsed to this deponent, *W. P.* Sworn, &c." as by the said affidavit, &c. (concluding with a verification). Demurrer—Because the affidavit of the cause of action, as required by the statute in such case made and provided, does not state or shew the amount for which the promissory note was drawn, or the amount for which it was payable; but merely states that the plaintiff was justly and truly indebted to the defendant in the sum of 20*l.* and upwards on a promissory note, drawn by the plaintiff, payable to one *Charlotte Moore* or order, and by her indorsed to the defendant. Joinder in demurrer.

Petersdorff in support of the demurrer.—The question raised upon this demurrer is, whether it is not requisite, in order to support the justification relied upon by the defendant, that the affidavit of debt, which is the foundation of the proceeding, by virtue of which he justifies the imprisonment, should be in conformity with the requisitions of the statute 12 *Geo.* 1. According to a great

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number of recent decisions, an affidavit of debt, like that set forth in the rejoinder, is insufficient. [Lord *Abinger*, C. B.—It does not follow, that, because the Court has in such cases discharged the party arrested, on account of the irregularity, that therefore an action for false imprisonment may be maintained.] The case of *Parsons* v. *Loyd* (*a*) is an authority to shew, that, in a case of this kind, trespass may be sustained. The marginal note of that case is as follows:—"One was arrested by a *capias ad respondendum*, tested in *Trinity* and returnable in *Hilary* Term following. The writ was set aside as void. Trespass for false imprisonment lies against the plaintiff in that writ, and he cannot justify under a void or *irregular* writ." [Lord *Abinger*, C. B.—In that case, the distinction was taken between process which is *void*, and that which is merely irregular. Lord Chief Justice *De Grey* says, that the writ is *void* and a mere nullity; but that is not the case here.] This case is not one of mere irregularity. The affidavit not having pursued the terms of the statute, is no affidavit at all, but a mere nullity. Had the objection been merely technical, as an objection to the name of the defendant, it might perhaps be otherwise; but here the objection goes to the very foundation of the instrument upon which the justification depends. It is not inconsistent with the affidavit, that the defendant in the former action may never have been liable to be arrested. [*Alderson*, B.—The promissory note may have been drawn for 20*l.*] It is not sufficient that by possibility the one party may have had good ground for arresting the other; it must appear affirmatively upon the affidavit. It is a rule, that the plaintiff shall not be allowed to make any supplementary affidavit, or the defendant any affidavit in contradiction to that of the plaintiff: and this rule affords a strong reason for requiring, that the affidavit of debt

(*a*) 3 Wils. 341.

should contain a full and explicit statement of the plaintiff's title. The authorities to shew the irregularity of this affidavit are numerous (*a*). [Lord *Abinger*, C. B.—The Court do not require any decisions to be cited, in order to shew, that this is an affidavit upon which they would discharge the defendant, upon the ground of irregularity.] Then, the only question is, the distinction between obtaining a discharge by a summary application to the Court, and the remedy by action, for the false imprisonment. In the former case, the proceedings being irregular only, it is necessary to apply to the Court; but here the irregular affidavit being equivalent to no affidavit, all the proceedings founded upon it are void.

Lord ABINGER, C. B.—In this case there must be judgment for the defendant. The affidavit to hold to bail is indeed irregular, but the proceedings which have taken place upon it are only voidable, and not void. The defendant, therefore, ought to have applied to the Court, for the purpose of having them set aside, before he commenced the present action. There is no colour whatever for maintaining it.

PARKE, B.—Where the process is irregular merely, no action for false imprisonment can be maintained until that process is set aside. It is every day's practice in cases of this kind, where the defendant has given a bail-bond, or where he has suffered judgment by default, or has been guilty of laches in making his application, for the Court to refuse to interfere (*b*); but it has never been supposed in such case, that he had a remedy by an action for false imprisonment. An affidavit to hold to bail in trover, with-

(*a*) See *Latraille* v. *Hoepfner*, 10 Bingh. 334; 3 Moore & S. 800; 2 Dowl. P. C. 758, S. C.

(*b*) Tidd's Pr. 190, 191, 8th ed.

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out a judge's order, is irregular; but can it be contended, that in such case an action for false imprisonment could be sustained? What distinction is there between that and the present case—the judges in this case not permitting the defendant to be held to bail for the amount of interest?

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ALDERSON, B.—There is no doubt that an action of trespass for false imprisonment cannot be maintained. When process is set aside for irregularity, the Court in general make it part of the terms, that the defendant shall bring no action. The reason of that is, that the right to bring such action accrues upon the process being set aside.

GURNEY, B., concurred.

Judgment for the defendant.

THOMAS *v.* THOMAS and Another.

A unity of possession of the land *a quâ* and of the land *in quod* an easement exists, does not extinguish but only suspends the easement, where the party is seised in fee of the one parcel, and possessed for the residue of a term of the other.

Where a party has a right to have the droppings of rain fall from his wall upon the premises of another, the right is not destroyed by his raising the height of the wall.

CASE.—The declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was, and from thence had been, and still was, lawfully possessed of a certain messuage or dwelling-house, yard, and premises, with the appurtenances, situate and being in the county of *Devon*, to wit, in the borough and town of *Crediton*, in the said county, and of a certain thatched wall standing and being in and upon those premises; and by reason of such possession, during all that time, she, the plaintiff, for the necessary use and enjoyment of her said premises, ought to have had, and still of right ought to

have, the use and benefit of a certain channel, drain, gutter, or sewer, leading and running, by and from the said messuage or dwelling-house, over, across, along, and through the said yard of the plaintiff unto and into certain premises in the possession or occupation of the defendants there, near to the said premises of the plaintiff, by, through, and along which the said drain, &c. (stating the particular easement). And also, by reason of such possession as aforesaid, she, the plaintiff, was, during all the time aforesaid, entitled to the benefit, easement, privilege, and advantage of having and permitting the eaves and thatch of her said wall to extend and project a convenient space beyond and from the said wall over and upon the said premises so as aforesaid in the possession or occupation of the defendants, for the convenience and use of conveying and carrying off from her said wall and thatch thereof the rain which from time to time descended and fell thereupon. Yet the defendants, well knowing all the premises, but contriving, &c., whilst the plaintiff was so possessed &c. as aforesaid, to wit, on &c., wrongfully and injuriously shut, closed, stopped up, and obstructed the said drain, channel, gutter, or sewer, to wit, by and by means of divers large quantities of brick, &c., and the same so shut, closed, stopped up, and obstructed as aforesaid, kept and continued for a long space of time, to wit, from &c. And thereby and from no other cause whatsoever, during all the time aforesaid, divers large quantities of the refuse and foul water, and other filth, arising and proceeding from the said messuage and premises of the plaintiff, have been and still were prevented and hindered from running, flowing, and passing off in their usual course, through and out of the said channel, drain, gutter, or sewer, in the manner aforesaid; and by reason thereof, not only divers noisome, noxious, offensive, and unwholesome smells, &c., during all the time aforesaid, have ascended, &c. into the said messuage, dwelling-house, and premises of the plaintiff, but also

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thereby the said premises, &c. of the plaintiff became and were greatly overflowed and wholly untenantable, and the plaintiff and her family thereby had been and were greatly annoyed, &c. in the occupation, possession, and enjoyment thereof. And the defendants furthermore, on the same day and year aforesaid, and on divers other days and times, &c. wrongfully, injuriously, without the leave, and against the will of the plaintiff, erected, put, and placed, close to the said wall of the plaintiff, divers large quantities of brick, mortar, stone, wood, and other materials, and divers erections and buildings; and the same respectively there kept and continued for a long space of time, to wit, &c., so near to the said wall and to the thatch thereof, that by reason thereof, and from no other cause whatever, the rain, which from time to time descended to and fell upon the thatch of the said wall, was wholly prevented from dripping and falling from the thatch thereof in manner aforesaid, as the same ought to have done; and in consequence thereof great quantities, to wit, ten perches of the said thatch, and of the covering and coping of the said wall, had respectively become and been greatly rotten, decayed, damaged, injured, and destroyed; and by reason thereof, not only the plaintiff, during all the time aforesaid, lost the use and advantage of the said wall, but also by means of the said thatch covering and coping of the said wall having been so damaged and destroyed as aforesaid, large quantities of rain and moisture have from time to time, during all the time aforesaid, fallen upon and penetrated into the said wall of the plaintiff, and the same has thereby been greatly injured and damnified, and has been rendered ruinous, insecure, and dilapidated; so that, by means of the several premises aforesaid, the plaintiff hath been, during all the time aforesaid, greatly inconvenienced, &c. Pleas.—*First*, Not Guilty. *Secondly*, As to the part of the said declaration which relates to the said channel, drain, gutter, or sewer in the said declara-

tion mentioned, the defendants say that the plaintiff ought not to have or maintain, &c., because, they say, that the surplus or foul water, or other filth, which from time to time arose, were collected and proceeded from the said messuage or premises of the plaintiff, were not, during all the time aforesaid, used and accustomed, nor of right ought to enter, flow, pass, and be carried away from and off the said premises of the plaintiff into the said premises of the defendants, in manner and form as the plaintiff hath in her said declaration in that behalf alleged; and of this the defendants put themselves upon the country. *Thirdly*, And as to that part of the said declaration which relates to the eaves and thatch of the said wall in the said declaration mentioned, the defendants say that the plaintiff ought not to have or maintain, &c., because they say that the plaintiff was not, during all the time aforesaid, entitled to the benefit, easement, privilege, and advantage of having and permitting the eaves and thatch of the said wall to extend and project a convenient space beyond and from the said wall over and upon the said premises so as aforesaid in the possession or occupation of the defendants, for the convenience and use of conveying and carrying off and from her said wall and the thatch thereof the rain which from time to time descended and fell thereupon, and of this the defendants also put themselves upon the country. Upon these pleas, issue was joined.

At the trial before *Patteson*, J., at the last assizes for the county of *Devon*, the following appeared to be the facts of the case:—*Joseph Thomas*, the father of the defendants, being seised in fee of the land and premises occupied by the defendants at the time of the alleged injury, purchased the adjoining premises occupied by the plaintiff at the time of the alleged injury, in which there was a term of 500 years. By his will, dated the 18th *April*, 1816, the former property was devised to his wife

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for life, with remainder in fee to his son *John Vicary Thomas*, one of the defendants; and the latter property was bequeathed for the residue of the term of 500 years to his wife for life, and afterwards to his son *William*, the husband of the plaintiff. *Joseph Thomas* died on the 28th *May*, 1820, having made *Abraham Wreyford* the trustee under his will, in whom the legal estate in all the property vested.

The defendants for some time after the death of their father, occupied the premises in question as tenants from year to year; but, on the 10th of *April*, 1834, a lease of those premises was granted by Mrs. *Thomas*, the mother of the defendants, and by *Wreyford*, to the defendant *John Vicary Thomas* for sixty years, in case Mrs. *Thomas* should so long live. Both the defendants continued to carry on their business upon the premises. The plaintiff was in the actual possession of the other premises held for the residue of the term of 500 years, having been put into possession by *Wreyford* in the month of *May*, 1834. It appeared, that at one period of time after the death of *Joseph Thomas* the testator, and before the lease to the defendant *John Vicary Thomas*, *Wreyford* the trustee was in possession of both the premises.

The situation of the respective premises with regard to the drain did not become material, the defendants admitting the obstruction, and contesting the plaintiff's right to the easement. With regard to the claim of easement for the eaves-dropping, it appeared, that, about thirteen years since, the top of the plaintiff's wall was covered with pantiles, which projected several inches; but that upon the buildings being accidentally burnt, the wall was thatched, and the thatch projected some inches further than the pantiles had done. On this occasion, also, the wall was raised about three feet. The obstruction of the eaves-dropping was caused by the defendants building a wall close up to the wall of the plaintiff, within the space over which the pantiles had formerly projected, and within the projection of the thatch.

The existence of the easements in question for the period of upwards of twenty years was proved, and the obstruction of the plaintiff in the user of them was admitted; but, it was insisted for the defendants, that the right to the easements was determined by the unity of possession of the premises in *Wreyford* the trustee. It was likewise insisted with regard to the eaves-dropping, that by the alteration made by the plaintiff in the height of the wall and the substitution of the thatched for the tiled roof, the right to that easement had ceased. The jury having found a verdict for the plaintiff with 40*s.* damages, the learned Judge gave the defendants leave to move upon the first objection to enter a nonsuit.

Erle now moved accordingly, or for a new trial.—*First*, with regard to the easement of eaves-dropping. Where a party claims an easement, he cannot vary his mode of exercising his right; if he does so, that right ceases. The exercise of an easement is an infringement upon the right of another, and must be strictly pursued. Thus, a person who has a right of way for a particular purpose, cannot use it for another purpose; as where he possesses a right to carry corn or manure, that will not justify him in carrying lime, or the produce of a quarry. *Jackson* v. *Stacey* (*a*). Here, if the plaintiff had a right to raise the wall three feet, she had a right to raise it to any indefinite height; and if she could extend the projection of the roof four inches, why might she not extend it further, whatever inconvenience it might prove to be to the defendants? The alteration in the enjoyment of the right destroyed it, and the defendants were justified in building up their wall, as they would have been in case no easement whatever had existed. [*Alderson*, B.—How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been

(*a*) Holt, N. P. C. 455. See *Saunders* v. *Newman*, 1 B. & A. 258.

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held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window (*a*). If the act of the defendants is injurious to the plaintiff's original right, it is not the less so, because it is injurious also to a further right which the plaintiff claims.] If the wall is altered in height or extent, the right claimed ceases to be what it was. [*Alderson*, B.—The only difference is, that since the alteration the drops have to fall from a greater height. How can that be in any degree prejudicial to the defendants?] *Secondly*, the easements were extinguished by the unity of possession in *Wreyford*, the trustee. It is a rule of law, that whenever the land upon which an easement is claimed and the land in respect of which it is claimed are united in one person, the easement must cease; for no one can claim a right as against himself. Here, then, as soon as the possession of the whole premises was vested in *Wreyford*, the easements ceased to exist; and the plaintiff and the defendants took their respective premises in the same manner as *Wreyford* held them, *viz.* discharged from the easement. With regard to a right of way, it has been held, that unity of possession of the land in respect of which the way is claimed, and the land over which it passes, will extinguish the right, for the prescription is gone, and the way is against common right (*b*).

Lord ABINGER, C. B.—The union of possession in the trustee did not extinguish the easement, but only suspended it during that unity of possession; and upon his parting with the premises to different tenants, the right revived. The verdict is correct, and ought not to be disturbed.

(*a*) *Chandler* v. *Thompson*, 3 Campb. 80; *Martin* v. *Goble*, 1 Campb. 322; *Luttrell's case*, 4 Rep. 87 a.

(*b*) 1 Rol. Ab. 935, Vin. Ab. Extinguishment (A.) (C.)

BOLLAND, B., concurred.

ALDERSON, B.—If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin; and if I part with the premises, the right, not being extinguished, will revive. That was the case here.

GURNEY, B., concurring—

Rule refused (*a*).

(*a*) The distinction between the case of a unity of *possession* and a unity of seisin does not appear to have been always accurately observed. In *Whalley* v. *Tompson*, 1 Bos. & Pul. 375, *Eyre*, C. J., is reported to have said, "From the moment that the *possession* of two closes is united in one person, all subordinate rights and easements are *extinguished*. The only point, therefore, that could possibly be made in this case, is, that the ancient right which existed while the possession was distinct, was merely suspended, and may revive again. If it be stated, that a man and his ancestors have been in *possession* of two adjoining closes, and a prescription be then set up for a way over one to the other, that prescription will be *felo de se*. If, indeed, the fields were let to different tenants, and from time immemorial a causeway had been built over one field to the other, by which the tenants had passed and re-passed, this in user and in fact would be a road; but there would be no right to a road in point of law, for no right could exist in the owner independent of the fee simple." So in Brooke's Abr. Extinguishment, pl. 15., it is said, that a way to a mill having been extinguished by unity of *possession* in J. S., and on J. S.'s death partition being made amongst his daughters, and the mill being assigned to one and the land to the other, it was held, that the way revived; but it is added, *tamen videtur*, that it is a new way. There are, however, many authorities to shew, that, in order to create an extinguishment, the interest which the party takes in the premises, over and in respect of which the easement exists, must be the same. Thus, with regard to a charge, it has been held, that, where it comes to

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DOE *d.* SHOWELL *v.* ROE.

Where a portion of the premises in ejectment consisted of three unfinished and uninhabited houses, the court refused to permit the affixing of the declaration on the doors of the houses to be deemed good service.

MOTION for judgment against the casual ejector. As to some part of the premises, the service of the declaration was regular; but with regard to another portion, the service was described in the affidavit to have been by affixing a copy of the declaration "on each of the doors of three unfinished and uninhabited houses, being the residue of the premises in the declaration mentioned, there being then no person on the premises."

Wallinger moved for judgment against the casual ejector as to the part with regard to which the service was

the same person that is entitled to the land, if he has not the same title to both, there shall be no extinguishment. *Price* v. *Leys*, Barnardist. C. R. 117; Vin. Ab. Exting. (A. 1.) And the same rule holds with respect to the extinguishment of rents. If the conveyance of the land to the party entitled to the rent be only of a particular estate of shorter duration than the estate which the lord has in the rent service, though there be a union of the rent and the tenancy in the same hand, yet, because that union is but temporary, the rent in such case is only *suspended*, and not *extinguished*. Gilb on Rents, 150. But it is otherwise, where the same party is *seised* of both the premises. Thus, where two were seised of two several acres of land, of which the one ought to inclose against the other, and one purchased both, and let them to several men, it was adjudged that the inclosure was not revived, but remained extinguished. Poph. 167, arg. citing *Hemdon & Crouche's* case, 36 Eliz. Vin. Ab. Extinguishment (A.) But see Id. (C.) where it was contended, that a claim of common of pasture had been extinguished by unity of possession in king Hen. 8. It appeared, that, in the tenements in respect of which the common was claimed, he had a fee simple absolute, while in the premises over which the right was claimed, he had only a fee simple determinable.—The Court held, that such an unity worked no extinguishment; for, where an unity of possession extinguishes a prescriptive right, it is requisite that the party should have an estate in the lands *a quâ* and in the lands *in quâ*, equal in duration, quality, and all other circumstances of right. *Rex* v. *Inhab. of Hermitage*, Carth. 239.

in the usual manner; and with regard to the residue of the premises, that the service of the declaration in the manner above stated should be deemed good service. Where the premises consisted of a mansion and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access; in one of which small houses resided a man, who was permitted to live there merely to take care of them, and the mansion house and the rest of the messuages were vacant—the Court refused a rule to make the service on the man good, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it should be deemed good service (*a*).

ALDERSON, B.—Why should not the lessor of the plaintiff pursue the regular course, and proceed as in the case of a vacant possession? There is no ground for permitting such a service as this to be deemed good service.

Rule refused as to latter point (*b*).

(*a*) 2 Archb. Pr. 642, 4th ed.; Tidd, Pr. 443.

(*b*) See *Doe* d. *Norman* v. *Roe*, 2 Dowl. P. C. 428.

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THE bail in this case having been excepted to, and having justified, *J. Jervis* applied for the costs of the justification.

Where an affidavit of sufficiency omits to state the place where the property of the bail is situate, and only ascribes the value to several kinds of property collectively, it is a departure from the form given by the rule 3, *T. T.* 1 *W.* 4; and the bail having justified, the defendant is not entitled to the costs of justification.

Walesby opposed the application, on the ground, that the affidavit of sufficiency did not pursue the form direct-

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ed to be observed by the rule 3 of *Trinity* Term, 1 *Will.* 4 (*a*). The description of the property of the bail given in the affidavit, is "household furniture and effects, and good book debts;" without specifying the place where the household furniture and effects are to be found, and without affixing the value to each description of property. Now, in the form given by the rule, the description is stated thus:—"Stock in trade in his business of , carried on by him at , of the value of ; of good book debts owing to him of the value of ; of furniture in his house at of the value of ." In the case of *De Bode's bail* (*b*), where the affidavit of sufficiency did not state the numbers and occupants of certain houses, of which the bail stated themselves to be possessed, it was held, by Mr. Justice *Taunton*, that, though it was no reason for rejecting the bail, it was good ground for refusing the costs of justification.

ALDERSON, B.—The form given by the rule ought to be pursued, and this is such a departure from it, as to prevent the defendant from having his costs of justification. The object of the rule was to give the party an opportunity of making inquiries respecting the property, at the places where it was locally situate; but this has not been done here.

Costs refused.

(*a*) "If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined; and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court, or a judge thereof, shall otherwise order."

(*b*) 1 Dowl. P. C. 368.

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ASSUMPSIT for wages, and for work and labour, and materials found and provided, and for money found to be due upon an account stated. Pleas—*First, non assumpsit; secondly, actio non accrevit infra sex annos.* Replication, that the several causes of action mentioned in the declaration did accrue within six years. At the trial before *Williams*, J., at the last assizes for the county of *Carmarthen*, it appeared, that the action was brought to recover the sum of 205*l.* 12*s.* 11*d.* for wages and services for thirteen years or thereabouts, at 12*s.* per week, under the following circumstances:—The plaintiff had occupied a house and a few acres of land, under the defendant, at the rent of 16*l.* a year; and had also worked for him as a mason, in erecting walls about his farm-yard, previous to March, 1821. On the 25th of March, 1821, the defendant proposed, that the plaintiff should take the place of a man who had till then been employed by the defendant, at 12*s.* a week, as his farming bailiff, and in the performance of various services; which the plaintiff agreed to do, and continued in such service until a short time before the commencement of the action, but no wages were ever paid on the one hand, nor any rent on the other. At the trial, the plaintiff recovered a verdict for 83*l.* 19*s.* 9*d.*, the learned Judge being of opinion, that this was not such an open account between the parties as to take the case out of the Statute of Limitations; but he gave the plaintiff leave to move to increase the verdict to the sum of 205*l.* 12*s.* 11*d.*, if the Court should be of opinion that the Statute of Limitations was not a bar.

A. occupied a house and land under *B.*, at the rent of 16*l.* a year, and *A.*, at *B.'s* request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by *A.*, and had been paid 12*s.* a week. *A.* continued in *B.'s* service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by *A.*, to recover wages for twelve years, deducting the rent:—*Held*, that this was not such an open account as would take the case out of the Statute of Limitations since the 9 *G.* 4, c. 14; but that there must be a part payment in cash, or what is equivalent to it, to have that effect.

Chilton now moved accordingly.—The Statute of Limitations was not a bar, this being a running and open account between the parties: on the debit side, services;

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and on the credit side, rent. In *Catling* v. *Skoulding* (*a*), it was held, that if there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as will take the case out of the Statute of Limitations. *Le Blanc*, Serjeant, there says in argument, and which was adopted by Lord *Kenyon*, C. J., in giving his judgment, that, "when there is an open unliquidated account between the parties, that is evidence of such a promise," (viz. as would take the case out of the Statute of Limitations,) "because the credit is given on either side on the faith of such account, and every new transaction amounts to an implied acknowledgment of the prior existing debt; each article of the account on one side being equivalent to a part payment of the bill on the other, and a promise to pay the balance." In that case, the items consisted of rent accruing half-yearly, on the one side; on the other, of candles and liquors furnished by the defendants. In the present case, the items on the one side were the rent of 16*l.* a year; and on the other, the wages and services performed by the plaintiff for the defendant, at 12*s.* per week. [*Parke*, B.—Since Lord *Tenterden's* act, must you not contend, that this was equivalent to part payment, in order to avoid that statute?] Perhaps it will not be found necessary to go that length; for, if the old statute is avoided, it is contended, that the language of Lord *Tenterden's* act does not touch the present case, because this is not an "acknowledgment or promise by words only," but is a promise implied in law, from the circumstances of the case and the conduct of the parties. [*Parke*, B.—I think there must be something equivalent to part payment. You must shew an

(*a*) 6 T. R. 189.

agreement between the parties, that the rent should go in part payment of the wages. I think, especially since Lord *Tenterden's* act, if not before, that it must be something equivalent to part payment.] This, it is submitted, proceeds on the acts and conduct of the parties, and not on any verbal promise or acknowledgment, and is therefore not touched by Lord *Tenterden's* act. But even admitting that something equivalent to part payment must be shewn here, as in *Catling* v. *Skoulding*, "each article of the account on one side is equivalent to a part payment of the bill on the other:" no express agreement between the parties, that the rent should go in part payment, was proved in the case cited, any more than in the case at bar. This is an important rule to lay down, as it will materially affect all cases in which there have been mutual dealings. [*Parke*, B.—This is not the replication of merchants' accounts, but the general replication, that the action did accrue within six years.] It is laid down in *Webber* v. *Tivil* (*a*) that, "Where there have been mutual current and unsettled dealings and accounts between the parties, and any of the *items* are within six years, the plaintiff, to a plea of the statute that the defendant did not promise within six years, may reply *generally*, that the defendant *did* so promise; and the reason seems to be, because the mutual accounts between the parties, for any *item* of which credit has been given within six years, are of themselves evidence of there being such an open account, *and of a promise to pay the balance;* therefore, that sort of evidence is as proper on the issue of *non assumpsit infra sex annos*, as any other evidence of an acknowledgment of the debt by the defendant, or of his promise to pay it." This replication, therefore, is sufficient to meet the present case, as here, there are items down to the commencement of the action.

(*a*) 2 Wms. Saund. 127 b, n. (7).

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PARKE, B.—I think it was incumbent on the plaintiff to shew a part payment in cash, or what is equivalent to it, to take the case out of the statute, since Lord *Tenterden's* act. There might have been an agreement between the parties to this effect:—that the one should not call upon the other for payment of the money due to him; because he owed him money on the other hand. Before Lord *Tenterden's* act, that would have been a sufficient acknowledgment to take the case out of the Statute of Limitations, on the ground that the conduct of the parties was equivalent to an acknowledgment, and of a promise to pay the debt: but it appears to me, that, since the new statute, there must be something equivalent to part payment.

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BOLLAND, B.—I am of the same opinion. Before Lord *Tenterden's* act, I think this would have been taken out of the statute; but, since that statute, there must be part payment, or something equivalent to it, to have that effect.

ALDERSON, B., concurred.

Rule refused.

MARY KING, JOHN KING, and SILVANUS KING, Executrix and Executors of the Will of JAMES KING, deceased, *v.* MATTHEW URLWIN SEARS.

Where a declaration in *assumpsit* states several matters as a consideration for the defendant's promise, though all be not good, yet, if a sufficient consideration remains, it is enough to support the promise laid in the declaration.

It is only necessary in cases of executed considerations to state that the consideration for the defendant's promise moved at the defendant's special instance and request.

ASSUMPSIT.—The *first* count of the declaration stated that the defendant, before and at the time of the

making of the promise and undertaking thereinafter next mentioned, was the administrator of the goods, chattels, and effects of *William Sears* deceased, who died intestate theretofore, to wit, on the 10th of *August* in the year of our Lord 1833; that the said *William Sears* in his lifetime, and at the time of his death, was indebted to the plaintiffs, as executrix and executors as aforesaid, in a certain sum of money, to wit, the sum of 13*l.*, being rent due and in arrear for the use and occupation of certain premises of the plaintiffs, as executrix and executors as aforesaid, before then used and occupied by the said *William Sears*, by the sufferance and permission of the plaintiffs, as executrix and executors as aforesaid, and at his request, under and by virtue of a certain demise thereof theretofore made, and at and under a certain yearly rent, to wit, the yearly rent of 26*l.*, payable quarterly, to wit, on the 25th of *March*, the 24th of *June*, the 29th of *September*, and the 25th of *December* in every year; that the said *William Sears* in his lifetime being so indebted as aforesaid, he, the said *William Sears*, deposited with the plaintiffs, as executrix and executors as aforesaid, as a collateral security for the said debt, a certain bill of exchange, bearing date the 12th of *March*, in the year aforesaid, drawn by the said *William Sears* on and accepted by one *Joseph Fabian*, for payment, five months after date, to the drawer's order, of the sum of 16*l.* 14*s.* for value received, and which said bill of exchange, at the time of the depositing of the same as aforesaid, was indorsed by the said *William Sears*; that the said *William Sears*, at the time of his death, was in possession of the said demised premises under and by virtue of the said demise, and after the death of the said *William Sears*, and up to, and at, and after the making of the promise and undertaking hereinafter next mentioned, *Winifred*, the widow of the said *William Sears*, and the mother of the defendant, was in possession of the said demised pre-

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mises, and was then possessed of certain goods and chattels of great value, to wit, of the value of 50*l.*, and which said goods were then in and upon the said demised premises, and were then liable to be seized and distrained for the said rent; and the plaintiffs, as executrix and executors as aforesaid, then intended to distrain the same for the said rent; and the said *Winifred* was desirous of quitting the said demised premises at *Michaelmas* then next, and of removing the said goods and chattels from and off the same (of all which said premises the defendant then had notice); and thereupon afterwards, to wit, on the 24th of *September*, in the year aforesaid, in consideration of the premises, and that the plaintiffs, as executrix and executors as aforesaid, would permit the said *Winifred* to quit the said demised premises at *Michaelmas* then next, and to remove her said goods and chattels from and off the said premises, and would forbear to distrain the same for the said rent so due and in arrear as aforesaid, and for the further sum of 6*l.* 10*s.*, being another quarter's rent, which would become due to the plaintiffs, as executrix and executors as aforesaid, under the said demise, at the said *Michaelmas* then next, he, the defendant, undertook and then faithfully promised the plaintiffs, as executrix and executors as aforesaid, to pay them one quarter's rent, being the sum of 6*l.* 10*s.*, immediately, and the remainder of the said rent within twelve months then next, the said bill of exchange being given up by the plaintiffs to the defendant. And the plaintiffs aver that they, confiding in the said promise and undertaking of the defendant, did permit the said *Winifred* to quit the said demised premises at the said *Michaelmas*, and to remove her said goods and chattels from and off the said demised premises, and did wholly forbear then, and always hitherto have forborne, to distrain the same for the said rent as aforesaid (whereof the defendant had notice); and, although the said twelve months have long since elapsed, and al-

though the plaintiffs, as executrix and executors as aforesaid, afterwards, and after the expiration of the said twelve months, to wit, on the 15th of *October*, 1834, requested the defendant to pay the said rent, being a large sum, to wit, the sum of 19*l.* 10*s.*, and also tendered and offered to give up the said bill of exchange to the defendant, which he then refused to accept, yet &c. Breach, nonpayment of the sum of 19*l.* 10*s.*

The last count was *indebitatus assumpsit* for the use and occupation of a certain messuage and premises, with the appurtenances, of the plaintiffs, as executrix and executors, and for money found to be due to them as such, upon an account stated, laying the promise to the plaintiffs, as executrix and executors as aforesaid.

General demurrer to the first count, and *non-assumpsit* to the last.

The grounds stated for argument in the margin of the paper book were—

First, that by the first count it appears that the bill of exchange therein mentioned was at the time of making the defendant's supposed promise overdue, and it is not averred to have been dishonoured; so that the rent of 13*l.*, supposed to have been in arrear from *William Sears*, deceased, appears to have been satisfied thereby; and the forbearance to distrain for that sum of 13*l.*, which forms part of the consideration stated for the defendant's promise, is therefore insufficient.

Secondly, that it does not appear on the first count that the plaintiffs had any right to distrain for the quarter's rent, which is supposed to have been becoming due to them at *Michaelmas* mentioned therein; and so the forbearance to distrain for the sum of 6*l.* 10*s.* in respect thereof, which forms part of the consideration stated for the defendant's promise, is insufficient to support such promise, and renders the same of none effect.

Thirdly, that the consideration expressed in the first

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count as moving the defendant to the promise therein alleged, is not stated to have been at the defendant's request, as to give the same any effect, it ought to have been.

Fourthly, that it does not appear, nor can it be collected from the first count, whether the plaintiffs seek to recover against the defendant, as administrator of his late father, or personally.

Erle, in support of the demurrer.—First, the bill of exchange, as appears by the declaration, was given as a collateral security for the rent; but the plaintiffs do not state that any steps were taken by them, on the bill becoming due, to obtain payment of it, nor do they aver any presentment, or shew that it was dishonoured, which it was their duty, as holders, to have done, and, not having done so, it amounted to a satisfaction of the debt for which the bill was given, that is to say, the 13*l.* for rent due from *William Sears*. It was the duty of the plaintiffs to have shewn on their declaration that they had done all the acts necessary to entitle them to recover on the bill. [Lord *Abinger*, C. B.—It is stated in the declaration to have been given as a collateral security. The action is not brought on the bill itself.] It is submitted that it was incumbent on them to shew that the bill was duly presented; and, if they fail to do so, then they must be taken to have made the bill their own, and it operated as a satisfaction for the rent of 13*l.*, and the forbearance to distrain for that sum, which formed part of the consideration for the defendant's promise, failed. [*Parke*, B.—Though the bill was not duly presented, that objection might have been waived afterwards.] If the consideration fails to that extent, then the whole promise is *nudum pactum*. Another part of the consideration stated, is the agreement not to distrain the goods of the widow to recover the sum of 6*l.* 10*s.* for rent to become due the *Michaelmas*

following; but, as the rent was not then due, the plaintiffs could have no right to distrain for it, and, consequently, that was no consideration whatever. [Lord *Abinger*, C. B.—Was it not a privilege granted to her to be allowed to give up the tenancy at *Michaelmas?*] The executors could not compel her to remain, as she was a stranger to them. The allegation is that, in consideration that the plaintiff would permit the widow to quit the demised premises at *Michaelmas* then next, and to remove her goods and chattels from the premises, and would forbear to distrain for the said rent so due and in arrear, and for the sum of 6*l.* 10*s.* to become due at *Michaelmas* then next, the defendant undertook to pay the 6*l.* 10*s.* immediately, and the remainder within twelve months, the bill of exchange being given up by the plaintiffs to the defendant; but the rent of 6*l.* 10*s.* was not due, and they had no right to distrain for that sum, and therefore there is a failure of consideration. [*Parke*, B.—The giving up the note is one consideration, and the forbearance to distrain the goods of the widow on the premises for the rent then due from the intestate is another consideration.] At all events, the whole of the consideration stated for the defendant's promise is not shewn, and therefore the promise is not supported. [*Parke*, B.—If a sufficient consideration remains, it is enough to support the promise laid in the declaration. There is abundant consideration.] Then the consideration alleged as moving the defendant to make the promise is not stated to have been at the request of the defendant. [*Parke*, B.—That would only be material in the case of an executed consideration. An averment of request is only necessary in cases of executed consideration (*a*).]

Judgment for the plaintiffs.

Butt was to have argued for the plaintiffs.

(*a*) See 1 Wms. Saund. 264, n. 1.

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The plaintiff agreed to enter the defendant's service as head gardener, and to have the management and superintendence of the defendant's hot-houses, pineries, &c., at the wages of 100*l.* The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking in apprentices, and had taken in two, at 15*l.* per annum premium. The plaintiff remained with the defendant in the capacity above mentioned about four years; when the defendant gave him a month's warning. In an action, brought by the plaintiff to recover a quarter's wages, as being a yearly servant:—*Held*, that he was a menial servant only, and was only entitled to a month's warning.

ASSUMPSIT.—The *first* count of the declaration stated, that theretofore, to wit, on the 14th *March*, 1834, in consideration that the plaintiff, at the request of the defendant, had become and was the servant of the defendant, to wit, in the capacity of a head gardener, to serve him for a year then next following, at and for certain wages, to wit, the wages of 100*l.*, the defendant undertook and promised the plaintiff to retain and employ him in his service, and in the capacity aforesaid, and at and for the wages aforesaid, and to continue him in such service and employ for and during the said term of a year. And although the plaintiff confiding &c., did continue in such service and employ of the defendant for a long space of time, to wit, until the 15th *December*, 1834; and although the said plaintiff hath always been ready and willing, and then offered to continue in the said service and employ of the said defendant in the capacity aforesaid, on the terms aforesaid, for the said term of a year; yet the defendant not regarding &c., did not nor would continue the said plaintiff in his said service or employ for and during the said term of a year, and afterwards, and before the expiration of a year of the said service, to wit, on the day and year last aforesaid, put an end to such service and employ, and wholly refused to suffer or permit the plaintiff to continue in his said service and employ, and then discharged him, the said plaintiff therefrom, without any reasonable notice or warning previous thereto; and hath from that time hitherto wholly refused to retain or employ him in the said service, or pay him the said wages for the residue of the said term of a year, by means whereof &c. The second count was *indebitatus assumpsit* for wages and for money due on an account stated.

Pleas.—*First*, to the first count, that the defendant made no such promise; *secondly*, that the said plaintiff became and was the servant of the defendant, as in the said first count mentioned, upon certain terms, and according to a certain proviso, to wit, upon, amongst others, the terms and according to the proviso following, that is to say, that either of the said parties might determine the said service upon giving to the other of them one calendar month's notice of his intention so to do, and that in the case of the said defendant's determining the said service, he should pay to the said plaintiff a proportionate part of his wages aforesaid, up to the expiration of such notice, and to the time of such determination of the said service. And the said defendant in fact further saith, that heretofore, and one calendar month before the said defendant put an end to the said service and employ, or refused to suffer or permit the said plaintiff to continue in his said service and employ, or discharge the said plaintiff, heretofore, to wit, on the 15th day of *November*, A. D. 1834, he, the said defendant, gave to the said plaintiff one calendar month's notice of his the said defendant's intention to put an end to the said service and employ, and to discharge the said plaintiff therefrom. And the said defendant further saith, that, after the expiration of the said calendar month, and at the determination of the said service, he, the defendant, was ready and willing, and then offered, to pay to the plaintiff a proportionate part of his wages aforesaid, up to the expiration of the said notice and to the time of the said determination of the said service; concluding with a verification.

The *third* plea was to the last count:—that the plaintiff ought not further to maintain his action, in respect of the causes of action in that count mentioned, because the defendant now brings into Court the sum of 21*l.* 13*s.* ready to be paid to the plaintiff; and the defendant further saith, that the plaintiff has not sustained damages

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to a greater amount than the sum of 21*l.* 13*s.* in respect of the causes of action in the last count of the declaration mentioned, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action against him, in respect of such last-mentioned causes of action.

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The plaintiff replied to the *second* plea, that he did not become nor was the servant of the defendant as in the said first count mentioned, upon the terms and according to the proviso in the said second plea alleged.

The plaintiff took the money out of Court, on the last plea.

At the trial, before *Bolland*, B., at the last assizes for the county of *Denbigh*, it appeared, that, in *March*, 1830, the plaintiff entered into the defendant's service, as head gardener, having the management and superintendence of the hot-houses, pineries, &c. In the winter of 1829, when the engagement was entered into between the defendant and the plaintiff, the defendant said to the plaintiff, "What wages am I to give you?" and the plaintiff replied, "I shall not come from *Kew* without a hundred pounds;" to which the defendant assented. Nothing was said about notice. The plaintiff lived in a house within the defendant's grounds, about 200 yards from the defendant's residence. He had the privilege of taking in apprentices, and had taken two apprentices for a year, at 15*l.* premium; and he had five under-gardeners employed for his assistance in the gardens. The defendant had given the plaintiff a month's warning, which would expire in *December*, 1834. The question at the trial was, whether the plaintiff was to be considered as a menial servant, and entitled only to a month's warning; or whether he was a yearly servant, and entitled to wages, as such, to the end of the year. The jury having found a verdict for the defendant,

Sir *W. W. Follett* now moved for a new trial, on the

ground of misdirection and that the verdict was against the evidence. The question in this case is, whether the plaintiff was hired by the year, or as a menial servant only. If the plaintiff was a menial servant, the master was, according to usage and custom, entitled to turn him away, on giving a month's notice. That rule applies only to menial servants and does not extend further; for in the case of all other servants, where no stipulation is entered into, the hiring has always been considered to be a hiring for a year, as in the case of servants in husbandry. [*Bolland*, B.—I pointed out to the jury several cases where the party would be entitled to a whole year's wages, and stated the facts to them, and left it to them to say whether the plaintiff came within the class I had mentioned, or whether, as being a gardener, they considered him as a menial and domestic servant; that although he was a gardener he lived out of his master's house, but in a house which was his master's property and near his residence.] It is submitted that that was a question of law for the Court to decide and not for the jury. [*Alderson*, B.—Where is the rule as to domesticity to stop? A groom is a domestic servant.] The groom generally lives in his master's house. [Lord *Abinger*, C. B.—If the gardener were to sleep in his master's house and dine with the servants, would he not be a menial servant?] The plaintiff relies on the general rule, to which the custom of domestic servants is an exception. Persons must be taken to be hired for a year where no stipulation is made as to notice, or unless there is some usage to control the general rule of law. There is no question about labourers in husbandry being annual servants, and yet they live in the house. A gardener has more analogy to a servant in husbandry than to a domestic servant. In *Beeston* v. *Collyer* (*a*), where the plaintiff was clerk to an army

(*a*) 12 B. Moore, 552; 4 Bing. 309, S. C.

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agent, and had lived with him many years in that capacity, and had been paid monthly, it was held, that there was an implied yearly hiring, and that the defendant having dismissed the plaintiff in *December*, 1826, without assigning any reason, he must pay the plaintiff his salary till the *March* following, which was the period of the year when the plaintiff entered into the defendant's service. In *Turner* v. *Robinson* (*a*), where a servant, who had been dismissed for misconduct, brought an action for wages, it appeared that he was to have wages at the rate of 80*l.* a year, and it was held, that the presumption was, that the hiring was for a year, and that having been rightfully dismissed for misconduct before the year was expired, he was not entitled to recover wages *pro ratâ*. Again, in *Fawcett* v. *Cash* (*b*), where, on the 5th of *March*, 1832, the plaintiff entered into the defendant's service as warehouseman, at the rate of 12*l.* 10*s.* for the first year, and to advance 10*l.* per annum until the salary was 180*l.*: it was held, that this was a contract by the defendant to employ the plaintiff for a year; and *Denman*, C. J., there said, "The general rule is, that if a master hire a servant without mentioning the time, that is a general hiring, and, in point of law, a hiring for a year. Then assuming that the agreement in this case does not specify the period for which the service or employment was to continue, it must be taken to be a contract for a year's service." And *Littledale*, J., says, "In the case of domestic servants, the rule is well established that the contract may be determined by a month's notice, or a month's wages; but that depends upon custom. Here, no custom having been proved, the contract must be taken to be a hiring for a year." It is submitted that in this case, if the defendant seeks to shew that there was any custom which entitled the defendant to discharge the plaintiff on giving him a month's notice, the *onus* lay

(*a*) 5 B. & Ad. 789; 2 Nev. & M. 829, S. C.

(*b*) 5 B. & Ad. 904; 3 Nev. & Man. 177, S. C.

on the defendant to shew that this case was within such custom.

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Lord ABINGER, C. B.—Did you ever know that done? If a footman were discharged on a month's notice and he afterwards brought an action for wages, would it be necessary to prove that there was any custom as to domestic servants, and that he came within that custom? I should have been inclined to have told the jury, that the plaintiff was a menial servant; for, though he did not live in the defendant's house, or within the curtilage (*intra mœnia,*) he lived in the grounds within the domain. I think the verdict was right.

The rest of the Court concurred.

Rule refused.

LACEY *v.* FORRESTER.

THIS case was tried before the secondary, when a verdict passed for the plaintiff, damages 10*l.* The action was on a promissory note; the defendant pleaded that there was no consideration given for the note, to which the plaintiff replied that there was a good consideration, on which issue was joined.

Where, in an action on a promissory note, the defendant pleads that there was no consideration for the note, and the plaintiff replies that there was a good consideration, the issue lies on the defendant to shew that the note was given by way of accommodation, and without value.

Kelly now moved for a new trial. There was no evidence on the part of the plaintiff. The plea of the defendant being that there was no consideration for the note, the replication of the plaintiff that there was a good consideration threw upon him the *onus* of shewing the consideration affirmatively; and that not being done, the defendant was entitled to the verdict.

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ALDERSON, B.—The *onus* of shewing that there was no consideration for the note lay upon the defendant. The new rules expressly state that in *assumpsit* all matters in confession and avoidance shall be specially pleaded, such as illegality of consideration, drawing, indorsing, or accepting bills or notes by way of accommodation. It ought to have been stated in the plea that this note was by way of accommodation, and then it would have been clear that the affirmative lay on the defendant, who ought not to be in a better situation by avoiding the statement.

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The rest of the Court concurred.

Rule refused.

DOE *d.* DRAYCOTT *v.* DYOS.

It is not an answer to a motion for judgment as in case of a nonsuit in an ejectment where the landlord defends, that the tenants in possession have given up possession of the premises to an agent of the lessor of the plaintiff.

IN this case *Whitmore* shewed for cause against a rule for judgment as in case of a nonsuit, in an action of ejectment, in which *Dyos* defended as landlord, that the tenants in possession had some months since given up possession of the premises sought to be recovered to an agent of the lessor of the plaintiff, which agent was still in possession; and he contended that it could not be of any advantage to either party that the cause should now go on to trial.

Welsby, contrà.—The action being against *Dyos* alone, it is clear, though the defendant has not now any opportunity of shewing the fact by affidavit, that possession has been given up by the *tenants* in possession collusively, which ought not to prejudice the defendant, the landlord, who has a right to have the cause tried.

Per Curiam.—The tenants cannot deprive the landlord of his right to have the title tried, by giving up the possession behind his back. He is not necessarily to be driven to bring an ejectment.

Rule discharged on a peremptory undertaking.

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THE *first* count of the declaration stated, for that whereas heretofore, to wit, on &c., by a certain memorandum of agreement then made between the defendant of the one part, and the plaintiff of the other part, the defendant did agree to sell to the plaintiff, and the plaintiff did agree to purchase of the defendant, all the naptha that the defendant might make from the 1st day of *June* then next, for and during the term of two years, say from 1000 to 1200 gallons per month, proof strength, *Sykes'* hydrometer, at the rate of *2s. 6d.* per gallon imperial measure, to advance *2d.* per gallon on every number above proof strength, and to allow in the same proportion for all that might be delivered under proof, to be delivered at *Newport*, and packages to be returned: payment by acceptance at two months after date, allowing $2\frac{1}{2}$ *per cent.* discount, or if in cash 5 *per cent.* discount, from the 14th day of every month, for the quantity delivered in the month preceding. And it was thereby then also agreed, that, should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do, on his giving the defendant three months' notice in writing; and the said agreement being so made, afterwards, on the day and year first aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said agreement, &c. (mutual promises). And the plaintiff says, that although the defendant did after the time of making the said agreement, at various times, from the 1st day of *June*, 1832, to the 1st day of *April*, 1833, duly sell and deliver to the plaintiff certain quantities, to wit, 3000 gallons of the said naptha, and delivered, viz. 7000 gallons more; yet that the defendant had not sold and delivered the same to him:—*Held*, on demurrer, that the declaration could not be sustained.

Assumpsit on an agreement, by which the defendant agreed to sell, and the plaintiff to purchase, all the naptha which the defendant might make from the 1st *June* next, for and during the term of two years, say from 1000 to 1200 gallons per month, at the rate of 2*s.* 6*d.* per gallon, &c.; and it was agreed, that, should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do, on giving the defendant three months' notice. The declaration averred, that the quantities of naptha that the defendant ought to have made during a period of ten months, under the agreement, at the rate of from 1000 to 1200 gallons per month, and to have sold and delivered to the plaintiff, amounted to a much larger quantity than he had sold and

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although the plaintiff did from time to time during the period last aforesaid duly purchase and accept of the defendant the said last-mentioned quantity of naptha at the prices, and pay for the same in manner and at the time in the said agreement in that behalf provided, and did from time to time during the same period duly return the packages in the said agreement mentioned to the defendant, and did in all other things perform the said agreement on his part; and although the quantities of naptha aforesaid that the defendant ought to have made during the said last-mentioned period, being a period of ten calendar months, under his said agreement, at the rate of from 1000 to 1200 gallons per month, and to have sold and delivered to the plaintiff, amount to a much greater quantity than the said 3000 gallons, to wit, to 10,000 gallons at the least; and although a reasonable time for the sale and delivery of the residue, to wit, 7000 gallons of the said last-mentioned quantity of naptha has long elapsed, and the plaintiff was always after the making of the said agreement, from the 1st day of *June*, 1832, during the period last aforesaid, and within a reasonable time after the expiration of each month of the said last-mentioned period, ready and willing to have purchased and received of the defendant the residue of all the said naptha that the defendant might make at the said rate of 1000 to 1200 gallons per month, at the prices in the said agreement in that behalf specified, and to have duly returned the packages of the said naptha from time to time as in the said agreement is also mentioned, and to have paid for the said naptha in the manner and at the time in the said agreement also mentioned, whereof the defendant then had notice; yet the defendant, not regarding the said agreement and his said promise, or either of them, did not at any time during the period last aforesaid deliver, nor hath he hitherto delivered, to the plaintiff at *Newport*, or elsewhere, any greater quantity of the said 10,000

gallons than the said 3000 gallons of the said naptha, and the residue thereof, to wit, 7000 gallons, was and is wholly unsold and undelivered by the defendant to the plaintiff, whereby the plaintiff has been deprived of great gains and profits, to wit, 1000*l.* which he might and otherwise would have acquired by rectifying the said residue of the said naptha, and selling the same at much advanced prices.

The *second* count of the declaration resembled the first in substance, and ultimately no question arose upon it.

Pleas—*first*, as to the first and second counts of the declaration, that before and at the times of making the said agreements respectively, the defendant was a manufacturer of acetate of lime, and carried on the trade and business of such manufacturer, to wit, in the county aforesaid; and at the said times respectively the defendant intended and expected to continue, and it was expected by the plaintiff that the defendant would continue, to carry on such trade and business for the periods of time to which the said agreements respectively referred, in the manner in which he was at the said times carrying it on; and by the course of such manufacture as so carried on and expected to be carried on, naptha was and was expected and intended to be made and produced, not as the principal object of such manufacture, but as incidental to the manufacture of acetate of lime, the quantity of naptha so produced being limited by the quantity of acetate of lime which the defendant might have occasion to make in his said business; and that it was not then and there intended or expected that the defendant should, during any part of the said periods of time, make any naptha otherwise than as aforesaid; of all which premises the plaintiff at the said times respectively had notice; and the defendant avers that the said agreement was made of and concerning such naptha so expected to be produced in such trade and business, and that the plaintiff and defendant meant and intended by the said first men-

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tioned agreement, that the defendant should sell, and the plaintiff buy, all such naptha so to be made in such trade and business as aforesaid, and no more; but that the plaintiff should not be compellable to receive or pay for more naptha than from 1000 to 1200 gallons per month. And the defendant further saith, that during the periods in the said agreement mentioned, he did carry on the said trade and business in the manner as so intended and expected, and did sell and deliver in the manner and on the terms in the said agreement mentioned, the said quantities of naptha in the said declaration in that behalf mentioned, and that the same was all the naptha made by the defendant in his said trade and business, and that the defendant did not during the said periods make any more or other naptha than what he so delivered—concluding with a verification. *Second* plea—That before the time of the sale and delivery of the said quantities of naptha in the said declaration mentioned to have been sold and delivered by the defendant to the plaintiff respectively, it was agreed by and between the plaintiff and the defendant, that such quantities of naptha should be accepted and received by the plaintiff, and sold and delivered by the defendant, instead of the quantities mentioned and agreed by the said first-mentioned agreement to be bought and sold; and that the same were, under such agreements so made in that behalf, bought and sold, delivered and received, in full satisfaction of such quantities in such first-mentioned agreement. Verification. *Third* plea—As to the said first count, that after the making of the said agreement in that count mentioned, and that the whole of the supposed causes of action therein mentioned had accrued, and during the said term of two years therein specified, to wit, on the 25th day of *March*, in the year of our Lord 1833, in consideration that the defendant, at the plaintiff's request, would agree with the plaintiff to reduce the price of the naptha to be sold by the defendant to the plaintiff under the said agree-

ment in the said first count mentioned, from the 1st day of *April*, 1833, until the expiration of the said term of two years, at 2*s.* 4*d.* per gallon, at proof, per *Sykes'* hydrometer, the plaintiff then promised the defendant to forego all claim in respect of such last-mentioned causes of action, and the plaintiff's damages on occasion thereof, and to accept such agreement in full satisfaction and discharge of such last-mentioned cause of action and damages. And the defendant avers that he did accordingly then agree with the plaintiff to reduce the price of the naptha to be sold by the defendant to the plaintiff under the said agreement in the first count mentioned, from the said 1st day of *April*, 1833, until the expiration of the said term of two years, at 2*s.* 4*d.* per gallon, at proof, per *Sykes'* hydrometer, and reduced such price accordingly upon the terms aforesaid; and the defendant then accepted such agreement in full satisfaction and discharge of the said cause of action in the said first count mentioned, and all the plaintiff's damages on occasion thereof. Concluding with a verification. *Fourth* plea, as to the second count, that there was not any consideration for the said supposed agreement and promise of the defendant in the second count mentioned, as the plaintiff hath alleged; and of this he defendant puts himself upon the country, &c.,

To these pleas the plaintiff demurred, and assigned the following causes of demurrer. As to the first plea, that the defendant offered to put in issue as matter of fact the construction of an agreement which was matter of law; that the plea amounted to the general issue, and that it offered to put in issue matters irrelevant and immaterial, and that it was double. As to the second plea, that the agreement stated ought to have been shewn to be in writing; that there was no consideration for such agreement; that the delivery of a smaller quantity could not be a satisfaction for the non-delivery of a greater quantity. As to the third plea, that the agreement there stated

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should have appeared to be in writing, and signed by the party chargeable; and that the plea was double. And as to the last plea, that it did not confess and avoid, or deny the matters in the second count, but referred to it as the "supposed" agreement; that it was doubtful to which of the agreements mentioned in the second count the plea was pleaded; that it was repugnant, that it ought to have concluded with a verification, and that it was double. Joinder in demurrer.

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W. H. Watson, in support of the demurrer.—All the pleas are bad. [*Maule*.—The defendant means to contend that neither of the counts of the declaration can be sustained.] The first count is on an agreement to purchase from the defendant all the naptha he may make during the term of two years, "say from 1000 to 1200 gallons per month." The construction of this contract is a question for the Court; but the first part of the first plea attempts to explain it, by the introduction of extrinsic evidence. By the insertion of the averment that the quantity of naptha was to be limited by the quantity of acetate of lime manufactured, the defendant has given a totally different construction to the contract stated in the declaration. That contract being for the sale of goods above the value of 10*l.*, and also being a contract not to be performed within the year, is within the Statute of Frauds, and must therefore be taken to be in writing; and being in writing, it cannot be varied by parol. It is true that there are certain cases where parol evidence has been received to explain the meaning of written contracts, but those are cases where there has been a particular course of trade, or where words have acquired a certain mercantile sense, with reference to which the agreement is supposed to have been made. It is for the Court to put the proper construction upon a contract of this kind, and the defendant is not entitled to shew what expectations it was

made under. Where the contract was for the purchase of "*about* 300 quarters, *more or less,* of foreign rye," Lord *Tenterden* said, it was for the Court to put their construction upon the contract. *Cross* v. *Eglin* (*a*). [*Parke,* B.—Does not that part of the plea which seeks to put a different construction upon the contract stated in the declaration amount to the general issue?] It does so, and that is assigned as one of the causes of demurrer.

The second plea states, that before the time of the sale and delivery of the quantities of naptha in the declaration mentioned to have been sold and delivered, it was agreed between the plaintiff and the defendant, that such quantities of naptha should be accepted and received by the plaintiff, and sold and delivered by the defendant, instead of the quantities mentioned and agreed by the first agreement to be bought and sold, and that the same were under such agreements bought and sold, delivered and received, in full satisfaction of such quantities mentioned in the first agreement. This plea is bad on two grounds: first, as already stated, the first agreement is within the Statute of Frauds, and must exist in writing. It was not competent, therefore, for the parties to waive that agreement by a subsequent parol agreement, even before breach; *Goss* v. *Lord Nugent* (*b*), where the distinction is taken between waiving a written contract at common law by parol, and waiving a written contract under the Statute of Frauds, and where it was held that in the latter case such waiver could not take place. That the subsequent agreement was by parol, is admitted on the pleadings; for had it been in writing, it should have been so stated in the plea, the distinction being between the mode of pleading in a declaration and in a plea; in the former case it not being necessary to shew the agreement in writing,

(*a*) 2 B. & Ad. 106.
(*b*) 5 B. & Adol. 58; 2 Nev. & M. 28, S. C.

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while it is essential in the latter case. *Case* v. *Barber* (*a*). The second objection to the plea is, that it purports to show an accord and satisfaction, and fails to show the latter; it merely states that it was agreed to take a smaller quantity of naptha in satisfaction of a greater. To make this plea good, the satisfaction must appear to be reasonable; and therefore it has been held that a plea of the acceptance of a smaller sum of money in lieu of a larger sum, is bad. *Fitch* v. *Sutton* (*b*). Upon both the grounds above stated, it is submitted that the second plea is bad.

The third plea is also bad, on the same ground as the second, namely, that it sets up a parol agreement to vary a written contract under the Statute of Frauds. This plea is likewise defective as not sufficiently confessing the cause of action which it afterwards professes to avoid: it attempts to give an answer to the claim of the plaintiff after breach, and states that after "the said *supposed* causes of action had accrued." Now it ought to have confessed the causes of action, according to the case of *Gould* v. *Lasbury* (*c*), where a plea that the defendant was discharged, by the order of the Insolvent Debtors' Court, from the causes of action in the declaration mentioned, *if any*, was held bad on special demurrer. The word "supposed" is equally objectionable with the words "if any," and equally fails to confess the breach. [*Parke*, B. —It does not appear to me that the word "supposed" is open to the same objection. It is the common form of pleading, and its origin was, that when the general issue was pleaded, together with special pleas, a seeming incongruity might be avoided.]

The last plea pleaded to the second count is bad, because it amounts to the general issue. A denial of

(*a*) T. Raym. 450; Com. Dig. Action upon Assumpsit, (F. 3); 1 Saund. 211 b, a.

(*b*) 5 East, 230.

(*c*) Ante, Vol. 1, p. 254.

the consideration is a denial of any contract between the parties.

But the defendant says, that although the pleas may be bad, yet still he is entitled to judgment, on the ground that the declaration cannot be maintained. In order to ascertain whether the counts be good, it is necessary to see what is the proper construction of the contract. The plaintiff contends that the meaning of the agreement is this, that the defendant undertakes to manufacture naptha for two years, to let the plaintiff have all that he shall manufacture during that period, and that the quantity shall amount to somewhere about 1000 or 1200 gallons per month. [Lord *Abinger*, C. B.—Do you contend that at all events the defendant was bound to carry on his business for the purpose of fulfilling this contract with the plaintiff?] Certainly. [Lord *Abinger*, C. B.—Would there have been a breach of the agreement, if at the end of the first year circumstances over which he had no control had compelled him to relinquish his trade?] It is not necessary to go the whole length of that proposition. It is sufficient to say that if he voluntarily abandoned the business before the expiration of the two years, it would be a breach. Unless prevented by some inevitable necessity, he must perform his contract. The case of *Lord Shrewsbury* v. *Gilbert* (*a*) is a direct authority upon this point. There a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses; and the Court held that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises, out of which the lessor could be supplied. [Lord *Abinger*, C. B.—The meaning of any particular words in a contract

(*a*) 2 B. & Ald. 487.

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is to be collected not only from the words themselves, but likewise from the context, as was done in the case of *Lord Shrewsbury v. Gilbert.* But what is there in the present agreement to shew an obligation upon the defendant to continue his manufactory for the full period of two years, or to supply, at all events, a quantity amounting to about 1000 or 1200 gallons per month? Suppose that the defendant had in any one month manufactured only 500 gallons of naptha, and with the view of performing his contract had purchased 500 gallons more, would the plaintiff have been bound to accept the latter quantity?] It is conceived that he would have been liable.

Maule, for the defendant, was stopped by the Court.

Lord ABINGER, C. B.—There is no occasion to inquire whether the pleas be good or not; the question is, whether the declaration can be sustained. The contract there stated is, that the defendant agreed to sell, and the plaintiff agreed to purchase, all the naptha which the defendant might make from the first day of *June* then next, for and during the term of two years, say from 1000 to 1200 gallons per month. In declaring upon this contract, the plaintiff states, that although he has received 3000 gallons, the defendant ought under the agreement to have made naptha at the rate of from 1000 to 1200 gallons per month, which would have amounted to a much larger quantity than the 3000 gallons, that is to say, 10,000 gallons; and he assigns as a breach the not delivering to him the difference between the 3000 and 10,000 gallons. The declaration contains no averment attributing to the words of the contract any other sense than that which they naturally bear. In cases of mercantile contracts, the words employed may, by usage, bear a very different meaning from their natural import. Thus, by

custom, the word "average" has acquired the sense of "partial," although in its proper sense it has a very different signification. There are numberless other instances in which the meaning of mercantile contracts has been made matter of evidence. In the present case, however, we can only construe the agreement from the bare words employed, there being no averments in the declaration to give a different construction to those words. The agreement there is simply this, that the plaintiff undertakes to accept all the naptha that the defendant may happen to manufacture within the period of two years. The words "say from 1000 to 1200 gallons," are not shewn to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that in the ordinary course of his manufacture the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract. If any uncertainty existed with regard to the meaning of the contract, that uncertainty ought to have been removed by the plaintiff, who ought to have put the proper construction upon it. He ought to have explained the meaning of the word "say," and have shewn that it was intended as a sort of warranty. I construe it in favour of the defendant, as meaning merely that in all probability the quantity of naptha produced will amount to 1000 or 1200 gallons. If this was a fraudulent statement, the plaintiff might have avoided the contract, and might have sued the defendant for a fraudulent representation. But the contract in reality was this, "I undertake to sell to you all the naptha that I may make in my works during the next two years." That it may probably amount in quantity to 1000 or 1200 gallons per month, is no part of

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the contract. The real contract is for the sale of all the naptha that the works may reasonably make. It is consistent with the breach assigned in the declaration, that the works were wholly incapable of producing more than the quantity actually delivered.

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The rest of the Court concurring—

Judgment for the defendant.

WILLIAM STOUGHTON, Executor of the Rev. ANTHONY STOUGHTON, Clerk, deceased, *v.* the Earl of KILMOREY.

In *assumpsit* on a promissory note by the payee against the maker, the defendant pleaded, that he made the promissory note without any value or consideration whatever for his so doing, or for his paying the amount thereof or any part thereof:—*Held*, that the plea was ill on special demurrer.

ASSUMPSIT on a promissory note, dated the 25th of *May*, 1822, made by the defendant payable at sight to the said *Anthony Stoughton*, for 889*l.* 18*s.*, with lawful interest.

Plea—that the defendant made the said promissory note without any value or consideration whatever for his so doing, or for his paying the amount thereof or any part thereof; concluding with a verification.

Special demurrer—assigning for causes that it was not averred, nor did it appear in and by the plea, how or under what circumstances, or for what purpose, the note was made; and also, that the plea ought to have stated and shown affirmatively, how there was no consideration or value for the said earl's making the said note; and also for that the said plea is too general; and also for that as the note must be taken and presumed in law to have been made for value and consideration, and as no fresh facts were stated in the plea, the plea ought to have concluded to the country, and not with a verification.

Joinder in demurrer.

It was stated in the margin of the paper book, that the grounds for the demurrer were, that the plea ought to have set forth the special facts under which the note was given, so as to have shewn that there was no value or consideration for it, and also other the grounds set forth in the demurrer. And that the plaintiff would also object that the plea was bad, not only for alleging that there was no consideration or value for making the note, but also hat there was none for paying it.

Chandless, in support of the demurrer.—Besides the objections to which the demurrer is peculiarly directed, the plea that the defendant made the note without any value or consideration for so doing, is consistent with the fact of his having afterwards had consideration for it. There might have been a consideration after the delivery; and the defendant by his plea ought to have provided against such a supposable case, to make it a good answer to the declaration. [Lord ***Abinger***, C. B.—This Court has already expressed an opinion in *Easton* v. *Pratchett* (*a*), that such a plea as this would be bad on demurrer.]

The Court then called upon

Wightman, to support the plea.—If there be no consideration for the note, as between these parties, it is a good defence to the action, and consequently may be pleaded. [Lord ***Abinger***, C. B.—If issue were taken on such a plea, who would have to begin?] The defendant. The plea would not have the effect of throwing the onus of proving the consideration upon the plaintiff, and he might reply generally that there was no consideration. *Bramah* v. *Roberts* (*b*).

(*a*) 1 C. M. & R. 798. (*b*) 1 Bing. N. C. 469.

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Lord ABINGER, C. B.—This is a plea in the negative. The object of the rules of pleading was, that all these matters, independent of the making of the promise, should be stated affirmatively, in order that the plaintiff might know, from the facts stated, what he was to come to try. A variety of circumstances might defeat the consideration; they ought therefore to be stated, in order that the plaintiff may know what he is to meet. All the advantages to be derived from the new rules as to pleading would be entirely lost, if this mode of pleading were to be allowed.

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PARKE, B.—It was expressly inserted in the new rules (*a*), that drawing, indorsing, or accepting, &c. bills or notes by way of accommodation, must be specially pleaded; and that insertion was made advisedly.

Wightman then prayed leave to amend on payment of costs.

Lord ABINGER, C. B.—This being an action on a promissory note, which imports a consideration, we think we ought not to allow the amendment, without an affidavit being filed of the truth of the facts stated in the plea.

Amendment allowed on those terms.

(*a*) Vide Regulæ Generales H. T. 4 Will. 4, as to pleadings in particular actions—Assumpsit, s. 3.

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INDEBITATUS assumpsit in the sum of 100*l.* for money had and received, and in 100*l.* for money found to be due on an account stated. Plea as follows:—And the defendant by *B. Austen*, his attorney, as to the sum of *25l.*, parcel of the monies in the declaration mentioned, saith, that the plaintiff ought not further to maintain his action, because the defendant brings into Court here the said sum of *25l.* ready to be paid to the plaintiff. And the defendant further saith, that the plaintiff has not sustained damage to a greater amount than *25l.*, in respect of the causes of action in the said declaration mentioned *as to the sum of 25l.*; and this the defendant is ready to verify. And as to the residue of the monies in the said declaration mentioned, the defendant saith that he did not promise in manner and form as the plaintiff hath above alleged, and this he prays may be inquired of by the country, &c.

Demurrer—stating for cause, that the said plea is not in the form, nor as near as might have been in the form, required by the 17th rule, relating to the mode of pleading in the superior Courts of common law at *Westminster*, made by the Judges of the said Courts, in pursuance of a statute made and passed in the third and fourth years of the reign of our sovereign lord the now King.

Joinder in demurrer.

Waddington, in support of the demurrer.—This plea is not in the form prescribed by s. 17 of the new rules, nor is it in substance the same. It differs in a manner calculated to mislead the plaintiff. The form prescribed by the rule is, "That the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of *l.* ready to be paid to the plaintiff; and the defendant says that the plaintiff has not sustained damages [*or, in actions of debt*, that he is not indebted to

To a declaration in *indebitatus assumpsit* for money had and received, and on an account stated, the defendant pleaded "as to *25l.*, parcel," &c., that the plaintiff ought not further to maintain his action, because the defendant brings into Court here the said sum of *25l.* ready to be paid to the plaintiff. And the defendant further saith, that the plaintiff has not sustained damage to a greater amount than *25l.* in respect of the causes of action in the declaration mentioned, as to the sum of *25l.* concluding with a verification. The defendant as to the *residue of the monies* in the declaration mentioned pleaded *non assumpsit*:—*Held*, on special demurrer, that the plea, as to the payment of money into Court, was ill, for not concluding with a prayer of judgment to the further maintenance of the action.

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the plaintiff] to a greater amount than the said sum, &c., in respect of the cause of action in the declaration mentioned; and this he is ready to verify: wherefore he prays judgment, if the plaintiff ought further to maintain his action." Instead of which, the defendant splits this plea into two averments. After saying, that as to the sum of *25l.*, parcel &c., the plaintiff ought not further to maintain his action, because the defendant now brings into Court here the said sum of *25l.* ready to be delivered to the plaintiff, he says, " and the defendant further saith, that the plaintiff has not sustained damage to a greater amount than *25l.* in respect of the causes of action in the declaration mentioned, *as to the sum of 25l.*" He thereby puts in issue something not averred in the declaration, as if the declaration had mentioned a cause of action as to *25l.* and claimed damages above *25l.* for the breach of promise in not paying that sum: whereas the declaration was in the common form of *indebitatus assumpsit,* for 100*l* for money had and received, and in 100*l.* for money due on an account stated. To such a plea the plaintiff must have replied, that he sustained damage beyond *25l.* in respect of the sum of *25l.* Then as to the residue, he pleads *non assumpsit.* [Lord *Abinger*, C. B.—He might have simply pleaded payment of money into Court, according to the form prescribed by the new rules, but the defendant appears to have pleaded this as if it were a tender.] The defendant offers two issues where one is perfectly sufficient. Besides, the form in the new rules concludes with a prayer of judgment, " if the plaintiff ought further to maintain his action," which this does not: here there is no prayer of judgment; and therefore, according to the 9th of the new rules, it must be taken as pleaded in bar of the whole action, and if so, the plaintiff would not have been safe in taking the money out of Court and taxing his costs; nor could he have replied in the form given by the 19th rule.

Humfrey, contrà.—It does not follow, that the form of the plea as to payment of money into Court is applicable to all cases:—there may be some cases in which the form given cannot strictly be applied. In this instance, the action is respecting a wager. The plaintiff demands, *first*, the wager as won; and if not entitled to that, then he says that he is entitled to *25l.*, the amount of the stake deposited with the defendant. [*Parke*, B.—How could the plaintiff recover the wager in this action for money had and received? If the wager cannot be recovered, the defendant has paid into Court all that the plaintiff can recover. Then why can you not plead payment of money into Court generally, according to the form prescribed by the new rules? If the particulars claim several demands, you can plead as to the one, *non assumpsit;* to another, payment before action; and as to the rest, payment of money into Court.] This, it is submitted, is substantially the same,—the defendant pleads payment of money into Court, and *non assumpsit* as to the residue.

PARKE, B.—The payment of money into Court is the only matter, in this instance, which he could properly plead. It is quite clear that the plea is bad, because there is no prayer of judgment to the further maintenance of the action. If there were any defence as to part of the causes of action, that should have been pleaded first, and payment of money into Court to the residue.

ALDERSON, B.—The plea of payment of money into Court must be *of the residue.* You ought first to plead as to the other matters, and then plead payment of money into Court to the residue.

Humfrey then prayed leave to amend on payment of costs.

Rule accordingly.

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In libel, one of the counts set forth the following libel, addressed in a letter to one *C. A. P.*—"I (meaning the defendant) have reason to suppose that many of the flowers of which I (meaning the defendant) have been robbed, are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to *C. A. P.*, and unlawfully placed them in the garden of the last mentioned person)." Upon motion in arrest of judgment, on the ground that larceny could not be committed of flowers, and that the *innuendo* was too large:—*Held*, that the count was good.

CASE.—The declaration stated, that the said plaintiff now is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned was always reputed, esteemed, and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the county of *Middlesex*. And whereas also, the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been supposed to have been guilty of larceny, or of other the offences and misconduct hereinafter mentioned to have been imputed to and charged upon the said plaintiff, or of any other such offence or misconduct, by means of which said premises, the said plaintiff before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to wit, in the county aforesaid. And whereas also, before the committing of the said grievances by the said defendant, hereinafter mentioned, he the said plaintiff had been in the service and employ of one Mrs. *Nicholls*, as a gardener, and having left the said service and employ, had become, and at the time of the committing of the said grievances was the servant and gardener of one *Clement Anthony Peirce*, to wit, in the county aforesaid; yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and combining and wickedly and maliciously intending to injure

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the said plaintiff, in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that he, the said plaintiff, had been and was guilty of larceny and other dishonest and unlawful practices, and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty of larceny, and to cause him to lose and be deprived of his said place and situation of servant and gardener as last aforesaid, and to vex, harass, oppress, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, on the 12th day of *October*, in the year of our Lord, 1833, in the county aforesaid, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the said plaintiff, and of and concerning him in his said business and employment of a gardener as aforesaid, a certain false, scandalous, malicious, and defamatory libel in the form of a letter, addressed to the said *Clement Anthony Pierce* by the said defendant, containing amongst other things the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said plaintiff, and of and concerning him in his said business and employment of a gardener; that is to say—"Sir, (meaning the said *Clement Anthony Pierce*), as I (meaning the said defendant) believe you (meaning the said *Clement Anthony Pierce*) were perfectly aware that the gardener (meaning the said plaintiff) whom you (meaning the said *Clement Anthony Pierce*) are employing, was discharged from the service of Mrs. *Nicholls* (meaning the said Mrs. *Nicholls*) and myself (meaning the said defendant) for his (meaning the said plaintiff's) dishonesty, (meaning that the said plaintiff had been guilty of dishonesty, and unlawful practices in his said business and employment of a gardener); and I

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(meaning the said defendant) have reason to suppose that many of the flowers of which I (meaning the said defendant) have been robbed are growing upon your premises, (thereby meaning that the said plaintiff had been guilty of larceny, and had stolen from the said defendant certain plants, roots, and flowers of the said defendant, and had disposed of them unlawfully to the said *Clement Anthony Pierce*, and unlawfully placed them in the garden of the said last-mentioned person); may I (meaning the said defendant) beg to know when it will be convenient for you (meaning the said *Clement Anthony Pierce*) to see me (meaning the said defendant).

There were other counts, setting forth the libel differently. Pleas.—*First*, the general issue, and *secondly*, as to part of the libel a justification.

The cause was tried before Lord *Abinger*, C. B., at the sittings for *Middlesex* after the last term, when the jury found a verdict for the plaintiff.

Maule obtained a rule to shew cause why the judgment should not be arrested, on the ground that the offence imputed to the plaintiff could not amount to larceny, and also that the *innuendo* was too large.

Thesiger and *Addison* now shewed cause.—The first ground upon which this rule was moved was, that the declaration does not shew any offence amounting to larceny. The part of the alleged libel relating to this charge is as follows:—"I have reason to suppose that many of the flowers of which I have been robbed are growing upon your premises," and the *innuendo* attached to these words is "(thereby meaning that the said plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the said defendant, and had disposed of them unlawfully to the said *C. A. Pierce*, &c.") The defendant contends, that because the statute 7 & 8 *Geo.* 4, c. 29, s. 42, makes the

stealing " of any plant, root, fruit, or vegetable production, growing in any garden, orchard," &c., punishable by summary conviction only, the offence imputed by the letter does not amount to larceny. The statute, however, relates only to plants, &c. *growing* in any garden, &c., and there is nothing in the libel to shew that it was intended to be confined to such plants. It does not state, that the plants were *growing* at the time of their being carried away, but that they were growing in the garden of Mr. *Pierce* at the time of the letter being written; which is quite consistent with the fact of their having been taken up from the ground before they were carried away by the plaintiff. [Lord *Abinger*, C. B.—I rather think that the rule was not granted on the ground that the offence imputed did not amount to larceny. The Court granted it on a doubt which they entertained, whether the *innuendo*, in using the words " plants, roots, and flowers," was not too large.] The *innuendo* is not too large. The word " flowers" in the letter does not signify merely the flowering part of the plant, but the plant itself; for the letter speaks of it as *growing* in the garden of Mr. *Pierce*. To be growing there, it must be a *plant*, and to be a growing plant it must have a root; therefore the expression " plants, roots, and flowers" carried the meaning no further than the word " flowers." Lord *Bacon*, in his *Essay on Gardens*, says (*a*), " I like little heaps in the nature of mole-hills (such as are on wild heaths) to be set, some with wild thyme and some with pinks, some with germander, that gives a good flower to the eye; some with periwinkle, some with violets, some with strawberries, some with cowslips, some with daisies, some with red roses, some with lilium convallium, some with sweet williams red, some with bear's foot, *and the like low flowers*, being withal sweet

(*a*) Essays, p. 128, ed. Lond. 1706.

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and sightly." The word *flower* here evidently includes both *plant* and *root*.

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Wightman, contrà.—The defendant is entitled upon both grounds to have the judgment arrested. In speaking of flowers, living and growing flowers must be intended, in the same manner as, where *animals* generally are mentioned in an indictment, the word will be presumed to mean *living* animals. In the construction of a libel, the words are to be taken in their ordinary meaning; and here it is apparent that living flowers were intended, for they are afterwards spoken of as growing in Mr. *Pierce's* garden. Now, of living flowers larceny cannot be committed. The second objection is also fatal. The *innuendo* is too large: "plants, roots, and flowers," include many things which are not comprehended under the word "flowers" alone. It is not a sufficient answer that flowers are plants and have roots; the point is, whether "plants and roots" may not include something beyond flowers. If it be possible to suppose a state of things, by which the words of the *innuendo* may be extended beyond the words of the libel, then the *innuendo* is too large. The case of *Day* v. *Robinson* (*a*) very much resembles the present. There, one of the counts in the declaration laid the words as follows:—"You have robbed me of one shilling, tan money," and the *innuendo* explained the meaning to be, that the plaintiff had fraudulently taken and applied to his own use the sum of one shilling, received by him for the defendant, being the produce of some tan sold by the plaintiff as the servant of the defendant. The facts stated in this *innuendo* were not connected with any independent averment in the declaration. The Court of *Exchequer Chamber*, on error, held, that the *innuendo* was bad, as introducing new facts; and that, without the innuendo, the count did not

(*a*) 2 Nev. & Mann. 670; 1 Ad. & Ell. 554.

charge words actionable in themselves. In the present case, there should have been previous averments, shewing that there were certain matters the subject of larceny, and then the *innuendo* should have referred to those matters; but the substance of those averments being first introduced into the *innuendo*, renders it bad, and judgment must be arrested.

Lord ABINGER, C. B.—The first objection taken by the defendant, in arrest of judgment, is, that the offence of larceny cannot be committed with regard to flowers. The answer to that objection is, that many cases may be put in which larceny may be committed of flowers; and as after verdict all matters necessary to support that verdict will be presumed to have been proved, it will be sufficient if a single case can be shewn, in which an indictment for larceny may be maintained for stealing flowers. Not only one, but a variety of such cases may be put. They may have been detached from the ground, and lying on it in a portable state; they may have been growing in flower-pots. Many species of roots are taken up from the ground and protected during the winter, and the plants in question may have been of this kind. Nor is the description of the flowers in the libel inconsistent with any of these suppositions. A man steals a flowering plant with roots, which has been taken up for the winter, and he afterwards plants it, and it grows. The owner sees it, and speaking of it calls it the "growing flower stolen from me." What is there inconsistent in this description? Any assignable case which will support the verdict must be presumed.

PARKE, B.—The Court, after verdict, will intend that the libel meant flowers, which were the subject, if there be any case in which flowers can be the subject, of larceny. That they may be so, appears from the recent statute

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of 7 & 8 *Geo.* 4, c. 29, s. 42, which makes the stealing of flowers, &c. after a previous conviction, felony. Nor does the *innuendo* appear to me to be too large. The word *flowers*, used in the letter, does not mean flowers as contradistinguished from the rest of the plant, but obviously applies to such flowers as were capable of being planted in another garden, though it does not describe them as being, at the time of the supposed larceny, *growing* flowers. I am of opinion, therefore, that after verdict the flowers spoken of must be taken to be flowers with respect to which larceny might be committed, and that the words *plants*, *roots*, and *flowers*, do not carry the *innuendo* too far; but even if the *innuendo* should be rejected as repugnant and incongruous, there is sufficient left in the remainder of the libel to support an action.

BOLLAND, B., concurred.

Rule discharged.

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A lessee of 100 acres of land for one year accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until a half-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder:—*Held*, that this was not a case of eviction by the landlord, but that the rent was apportionable, and that the landlord was entitled to distrain for such apportioned rent.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and seizing and distraining divers household furniture, goods, and chattels therein. Plea—that before and at the time of the demise thereinafter mentioned, the defendant was seised of the dwelling-house in which &c., and of other premises thereinafter mentioned to be therewith demised, with their appurtenances, in his demesne as of fee; and, being so seised, afterwards, and before the time when &c., to wit, on &c., demised the said dwelling-house, and certain other premises, with the appurtenances, to the plaintiff, for the term of one year, commencing from the 25th day of *June*, 1833, at the clear rent of 70*l.*, payable quarterly, that is to say, &c.; that

afterwards, &c., the plaintiff accepted the said lease, and by virtue of the said demise entered into and upon the demised premises with the appurtenances, and thereupon became, and was, and yet is possessed thereof for the term so to him thereof granted as aforesaid, until the 25th day of *December*, in the year 1833 aforesaid, and from thence until and at the said time when &c. held and enjoyed the said dwelling-house, in which &c., and the said demised premises with the appurtenances under and by virtue of the said demise. And the defendant further says, that on the said 25th day of *December*, 1833, a large sum of money, to wit, 35*l.* of the rent aforesaid, for six months of the said term ending on the day and year last aforesaid, and then last elapsed, became and was due and payable to the defendant, and at the time when &c. was in arrear and unpaid. Wherefore the defendant, on the day when &c. entered into and upon the said dwelling-house, in which &c., for the purpose and in order to seize, take, and distrain, and did then and there seize, take, and distrain the household furniture, &c., in the declaration mentioned, as for and in the name of a distress for the said rent so due and in arrear to the defendant as aforesaid, and kept and detained &c., according to the form of the statute &c., and in so doing &c.

Replication—that before and at the time of making the said demise in the declaration mentioned, one *Adam Charlton* was and from thence hitherto has been and still is in the possession, use, occupation, and enjoyment of divers, to wit, eight acres of land, parcel of the said demised premises in the plea mentioned, as tenant thereof to the said defendant, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the said last-mentioned land, so being parcel of the said demised premises, or any part thereof. And although the plaintiff has always, from the time of the making of the supposed demise in the said plea mentioned, hitherto,

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been ready and willing and desirous of entering into the possession, use, occupation, and enjoyment of the said last-mentioned land, under and by virtue of the last-mentioned demise, of which the defendant had due notice; yet the plaintiff in fact says, that he the said plaintiff always from the time of the making of the said last-mentioned demise has been and still is kept out of the possession, use, occupation, and enjoyment of the said last-mentioned land and every part thereof, by the act and default of the defendant, whereby the plaintiff has been wholly hindered and prevented from entering into, and holding and enjoying the same, and from having and receiving all the profit, benefit, and advantage which ought and would otherwise have arisen and accrued to the plaintiff therefrom. Wherefore the defendant at the said time when &c., wrongfully and unlawfully entered into and upon the said dwelling-house, in which &c., and seized and distrained &c. Verification.

Demurrer—shewing for cause, that the replication does not traverse or put in issue any fact contained in the plea, and contains no matter of fact in avoidance of the demise and entry contained in the plea. That the averment in the replication, that the said *A. C.* was and still is tenant of the defendant of part of the same premises, consists of mere inference and matter of law, wholly inconsistent with the facts admitted on the pleadings; and that the other averments in the replication consist of mere inference not warranted by the facts, and upon which no apt or material issue can be taken. That the replication is argumentative, and denies by implication a material averment contained in the plea, viz. the entry of the plaintiff into the demised premises under and by virtue of the demise, and alleges that the plaintiff has been kept out of the possession and enjoyment of the eight acres of land, part of the demised premises, by the act and default of the defendant, without stating any act or default of the

defendant by which he has been kept out of possession or enjoyment. Joinder in demurrer.

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Cleasby, in support of the demurrer. The replication is bad on various grounds:—*First*, the tenancy of *Charlton* is informally pleaded; nor, if rightly pleaded, would it have been an answer to the plea. It is not shown how *Charlton* was tenant, whether for years or otherwise. [*Parke*, B.—Does the replication contain any answer to the right to distrain set up in the plea?] It does not, and that is one of the grounds upon which it is contended that it is bad. [*Parke*, B.—It states, in an informal manner, a sort of eviction by title paramount; but the question is, whether that is any answer to the plea. The averment in the plea is, that the plaintiff entered into the demised premises, and became and was possessed thereof. The Court will hear the other side.]

Bompas, Serjt., *contrà*.—The replication is good; it shews an eviction of the plaintiff from part of the premises by the act of the defendant himself, and after such an eviction the defendant could not distrain. There is a distinction between an eviction by title paramount, in which case the rent may be apportioned, and an eviction by the act of the party, as here, in which case there can be no apportionment. [*Parke*, B.—If the party evicting holds under the defendant by virtue of a former lease, he holds by title paramount to that of the plaintiff.] The distinction is between cases where the tenant is deprived of the beneficial enjoyment of part of the premises, in consequence of his landlord's own act, and where he is deprived in consequence of the act of some other party. Here it is by the act of the landlord himself; for it is the same thing whether, after the lease, he actually evicts him from part of the premises, or whether, knowing that he has already conferred upon a third person a title to the possession of part of the pre-

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mises, he lets the whole to a tenant who is afterwards evicted from that part. Title paramount means paramount to the title of the landlord. [*Parke*, B.—It means paramount to the lease or other title conveyed. In this case, suppose the lease to have been made, not by the defendant, but by a former owner of the property; it is clear that in such case the rent would have been apportioned.] If the former lease was, as it must have been, within the knowledge of the landlord when he made the second lease, the entry of the first lessee would in law amount to an eviction by the wrongful act of the landlord, and the rent would not be apportioned. There are several cases in which this has been held to amount to a wrongful eviction.

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The Court expressing an opinion against the form of the replication, *Bompas*, Serjt. prayed leave to amend, and it was granted to him accordingly.

The following was the form of the replication as amended.

That before and at the time of the making of the demise in the plea mentioned, one *Adam Charlton* was and from thence hitherto has been and still is in the possession and enjoyment of divers, to wit, eight acres of land, parcel of the said demised premises in the plea mentioned, under and by virtue of a certain demise theretofore made by the defendant to the said *A. C.*, and which last-mentioned demise was then, and from thence hitherto has been, and still is, in full force and undetermined: whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the last-mentioned land, so being parcel of the demised premises in the plea mentioned, or any part thereof. And although the plaintiff has always, from the time of making the said demise in the plea mentioned, been ready and willing and desirous of entering into the possession and occupation and enjoyment of the last-mentioned land, under and by virtue of the last-mentioned

demise, whereof the defendant had due notice; yet from the time of making the last-mentioned demise, hitherto, the plaintiff has been and still is kept out of the possession, use, occupation, and enjoyment of the last-mentioned land and every part thereof by the said *A. C.*, under and by virtue of the said demise to him thereof made by the defendant; whereby the plaintiff has been wholly hindered and prevented from entering into, and holding and enjoying the same, and from having and receiving all the benefit, profit, and advantage which might and otherwise would have arisen and accrued to the plaintiff therefrom. Wherefore &c.

Rejoinder—That the plaintiff, at the time of his said entry into and upon the said demised premises, under and by virtue of the said demise in the said plea mentioned, had notice of and well knew, that the said eight acres of land in the replication mentioned, parcel of the said demised premises, were then in the actual occupation of a certain person, to wit, the said *A. C.*, as tenant thereof to the defendant, under and by virtue of a certain demise to him theretofore made for a certain term then unexpired.

Demurrer—assigning for cause, that by the plea of the defendant it is averred, that the defendant demised the premises in the plea mentioned to the plaintiff, in manner therein mentioned; and by the rejoinder it is admitted, that the defendant did not and could not lawfully demise the same premises as in the plea mentioned; and also that by the plea it is averred, that, by virtue of the demise in the plea mentioned, the plaintiff entered into and upon the demised premises, and thereupon became and was possessed thereof, and enjoyed the same. And by the rejoinder it is admitted, that the plaintiff did not and could not enter into and upon, and did not and could not become possessed of, and did not and could not hold and enjoy eight acres of land, being parcel of the demised premises. And then the defendant avers notice thereof

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to the plaintiff, which is no answer to the replication of the plaintiff; and the defendant by his rejoinder does not fortify the matter by the plea pleaded in bar, but the rejoinder is inconsistent with the plea, and a departure therefrom; and also, that the rejoinder offers an immaterial issue, and is in other respects uncertain, &c.

Bompas, Serjt. in support of the demurrer.—The first point is, whether, upon the pleadings as they now stand, there appears to have been, at the time of the distress, any such contract of demise as entitled the defendant to distrain. It is admitted on the record, that, at the time of the demise to the plaintiff, eight acres of the land, which the defendant affected to demise, were already leased to *Adam Charlton*. The effect of that lease was to render the subsequent lease void, according to the doctrine laid down in *Bacon's Abridgment* (*a*), where it is said, "If one make a lease to *A.* for ten years, and the same day makes a parol lease," (and here the lease must be taken to be by parol, for there is no averment of its being in writing) "to *B.* for ten years, of the same lands, this second lease is absolutely void, and can never take effect, either as a future *interesse termini*, or a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it." [*Parke*, B.—It does not appear what was the length of the term granted to *Adam Charlton*; if the lease to the plaintiff exceeded that term, the plaintiff

(*a*) Leases for Years, (N.)

would, for the excess, have an *interesse termini*. He cannot have the reversion, for there is no grant of it by deed.] Whether the plaintiff be entitled to an *interesse termini* or not, the defendant's contract with him is broken; for it was a contract for the present demise of the whole premises. This is analogous to the case of a contract for the sale of goods. Where there is a contract to deliver 100 bushels of flour, if the vendor deliver only fifty, he cannot recover the value upon the original contract, because he has not performed it, but he claims upon an implied contract, arising from the acceptance of the fifty bushels by the vendee. Here, although, in consequence of the plaintiff having entered upon part of the premises, an implied contract may arise to pay the defendant for the use and occupation of that part, yet such contract is insufficient to justify the defendant in making a distress, because there is no certain rent reserved in respect of the portion occupied, without which a distress cannot be maintained. *Tomlinson* v. *Day* (*a*) is an authority in point. There *A.* demised to *B.* a farm, glebe land, and right of sporting, and *B.* entered upon the farm, but could not get possession of the glebe land or of the right of sporting. *A.* having brought use and occupation for the whole rent reserved, *B.* paid into Court the value of the farm only, and had a verdict; which, upon motion to set it aside, he was permitted to retain. In *Gardiner* v. *Williamson* (*b*), tithes and a homestead for collecting them were let together by an agreement, not under seal, for 200*l.* per annum; it was held, that as the tithes could not pass by the demise, in consequence of its not being under seal, and as there was no separate and distinct rent reserved for the homestead, the lessor was not entitled to distrain.

(*a*) 5 B. Moore, 558; 2 Br. & B. 681, S. C.
(*b*) 2 B. & Ad. 336.

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The next point is, whether there does not appear upon the record such an eviction by the defendant of the plaintiff, from a part of the premises demised, as to create a suspension of the whole rent. The facts upon this question, as admitted by the pleadings, are these:—That when the demise was made, *Adam Charlton* was in possession of eight acres of the demised premises, by virtue of a certain demise made to him by the defendant, and the plaintiff was thereby unable to obtain possession of the whole of the premises. It is also admitted, that the plaintiff, at the time of his entry, had notice of the previous lease. The question, therefore, is this—whether a landlord, who has already demised a portion of certain premises, and who afterwards, and before the expiration of the first demise, leases the whole to a tenant who is aware of such former demise, can be said to evict the second tenant who is unable to obtain possession of the portion demised by the first lease. Had this been an eviction by title paramount, that is, by title paramount to that of the landlord, a title not created by him, but adverse to his own, then as the tenant would be dispossessed of a portion of the premises, not by any fault on the landlord's part, the rent would be apportioned. *Stevenson* v. *Lambard* (*a*), *Vaughan* v. *Neyler* (*b*). But here the eviction proceeds from the act of the landlord himself, which, as against the second tenant, is a tortious act, and occasions a suspension of the whole rent. *Co. Litt.* 148. b.; *Walker's case* (*c*). Nor, according to the opinion of the Court in *Tomlinson* v. *Day*, does it make any difference that the plaintiff was never in possession of the eight acres. *Dallas*, C. J. there says, that the facts "operated as an eviction of part of the subject-matter of the demise;" and Mr. Justice *Burrough* adds, that "they were either a misrepresenta-

(*a*) 2 East, 575. (*b*) 2 Maule & S. 276.
(*c*) 3 Rep. 22 b.

tion, or amounted at least to an eviction as to part." The distinction between an eviction by title paramount, and an eviction by the landlord, was adverted to by Mr. Baron *Parke*, in a late case in this Court (*a*). The operation of such an eviction is clear, and the only question is, whether the facts of this case shew such an eviction. It is submitted that they do, and that the rent being thereby suspended *in toto*, the defendant had no right to distrain, and that this action is maintainable.

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Cleasby, contrà.—First, with regard to the supposed nonperformance of the defendant's contract. The plea, in the statement of the premises demised, does not apply to the land of which the plaintiff did not enter into possession: it states, that the defendant demised a dwelling-house and certain other premises with the appurtenances to the plaintiff; and the question is, whether, after the averment in the replication, which has not been traversed, this appears to be such a demise as is sufficient to support a distress. The case has been assimilated to that of a contract for a certain quantity of goods, under which a less quantity has been delivered; in which case, as the contract has not been performed, it is clear that the vendor cannot sue upon it, but must resort to the implied contract to pay for the quantity actually delivered upon a *quantum meruit*. But the analogy does not hold; for in the case of a rent reserved, it issues out of the whole land and every part of it, and every part is subject to the whole rent. In *Hargrave* v. *Shewin* (*b*), the defendant avowed for taking growing crops in four closes, and stated that the plaintiff held the closes in which &c., at a certain yearly rent, and it appeared that he also held two other closes at that rent. This was held to be no variance; for every part of the land

(*a*) *Reeve* v. *Bird*, 1 Crom. M. & R. 36. (*b*) 6 B. & C. 34; 9 D. & R. 20, S. C.

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was liable to the rent. If the analogy put were correct, there could, in no case, be an apportionment of rent reserved under a lease, where the tenant is evicted by any person out of part of the lands demised, for, in all these cases, the landlord has not performed his part of the contract. But even supposing that the previous demise to *Adam Charlton* would *primâ facie* shew a nonperformance of the contract made by the defendant with the plaintiff; yet, as it is admitted that, at the time of the plaintiff's entry upon the remainder of the premises, he had notice of the interest claimed by *Charlton*, he must be taken to have waived the objection, and to have accepted the lease, subject to *Charlton's* interest.

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But the replication is no answer to the plea, because, at all events, there is no such eviction by the defendant as to occasion a suspension of the whole rent; and if the defendant was entitled to distrain for any part of the rent, trespass is not maintainable. It is not every eviction which will produce that consequence. It is said by Chief Baron *Gilbert*, in his *Treatise on Rents* (*a*), "that if a disseisor makes a lease for years, rendering rent, and afterwards the disseisee enters, and ousts the lessee, yet the lessee shall be accountable for the rent incurred before the ouster, because the lessee cannot be taken for a trespassor, since he came into the land under the sanction of a legal contract, though the disseisor, having but a defeasable title, could not perform the contract; however, till it was destroyed, and while the lessee had the peaceable enjoyment of the land, that obligation to pay the rent which was founded upon the enjoyment must continue, and, consequently, the lessee be obliged to pay the rent till the entry of the disseisee. For the same reason, if part only of the land which was let be evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted (*b*)."

(*a*) P. 146. (*b*) Moore's Rep. p. 50; Dyer's Rep. p. 56.

This passage is an authority against the plaintiff upon both the points on which he rests his case; for, first, it shews that although the lessor has not performed his whole contract, and though, being a disseisor, he must have known that he could not perform it, yet the tenant is still liable in proportion to the enjoyment of the land by him; and, secondly, it proves that though this tenant be evicted from part of the land, in consequence of an infirmity in the landlord's title of which he was aware, the rent is not suspended *in toto*, but only in proportion to that part of the premises demised, from which the lessee has been evicted. [*Parke*, B.—Here the plaintiff never entered into the eight acres of land; and can there be an eviction from that of which the party never was in possession? Again, can this be said to be an eviction by the defendant, when it was in fact an eviction by *Adam Charlton?*] It was not an eviction by the defendant; for, to constitute an eviction, there must be a tortious entry and expulsion (*a*); and here, on the part of the defendant, there was neither entry nor expulsion. [*Parke*, B.—Your argument is, that although the plaintiff obtained possession of a part only of the premises, yet having accepted the lease, and entered upon that part with notice of the title of *A. Charlton* to the residue, he became liable to all the terms of the lease.] The plea alleges a lease, an acceptance of that lease, and entry and possession taken under it. The replication traverses none of these facts, but merely alleges the prior title of *Charlton*. [Lord *Abinger*, C. B.—You have not in your rejoinder answered the replication.] The fact there averred, viz. the title of *Charlton*, was no answer to the plea, if the plaintiff entered with a knowledge of the prior demise, which it is admitted by the demurrer that he did. If the plaintiff intended to say that he was not bound by the lease, he ought to have traversed that

(*a*) Gilbert on Rents, p. 178, and the authorities there cited.

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he entered under it; but he cannot now be permitted to take advantage of that fact, under a bad plea in confession and avoidance. In *Gardiner* v. *Williamson* (*a*) there could be no apportionment, because there was only one thing granted, namely, the homestead. There was no grant of the tithes, not being by deed. The case of *Tomlinson* v. *Day* (*b*) is in favour of the defendant; for the judgment pronounced in that case proceeded upon the ground, not that the rent was suspended, but that it was apportioned; and it is clear that a person may distrain for an apportioned rent. *Stevenson* v. *Lambard* (*c*); *Coke's 2nd. Instit.* (*d*). In the present case, supposing the defendant was not entitled to the whole rent, he was at least entitled to an apportioned part of it, and might lawfully distrain for that part. That being so, the replication is no answer to the plea; for even if it shew that the defendant was not justified in distraining for the whole rent, yet, inasmuch as he was entitled to distrain for part, trespass is not maintainable. *Lyne* v. *Moody* (*e*).

Bompas in reply.—The objection that the contract was not performed is not answered. The defendant was called upon to put the plaintiff into the possession of the whole, but was unable to complete his contract. The lease was absolutely void. [*Parke*, B.—It was not necessarily void. It was capable of being rendered valid by the prior lease being put an end to before the entry of the plaintiff.] Upon the pleadings, the demise and the entry appear to be on the same day. [Lord *Abinger*, C. B.—The difficulty is, to see what is the real situation of the parties on this record. Suppose a person about to take a farm, finds that there are upon it several cottages on lease to tenants, but notwithstanding he accepts a lease of the whole, and takes

(*a*) 2 B. & Ald. 336.
(*b*) 5 B. Moore, 558; 2 B. & B. 680, S. C.
(*c*) 2 East, 575.
(*d*) P. 503.
(*e*) Fitzgib. Rep. 85.

possession of the farm. Will it afterwards lie in his mouth to say, that he has been evicted from the cottages? *Parke*, B.—If there be a title paramount in a stranger, of which the lessor has notice, and notwithstanding demises the premises, and the lessee is evicted from part under the title paramount, that, *primâ facie*, would create only an apportionment of the rent. Is there any distinction between that case and the present? My impression has been, that to constitute an eviction there must be some tortious subsequent act of the lessor.] Where a man demises that which he knows the tenant can never enjoy, it is surely equivalent to dispossessing him of it himself.

Cur. adv. vult.

The judgment of the Court was now delivered by—

Lord ABINGER, C. B.—The plaintiff, in this case, complains of a trespass in entering his dwelling-house and taking his goods. The defendant pleads in substance that he was seised in fee, and, before the time of the alleged trespass, demised the dwelling-house and other premises to the plaintiff for one year, from the 25th *June*, at the rent of 70*l.*, payable quarterly; that the plaintiff accepted the lease and entered under it, and that half a year's rent was due at *Christmas*, for which the defendant took the goods as a distress. The plaintiff replies, and, not denying that he accepted the lease, and that he entered under it, says, that, at the time of the demise, one *Adam Charlton* was in possession of a part of the demised property, under a prior lease from the defendant, which continued and was in force until after the time when the half year's rent was due; and that during the whole of that time he was kept out of the possession of that part by *Adam Charlton*.

To this there is a rejoinder, which states that the plaintiff had notice of *Adam Charlton's* title at the time of his

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own entry (but not before), and consequently not at the time of the demise, or of his acceptance of the lease. To which rejoinder the plaintiff has demurred.

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It is not necessary to consider whether this rejoinder is a departure or not; indeed it does not add any new fact to those which are stated in, or necessarily inferred from, the replication, for that shews by implication, that, after he entered, the plaintiff knew that *Adam Charlton* was in possession of part.

The question is, whether the replication is a good answer to the plea, which plea is clearly a good bar to the action; and that depends upon a point of law of some nicety and difficulty.

The case is this:—A lessee under a lease for one year of a certain quantity, say 100 acres, accepts the lease and enters on the faith of his being entitled to the whole. He finds eight acres in the possession of a person entitled under a prior lease from the lessor, which person keeps possession of that part until half a year's rent accrues due, and excludes the lessee from the enjoyment of it for all that time. The lessee continues in possession of the remainder, and the question is whether he is liable to be distrained upon for the whole rent, or for any part; and, in the latter case, whether a plea, or avowry, justifying a distress for the whole rent, can be supported.

The first point to be decided is one which was made on the argument, *viz.* whether the supposed lessee was in under the lease at all, or under a new contract for an unascertained rent, upon which he would be liable, on a *quantum meruit*, for use and occupation, but not to a distress.

We think he was in under the lease, and for these reasons:—If a lessor who makes a lease not under seal, purporting to demise 100 acres in possession, has already demised eight to another person, his lease cannot operate according to the intention of the parties; and the lessee,

who has agreed for a lease of the whole, cannot be bound to accept a demise which does not convey the whole. He may decline to accept it and to enter, and if he does so he cannot be bound by the stipulations in it. But, notwithstanding this defect, the lease is capable of a legal operation; it enures as a present demise, giving a right to immediate possession of the residue of ninety-two acres for one year, and passes (not the reversion, because that lies in grant, and the lease in question is not under seal), but an *interesse termini* in the remaining eight (*a*), for one year also from the date of the lease, so as to give a right to a term for all that period, and to the possession, on the determination of the prior lease by efflux of time, or by any other lawful mode; for, as the existence of the prior demise of part is the only impediment which prevents the present operation of the lease as to that part, it should seem that whenever and in whatever way that impediment is removed, the new lease must take effect in possession (*b*). If, then, the lease being capable of such legal operation, the lessee enters with the knowledge of the defect of title, or, which is the same thing, having entered afterwards with the like knowledge, and consequently with knowledge of the limited operation of the lease, continues in possession, he must hold as lessee, under the lease, so far as it is capable of a legal operation.

What, then, is the situation of such a lessee whilst he is kept out of the possession of the remaining part? He cannot be considered as a lessee at an apportioned rent for the whole term, according to the value of the part enjoyed; for *non constat* but that the former demise of a part may not end during the term, and then he would be lessee in possession of the whole, at the whole rent; or

(*a*) Sheph. Touchstone, by Preston, 276.

(*b*) Bacon's Abr. tit. Leases, (N.); 2 Preston's Conveyancing, 150.

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non constat, that though the former demise may not be determined, yet that the prior lessee may quit possession, and the present lessee enjoy the whole; in both which cases he would be liable for the whole rent reserved, which should subsequently become due, and that by virtue of the lease. In this respect the case differs from a release of part of the rent, or a purchase by the lessor of the lessee's interest in part of the demised land; for in such cases the rent would be apportioned for the whole term, and the lessee would hold at the diminished rent for the whole term.

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If, then, the rent is not to be apportioned during the whole period of the demise, the lessee must either continue liable to the whole rent with a remedy over against his lessor on the contract, express or implied, in his lease, for quiet enjoyment; or he must be liable to no part of the rent, or to an apportioned part, during the time that he is kept out of possession of part, in the same way that he would be, if, after he had entered, he had been evicted of part by a title paramount.

If he is liable to the whole rent the plea in bar would not be answered, because the demise therein mentioned would be correctly stated, and the tenant's liability to the full amount would continue. But we conceive that he cannot be liable to the whole rent, whilst he is kept out of part of the demised property, and that this case is one of eviction, or is to be governed by the same principle.

The principle upon which eviction is a defence is this, that rent issues out of the land, and is to be paid out of the profits; and, if the land be taken away, the rent is discharged. *Slade* v. *Thompson* (*a*). If the lessee had entered into the whole, and been evicted the instant after by the tortious act of the lessor, or by an elder title from part, and kept out till the rent was due, the rent would

(*a*) 1 Roll. Rep. 198; Co. Litt. 292. b.

have been either entirely suspended or proportionably diminished; and we cannot see that there is any difference between such a case and one in which the lessee never did get possession of the whole, but was kept out of part from the very commencement of the lease until the rent day. In each case the lessee has been deprived of the profits, and therefore in each he should be exonerated, either altogether or in part, from the payment of the rent.

If this be correct, the only question is, whether the rent is entirely suspended or apportioned. The whole rent is suspended by eviction, where the lessor is guilty of a tortious act, as if he enter and disseise, or put out the lessee (*a*); and the reason given by C. B. *Gilbert* (*b*), is "that no man might be encouraged to hinder or disturb his tenant in his possession." But, if there be lawful eviction from part by an elder title, it is clear that the rent is apportioned only, and not suspended.

The question is, to which of these two classes of eviction the present case is analogous. If *Adam Charlton*, the tenant of the part, had claimed under a conveyance granted by the lessor subsequently to the lease, his act would have been unlawful, and the same as an unlawful act by the lessor himself. In that case the rent would have been suspended *in toto*.

But *Adam Charlton* claims under a prior demise, and therefore by a title paramount to the lease, though not paramount to that of the lessor, and his act in retaining possession is lawful, and there is no tortious act by the lessor himself, unless the fact of demising with knowledge of the title of another be so. But it is clear that this would not be a tortious act, so as to suspend the whole rent, if the person having title enter; for, if a disseisor demise land, and the disseisee afterwards enter into part,

(*a*) Co. Litt. 148. b. (*b*) Gilbert on Rents, 179.

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it is a case of apportionment only, though the disseisor must have known of his own defect of title (*a*).

It appears to me that this is a case of apportionment only, and in the nature of a discharge of part of the rent alleged to be in arrear, and therefore no answer to the plea, if there was a power of distress for the remainder; and that there is a power to distrain for an apportioned rent is clear from the passage in 2 *Coke*, 503, cited on the argument.

The case of *Gardiner* v. *Williamson* (*b*) was adduced to prove that there could be no distress for the rent of a part of the demised premises, where the precise amount of the rent was not fixed by the parties. But that case is distinguishable from the present; there the contract between the parties was to pay one entire sum of 200*l.* for the rent of the homestead, which was demised in point of law, and for a compensation for the tithes for one year, which were not; for, as to the latter, the demise was absolutely void on the face of the instrument, and could never have any operation as a lease. The entire sum never could be due, under any circumstances, as rent, and therefore there could be no apportionment of it upon the principle of eviction, that is, a discharge of part of the rent, by the loss of part of the consideration for the payment of it, and during such loss. It was, therefore, a case of a demise of the land at an uncertain sum, for which there could be no distress. But in this case there is a demise at a sum certain, which sum is subsequently abated during the time that the lessee is prevented from enjoying.

We therefore think that the replication is no answer to the plea, and the defendant ought to have judgment.

Judgment for the defendant.

(*a*) Moore, 50. (*b*) 2 B. & Ald. 336.

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The plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant paid to the plaintiff as a deposit a cheque for 100*l.* There being a wilful misrepresentation in the description of the premises, the defendant refused to pay the cheque, upon which the plaintiff brought an action against him on the cheque. The defendant having pleaded that there was no consideration for making the cheque:—*Held*, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have been bad on special demurrer.

ASSUMPSIT upon a banker's draft, payable to the plaintiff or bearer for the sum of 89*l.* 18*s.* *Second* count upon an account stated. Pleas—as to the first count, that there was not at any time any consideration or value for his, the defendant's, making the said draft or order, or for paying the amount thereof; and, as to the last count, the general issue. Replication—as to the first plea, that at the time of making the draft or order there was a good, valid, and sufficient consideration for his, the defendant's, making the said draft or order. At the trial before *Parke*, B., at the *London* Sittings after last *Michaelmas* Term, it appeared that the plaintiff, who was an auctioneer, put up to auction in the month of *August* certain premises which he had been employed to sell on behalf of the assignees of a bankrupt, and that the defendant having become the purchaser of a part of those premises, gave to the plaintiff the draft in question as a deposit upon the purchase. The defence set up was that there was in the description of the premises a wilful misrepresentation by the plaintiff. The learned Judge was of opinion that a clear legal fraud or wilful misrepresentation on the part of the plaintiff had been proved; but, as he thought that defence inadmissible under the plea of no consideration, he directed a verdict for the plaintiff for the amount of the draft, with liberty to move to enter a verdict for the defendant; at the same time he requested the jury to say whether they found that there was a misrepresentation, and whether such misrepresentation was wilful or not; and the jury found in the affirmative. If the Court should think the plea not proved, these facts were to be considered as found specially (*a*). *Chandless* moved accordingly, and it was also made a part of the rule that the

(*a*) 3 & 4 W. 4, c. 42, s. 24.

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plaintiff should shew cause why the plea should not be amended.

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Erle, and *Rawlinson*, now shewed cause.—The plaintiff is entitled to maintain the verdict found for him. The action is brought upon a cheque given by the defendant to the plaintiff, who is an auctioneer, as a deposit upon the sale of property sold by auction; and the consideration for the cheque was that the plaintiff, as auctioneer, permitted the defendant to stand in the situation of purchaser with regard to the property in question. Upon the pleadings, as they stand, the issue was properly found for the plaintiff. The defendant merely alleges that there was no consideration; the plaintiff shews that there was a sufficient consideration in the sale of the premises. Then it is said that the sale was void, on the ground of the wilful misrepresentation; but that defence was not open to the defendant under the plea of no consideration Since the new rules (*a*) it is a general rule that illegality or fraud must be specially pleaded; and if the defendant had intended to rely on either of these grounds, he ought to have shaped his plea accordingly. The plea of no consideration gave to the plaintiff no notice that a question of misrepresentation would be raised, and he went into Court prepared only to prove that which was denied by the plea, *viz.* that there was a consideration in the contract of sale entered into by the defendant. Then at the trial the defendant says, "I do not contend that there was no consideration, but I say that the consideration was tainted with fraud." The learned Judge who tried the cause, considered that this defence was not admissible under the plea, and now the defendant claims to have his plea amended under the 3 & 4 *Will.* 4, c. 42, s. 23, in case the Court should be of the same opinion. That statute does not authorize such an amendment. Is this (to take the most general term

(*a*) Vide Regulæ Generales, H. T. 4 Will. 4, as to pleadings in particular actions.—Assumpsit, s. 3.

used) "a *matter* not material to the merits of the case," and by which the opposite party cannot have been prejudiced in the conduct of his action? Certainly it is not. The matter of the amendment is most material to the plaintiff in the conduct of his action. It is totally changing the nature of the defence, and setting up a new case. Then how can this variance be said to be "immaterial to the merits of the case" within the 24th section of the statute, which authorizes the Court to give judgment "according to the very right and justice of the case." The variance prevented the plaintiff from answering the case upon which the defence wholly rested; and yet, according to the argument on the other side, the Court might be called upon, under the 24th section, to give judgment for the defendant. The question is, whether a plea, stating that there was no consideration, can be amended into a plea stating that there was a consideration, but that it was tainted with fraud. [*Parke*, B.—In framing the plea of want of consideration, in actions upon bills and notes, the new rules upon that subject have not been rightly understood. The question is, whether it was not the object of those rules not to compel the defendant to plead negatively the want of consideration, but affirmatively to set forth the facts, from which the want of consideration would appear. Thus, in the present case, the plea might have stated the facts which shewed that there was no sufficient consideration to support the action, *viz.* that there had been a wilful misrepresentation on the part of the plaintiff upon the sale of the property in respect of which the cheque in question was given. The Judges, in framing the rules, never contemplated the adoption of a general plea of want of consideration. The intention was, that the facts under which the bill or note was given should be specially stated as the ground of defence.] It is possible that the defence might simply be the absence of all consideration. [*Parke*, B.—Still the

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instrument must have been made under some state of facts, as to accommodate the party, or otherwise, and these facts, whatever they were, might be set forth in the plea.]

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Thesiger and *Chandless, contrà.*—The first question is, whether there really was, in point of law, any consideration for this cheque, and whether the plea was not therefore properly framed. There is a clear distinction between a partial and a total failure of consideration.

Where there is a total failure of consideration it is a complete defence. Here the jury have found that there was a wilful misrepresentation. That is a fraud, and, where there is fraud in a contract, it is vitiated altogether, and the case is the same as if no contract had ever been made. It was competent to the defendant to set up that fraud, and to say that there was no legal contract. That contract is alleged on the other side to have been the consideration for giving the cheque; then, if the contract never existed, in point of law there was no consideration. The defendant might have treated the contract as void, and maintained an action for money had and received against the auctioneer for the deposit, (had it been made in money), and the circumstances which would have formed his cause of action in that case are now good by way of defence under this plea. No consideration would have been the ground of his recovery, and no consideration is equally the ground of his defence. Assuming this case to have occurred previously to the making of the new rules, a plea like this would have sustained the defence proved. All that could have been necessary would have been that the defendant should plead the legal effect of the circumstances which constituted his defence. The question then is, whether the new rules have altered the mode of pleading. Now, under the head of pleadings in *assumpsit*, these rules state that, in all actions of *assump-*

sit, except on bills of exchange and promissory notes, the plea of *non-assumpsit* shall operate only as a denial in fact of the express contract alleged, or of the matters of fact from which the promise or contract alleged may be implied by law. It then proceeds, (s. 3) that in every species of *assumpsit* all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, shall be *specially pleaded*. In directing that these matters shall be specially pleaded, the rule does not require that they should be pleaded in any other manner or form than according to the usual principles of pleading. The term *specially pleaded* is a well-recognised term, and is used in its ordinary legal sense, that is, a setting forth of the party's defence specially, in opposition to giving it in evidence under the general issue. Then the meaning of the new rule is to abolish the practice of giving such matters in evidence under the general issue, and to make it necessary to plead them specially, but not to introduce any new method of pleading. If, then, no change has been effected in the principles and forms of pleadings, have the facts which form the ground of the defence in this action been specially pleaded, according to the rules of law? It is a well-established principle of pleading that it is not necessary to put the evidence upon the record, but that it is sufficient to state the legal effect of that evidence. Thus, in an action upon the case for words charging the defendant with accusing the plaintiff of stealing—if the defendant justifies, he need not state more than that the plaintiff did steal the property; he need not shew the circumstances of the larceny, the taking, the asportation, and the other facts which constitute the offence. Again, where payment is pleaded, it is not requisite to shew under what circumstances, and how and when it was made, as to a banker, a clerk, or otherwise. The summary of

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the facts in such cases is all that it is necessary to set forth. The doctrine upon this head is to be found in a very great number of cases from the earliest period of the law, all of which clearly shew that a party is not bound to state specially the actual circumstances upon which he relies, but that it is always good to state the legal effect of those circumstances. *Butler & Baker's case* (*a*), *Hodgson* v. *Gascoigne* (*b*). So, in declaring upon a deed, it is not necessary to set out the very words, but it is sufficient to state the substance and legal effect (*c*). So in criminal pleadings the same rule holds. Thus, in an indictment for larceny or embezzlement, it is not necessary to state the circumstances under which the prisoner was guilty of the felonious taking or embezzlement; all that is requisite is, to state the conclusion of law that he feloniously took the goods or embezzled the money.

It is a mistake to suppose that the defendant relies upon fraud as an answer to this action. He relies upon the contract being rescinded *ab initio*, and that defence is open to him under the plea upon the record. [*Parke*, B. —Your defence is, that either the fraud worked a rescinding of the contract *ab initio*, or the breach of the contract in not making a good title, furnishes an answer to the action.] Here the facts amount to no consideration; for, whether the contract be avoided by the wilful misrepresentation of the plaintiff, or by his inability to perform it, the defendant was entitled to rescind it: he has rescinded it *ab initio*; there is no contract remaining; and this defence is properly pleaded, and the circumstances may be properly given in evidence under the plea of no consideration.

But, if the Court should not be of this opinion, then it is submitted that they will permit the plea to be amended

(*a*) 3 Rep. 25. (*b*) 5 B. & Ald. 88.
(*c*) 1 Saund. 233 *a*, (n.)

under the 23rd section of the 3 & 4 *Will.* 4, c. 42. [*Parke*, B.—The case is one of very considerable importance. It has been extremely well argued on both sides, and the Court will consider their judgment.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—This was an action against the defendant as drawer of a cheque for 39*l.* 18*s.*, on the Bank of *England*. The plea was, that there was no consideration or value for the drawing of the said cheque. The replication, that there was good consideration. On the trial before me at *Guildhall*, it appeared that the cheque was given by the defendant for the payment of the deposit on a sale by auction of certain leasehold property, by the plaintiff, as auctioneer, to the defendant, which property was misdescribed in the particulars of sale, by which the defendant bought. The conditions contained a clause that no error or misstatement should vitiate the sale, but the jury found that the misdescription was wilful, and that therefore the defendant had a right to repudiate the contract altogether, which he did, and, having given orders to the Bank to dishonour his cheque, it was refused payment.

It appeared to me at the trial that the plea was not framed in the way it ought to have been, in order to meet the case, and I directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a verdict for him; and, in the event of the Court being of opinion that the plea was not proved, the facts were to be considered as found specially, pursuant to the 3 & 4 *Will.* 4, c. 42, s. 24.

A rule *nisi* having been obtained, cause was shewn last term, and the Court took time to consider their judgment. It was argued by the learned counsel for the defendant,

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first, that by the old law all facts must be pleaded according to their legal operation, and that the legal operation of the circumstances in evidence in this case is properly stated in the plea; and, secondly, that the new rules have not made any difference in the principles and rules of pleading, except in those instances for which they have specially provided; and either they have not provided any other mode of pleading in this case, or, if they have, the objection should have been taken on demurrer, and cannot now be available; and upon consideration we think the argument well founded.

That all facts are to be pleaded according to their legal operation is clear, and the case cited on argument in *Butler & Baker's case* (*a*) is a striking instance of the application of that rule, and affords a close analogy to the present. It is said that if lands are given to a husband and wife, and the heirs of the husband, or to their heirs, and afterwards the husband dies, the wife may waive the joint estate, and bring her writ of dower; and the husband be said in pleading to be sole seised *ab initio;* and the refusal shall have such relation, in judgment of law, that the husband was sole seised *ab initio.*

In the present case the cheque was given in lieu of money, as a deposit on a sale; the consideration for giving it by the defendant was the plaintiff's contract to sell leasehold property of a certain description, which property in fact he had not to sell; and therefore the defendant had a right to rescind the contract, and would have been entitled to recover back the deposit if it had been paid in cash, and of course therefore he may resist the payment of his cheque, and that on the ground that the contract, which was the consideration, having been done away with *ab initio,* no consideration in judgment of law existed at all.

(*a*) 3 Coke, 27 a.

But then it may be said that, as the defendant would have been bound by his contract if there had been any unintentional error or mis-statement, and could only rescind it on the ground that the mis-statement was wilful, and therefore of necessity fraudulent, the true nature of the defence was, that the transaction was void on the ground of fraud, and therefore, by article 3 of rule 1, of Pleadings in *Assumpsit*, should have been specially pleaded.

If, however, this be such a case of fraud as falls within the rule, and we doubt if it be, the question is, whether the plaintiff can take advantage of the noncompliance with the rule in this stage; and we think he cannot. The note has been, in point of law, given without consideration, and the plaintiff's fraud has enabled the defendant so to treat it. The plea is therefore proved by the evidence, and that is the only point now to be decided.

The plea would, no doubt, have been bad on special demurrer, for, before the new rules, it would have amounted to the general issue, as being in truth no more than a denial of the implied allegation of consideration involved in that of drawing the cheque; and it was not authorized by the new rules, because they require some affirmative allegation; and the reason for so framing them was purposely to avoid any question as to the issue on such a plea. In the recent case of *Easton* v. *Pratchett* (*a*), the Court held a similar plea good after verdict, though they intimated that it would have been bad on demurrer; and still more recently, in the case of *Stoughton* v. *Earl of Kilmorey* (*b*), the Court decided such a plea to be bad on special demurrer.

We are therefore of opinion that the rule must be made absolute to enter a verdict for the defendant.

Judgment for the defendant.

(*a*) Ante, p. 798. (*b*) Ante, p. 72.

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A declaration in *assumpsit* stated that by the usage of racing, it was regulated that in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, in cash, bank bills, or banker's notes, payable on demand, and be placed in the hands of the person appointed by the stewards to receive the same; and in default thereof by any person, he should pay the whole stake as a loser.

ASSUMPSIT.—The first count stated, that whereas before and at the several times in this count after mentioned, by the practice and usage of racing, established and approved, it was regulated that in all races to be run, all stakes for matches, subscriptions, and sweepstakes, should be made before the hour of starting for the first race of the day, in cash, bank bills, or banker's notes payable on demand, and be paid into the hands of the person appointed by the stewards of such races respectively to receive the same, and in default thereof by any person he should pay the whole stake as a loser, whether his horse should come in first or not, unless such person should have previously obtained the consent of the party or parties with whom he was engaged, to his not staking. And whereas, it being so regulated by the practice and usage

the whole stake as a loser. The declaration then stated, that, it being so regulated, certain races were appointed to be run, and were run at L., of which one R. B. was steward, and one J. J. clerk of the races; and that there were at the races certain produce stakes to be run for, &c., and that a certain filly of the plaintiff and a certain colt of the defendant had been nominated for the stakes—that, by a regulation of the races at L., it was provided that all stakes, &c. should be paid to the clerk of the races before eleven o'clock on the day of running, or the owner should not be entitled, though a winner. The declaration then alleged that the plaintiff had, before the hour of starting, and before the hour of eleven o'clock on the day of running, made and paid his stake into the hands of the clerk of the races—that the defendant's colt ran, and came in first, and but for the defendant's default, according to the usage of racing, would have been entitled to the sweepstakes; but that the defendant did not, before the hour of starting for the first race of the day, or before eleven o'clock on that day, being the day of running, make his stake, or pay the same into the hands of the clerk of the races. It then averred that the plaintiff's filly did run, and came in second only to the defendant's colt, whereby the defendant became liable to pay the whole of the stake, &c.—Plea, that before the defendant had notice of the regulation of the races at L., and before the hour of starting for the first race of the day, and before the running for the race for the said sweepstakes, the defendant was ready and willing, and offered to make his stake for his said colt for the said sweepstakes in banker's notes payable on demand, and then tendered and offered to pay the said stakes in such banker's notes, into the hands of the said J. J.; but that the said R. B. then refused to allow the said J. J. to accept or receive the said stake, or to allow the defendant's colt to run for the sweepstakes, on the ground that the colt was disqualified to run for the said sweepstakes; and that the said J. J. did, in pursuance of such refusal of the said R. B., refuse to accept or receive from the defendant his stake, and to allow his colt to run for the said sweepstakes, on the ground and for the reason aforesaid, and on no other ground whatsoever.—Replication, that the defendant did not tender or offer to make his stakes for his said colt for the said sweepstakes, or to pay the same into the hands of the said J. J. until long after eleven o'clock on the day of running for the said sweepstakes, (although before and at that hour he had notice of the regulation of the said races at L.). *Held*, on special demurrer, that the replication was ill, and that if it was not a departure from the declaration, at all events that the replication did not shew any cause of action.

of racing as aforesaid, heretofore, to wit, on *Wednesday* and *Thursday*, the 26th and 27th days of *June*, in the year of our Lord 1833, races were appointed to be run, and were run, at *Ludlow*, in the county of *Salop;* of which races one *R. Betton*, esq. was the steward, and one *James Jones* was the clerk of the said races, and was then appointed by the said steward to be and was the person to receive all stakes for matches, subscriptions, and sweepstakes, to be run for at the said races. And whereas, at the said races, certain produce sweepstakes (to wit) sweepstakes for the produce of mares at the times of the respective nominations for the said sweepstakes supposed to be in foal, of fifty sovereigns each, were to be and were run for; and the produce of a certain mare called *Itty Pet*, by a certain horse called *Champion*, had been and was nominated to run in and for the said sweepstakes, and which produce was a certain colt, at the time of the running the said races, of the defendant; and the produce of a certain other mare called *Stella*, by a certain other horse called *Chateau Margaux*, had been and was nominated to run in and for the said sweepstakes, and which produce was a certain filly, at the time of running the said races, of the plaintiff. And whereas, by a certain regulation of the said races, at *Ludlow* aforesaid, it was further provided, that all stakes, entrance money, arrears, and fees, should be paid to the clerk of the said races before eleven o'clock on the day of running, or the owner should not be entitled, though a winner; of which several premises, the defendant at the times in this count after-mentioned had notice. And thereupon, heretofore, to wit, on the 26th day of *June*, in the year aforesaid, in consideration of the premises aforesaid, and that the plaintiff at the like request of the defendant had then promised the defendant in all things to conform to the practice, usage, and regulations aforesaid, he the said defendant promised the plaintiff that he would in all things

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conform to the same. And the plaintiff in fact says, that he, confiding in the said last-mentioned promise of the defendant, did afterwards, and before the hour of starting for the first race of the day and year last aforesaid, at *Ludlow* aforesaid, and before eleven o'clock on that day, being the day of running the said sweepstakes, make his stake, to wit, of fifty sovereigns for his said filly, being such produce as aforesaid for the said sweepstakes, in a bank bill (to wit) of the governor and company of the Bank of *England*, and did then pay the same to and into the hands of the said *James Jones*, then being the clerk of the said races, and the person appointed by the said steward to receive the same. And the plaintiff further says, that the said defendant's said colt, being such produce as aforesaid, was by the defendant brought to run, and did run for the said sweepstakes, and did come in first, and but for the defendant's default hereinafter next mentioned, and according to the practice, usage, and regulations aforesaid, he would have been entitled to the said sweepstakes. And the plaintiff further says, that the defendant did not, nor would, before the hour of starting for the first race, on the day and year last aforesaid, at *Ludlow* aforesaid, or before eleven o'clock on that day, being the day of running the said sweepstakes (although requested by the plaintiff so to do, and although he had not then obtained nor ever did obtain the plaintiff's consent to his not staking) make his stake (to wit) of fifty sovereigns for his said colt, being such produce as aforesaid, for the said sweepstakes, in cash, bank bills, or banker's notes payable on demand, or otherwise, or pay the same to or into the hands of the said *James Jones*, then being the clerk of the said races, and the person appointed by the said steward to receive the same. And the plaintiff further says, that his said filly did run for the said sweepstakes, and did come in second, and next only to the said colt of the defendant, whereby and according to the said practice, usage,

and regulations, and his promise aforesaid, the defendant then became liable to pay the whole of his stake (to wit) the sum of fifty pounds of lawful money of *Great Britain* to the plaintiff on request, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then and often since requested by the plaintiff to pay him the said sum of 50*l.*, according to the said practice, usage, and regulations, and his promise last aforesaid, yet, &c.

The second count was upon an account stated.

First plea, *non assumpsit.*

Second plea, to the first count of the declaration, that before the said defendant had notice of the said regulation of the said races at *Ludlow*, in the said first count mentioned, and before the said defendant was requested by the said plaintiff to make his said stake as in that count mentioned, and before the hour of starting for the first race of the day whereon the said races in the said first count mentioned were run, and before the running for the race for the said sweepstakes in the said first count mentioned, he the said defendant was ready and willing, and then offered to make his stake of 50*l.*, in the said first count mentioned, for his said colt, for the said sweepstakes in that count mentioned, in banker's notes payable on demand; and then tendered and offered to pay the said stake in such banker's notes into the hands of the said *James Jones;* but the said *R. Betton*, Esq. then refused to allow the said *James Jones* to accept or receive the said defendant's said stake, or to allow the said defendant's said colt to run for the said sweepstakes, on the ground that the said colt was disqualified to run for the said sweepstakes; and the said *James Jones* did accordingly, in pursuance of such refusal of the said *R. Betton*, Esq. then refuse to accept or receive from the said defendant his said stake, and to allow the defendant's said colt to run for the said sweepstakes, on the ground and for the reason aforesaid,

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and on no other ground whatsoever, of all which the said plaintiff before the commencement of this suit had notice. And this, &c.

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To the *second* plea, the plaintiff replied, that the defendant did not tender or offer to make his stake of fifty sovereigns in the said first count mentioned, for his said colt, for the said sweepstakes in that count mentioned, or to pay the same to or into the hands of the said *James Jones*, until long after eleven o'clock on the day of running for the said sweepstakes (although before and at that hour he had notice of the said regulation of the said races at *Ludlow*). And this, &c.

Demurrer, assigning for causes that the replication to the *second* plea tenders an immaterial issue; and also for that the same is a departure from the declaration, and does not fortify or strengthen the same. And for that the plaintiff in his replication to the *second* plea hath not traversed or denied any material facts alleged in the defendant's *second* plea; and for that the replication is in other respects defective, &c. Joinder in demurrer.

R. V. Richards in support of the demurrer.—The question depends on the contract as stated in the declaration, whether it was not sufficient if the defendant paid or offered to pay his stake on or before the hour of starting for the first race of the day on which the sweepstakes was to be run for, in order to exempt himself from losing his stake. [*Parke*, B.—According to the *Ludlow* regulation, if he paid before eleven o'clock, he would be entitled to the stakes if he won; but it does not provide, that if he does not do so, he shall pay the stake as a loser.]

The Court then called upon—

G. T. White to support the replication.—The difference between forfeiting the whole of a man's own stake and not being entitled though a winner, is a difference in words

only, and the substance of both is the same. [Lord *Abinger*, C. B.—The *Ludlow* regulation prevents the party from winning, unless he pays before eleven o'clock; but to make him liable to pay, the defendant must have refused or failed to pay his stake before the hour of starting for the first race of the day on which the sweepstakes were run for.] The expression used in the *Ludlow* regulation applies to the first regulation of the *Jockey Club*, stated in the declaration, by effecting an alteration in the hour to eleven o'clock instead of the hour of starting for the first race of the day. [Lord *Abinger*, C. B.—Is not the replication a departure from the declaration? By the declaration you make the hour of starting for the first race of the day material: then in the replication you say that he did not tender or offer to make his stake of fifty sovereigns, or to pay the same until after eleven o'clock. So that, according to that, you seem to insist that if he does not pay the stake before eleven o'clock, still he is bound to pay as a loser. You should have added, that he had not paid or offered to pay before the hour of starting.] The replication is not a departure from the declaration. It fortifies it, by shewing that the tender pleaded was not made in time, and so was a bad tender. [*Parke*, B.—Even if the replication be not a departure, then you have not stated any cause of action in the replication. If the defendant has not won, he has not lost.] It is submitted that the words "not being entitled though a winner," in substance mean the same thing as paying the whole stake as a loser. [*Parke*, B.—In my opinion, they certainly do not.]

Per Curiam.—There must be

Judgment for the defendant.

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To a declaration in *assumpsit*, brought to recover the sum of 30*l.*, the defendant pleaded, *first*, to the whole declaration, payment of the sum of 27*l.* 4*s.* 4*d.* into Court, and that the plaintiff had not sustained damages to a greater amount; *secondly*, except as to 27*l.* 4*s.* 4*d.*, *non assumpsit*; *thirdly*, payment of the sum of 10*l.* before action; and *fourthly*, as to all except 27*l.* 4*s.* 4*d.*, a set-off. The plaintiff replied, that he accepted the money paid into Court, and was satisfied:—*Held*, that the defendant was not justified in signing judgment of *nonpros*, for want of a replication to the said pleas.

ASSUMPSIT. The defendant pleaded,—*first*, to the whole declaration, that the plaintiffs ought not further to maintain their action, because the defendant, on &c. brought into Court 27*l.* 4*s.* 4*d.*, ready to be paid to the plaintiffs; and the defendant further said, that the plaintiffs had not sustained damages to a greater amount than the said sum of 27*l.* 4*s.* 4*d.* in respect of the causes of action in the declaration mentioned, &c. And, for a *second* plea, the defendant pleaded, except as to the sum of 27*l.* 4*s.* 4*d.* *non assumpsit*. And, for a *third* plea, as to 10*l.*, other parcel of the sums of money in the declaration mentioned, that the defendant paid to the plaintiffs 10*l.* before the action was commenced. And *fourthly*, except as to the said 27*l.* 4*s.* 4*d.*, that the plaintiffs were indebted to the defendant in 50*l.* The plaintiffs replied in the form given in the new rules, that they accepted the said sum of 27*l.* 4*s.* 4*d.* in discharge of the causes of action in the declaration mentioned, and were satisfied. They took the money out of Court and taxed their costs. Whereupon the defendant signed judgment of *nonpros* against the plaintiffs for not replying to the other pleas. It appeared by the particulars delivered, that the action was brought for 30*l.*, the balance of an account of 40*l.* A rule having been obtained by *Comyn* on a former day in this term, to set aside this judgment for irregularity—

Addison now shewed cause.—The plaintiffs not having replied to all the pleas, the judgment is regular. It will, however, be contended on the part of the plaintiffs, that the plea of payment of money into Court being pleaded to the whole declaration, the plaintiffs were justified in discontinuing their action, according to the rule of *Hilary* Term, 4 *Will.* 4, s. 19. That rule is, that "the plaintiff, after

the delivering of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed." But it is submitted, that the plaintiffs had no right to pass by the other pleas, and leave them unanswered. The defendant was, therefore, for the purpose of obtaining his costs of those pleas, compelled to sign a judgment of *nonpros*, and had no other means of obtaining them. The defendant could not sever the sum in the declaration, and plead as to 27*l.*, parcel &c. of the money in the declaration, payment of that sum into Court. *Hodges* v. *Lord Lichfield* (*a*).

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PARKE, B.—You had no necessity to plead the payment of the sum of 10*l.*, as that was admitted by the particulars. But if there be another 10*l.* you should have pleaded the payment of that 10*l.* in the first place: then you should have pleaded the set off, and then the plea of the payment of money into Court. You should first exhaust all your defences to the other portions of the demand, and then plead the payment of money into Court to the residue. Here, there were inconsistent pleas on the record to the whole declaration, and the defendant's judgment of *nonpros* was irregular.

The rest of the Court concurred.

Rule absolute.

(*a*) 9 Bing. 713; 3 Mo. & Scott, 210, S. C.

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The addition of the defendant need not be inserted in the writ of summons. It is sufficient to state his residence.

IN this case, *Miller* moved to set aside the service of the writ of summons for irregularity, on the ground that the defendant being an attorney, he was only described as of *Paper Buildings* in the *Inner Temple, London:* his addition of "gentleman" was not given.

Per Curiam.—The form in the statute *2 Will.* 4, c. 39, s. 1, does not require the addition of the defendant to be inserted in the writ. The form of the writ of summons given in the schedule to that act is, "To *C. D.*, of &c.," that is only for the residence, and here it is given.

Rule refused.

THOMAS BALL *v.* WILLIAM CULLIMORE, THOMAS WITHERS, and Others.

A feoffment by a lessor, with livery of seisin made on the land, operates as a determination of a tenancy at will, although the tenant at will be off the land at the time the livery is made, and has had no notice of the determination of the will.

TRESPASS. The first count of the declaration was for breaking and entering the plaintiff's close, situate at *Whitfield*, in the county of *Gloucester*, and ejecting the plaintiff therefrom, &c. The second count was for an assault and battery. Pleas, not guilty, and a justification to both counts; upon which, however, no question arose (*a*).

At the trial before *Alderson*, B., at the last Summer Assizes for the county of *Gloucester*, the only question was, whether the plaintiff was lawfully in possession of a close of land, inclosed from the waste by one *Richard Withers*, the father of the defendant *Thomas Withers*. The inclosure from the waste had taken place about

(*a*) The pleadings were before the new rules as to pleading came into operation.

thirty years ago; since which time, *Richard Withers* had continued in quiet possession of the land until about six or seven years ago, when he agreed to sell the land to his son for the sum of *5l.*; and the son was in pursuance of that agreement put into possession: but only a small part of the purchase money was paid. *Thomas Withers*, the son, continued in quiet possession down to the year 1831, when *Richard Withers*, the father, not having been able to obtain the remainder of the purchase money, at the plaintiff's request, agreed to sell him the land for the sum of *5l.*; and the plaintiff having paid the money, a feoffment was accordingly prepared by one *Baxter*, an attorney, and duly executed by *Withers*, the father, and the plaintiff, with livery of seisin indorsed. After the feoffment was executed, the attorney of the feoffor proceeded to the land in order to make livery of seisin, for the purpose of delivering possession to the plaintiff; and possession was accordingly delivered to him. It appeared, that, shortly before the parties went on the land, they saw *Withers* the son upon the land, but there was no person upon the land when they got there. The possession of the land was disputed by *Thomas Withers*, the son, down to the commencement of the action. The jury found that *Thomas Withers* did not go off the land for the purpose of giving up possession. The learned Judge directed the jury to find a verdict for the defendants; but gave the plaintiff liberty to move to enter a verdict for him, if the Court should be of opinion, that the livery of seisin was sufficient in point of law to confer a valid title on the plaintiff. *Ludlow*, Serjeant, having in *Michaelmas* Term last obtained a rule accordingly—

Maule, *R. V. Richards*, and *Lumley* shewed cause.—The land in question having been already sold by the father to the son, and he having been put into possession, the sale to the plaintiff afterwards was a void sale; for, although there may not have been a sufficient conveyance from the

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father, yet still the son had a legal possession, which it was necessary should be put an end to, before the father could convey the property. Suppose *Withers*, the father, had a good right originally to sell and convey away this land, he had disposed of that right by the sale to his son; and having given up possession to him under that contract, he thereby conferred upon him a legal possession; and until that was determined, the sale to the plaintiff was the sale of a mere title, contrary to the Statute of Champerty, *32 Hen.* 8, c. 9. [Lord *Abinger*, C. B.—The father still had the legal estate in him, and therefore had something still to convey, as the contract of sale was not carried into effect by deed. There was no evidence of any sale but an equitable sale.—*Parke*, B. The son was not holding adversely, but as tenant at will to his father.] His rightful title undoubtedly would be as tenant at will, but he was claiming adversely. [*Parke*, B. The evidence of the contract of purchase, and of his being put into possession under that contract, shewed that he was in possession as tenant at will; that was his legal title.] It is submitted that the son was in possession holding adversely. But, assuming that the possession was not adverse, there was still the tenancy at will, which it was necessary should be determined; and the entry on the land to give livery of seisin to the plaintiff under the feoffment, in the absence of the tenant, could not have that effect. [*Parke*, B.—There is an authority in *Com. Dig. Estates*, (H. 6.) that if the lessor comes on the land and makes a feoffment, it determines the will.] It is certainly so laid down, but that must be intended when the tenant is on the land and has notice of it (*a*). In *Com. Dig. Feoffment*, (B. 7.) it is stated that the livery will be good, if the tenant be only lessee at will, though he dissents, for the livery shall be a determination of the will; and *Dyer*, 186,

(*a*) See Com. Dig. Est. (H. 6.) where it is expressly laid down that, "If the lessor comes upon the land, he may determine his will in the absence of the lessee." Co. Lit. 55. b.

is cited. But it may be argued that the words "though he dissent" imply that possession has been previously demanded, and, after that, the tenant at will became a mere trespasser. The feoffor ought not to be allowed to make the tenant at will a trespasser, which this would have the effect of doing, without his knowledge, or some notice or demand of possession. If entitled to possession to make livery, he must be entitled to maintain an ejectment, which it has been decided the lessor cannot do without a demand of possession. *Goodtitle* d. *Gallaway* v. *Herbert* (*a*). [*Parke*, B.—The rule of law is, that if the landlord goes upon the land and makes a feoffment with livery, then, whether the tenant be present or absent, it determines the will. It is a notorious act.]

Ludlow, Serjt., and *W. J. Alexander*, *contrà*, were stopped by the Court.

Lord ABINGER, C. B.—A tenant at will has a mere scintilla of interest, which the landlord may determine by making a feoffment with livery upon the land or by a demand of possession. There is no doubt here that the father had contracted to sell the land in question to his son, and that the son had been put into possession under that contract; but the son had only a mere equitable interest, of which a Court of law cannot take notice; at law, he had no other title than that of a tenancy at will. Any mode by which the will was determined would entitle the father to maintain an ejectment. If the lessor makes feoffment with livery of seisin on the land it is a solemn act done by him which would have that effect. The general rule of law that any act done upon the land by the lessor in assertion of his title to the possession determines the will, is a sufficient ground for us to say that this feoffment and livery of seisin did determine it. I therefore think that the title of the plaintiff was a good and valid title.

(*a*) 4 T. R. 680.

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PARKE, B.—I am entirely of opinion that *Withers* the son was nothing more than a mere tenant at will. He had nothing more than a lawful possession; and must be considered as having that kind of legal title to the possession, which in law is recognised as a tenancy at will. Then the father executes a feoffment to the plaintiff, and livery of seisin is given. I am clearly of opinion that the entry on the land to make livery of seisin determined the will. Any act of that kind determines the will whether the tenant knows it or not. It consequently follows, that, by the feoffment and livery, the plaintiff acquired a good title, and that the defendant who entered afterwards was a trespasser.

BOLLAND, B.—I am clearly of opinion that the defendant *Withers* had no title to this land, and the authorities clearly shew that the plaintiff's title was a good title.

ALDERSON, B.—I am of the same opinion.

WRIGHT *v.* NEWTON.

A. contracted with *B.* for the purchase of the good-will and fixtures of a public house, at the sum of 120*l.*; 50*l.* was to be paid as a deposit on the landlord's consenting to the change of tenancy, and, on the remainder of the purchase money being paid, *A.* was to have possession. The landlord, on application, gave a verbal consent, and the 50*l.* was acordingly paid. *A.* sent part of his furniture to the house, and went to reside in part of it; *B.*, however, still continuing to reside and carry on the business there. Some time afterwards, the remainder of the purchase money not having been paid, and possession not having been given up to *A.*, the landlord withdrew his consent:—*Held*, that the contract was conditional on the landlord's consent being obtained; and that the verbal consent originally given having been withdrawn before any change of tenancy had taken place, it must be considered as not having been given, and, the condition not having been performed, that the money was paid on a consideration which had failed, and that *A.* might maintain money had and received, to recover back the 50*l.* paid.

ASSUMPSIT for money had and received. Plea, *non assumpsit*.

At the trial before *Alderson*, B., at the last *Lancaster* Assizes, it appeared that the defendant being in the occupation of a public-house, and being desirous of leaving it,

entered into a verbal agreement with the plaintiff for the sale to him, on behalf of a Mrs. *Williams*, of the goodwill and fixtures of the house, at the sum of 120*l.*, 50*l.* of which was to be paid on the *Monday* after, if the landlord consented to the change of tenancy, and on payment of the remainder of the money the defendant was to give up possession. The 50*l.* was paid to the defendant on the 19th of *May*, and on the 20th, on application being made to the landlord, he verbally agreed to accept Mrs. *Williams* as tenant. In consequence of this, Mrs. *Williams*, for whom the house had been taken by the plaintiff, removed, and took her furniture to the defendant's house, and went to reside there, and continued there for five or six weeks, and carried on the business, but the defendant and his wife also continued to reside there. It appeared, that, on the 2nd of *June*, the landlord withdrew his consent to accept Mrs. *Williams* as tenant. The defendant on being informed of this, said that Mrs. *Williams* might keep his, the defendant's, name up, and he would give possession in spite of the landlord. Mrs. *Williams* subsequently, by the defendant's consent, took away her furniture, but the defendant refused to return the 50*l.* The defendant afterwards sold the goodwill and fixtures to another person, who was accordingly let into possession. This action was brought to recover back the sum of 50*l.*, as money had and received for the use of the plaintiff. The learned Baron left it to the jury to say whether the parties had agreed to rescind the contract, and if they were of that opinion, he directed them to find a verdict for the plaintiff; which they accordingly did.

Creswell now moved by leave of the learned Baron to enter a nonsuit.—There was no evidence to shew that the parties had agreed to rescind the con-

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tract, so as to make this money had and received to the use of the plaintiff. The landlord's withdrawing his consent could not have that effect, as there must be the consent of all the parties to the contract. The evidence is, that the defendant agreed to let Mrs. *Williams* take her furniture away, but that he refused to return the 50*l.*; and therefore, there is no evidence of any consent to rescind the contract. The plaintiff ought, therefore, to have declared specially for a breach of the contract, and could not maintain money had and received. [*Parke*, B.—Does it appear that Mrs. *Williams* went in as tenant? She went there with her furniture, but the defendant and his wife still remained there and carried on the business. Had not the landlord a right to withdraw his consent? And was not the contract conditional upon the landlord's consent being obtained?] There could be no right to rescind after there had been a part performance of the contract. The goods were not taken to the defendant's until after the landlord's consent had been given, and 50*l.*, part of the sum agreed upon, had been paid. It could not, therefore, be said that the contract had entirely failed. [*Alderson*, B.—The defendant carried on the business afterwards, and Mrs. *Williams* was not to have possession until the rest of the money was paid, and the licence transferred. *Parke*, B.—Was the landlord's consent binding upon him. Mrs. *Williams* did not take possession as tenant.] The consent was binding on the landlord, as it operated as an agreement for a parol demise, which need not be in writing. [*Parke*, B.—An agreement for a demise to commence *in futuro* must be in writing. The parol consent was not sufficient to give an *interesse termini*. Was not the whole matter executory until Mrs. *Williams* took possession as tenant? It is a condition in the agreement, that the landlord's consent shall be obtained. If the condition is not per-

formed, then the plaintiff is entitled to recover back the 50*l.*] If there had been any failure on the defendant's part to perform the contract, then it is admitted, that the plaintiff might have been entitled to recover the 50*l.* If the plaintiff had paid the remainder of the money before the 2nd of *June*, possession of the premises would have been given to Mrs. *Williams* as tenant, before the landlord had withdrawn his consent. As it was Mrs. *Williams's* own fault that the money was not paid before the consent was withdrawn, the plaintiff cannot be entitled to recover.

PARKE, B.—It seems to me that this was a contract with a condition that the landlord's consent should be obtained; and the question is, has that condition been performed? There was a deposit of 50*l.* made upon the landlord's agreeing to take Mrs. *Williams* as tenant, but the remainder of the money not having been paid, and Mrs. *Williams* not having entered into possession as tenant, the landlord subsequently withdrew his consent. I think it must be taken as if the landlord never has consented; and if so, the condition has not been performed. There would be nothing to bind the landlord unless there had been an actual transfer of the possession. The money was paid on a consideration which has failed, and therefore the plaintiff is entitled to recover it back, as money had and received to his use. The simple question is, whether the landlord's consent of the 19th of *May* was binding upon him? I think it was not, and therefore the condition was not performed. There must be no rule.

BOLLAND, B.—The consent would have been sufficient if Mrs. *Williams* had acted upon it before it was withdrawn, by paying the remainder of the purchase money, and getting into possession as tenant. As it was withdrawn before Mrs. *Williams* took possession as tenant, I think that the verdict was right.

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ALDERSON, B.—I think that the defendant never gave up possession to Mrs. *Williams* as tenant. He kept possession of the house for a very good reason; because the remainder of the purchase money was not paid.

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Rule refused.

WELLS *v.* ODY.

In trespass for building upon and heightening the plaintiff's wall, and thereby obstructing his lights, the defendant pleaded the general issue. At the trial, the defendant having proved that the wall was a party wall, and that he had acted under a *bonâ fide* impression that the provisions of the Building Act, 14 *G.* 3, c. 78, s. 43, justified him in raising the wall, the plaintiff was nonsuited, he not having given a notice of action, as required by s. 100 of that act:—*Held*, that the evidence was properly received under the general issue, and that the nonsuit was right.

TRESPASS.—The declaration stated, that the defendant heretofore, to wit, on &c., and on divers other days, &c., with force and arms, &c., broke and entered a certain close of the plaintiff, situate in the parish of *St. Mary-le-Strand*, in the county of *Middlesex*, and there put, placed, laid, and fixed divers large quantities of bricks, stones, tiles, mortar, pieces of timber, and wood, and other building materials, in and upon a certain wall, of and belonging to the said plaintiff, before that time erected and being there, and thereby and therewith raised, erected, and built a certain building upon the said wall of the said plaintiff, and kept and continued the said bricks, &c., and the said other building materials, and the said building so erected and built upon the said wall of the said plaintiff as aforesaid, for a long space of time, to wit, from thence hitherto, whereby the said wall was and is greatly weakened, encumbered, and heightened, and by reason thereof the light and air, which during all the time aforesaid of right ought to have entered and come into a certain messuage or dwelling-house with the appurtenances of the said plaintiff, situate and being near to the said wall, have during all the time aforesaid been and still are hindered and prevented from coming unto and into the said dwelling-house with the appurtenances of the plaintiff, and the same hath been and is, by means of the said several trespasses and premises aforesaid, rendered close, uncom-

fortable, unwholesome, and unfit for habitation, and the said plaintiff hath thereby been and still is greatly annoyed and incommoded in the use, possession, and enjoyment of his said dwelling-house with the appurtenances, and other wrongs, &c.

The defendant pleaded not guilty.

At the trial before *Gurney*, B., at the *Middlesex* Sittings after last *Hilary* Term, the plaintiff, having proved the raising of the wall, contended that the defendant had admitted the property in the wall to belong to the plaintiff by not pleading specially. The defendant proposed to shew that this was a party wall, and that he had acted, or at least *bonâ fide* intended to act, in pursuance of the Building Act, 14 *Geo.* 3, c. 78, and contended, that he was entitled to give the special matter in evidence under the general issue, and was entitled to twenty-one days' notice of action by virtue of the 100th section of that act. Mr. Baron *Gurney* was of opinion that the defendant, on shewing himself to have acted within the Building Act, was entitled to set up that defence under the general issue. The defendant having then proved that the wall was a party fence wall, and that the erection thereon was according to the act, Mr. Baron *Gurney* nonsuited the plaintiff, on the ground that no notice of action had been given.

Bompas, Serjt., now moved to set that nonsuit aside, and for a new trial.—By the new rules (*a*), the general issue in trespass only amounts to a denial that the trespass was committed; not to a denial of the plaintiff's possession, or his right of property; and therefore the defendant had no right to set up this defence under that plea. The defendant, however, contends, that the wall in question was a party-wall, and that the trespasses complained of

(*a*) See R. V. s. 2, H. T. 4 Will. 4.

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having been committed in raising the wall according to the provisions of the Building Act, 14 *Geo.* 3, c. 78, s. 43, he was entitled to protection under that act; and that, as the plaintiff had not given twenty-one days' notice of action, in pursuance of the 100th section of that act, the defendant was entitled to a nonsuit; and *Pratt* v. *Hillman* (*a*) was cited at the trial to shew that this was a case within the protection given by that act. It is submitted, that, even if that were so, the defendant was bound to shew that he had proceeded strictly in pursuance of the act, which in this case he has not done. The *onus* was on the defendant to shew that he acted according to the provisions of the Building Act, to entitle himself to a notice of action. [*Alderson*, B.—Suppose the general issue were pleaded in this form, that, according to the form of the statute, he is not guilty, (which it would be very convenient if it were done, in order to apprize the plaintiff that the defendant intends to give the special matter in evidence under it, according to the provisions of a statute), then the plaintiff must have proved his title to the wall to maintain the action, and prove that he had given notice.] In *Titterton* v. *Conyers* (*b*) it was held that the Building Act had not destroyed the right to lateral windows which existed before that act, which shews that the Building Act does not authorize a party to build up his wall, so as to destroy the light in another's house. The 43rd section directs, that any party fence wall may be raised by or at the expense of the proprietor or occupier of the ground on either side adjoining thereto; but, in that case, as was said in argument by *Shepherd*, Solicitor-General, "that section applies only to cases wherein the liberty thereby given can be exercised without interfering with the prior rights of others." The latter part of the section provides, that the party erecting the wall shall make good every damage that may accrue to the adjoining pre-

(*a*) 6 Dowl. & Ryl. 360, 481; 4 B. & Cr. 269. (*b*) 5 Taunt. 465.

mises by such rebuilding. [Lord *Abinger*, C. B.—If the trespass can be justified under the Building Act, it is no answer to such a defence in trespass, that the plaintiff has suffered a consequential injury.] Suppose a building is erected, which the Building Act does not authorize under any circumstances, the person who built it could not justify it under that act. [*Alderson*, B.—The stat. 3 & 4 *W.* 4, c. 42, s. 1, provides that "no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so, by virtue of any act of Parliament now or hereafter to be in force." Suppose the party says, I have proceeded under the Building Act, and I plead not guilty. That puts in issue all the facts, upon which the plaintiff seeks to recover, and he must prove his possession. Lord *Abinger*, C.B.—Suppose a party *bonâ fide* intends to proceed under the Building Act, and mistakes the mode of proceeding, is he not entitled to notice, and to plead the general issue, and give the special matter in evidence? It is the same as where a magistrate exceeds his authority, believing that his authority extends to the subject matter in question; and there it has been held, that he is entitled to notice. The present act of Parliament says, that where any action shall be brought for any thing done in pursuance of that act, the party shall have notice of any such action. We should fritter away the clause altogether if we were to hold that a party was not so entitled, because he did not bring himself within the strict letter of the act.] If it were shewn that the defendant could by no possibility be justified by the statute, the defendant would surely not be entitled to notice, and to protection under it.

Lord ABINGER, C. B.—This action is not in case for obstructing the plaintiff's lights, but for a trespass. Where

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a party acts *bonâ fide* under the Building Act, but mistakes its provisions, he is entitled to protection under it. In *Theobald v. Crichmore* (*a*), which was an action against a constable for breaking open an outer door under a magistrate's warrant for the purpose of levying a church rate, Lord *Ellenborough* said, "It is perfectly clear that the defendant had no right to break open the outer door for the purpose of executing his warrant of distress. The question is then, whether he can be said to have acted in pursuance of the statute within the meaning of that term as there used: if it meant only acts lawfully done under the authority of the statute, he would not be protected. But the object was clearly to protect persons acting illegally, but in supposed pursuance of and with a *bonâ fide* intention of discharging their duty under the act of Parliament. The argument goes to shew, that in every case where the law is exceeded, the officer loses the benefit of the statute: but in those cases only can he require its protection." Wherever a party acts *bonâ fide* under the Building Act, he may plead the general issue, and give the special matter in evidence, and is entitled to notice of action.

ALDERSON, B.—I think you ought to have proved more under the general issue. You ought to have proved that you had given notice of action. There is certainly an inconvenience arising from pleading the general issue under a statute in the general form. Perhaps in such a case the plaintiff might take out a summons before a Judge to inquire what defence the party intended to set up under it. The Judges were desirous that some regulation should be made as to the form in which a general issue under a statute should be pleaded, but they thought they were prohibited by the late act from so doing.

The rest of the Court concurred.

Rule refused.

(*a*) 1 B. & Ald. 227, 229.

RICHARD BLAKEMORE and THOMAS BOOKER *v.* The GLAMORGANSHIRE CANAL COMPANY.

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In an action brought by *A.* and *B.*, for diverting water from their works, it appeared that *A.*, when in the sole possession of the same works, had brought a former action for a similar injury, against the same defendants, in which he had recovered a verdict and judgment against them; and it being proved that *A.* and *B.* were now in possession of the same works:—*Held*, that this was abundant *primâ facie* evidence, that the present plaintiffs were privy in estate to the former plaintiff, and that the verdict and judgment in the former action were admissible in evidence against the same defendants in this action.

Held, also, that the circumstance of *B.'s* having been examined as a witness in the former action, when he was disinterested, did not render such verdict and judgment inadmissible.

By a canal act, 30 *Geo.* 2, c. 82, s. 7, the owners of certain works called the *Pentyrch* works, were entitled to all the surplus water, or such as was not wanted for the purposes of the canal. By a subsequent act, 36 *Geo.* 3, c. 69, the canal company were required to finish the canal and all the works and extension of the same, within the space of two years, and were restricted from making any alterations in the canal after the expiration of that time. After the expiration of the two years, the canal company erected an engine for the purpose of forcing up water into the canal, by which the quantity of water was increased, and the company were enabled to pass down a greater number of barges than could have been passed down before the erection of this engine:—*Held*, that this having had the effect of diminishing the quantity of surplus water, in consequence of the increased trade, was an injury to the owners of the *Pentyrch* works, for which they were entitled to recover consequential damages.

The 30 *Geo.* 3, c. 82, s. 7, also provided for the purpose of better securing the surplus water for the benefit of the *Pentyrch* works, that the lock which should be made below and nearest to the *Pentyrch* works, should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or waste of water, &c. The canal company constructed a notch for the purpose of conveying water below the lock directed to be kept in repair:—*Held*, on the construction of this section, *Parke*, B., *dubitante*, that the company had no right to pass any water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the lock, and that the notch was not authorized by the act of Parliament.

CASE for the diversion of certain water, to which the plaintiffs claimed to be entitled.—Plea, the general issue. The cause was tried at the last *Summer* Assizes for the county of *Gloucester*, before *Alderson*, B., when a verdict was found for the plaintiffs. In *Michaelmas* Term, *Maule* obtained a rule to show cause why there should not be a new trial. The case was argued on several days during the past and present Terms, by *Ludlow*, Serjt., and *R. V. Richards* against the rule, and by Sir *John Campbell*, *Maule*, *Talfourd*, Serjt., and *E. V. Williams*, in support of it. The facts of the case are so fully stated, and the arguments so fully discussed, in the judgment of the Court, that the repetition of either in this place is unnecessary. After taking time to consider, the judgment of the Court was pronounced during the present term, by

PARKE, B.—This cause was tried before my Brother

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Alderson, at the last *Summer* Assizes for the county of *Gloucester;* and a general verdict found for the plaintiffs.

A motion has been made for a new trial, and the case fully argued before my Brothers *Bolland*, *Alderson*, *Gurney*, and myself, on several grounds, which will be fully stated and considered; but it will be proper, first, to state the circumstances under which these questions arise.

The act of Parliament (*a*) for making the *Glamorganshire* canal passed in the year 1790; its course was from *Merthyr Tidvill* to a place called the *Bank*, near *Cardiff*. The principal supply of water was to be obtained from the river *Taaffe*.

It appears, that, before that time, mills and iron-works had been established, which employed a considerable part of the waters of that river, and were entirely dependent upon them.

If the proposed company could not construct their canal without depriving these mills and iron-works of the water required for their use, it would be necessary to buy up their interests.

If the two could exist at the same time, that is, if there was water sufficient for both, then it would become necessary that means should be taken that the construction of the canal should not deprive the mills and iron-works of any portion of the water to which they were by law entitled.

The latter was the course preferred, and clauses were introduced to give protection to those prior interests, which were entitled to the preference.

The 4th sect. is framed for the protection of the mills and iron-works of the Earl of *Plymouth*. By that section those mills were protected in the complete enjoyment of all the water of the river, and the company were prohibited from taking even the lockage water from one level of the canal to the other; for that clause provides, that the

(*a*) 30 Geo. 3, c. 82.

lockage water shall be discharged, when the lock is filled from above, direct into the river *Taaffe*, and not through the lower gates of the lock.

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A different and more limited protection is, however, provided by the 5th, 6th, and 7th sections, which are framed for the protection of the *Melin Griffith* works and the *Pentyrch* works, by appropriating to them not the whole water, but only the surplus water, after that which was required for the use of the canal had been first subtracted: the 7th is the most material.—[Here the learned Baron read the clause (*a*).] And the construction

(*a*) "Provided also, and be it further enacted, that a proper weir shall be made upon the side of the said canal by the said company of proprietors, above the weir already erected upon the river *Taff*, for conveying the water from the said river to the iron-works belonging to *William Lewis*, Esq., called *Pentyrch* works, in some place between the brook at *Nantgarw* turnpike and the said weir already erected for securing the surplus water, or such as shall not be necessary for the use of the said canal, for the benefit of *Pentyrch* works aforesaid; which wier shall be kept in constant and sufficient repair at the expense of the said company of proprietors; and for better securing such surplus water for the benefit of the said *Pentyrch* works, the lock which shall be made upon the said canal, below and nearest to the said weir already erected as aforesaid, shall always be kept in good and sufficient repair and condition by the said company of proprietors, for the purpose of preventing leakage or waste of water; and in case such lock shall at any time be found out of repair, or anyways defective for the purpose aforesaid, and the said company of proprietors shall not forthwith, upon notice given to them or any of their agents, by writing under the hand of the said *William Lewis* or the proprietor or proprietors of the said iron-works for the time being, of such lock being out of repair or defective as aforesaid, then and in such case it shall be lawful for the said *William Lewis*, or such other proprietor or proprietors of the said iron-works, to cause such lock to be repaired or amended in such manner as he or they shall think necessary for rendering the same effectual for preventing any leakage or waste of water, and the expenses thereof (to be settled by the said commissioners, in case of any disagreement touching the same) shall be reimbursed and paid to the said *William Lewis*, or such other proprietor or proprietors of the said iron-works, by the said company of proprietors."

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of this section gave rise to a question on the trial, and to considerable discussion on the motion for a new trial.

After the year 1790, the company proceeded to construct the canal.

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In the year 1796, another act passed (*a*), reciting that the company had raised the 90,000*l.* which they were empowered by the former act to raise; that they had expended that sum in carrying on the said canal, and other works, but found that it would require a further sum to enable them to finish and complete the same: reciting further, that they were extending the navigation from the place called the bank to a place called the lower layer, below the town of *Cardiff*, which extension, when completed and made part of the said canal, would be of public utility. It then gave power to make the extension and to raise 10,000*l.* more for that purpose, and prescribed the manner in which the money should be employed.

And by the 3rd sect. it was provided, that the said works, and the extension and all other works incident to the canal and extension, should be completed within two years next after the passing of the act.

That act received the royal assent on the 26th *April*, 1796. The 26th of *April*, 1798, therefore, was the limit for the completion both of the original canal and the extension.

After the expiration of these two years, to wit, in 1809, the company, at a spot higher than the *Pentyrch* works, erected an engine, called the *Pontyrein* engine, which by increasing the supply of water at the upper parts of the canal by pumping an additional quantity from the river *Taaffe*, enabled the company to pass down a greater number of barges than could have been passed down by the supply of water from the *Taaffe*, according to the original construction of the canal.

This would necessarily occasion an increased expendi-

(*a*) 36 Geo. 3, c. 69.

ture of water in the locks below, and would prevent the same quantity of water going over the wier, erected in pursuance of the 7th sect. called the parliamentary wier, for the use of the *Pentyrch* works, as had gone over previously.

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But this, it is said, was not complained of, until another operation was performed; namely, the deepening of the sea lock, by which not only the traffic of the canal was extended, but even a new species of traffic (the carriage of coals) introduced.

This occasioned a still larger demand of water from above, and further diminished the supply of water passing over the parliamentary wier to the *Pentyrch* works.

In 1827, the plaintiffs brought an action against the company for the injury which he conceived he had sustained from the abstraction of water both from the *Melin Griffith* and *Pentyrch* works, by the erection of the *Pontyrein* steam engine, the deepening of the canal, the making the sea lock, and the division of the water by what was called the fraudulent wier.

The plaintiff obtained a verdict with entire damages on the whole declaration.

The company sued out a writ of error into the *Exchequer Chamber*; the judgment for the plaintiff was affirmed:— the company sued out a writ of error into the House of Lords, and there too the judgment was affirmed in 1832.

This judgment was given in evidence at the trial of this cause. Notwithstanding this judgment in the House of Lords, the company has persisted in the use of the *Pontyrein* engine and the sea lock, by both of which they have abstracted water from the plaintiffs' works; and although they have apparently removed the injury arising from the wier called the fraudulent wier, by placing at the dry season of the year boards therein, which, as well as the locks, they have made and carefully kept water-tight, yet they have substituted for the fraudulent wier, by

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which water formerly was supplied to the lower parts of the canal, a notch placed near the lock next below the wier called the parliamentary wier.

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This notch consists of a draw-gate suspended above a fixed sill, and is managed so that, by being kept constantly open at a given depth, the aperture being capable of regulation as to size, a given and limited quantity of water is kept continually flowing down to the lower levels of the canal, so as to supply the deficiencies arising from the original construction of the canal, and the increased traffic thereon. It is apparent, therefore, that this is only the old fraudulent wier in a limited and regulated state.

The learned Judge was of opinion on the trial, that this notch was not authorized by the 7th section. He was also of opinion, that the plaintiffs were entitled to recover damages, arising from the greater consumption of water from the increased trade on the canal, if such increased trade was occasioned by the unauthorized acts of the company; and the jury found for the plaintiffs with 500*l.* damages.

A rule *nisi* for a new trial was obtained on these three grounds:—*First*, that improper evidence was received; *secondly*, that the learned Judge misdirected the jury; *thirdly*, that the verdict was not warranted by the evidence.

The first objection was, that the verdict and judgment in the former action, in which *Blakemore* alone was plaintiff, were received in this action brought by *Blakemore* and *Booker* against the canal company, the issues in both being similar: and it was contended, that it was inadmissible, *first*, because there was no sufficient evidence that the present plaintiffs were privy in estate to the plaintiff in that action; and if they were, *secondly*, that the circumstance of *Booker* having been examined as a witness in that case, would prevent his making use of that verdict. We are all of opinion, that this objection is unfounded.

There is no doubt that a verdict for an owner of an

estate, upon a question relating to the rights and easements belonging to that estate, is evidence for another claiming under him. And in this case, there was proof that Mr. *Blakemore* was in possession of the works, when the former cause of action accrued; and that he and *Booker* were so at the time of the present cause of action; and this is without doubt abundant *primâ facie* evidence, that the present plaintiffs were privy in estate to the former plaintiff.

Does it then make any difference, that one of the present plaintiffs was himself a witness in the former suit, when he was disinterested? We are of opinion that it does not.

The case being brought within the general rule, that a verdict on the matter in issue is evidence for and against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it, which forms one of the reasons why verdicts between different parties are held to be inadmissible; any more than the absence of all such circumstances in a particular case, would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser and more convenient for the administration of justice, to abide as much as possible by general rules.

Nor is there any authority to be found, which, when properly understood, is in favour of such an exception. There are dicta of very learned judges at *Nisi Prius*, in cases in which, when they are properly rejecting records which were inadmissible on the principle of *res inter alios acta*, they assign one reason which exists in the particular case, instead of relying on the general rule. These are the dicta of Lord *Ellenborough* in *Smith* v. *Rummens* (*a*), and Lord Chief Justice *Mansfield* in *Hathaway* v. *Barrow* (*b*). There are also to be found cases in which the

(*a*) 1 Campb. 9. (*b*) Id. 151.

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courts, exercising their equitable jurisdiction, have refused to permit parties to avail themselves, on motions, of convictions of perjury, obtained by their own evidence, and that on account of the inconvenience which it would occasion if a practice of this kind were allowed. Such are the cases of *Burdon* v. *Browning* (*a*), *Bartlett* v. *Pickersgill* (*b*), contrary to what is said in *Rex* v. *Eden* (*c*). Yet it is to be observed, that even in these cases it is admitted that the conviction must have the legal effect of disqualification, and that in a suit in which the witness upon whose testimony the conviction proceeded was himself a party.

On the other hand, the established practice in Courts of equity affords a strong analogy in favour of admitting the evidence of this record, and making no exception in the particular case. The mode of proof in those Courts is by depositions, which are admissible when taken in the same cause. No exception is allowed in a particular case in which a person becomes a party who had been a witness; and such party may avail himself of his own deposition (*d*), *Goss* v. *Tracy* (*e*); and this authority is no way affected by the decision in *Tilley's case* (*f*), for that was a case at law, in which depositions on a bill to perpetuate testimony made by a person who became a party were rejected; but it was a sufficient ground for the rejection, that no deposition *by any one* would be admissible, whilst that person was *alive*.

We are therefore all clearly of opinion, that the verdict and judgment were admissible evidence in the present case; although Mr. *Booker*, who is a party to this action, was examined on the former trial.

The second head of objection is, that the learned Judge misdirected the jury, and that in three respects:—*first*, in the construction of the 7th section of the 30 *Geo.* 3, c. 82;

(*a*) 1 Taunt. 522.
(*b*) 4 East, 577 n. (*b*); 1 Eden, 515.
(*c*) 1 Esp. 97.
(*d*) 2 Mad. Court of Chanc. &c. 425.
(*e*) 1 P. W. 288.
(*f*) 1 Salk. 286, S. C. 2 Ld. Raym. 1008.

secondly, as to the right of the plaintiffs to recover consequential damages for widening and deepening the canal; *thirdly*, as to their right to similar damages for erecting the *Pontyrein* engine.

It will be more convenient, and will facilitate the consideration of the first question, if we now dispose of the two latter objections, upon which the Court feel no difficulty, and entirely concur in opinion.

First, then, as to the right of the plaintiffs to consequential damages for the alteration of the canal and the erection of new works. It is now too late to discuss the right of the company to enlarge or deepen the canal after it was made, still more after the extended period allowed by the 36 *Geo.* 3 had elapsed, that is, the year 1798. This question must surely be considered as settled by judicial decisions, if any question ever was. The deliberate opinions of Lord *Eldon*, Lord *Lyndhurst*, and Lord *Wynford*, have established, that these acts of Parliament constitute a contract or bargain between the public and the company, that the company should not enlarge, extend, widen, or deepen the canal after it should be completed, or at all events after the additional time allowed by Parliament had expired; and that they are liable at the suit of individuals, if they afterwards do so, in such way as to produce damage to their legal rights. The effect of this contract was, that the canal company acquired a parliamentary right to so much water as was necessary, under any circumstances of increased or diminished trade, for their canal when so completed, but to no more; and the mill proprietors retained their right to all the residue, which the company were therefore legally responsible for taking away. The opinion of Lord *Brougham* (*a*) is in this respect in no degree at variance with those of the other noble and learned lords; on the contrary, to this extent his Lordship intimates his concurrence with those authorities. The same prohibition which pre-

(*a*) 1 Mylne & Keen, 186.

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vents the company from enlarging their canal, prevents them from erecting a new steam engine in a different situation from any that existed before, if the rights of the mill owners are thereby injured; and this was in effect decided in the case in the House of Lords, for it formed the subject of one of the counts (the 10th) in the declaration in that case (*a*).

The decision of the Court of *King's Bench*, in the *King* v. *Glamorganshire Canal Company* (*b*), is no authority to the contrary, for that was a question between the freighter and the company; and that authority was fully considered in the House of Lords.

The widening and deepening of the canal, therefore, and the erection of the *Pontyrein* engine, not being authorized if they were prejudicial to the interests of the plaintiffs, the only question remaining on this part of the case is, whether, in order to support an action, a *direct* injury to the plaintiffs' works must be proved, as the immediate taking of surplus water; or whether it is not enough to shew, that the ultimate consequence was the abstraction of such water by the increased traffic occasioned by the improvement of the canal.

This question has been already considered by Lord *Eldon*, and it is impossible to read the report in 1 *Mylne & Keen* (*c*) without being satisfied that he was clearly of opinion, that, if the traffic on the canal was increased by the acts of the company, not authorized by the two statutes, and thereby an increased quantity of water was taken for the purposes of the canal, and the surplus water appropriated to the plaintiffs was diminished, the company were liable to an action; and it is difficult also to suppose that a verdict could have been found on the trial of the second issue before Lord *Wynford*, referred to in 1 *Mylne & Keen* (*d*), except upon the same principle. We do not place any

(*a*) 1 Cla. & Fin. 265.
(*b*) 12 East, 157.
(*c*) P. 168.
(*d*) P. 169.

reliance, with reference to this question, on the judgment of the House of Lords on the writ of error, because, as it proceeds on the record itself, it affords no satisfactory authority in favour of the plaintiff; for the record does not state whether the damage was immediate or consequential; and Lord *Lyndhurst*, in giving judgment, does not express any opinion on this subject. But there is certainly nothing in that case which throws any doubt on the correctness of Lord *Eldon's* opinion; and though Lord *Brougham* appears to have hesitated in acquiescing in it, there is nothing in his Lordship's judgment which necessarily shews that he held a contrary opinion: he refused an injunction, indeed, as to new works, except those which should directly diminish the quantity of water, but it does not follow that his Lordship would have thought that damages could not have been recovered for such abstraction; and he also expressed an opinion, that the principle could not be applied to the improvement of existing locks and engines, whereby the expense of the navigation should be diminished and the tolls reduced, and so, indirectly, the trade increased, which is quite a different point from that at present under our consideration.

Thus stands the question on authority; and on principle it is difficult to say that there is any distinction between those acts which occasion direct, and those which cause consequential, damage. If the defendants have taken away a part of the surplus water secured to the plaintiff by the parliamentary bargain above mentioned, by a violation of the bargain on their part, is it material whether it be done directly or indirectly? The acts complained of being prohibited, if they are prejudicial, does it make any difference that the prejudice is more or less remote, provided it be clearly traced to the prohibited acts? The difficulty of proof is no doubt increased, but when the proof is accomplished, and the damage connected with those acts, the result must be the same.

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We are, therefore, of opinion that the learned Judge did not misdirect the Jury as to the liability of the defendants to consequential damage for the alteration in the canal or the erection of the *Pontyreix* engine. It remains to consider whether there was any mistake in the construction of the 7th section, which has been before stated.

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The learned Judge was of opinion, that the notch above described was a violation of the 7th section, by which it was provided that the surplus water, or water not necessary for the use of the canal, should be conveyed to the *Pentyrch* works, by means of the parliamentary wier; and he thought that the meaning of these words was, water not necessarily expended in the use of the canal, that is, water not used at this lock, in passing vessels down the canal.

My Brother *Alderson* retains the opinion which he expressed at the trial, and my Brothers *Bolland* and *Gurney* concur with him. I own I have felt considerable doubt as to its propriety; nor can I now say that these doubts have been entirely removed: but as the majority of the Court are satisfied that the construction put on the clause by the learned Judge is correct, the objection made to it must be over-ruled. The question is, what is the meaning of the terms, "*Water not necessary for the use of the canal?*"

The construction contended for by the defendants is, that these words give them a full right to take from this part of their canal any quantity of water which may be necessary for the continuous use of the canal at any other point of it in short-water times, in consequence of the unequal lengths of the ponds below, or the inequality of the locks; and that water from the pond in question was necessary within the meaning of that term, though a similar quantity might by an expensive process have been pumped up from one pond below into another; because

the legislature cannot be supposed to have contemplated that such an unusual supply should be resorted to. It was further argued that the provision requiring the locks next below the parliamentary wier to be water-tight, upon which the learned Judge relied at the trial, affords no inference against the right of the company to make an aperture for the passing of the necessary water, because this provision is explained on the supposition that it was intended to prevent the escape of water, when it was not wanted. On the other hand, the argument on behalf of the plaintiffs is, that, if the defendants have a right to make a notch, they have equally a right to flash down water when necessary to the lowest pond of the canal, and that so extensive a construction of this clause could hardly have been within the contemplation of the legislature, or of the parties to the bargain by which a division and appropriation of the water of the *Taafe* was made. That it undoubtedly was intended to give some protection to the proprietors of the *Pentyrch* works is clear; but this construction would put them entirely at the mercy of the company, or compel them to have a watch established over an extent of several miles, in order to protect their interests effectually; an inconvenience so great as to leave them really without remedy. To obviate this mischief, therefore, it is argued, that a more limited construction should be put upon the clause in question, which would give to the mill proprietors all the water not used at the lock in question in passing vessels; and, if so, a very obvious and sensible effect would be given to the provision that the lock in question must be water-tight—a provision, which, although not entirely insensible, if the defendants' construction were adopted, seems to have been a provision worth making, if that construction be the true one.

It is also observed on the part of the plaintiffs not to be immaterial that this very construction has been practically adopted by the company themselves at the *Melin*

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Griffith works, the clause protecting which is framed in precisely the same words as those which we have been considering. If this be so, the notch by which this provision would be clearly evaded would be illegal, and the learned Judge's direction right.

There is also another point of view by which the direction may be supported. By the provisions of the different acts of Parliament, it is clear, as has been before stated, that the authority of the company to make new works ceased in 1798, and that they are responsible for all damages resulting from works subsequently erected. Now, supposing that the more enlarged construction of the protecting clauses were adopted, still the company could have only a right to take water necessary for the use of the canal by the mode adopted when the canal was finally constructed in 1798; and could have no right by a new construction to take more water, or to make the water communicate more conveniently between different ponds of the canal, if that produced damage to the plaintiffs. If, for instance, there were no communication except through the lock in 1798, the company could, it may be contended for the plaintiffs, have no right to make any communication afterwards. Or, if there were such a communication in 1798, and that had been by a feeding wier originally, the company would not now have a right to substitute a drawgate: a different thing, by means of which water flowing continually is carried to the lower pond, under different circumstances. The new drawgate, therefore, or notch, is, it may be said, a work not authorized by the act to be made; and, if so, the direction of the learned Judge was correct. For these reasons, which have been stated as an answer to the defendants' argument, my learned Brothers are all of opinion that the construction put by my Brother *Alderson* on the seventh section was right.

I must own that I am not free from the doubts upon this question which have been excited in my mind by the

able argument for the defendants; and that I do not feel quite satisfied that the notch is a new work in the sense above ascribed to that word, and therefore unauthorized, as it may perhaps be considered as a modification of an old one, whereby it is rendered less injurious to the plaintiffs; but I am not prepared to say that I think the opinion of my Brothers is not well founded, and therefore this objection also must be overruled.

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The last objection is, that the verdict is against the evidence; for that, admitting the defendants to be liable for consequential damages, there was none which ought to have satisfied the jury that even any remote damage was occasioned by the widening and deepening the canal and erecting the *Pontyrien* engine. There was, however, sufficient evidence to shew that a part of the increased traffic was attributable to the improvement of the navigation of the canal by the acts complained of, and there was reasonable ground for the jury to conclude, that, though the enlargement and deepening of the canal, by allowing the increasing of the tonnage of each vessel, diminished the expense of water, the increase of trade more than counterbalanced that advantage, and that, on the whole, more water was consumed by such increased traffic than before. There was no doubt a difficulty in ascertaining the precise amount of the damage so occasioned; but that is purely a question for the jury, and it is not possible for us to say that they have done wrong.

We are therefore of opinion, for the several reasons above given, that the rule ought to be discharged.

Rule discharged.

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HAMBER *v.* COOPER.

A defendant was arrested for the sum of 70*l.*, but it appearing that to part of that amount the defendant had a defence under the Statute of Limitations, it was agreed that he should be discharged out of custody on giving a bill of exchange for 30*l.* drawn by a third person, and accepted by himself. The defendant having been again arrested on the bill: —*Held*, that the defendant was not entitled to be discharged out of custody, as having been a second time arrested for the same debt.

IN this case the defendant was first arrested for 70*l.*, but, it appearing that part of that sum was barred by the Statute of Limitations, the plaintiff agreed to his discharge out of custody on giving a bill of exchange for 30*l.*, drawn by a third person, and accepted by himself. That bill was not paid, but was replaced by a second bill; upon which bill the defendant was arrested.

Humfrey now applied to discharge the defendant out of custody, on the ground that he had been twice arrested for the same debt. It is apprehended that this was in reality the same debt, though for a less amount; the one having been substituted for the other. [*Parke*, B.—It is a different security.] In *Wilson* v. *Hamer* (*a*), the defendant, on being arrested, obtained his discharge by giving the plaintiff security for the debt. The security turning out to be very inadequate, the plaintiff again arrested the defendant for the same cause of action. The Court ordered the bail-bond to be cancelled, no fraud being imputed to the defendant. There Lord Chief Justice *Tindal* puts it expressly on its being an arrest for the same cause of action, though a new security had been given. [*Parke*, B. In that case, the defendant was arrested on the original cause of action.] If, indeed, there has been any fraud in giving the security, then the defendant may be arrested a second time: *Cantellow* v. *Freeman* (*b*). Here it is not pretended that there was any fraud. The case of *Taylor* v. *Wasteneys* (*c*) is an express authority to shew that this was not a new debt, but only a further security. There, the defendant, being arrested for 25*l.*, lay in gaol till he was

(*a*) 1 Mo. & Scott, 120.

(*b*) 1 C. & M. 536. (*c*) 2 Stra. 1218.

superseded. The plaintiff meeting him afterwards, obtained from him a note for 20*l.*, and brought a fresh action upon it, and held the defendant to bail. But the Court discharged him on common bail, for that it was but a farther security, and did not extinguish the former cause of action, which might be declared upon still. In this case, it does not appear that the bill was accepted in satisfaction of the original debt. It was merely a reduction of the amount.

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Lord ABINGER, C. B.—I think that this amounted to an extinguishment of the original debt. The plaintiff obtained the security of a third person, which operated as an extinguishment. The defendant having given a bill of exchange with the name of another person upon it, he might have pleaded it as an accord and satisfaction. He has given the plaintiff a right of action against another person.

PARKE, B.—It is difficult to say that the defendant may not be arrested on this new security. The only doubt which can be raised, is on the case cited from *Strange*. There is, no doubt, a good accord and satisfaction, if accepted as such: but it is unnecessary to say that the original cause of action was extinguished. In this case, the original demand was actually reduced on accounts stated between the parties, and a bill for 30*l.* given, new for all purposes. I do not know why the plaintiff should not be entitled to maintain an action on this new instrument, and why the defendant should not be arrested upon it.

Rule refused.

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BELCHER and Others, Assignees of SAMUEL DAIMOND EVANS, a Bankrupt, *v.* MILLS and Another.

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A. on being arrested gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a Judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by *A.*'s attornies, on the 27th of *October*. *A.* had supplied his attornies with a sum of money towards the payment of the debt and costs on the 10th of *October*, and on the 14th he became bankrupt: —*Held*, that this was a payment under process of law, and that the assignees of *A.* had no right to recover the money back from the party to whom it was paid.

ASSUMPSIT for money had and received by the defendants to the use of the plaintiffs, as assignees, with a count on an account stated. Plea, *non assumpsit*. At the trial before *Gurney*, B., at the *London* Sittings after last *Hilary* Term, it appeared, that, on the 24th of *September*, a *capias* was issued in an action brought by the now defendants, upon which the bankrupt was arrested and gave a bail-bond, which was executed by himself and two other persons. On the 1st of *October*, on the application of the bankrupt's attornies, an order for time to put in bail, until the 4th of *October*, was obtained, the plaintiffs being at liberty in the meantime to rule the sheriff to return the writ, which they accordingly did, and the sheriff returned *cepi corpus*. On the 3rd of *October* notice of bail was given. The bail were excepted to, and notice of exception was given on the 11th of *October*, and on the same day the sheriff was served with an order to bring in the body. Notice of justification was given for the 15th of *October*, and, on opposition, the bail were rejected, on the ground of insufficiency. A fiat of bankruptcy issued against *Evans* on the 14th of *October*, and on the 23rd his attornies served a summons upon the defendants to shew cause before a Judge at chambers, why the proceedings taken upon the bail-bond should not be stayed, on payment of debt and costs. This application was stated to be made on behalf of the bail; and an order was made, that the sum of 31*l.* 1*s.* 5*d.* should be paid to the defendants' attorney by the attornies of the bankrupt; which was accordingly done on the 27th of *October*. It was also proved, that the sum of 27*l.* had been supplied by the bankrupt himself to his attornies four days before the fiat issued, for the purpose of paying the debt and

costs, the residue being paid by the attornies out of their own pocket. The defendants contended, that the action was not maintainable, on the ground that even if it really had been the bankrupt's money, it was in fact paid by his attornies; and if their authority was revoked by the bankruptcy, that they paid the money in their own wrong, and the plaintiffs could not be entitled to have it refunded. The learned Judge directed the jury to give their verdict for the plaintiffs, but gave the defendant leave to move to enter a nonsuit. *W. H. Watson* having obtained a rule accordingly—

Platt and *Busby* shewed cause.—At the time that this money was paid to the defendants, the attornies of the bankrupt had in their hands monies of the bankrupt for this particular purpose, but which they were under no obligation to pay over, and which payment the bankrupt himself might have countermanded, before it was paid over. The attornies could not have resisted an action brought by the bankrupt to recover the money under such circumstances, if the money had been paid over after the authority had been revoked. After such a revocation they would have held the money for his use. *Evans*, by his bankruptcy, lost the control over his property. If the fiat had not issued, the bankrupt would have had a right to countermand the payment, and his bankruptcy had that effect. The money having been the property of the bankrupt vested in the assignees on the issuing of the fiat. Therefore, when paid over, it was the money of the assignees. The paying the money over to the defendants gave them no better right than the attornies themselves had, who paid it over. It being then the money of the assignees, it was money had and received to their use, and they are entitled to recover it back.

Watson, contrà, was stopped by the Court.

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PARKE, B.—This money was recovered by legal proceedings against the plaintiff, and by due process of law, and cannot be recovered back again. It was recovered by a proceeding *in invitum*. It would be a great hardship on the defendants if they should be obliged to pay back this money when they have lost their remedy against the sheriff. The plaintiff's remedy is against the attornies who paid over the money after the bankruptcy. It would be a strange effect of the Judge's order, that the defendants should be compelled to take the money, and then be held liable to an action for taking it. It is a thing which cannot be allowed, that money which has been recovered by due course of law should be recovered back again in an action. This is just the same as if this money had been recovered from the sheriff under an attachment. If the money has been paid improperly by the agents of the bankrupt, the assignees of the bankrupt may have their remedy against them.

Rule for a nonsuit absolute.

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The Earl of FERRERS *v.* ROBINS.

The defendant, an auctioneer, was employed by the plaintiff to sell some furniture, and was desired to sell it for ready money only. The defendant, however, sold the furniture to one *M.* on his giving him a bill of exchange for the amount, drawn by himself upon, and accepted by one *D.* The plaintiff afterwards applied for payment of the amount of the sale, and the bill though at first refused to be taken by the plaintiff, was ultimately taken by an agent of the plaintiff, in order to get it discounted. The bill never was presented nor was any notice of dishonour given either to *M.* or the defendant, until ten days after the bill had become due. In an action brought against the defendant for negligence, in selling the furniture otherwise than for ready money, the jury having found that the plaintiff had not accepted the bill in satisfaction for the furniture:—*Held*, that the negligence of the plaintiff in not presenting the bill, and not giving notice of dishonour, by which *M.* was discharged from any liability on the bill, was no answer to the action.

Semble, that if, by the negligence of the plaintiff, any of the parties to the bill were discharged, the defendant might maintain a cross action against the plaintiff to recover such damages as he could prove he had sustained thereby.

CASE.—The declaration stated (*a*), that, in consideration that the plaintiff at the request of the defendant had re-

(*a*) The action was commenced before the new rules as to pleading came into operation.

tained and employed the defendant to sell and dispose of, for ready money, certain goods and chattels, to wit, &c., for certain commission and reward, to be paid to the defendant in that behalf, the defendant then and there promised the plaintiff to sell and dispose of the same, but not otherwise than for ready money. Yet the said defendant, not regarding, &c., afterwards, to wit, on &c., sold and disposed of the said goods and chattels of the said plaintiff, for a large sum of money, to wit, the sum of 750*l.* otherwise than for cash, to wit, for a certain bill of exchange drawn by one *Richard Mott*, upon and accepted by ——— *Depres*, who respectively were and are in bad and insolvent circumstances; and by reason thereof the same bill hath been and is of no use or value to the plaintiff, and by reason of the premises, he the said plaintiff is likely to lose the same.—Plea, not guilty.

The cause was tried before *Gurney*, B., at the *Middlesex* Sittings after last *Hilary* Term, when it appeared that the plaintiff, being the lessee of a house in *Harley Street*, assigned the lease and the fixtures in the house to *Mott*, and, being desirous to sell the furniture in the house, applied to the defendant for that purpose, and requested him to sell the furniture by auction; but desired him not to sell, except for ready money. The defendant sold the furniture by private contract to *Mott*, the assignee of the lease; and it was accordingly given up to him, on *Mott's* giving the defendant a bill for 750*l.*, drawn by him upon one *Depres* (who had accepted it), and indorsed by himself generally. The defendant sent this bill to the plaintiff, who objected to take it, and sent it back. Subsequently, the defendant was applied to for the amount of the sale; an interview afterwards took place between the defendant and an agent of the plaintiff's, before the bill became due; the result of which was, that the bill was taken away by the plaintiff's agent in order to obtain payment, and

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was placed by him in the hands of the plaintiff's bankers, to get it discounted. The bill never was presented for payment, nor any notice of dishonour given to *Mott*, the drawer, nor to the defendant, until about ten days after the bill became due. It was objected at the trial, that, even if the defendant had made himself responsible for the amount of the goods sold, by not selling for ready money; yet, the plaintiff having taken the bill for the purpose of getting it discounted, the defendant was entitled to notice of dishonour. The learned Judge left it to the jury to say whether the plaintiff had consented to take the bill in payment for the furniture: the jury found that he had not so done, and returned a verdict for the plaintiff.

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F. Kelly now applied for a new trial, on the ground of misdirection.—The plaintiff not having taken proper steps to enforce payment of the bill by presenting it when it became due, the defendant, who could only be considered in the nature of a surety, was discharged, and the learned Judge ought so to have directed the jury. The plaintiff ought to have presented the bill for payment, and, on its being dishonoured, ought to have given notice to the defendant, in order that he might give notice to *Mott*, the drawer. In consequence of the plaintiff's not having given due notice, it is clear that *Mott*, the drawer, was discharged, and the defendant would therefore be deprived of all remedy against him on the bill. Where a party takes a bill, it is matter of law, that, by taking the bill, he imposes on himself the liability to present the bill, and give due notice of its dishonour.

Lord ABINGER, C. B.—I am of opinion that there ought not to be a new trial, as I think the question was properly left to the jury. The first question is, whether the defendant was liable for not selling the furniture for ready money, as desired by the plaintiff. It is admitted that he

ought to have done so, and that the plaintiff was not bound to take the bill. The next question is, whether the plaintiff's agent took the bill on such terms as to make the bill his own. If he had, then that might have operated as a discharge to the defendant, and would have been a sufficient answer to the action. But the question was left to the jury, and they found that the plaintiff did not take the bill as a satisfaction for the furniture. Then how does the matter stand? The defendant being liable to the plaintiff to the amount of 750*l.*, and being applied to for payment, allowed the plaintiff's agent to take the bill; but the jury have found that the bill was not taken as a satisfaction for the price of the furniture, and it appears to have been taken merely for the purpose of endeavouring to raise money upon it. If the plaintiff has been guilty of laches, so as to discharge any of the parties to the bill, the defendant would have a right of action against him for negligence in placing the defendant in such a situation, that he is not entitled to maintain an action on the bill against the parties to it; and any damage he could prove he had sustained, he would in such an action be entitled to recover. But that is not an answer to an action brought by the plaintiff against the defendant for negligence in selling the furniture for a bill instead of ready money. In my opinion, there is no ground for a new trial in this case. It cannot follow as a consequence that the neglect of the plaintiff to give notice of dishonour absolved the defendant from all liability for his negligence. It might have turned out that the drawer was worth nothing, and the acceptor would still be liable to be sued upon the bill.

The rest of the Court concurred.

Rule refused.

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CHALMERS *v.* PAYNE and Another.

In an action for a libel, on not guilty pleaded, it appeared that the libel (which was contained in a newspaper) purported to be the account of the trial of a former action, brought by the same plaintiff for a libel against third parties, and after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the Judge, stated that the jury found a verdict for the plaintiff, with 30*l.* damages. No evidence was given as to any such trial having, in fact, taken place, or whether the report was fair or not. The Judge left it to the jury to say, whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether with the statement of the verdict being in his favour, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the Court refused to grant a rule for a new trial.

THIS was an action against the defendants for a libel, published by them in the *Morning Post* newspaper.

The libel for which this action was brought professed to contain the account of the trial of an action, brought by the present plaintiff against the proprietors of the *John Bull*, for a libel. After stating what the libel was, and the facts proved at the trial by the defendants in the original action, under a justification, together with the summing up of the Chief Justice in that action, it stated also, that the jury found a verdict for the plaintiff with 30*l.* damages. The defendants in the present action pleaded the general issue.

At the trial before Lord *Abinger*, C. B., at the *Middlesex* sittings after last *Hilary* Term, the newspaper containing the report was read in evidence, but no evidence was adduced to shew whether the trial had taken place or not, or whether the report was or was not a fair and impartial report of the trial. The learned Chief Baron left it to the jury to say, whether the statement was made in such a manner as to shew that it had been published with a malicious motive; and if they were of that opinion, then to find a verdict for the plaintiff, but if otherwise, for the defendants. The jury found a verdict for the defendants.

Stammers now moved for a new trial, on the ground of misdirection, and of the verdict being against the evidence. It ought not to have been left to the jury to consider whether this statement was published from malicious motives or not; it not being in the nature of a privileged communication, and there being no justification on the record that was not in issue. [Lord *Abinger*, C. B.—There was no evidence that it was a mere pretended report of a fictitious

trial. I told the jury that if they thought the statement of the facts proved at the trial were mistated, so as to be injurious to the plaintiff's character, or were published maliciously, then they ought to find for the plaintiff.] It is submitted that the question of malice was not a question which ought to have been left to the jury, but was a necessary inference of law from the libel itself. *Bromage* v. *Prosser* (*a*). Besides, there was no evidence to shew that there had been any such trial as that reported. [Lord *Abinger*, C. B.—I put it to the jury, that if they thought that the defendants had invented it, and that there had in fact been no trial at all, then they must find for the plaintiffs; but there was no evidence that it was so.] If there had been such a trial, the defendants were bound to plead it in justification, and that the report was a correct account of it; but it not having been pleaded must be taken not to have existed, and the jury ought to have been directed to find for the plaintiff, the publication of the libel having been proved.

Lord ABINGER, C. B.—I am of opinion that there is no ground for a rule in this case. The question is, whether the whole publication, taken together, is injurious to the character of the plaintiff. I apprehend that where a publication is injurious on the face of it, it is a wrong from which malice will be inferred, and which makes it actionable whether any injury was intended or not. That is a principle which is not confined to libel only, but is a general principle applicable to other cases. A party is not justified in committing an action injurious to another because the party does not mean to do any injury. [The learned Chief Baron here referred to the case of *Littledale* v. *The Earl of Lonsdale* (*b*).] But there may be cases where there is actual and wilful malice in addition

(*a*) 4 B. & C. 247. (*b*) See 2 H. Bl. 269.

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to the injury itself, and that aggravates the wrong, and the jury in such a case ought to award greater damages. The first question however for them to determine in cases of libel is, whether the publication is injurious to the character of the plaintiff. The statement may be made in such a manner as to be injurious to the plaintiff's character, or it may not be calculated to injure him. In criminal cases, in modern times, it is expressly provided, that the jury shall say whether the publication is a libel or not. I think most properly so. Who can tell so well what is the effect of an alleged libel on a man's character, as a jury taken impartially from persons in his own station and rank of life. In this case, I left it to the jury to say, whether the report, though it might contain some allegations prejudicial to the plaintiff, yet if taken altogether with the verdict in his favour, was on the face of it injurious to the plaintiff; and if they thought it was not, I directed them to find for the defendants. If, on the contrary, they thought that the statement of the verdict being in his favour was no palliation, and that it was on the whole injurious to his character, to find a verdict for him. The jury took the report out with them, and found it was not.

BOLLAND, B.—In the case of *Dicas* v. *Lawson*, which occurred here in the last term, this Court came to a similar decision to the present.

ALDERSON, B.—In *Dicas* v. *Lawson*, I directed the jury to look to the whole of the publication to see whether it was calculated to injure the plaintiff's character. The publication there complained of was the report of a trial, in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for 30*l*. It was said that the report was libellous, because it set forth the charge made on the trial against

the plaintiff. I left it to the jury to say whether, taking the whole of the publication altogether, they thought it likely to depreciate his character. The jury thought not; and on an application for a new trial, this Court approved of my direction. I quite agree, that, where slanderous words are used, which are actionable in themselves, and no justifiable cause is shewn for uttering them, the law will presume malice from the language itself. But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together. Then, it is said, that there is no evidence of there having been such a trial in fact. But we cannot suppose that it was a mere invention; we cannot assume that newspapers publish mere imaginary accounts of trials. The question being left to the jury, whether there was any thing in the mode of publication which indicated malice, was an additional advantage to the plaintiff.

Rule refused.

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CRISP *v.* GRIFFITHS.

Declaration in debt on a promissory note. Plea—that, after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards indorsed it to a person unknown to the defendant, and who, at the time of the commencement of the suit, was the holder thereof, and entitled to sue the defendant thereon. Replication, *de injuriâ*:—*Held*, on demurrer to the replication, that the plea was bad, inasmuch as it did not aver that the bill was *given* as well as *taken* in satisfaction of the note.

Quære, whether the general replication *de injuriâ*, was sufficient.

DEBT on a promissory note, dated the 31st of *July*, 1834, whereby the defendant promised to pay to the

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plaintiff, or order, at Messrs. *Farley & Co.*, bankers, *Worcester*, the sum of 12*l.* for value received, two months after the date thereof, which period had then elapsed.

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Plea—that after the making of the said promissory note, and accruing of the said supposed debt in respect of the same, to wit, on the 10th of *August*, 1834, the plaintiff drew his bill of exchange upon the defendant, and thereby requested the defendant to pay to the plaintiff's order 25*l.* as for value received at a certain period after the date thereof, and which period hath long since before the commencement of this suit elapsed, for and on account of the said promissory note; and the defendant then accepted the same, and delivered it to the plaintiff, who then took it for and on account of the said promissory note; and the plaintiff afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, indorsed and delivered the said bill of exchange so accepted by the defendant as aforesaid, to a certain person to the defendant as yet unknown, and who, and not the plaintiff, at the time of the commencement of this suit, was and still is the holder thereof, and entitled to sue the defendant thereon: concluding with a verification.

Replication—that the said defendant, of his own wrong, and without the cause in his said last-mentioned plea alleged, neglected to pay the amount of the said note in the declaration mentioned, in manner and form &c.

To this replication there was a demurrer, assigning for cause that the replication, instead of the general denial therein contained, ought to have traversed or denied, or confessed and avoided, some one or more of the facts stated in the said plea in express words; and also for that the general replication *de injuriâ* is not the proper replication in an action on promises; and also for that the replication is too large and general.

Joinder in demurrer.

Humfrey, in support of the demurrer.—This general replication puts in issue all the facts alleged in the plea, instead of traversing particular facts, as it ought to have done, and therefore cannot be supported. This is not a case where several facts, all forming together one ground of defence, are pleaded, but the plea in substance is, that the plaintiff, by taking this bill and indorsing it over, has suspended his right to sue on the note. It is not pleaded by way of excuse, but as a good answer to the action, and the plaintiff ought to have taken express issue upon the facts so alleged. [Lord *Abinger*, C. B.—You say that, according to the old rules of pleading, where the plea sets up some complete answer to the action which arises from several facts alleged, the general replication *de injuriâ* will not do; but that, if taken altogether, they amount to a mere excuse only, then it may be properly pleaded. Suppose, instead of setting out all these facts in the plea, the defendant had pleaded generally that the plaintiff's right of action had been suspended, would not the replication to that plea have been a general denial, and must not the defendant have proved his whole case? It appears to be hard that the plaintiff should be tied down to the traverse of one fact only.] In *Kendrick* v. *Lomax* (*a*), it was held, that where, on a bill becoming due, the holder agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by nonpayment of the first as for its amount. That shews that this plea is a good answer to the action; and, being a good answer, the facts alleged in it ought to have been expressly denied.

W. H. Watson, *contrà*.—The replication *de injuriâ* is good. The principal objection, that the plea is multifarious, is not tenable; for the plea is merely an excuse for

(*a*) 2 C. & J. 405.

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non-paymant of the bill, and the several facts together only constitute one defence, which, according to all the authorities, may be denied by the replication. [*Parke*, B. —Does not this fall within the third resolution in *Crogate's case* (*a*), being an authority derived from the plaintiff to which *de injuriâ* cannot be replied?] The subject matter of the plea is an agreement between the parties, not an authority, as instanced in the resolution cited. An agreement and an authority are essentially different. In *Curr* v. *Hinchliff* (*b*), which was on a demurrer to a plea, where the defendant claimed to set off against a principal a debt due from the agent, with whom the defendant had contracted; not being the principal, it was argued that the whole plea could not be put in issue; but *Bayley*, J., expressed an opinion that the whole plea might be traversed by the replication. *O'Brien* v. *Saxon* (*c*), where it was held, that a replication denying the trader's act of bankruptcy and petitioning creditor's debt stated as a plea was not multifarious, was decided on the ground that *several* facts, all constituting *one defence*, could be put in issue. *Robinson* v. *Raley* (*d*) is to the same effect. [*Alderson*, B.—Those are cases in *tort*. Can any replication in *assumpsit* be cited where *de injuriâ* was replied as where several facts were put in issue by the replication?] The rules of pleading are invariable, and equally applicable to all forms of action. For this *Selby* v. *Bardons* (*e*) is an authority; that case also shews that this replication is not multifarious. It is not easy to find many precedents of replications in *assumpsit*; for before the new rules, every defence was set up under the general issue; but in *Rickards* v. *Murdock* (*f*), *de injuriâ* was replied to a plea in an action of covenant. That was an

(*a*) 8 Rep. 66, b.
(*b*) 4 B. & C. 553.
(*c*) 2 B. & C. 908.
(*d*) 1 Burr. 317.
(*e*) 1 C. & M. 560.
(*f*) 10 B. & C. 527.

action *ex contractu* not *ex delicto*. [*Parke*, B.—The replication there was not specially demurred to.] Certainly not; but looking at the importance it would have been to the defendant in that case to have compelled the plaintiff to traverse some facts and to admit the rest, it is a fair argument that it was considered not to be demurrable. [Lord *Abinger*, C. B.—The spirit of the new rules is to bring the case to one single issue; this seems to be in opposition to the object of those rules.] It is submitted that the argument from the new rules is in favor of the plaintiff. Those rules have been framed with great care; they alter the mode of pleading as to pleas, but make no alteration in replications. The argument, therefore, is, that replications were to be pleaded as formerly. It would be a great hardship, where a defendant sets up by his plea several facts, all false, that a plaintiff should be obliged to go to trial admitting one of the facts alleged which has not any foundation in truth. [Lord *Abinger*, C. B.—And that hardship is much increased by the plaintiff being now only allowed one count in his declaration.] It is submitted that no rule of pleading has been more misunderstood by modern pleaders than the rule as to duplicity: all the instances in the old books are where two answers are set up to a declaration or plea; but this rule was never applied to prevent a party from denying several facts in one pleading. Many authorities to this effect may be cited. [*Parke*, B.—Probably that is so; but you have two points to contend here—one, that all the facts in the plea can be denied by the replication; secondly, supposing they can, that this is a proper mode of traversing them: both important points.] As to the form of traverse, no precise form of words is necessary. In *Selby* v. *Bardons* (*a*) this form was held applicable to replevin. Now this is mere excuse for non-payment; and Lord *Ellenborough*, in *Barnes* v. *Hunt* (*b*), explains

(*a*) 3 B. & Ad. 2. (*b*) 11 East, 455.

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the word "cause" in the replication *de injurid*, that it signified "without the matter of excuse alleged." [*Parke*, B.—This plea does not amount merely to matter of excuse: it is more in the nature of an accord and satisfaction, though the right to sue may revive by the non-payment of the bill. The plea does not allege, that, *before* the breach of the defendant's promise, something occurred which took away the plaintiff's right to sue; but that *after* the breach was committed, something was done which suspended that right. If several facts can be allowed to be put in issue by one replication, is this the right form? It appears to me that some better form ought to be adopted than the present.] The replication is a substantive denial of the whole plea.

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Per Curiam.—Without deciding whether the replication be sufficient or not, we think that the plea is insufficient, inasmuch as it does not expressly aver that the defendant gave the bill of exchange in satisfaction of the note. It is true that it is alleged that the plaintiff took it for and on account of the note; but we think that that of itself is not enough. However, we think that the parties should have leave to amend without payment of costs on either side.

Leave to amend, without payment of costs.

CHADWICK *v.* HOUGH.

Where an attorney of this Court authorizes an attorney of another Court to use his name, the proceedings must be in his name and notice of bail must be signed in the name of the former attorney.

IN this case, *Butt* objected to the notice of bail, on the ground that it was not properly signed. It was signed as follows: "*Eley*, *Chancery-lane*, by Mr. *Cole*." It appeared that Mr. *Eley* was not an attorney of this Court, but that Mr. *Cole* was.

Heaton for the bail.—Mr. *Eley* had the authority of Mr. *Cole* to use his name, and therefore the notice is correctly signed.

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ALDERSON, B.—If you had authority to use his name the proceedings ought to be in his name. The notice should therefore have been given in the name of Mr. *Cole*.

Leave was given to amend the notice.

STARTUP and Another *v.* CORTAZZI.

ASSUMPSIST for the nondelivery of *Odessa* linseed, pursuant to a contract of sale. The defendant pleaded the general issue, and also a special plea, in excuse of performance; but, to the latter plea, the plaintiffs had demurred, and judgment was thereupon given for the plaintiffs. At the trial of the cause before Lord *Abinger*, C. B., at the *London* Sittings after last *Hilary* Term, it was proved, that, on the 18th of *June*, 1833, the plaintiffs and defendant, through the medium of a broker, entered into a contract, by which the defendant agreed to sell 2100 quarters of *Odessa* linseed, warranted good and marketable, and equal to the average shipments of the season, at the rate of 30*s*. for each quarter, free on board a ship to be provided by the buyer. The quantity to be estimated at the rate of 100 chetwerts to 73 quarters; to be shipped on board the buyer's vessel in all *October* or

In *assumpsit* for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence, that the plaintiffs, pursuant to contract, had paid part of the purchase money to the vendor in advance; that the defendant, at the time when the linseed ought to have been delivered, had given notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into Court, with interest up to the time it was so paid in, as a condition for a commission to examine witnesses abroad, and was only obtained out of Court by the plaintiffs a short time before the trial:—*Held*, that, in estimating the damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial as a criterion; and the plaintiffs not having proved that they had sustained any special damage from the non-delivery of the seed, and the non-return of the money, that the repayment of the money advanced, with simple interest upon it, and payment of the difference between the contract price and the price of the linseed at the time when it ought to have been delivered, was that to which the plaintiffs were entitled; and the jury having found accordingly, that the verdict was right.

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November then next; the amount to be paid for, half by bills on buyers, three months from date of advice of sale reaching *Odessa*, and the remainder on banker at *London*, at three months from the date of the bill of lading and shipment. The plaintiffs' vessel arrived at *Odessa* in *October*, remained there some time, and returned without a cargo; the defendant having given notice previously, that the contract would not be fulfilled. On the 15th of *October* the plaintiffs paid the defendant 1575*l.* being a moiety of the purchase money of the presumed cargo. Previous to the argument on the demurrer, the defendant applied for a commission to examine witnesses at *Odessa*, which was granted on the 15th of *September*, 1834, on his paying that money with interest into Court; and on the 2nd of *February*, 1835, the defendant paid 524*l.* additional into Court, and the whole sum of 2172*l.* was ordered to be paid over to the plaintiffs. It appeared that, in *February*, 1834, when the cargo would have arrived if the seed had been delivered, the price of *Odessa* linseed was 50*s.* per quarter; at the time of the trial it would have been about 56*s.* The defendant had paid into Court at the rate of 47*s.*, which was about the price of the seed when the notice that the contract would not be completed was given. The plaintiffs contended, that, as they had paid a portion of the purchase money, which the defendant had retained until it was paid into Court, in *September*, 1834, and which the plaintiffs did not obtain until *February*, 1835, they were entitled to damages according to the price at which the seed was selling at the time of the trial. His Lordship told the jury, that, in his opinion, the plaintiffs were not entitled to treat this as a case resembling contracts for the replacing of stock, where the damages are estimated at the price of the funds, and that they were not entitled to damages according to the then price of the seed; that, taking the price at the time when the cargo would have arrived, it appeared to him that

enough had been paid into Court; but, with these observations, he left the case to the jury for their determination. The jury having found a verdict for the defendant,

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Maule now moved for a new trial, on the ground of misdirection.—It is admitted, that, in ordinary cases, the proper mode of estimating the damages for the nonperformance of a contract is, to take the price of the article at the time when the contract ought to have been performed. In the present case, however, the plaintiffs advanced money for the purchase of the linseed, and were deprived of the use of that money until *February* last. That places them in the same situation as the lenders of stock, who are entitled to take the price at the time of the trial. In *Gainsford* v. *Carroll* (*a*), where it was held, that, in *assumpsit* for a breach of contract, in not delivering a quantity of bacon upon a given day, the damages must be estimated by the price of the goods at or about the time when the contract was broken, and not at the time when the damages were assessed; the Court said, "In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here, the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken." The principle there laid down, it is submitted, is applicable to the present csse; as, in this case, the plaintiffs advanced their money to the defendant on the faith of this contract, and the defendant, by retaining the money, prevented them from using it, and of applying it in the purchase of other linseed. If they had had their money, they might have applied it in the purchase of other merchandize, by which they might have obtained a profit equivalent to the amount of the damages now claimed.

(*a*) 2 B. & C. 624.; S. C. 4 D. & R. 161.

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Lord ABINGER, C. B.—The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its nondelivery. I told the jury, that neither the witnesses nor the plaintiffs had pointed out any precise line, which should mark the proper estimate of the damages; for they had not stated what they had intended to do with the seed, whether to crush it, or to sell it. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced, and interest upon it. I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than *5 per cent.* on that money, or that they had not credit at their bankers to that extent, and thereby had sustained any peculiar inconvenience. The money had been paid into Court, and the plaintiffs received it as soon as the practice of the Court allowed them to do so. I felt a difficulty as to how the damages ought to be computed; but one of the witnesses gave something like a rule, which I pointed out to the jury. He said that *Odessa* linseed was about the same quality as *Sicilian* linseed, though it usually sold at a somewhat lower rate. The ship arrived in *England* in *March*. He stated, that at that time *Sicilian* linseed was well sold at *50s.* and that he himself had furnished good seed at that price; and deducting *2s.* for the difference in value, the fair price of the *Odessa* seed was *48s.*; and, allowing a discount, the price would have been about that which the defendant has paid into Court. It is to be remarked that, by the terms of the contract, supposing the cargo to have been shipped in pursuance of it, the plaintiffs would have been obliged to pay the residue of the purchase money at that time. I did not, however, prescribe any line to the jury

upon which they ought to proceed; but I told them they ought not to give speculative or vindictive damages.

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BOLLAND, B.—The case appears to me to have been left to the jury in the only way in which, upon the facts, it could have been properly left to them. There was nothing to guide them as to the particular mode by which the damages ought to be estimated. The Lord Chief Baron could only caution them against giving speculative or vindictive damages; and we have seen what sort of damages might be required, if speculative damages were allowed to be given in actions like the present.

ALDERSON, B.—The only question in the case was, as to the amount of the damages. The contract was, to deliver a certain quantity of linseed at a certain time, namely, on the arrival of the ship in *London*. Previously to that period, a notice was given by the defendant that he was unable to perform his contract. It appears that the price at that time was not the proper criterion for estimating the damages; for, as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due course according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is, to consider the loss of the gain which the party would have made, if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their having been kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of Court. It appears from the report of the trial, that there were no circumstances submitted to the jury to shew that the plaintiffs had sus-

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tained any special damage. The verdict is, therefore, in my opinion, right.

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GURNEY, B., concurred.

Rule refused.

The ATTORNEY-GENERAL *v.* TOMSETT.

In an information founded upon the 6 *Geo.* 4, c. 108, s. 45, the first count charged the defendant with assisting and being otherwise concerned in unshipping goods liable to the duties of customs, the duties not having been paid or secured. The second count charged that certain goods, liable to the payment of duties, which had been unshipped without the duties having been paid, came to the hands and possession of the defendant, he well knowing that the same had been illegally unshipped; and the third count charged the defendant with knowingly harbouring, keeping, and concealing certain goods liable to the payment of duties, he well knowing that the same were goods that had been illegally unshipped. On the trial it was proved that the goods were received from a boat in the *Downs*, a mile or two from the shore, within the limits of the port of *Dover*, into a hoy hired by the defendant at that port for the purpose of receiving them; and that they were brought in the hoy into the river *Thames*, and were there seized by the custom-house officers within the port of *London*:—*Held*, that the information was sustained by the evidence, inasmuch as it shewed that the defendant at *Dover*, and therefore clearly within the United Kingdom, was "*concerned* in the unshipping," as he there hired the master of the hoy to take the goods on board.

Held, also, that even supposing that the defendant's act of assistance or concern in the unshipment must be considered to have taken place through the agency of the master of the hoy, at the place where the unshipment was made, namely, in the *Downs*, and that such place was not "within the United Kingdom," in the sense ascribed to those words in the 6 *Geo.* 4, *c.* 108, *s.* 45, that when the master of the hoy, he being the defendant's agent, brought the goods into the port of *London*, the defendant was properly charged as having them in his possession within the United Kingdom.

THIS was an information filed by his Majesty's Attorney-General; the first count of which charged that the defendant at *Ratcliffe*, in the county of *Middlesex*, was assisting and otherwise concerned in unshipping from a certain vessel divers goods, to wit, 39,822 ells of foreign manufactured silk, &c. the said silk, &c. being then and there goods liable to the payment of duties of customs, the said duties of customs for the same not having been first paid or secured, contrary to the form of the statutes in such case made and provided. The second count charged that certain other goods, to wit, 39,822 ells of foreign manufactured silk, &c. the said silk, &c. being goods liable to the payment of duties, which had been then and there unshipped without the duties thereon having been first paid or se-

cured, contrary to the form of the statute, &c. came to the hands and possession of the said defendant, he the said defendant well knowing, at the same time when the said last-mentioned goods so came to his hands and possession, that the same had been illegally unshipped as aforesaid, contrary to the form of the statute in such case made and provided. The third count charged that the said defendant, on &c., at &c., did knowingly harbour, keep, and conceal, and did knowingly permit and suffer to be harboured, kept, and concealed, certain other goods, to wit, 39,822 ells of foreign manufactured silk, &c. the said silk, &c. being goods liable to the payment of duties: he the said defendant when he so harboured, kept, and concealed, and so permitted and suffered to be harboured, kept, and concealed the same goods, well knowing that the same, and every part thereof, were goods that had been illegally unshipped as aforesaid, to wit, at *Ratcliffe* aforesaid, contrary to the form of the statute, &c. To this information the defendant pleaded not guilty.

The information was tried before *Alderson*, B., at the sittings after last *Michaelmas* Term, when it appeared that the goods in question had been received from a vessel in the *Downs*, in the course of her voyage to *London*, into a *Dover* boy (which had been hired by the defendant at *Dover*) about two miles from the shore, but within the limits of the port of *Dover*, according to the limits of that port as set out by the commissioners appointed under the statute 13 & 14 *Car. 2*, c. 11. The goods were brought into the river *Thames* in the *Dover* boy, and were there seized by the officers of the customs. A verdict having been found for the Crown under the direction of the learned Judge, *W. Clarkson*, in *Hilary* Term last, obtained a rule for a new trial, on the ground that the goods in question were not unshipped within the United Kingdom, but on the high seas, in a place where the commissioners appointed under the statute 13 & 14 *Car. 2*, c. 11, had no authority

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to assign the limits of the port of *Dover*, and consequently that there had been no illegal unshipment of the goods.

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The *Solicitor-General* (Sir *W. W. Follett*), *Tancred*, and *Kaye*, shewed cause.—This information is framed upon the statute 6 *Geo.* 4, c. 108, s. 45, which enacts, "That every person who shall, either *in the United Kingdom* or the Isle of *Man*, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which have been illegally unshipped without payment of duties, or which have been illegally removed without payment of the same from any warehouse or place of security in which they may have been originally deposited, or shall knowingly harbour, keep, or conceal, or permit or suffer to be harboured, kept, or concealed, any goods prohibited to be imported, or to be used or consumed in the United Kingdom or in the Isle of *Man*; and every person either in the United Kingdom or the Isle of *Man*, to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the officers of his Majesty's customs." The goods in question had been imported into the United Kingdom, and according to the 6 *Geo.* 4, c. 111, s. 2, the duties are to be paid on the importation; they were, therefore, liable to the payment of duties. The time of importation is, by the 6 *Geo.* 4, c. 107, s. 122, defined to be when the ship shall have actually come within the limits of the port at which such ship shall in due time be reported. That definition is repeated in the 2 & 3 *W.* 4, c. 52, s. 125. The goods in question having arrived in the *Downs*, within the limits of the port of *Dover*, were liable to the duties of customs; and those duties not having been paid, the un-

shipment into the *Dover* hoy was an illegal unshipment. It is however contended, that the place in the *Downs* where the goods were unshipped was on the high seas, and consequently that they were not unshipped within the United Kingdom. But it is not necessary to render a person liable to the penalties of the act that the unshipment should be within the United Kingdom; for the section upon which the information is founded does not say that the unshipment is to be within the United Kingdom. It is sufficient if the person render assistance, or be otherwise concerned in that act within the United Kingdom; consequently it is enough if the defendant, being at the time within the United Kingdom, was concerned in unshipping the goods. The place, however, where the goods were unshipped was within the United Kingdom, for it was within the limits of the port of *Dover*, according to the limits of that port as set out by the commissioners under the 13 & 14 *Car. 2*, c. 11, s. 14. It is objected that they had no authority to include within those limits any part of the high seas, because the statute only authorizes them to assign the limits of the ports within the kingdom of *England*. There is nothing to shew that the limits assigned to the port of *Dover* are not within the kingdom of *England;* for that is not confined to low water mark; but the narrow seas have always been considered as wholly within the kingdom of *England*. The statute 1 *Eliz.* c. 11, to which the statute 13 & 14 *Car. 2* refers, and which first authorized commissioners to appoint places for landing goods, directs them to assign places for that purpose in all ports, havens, creeks, or *roads*. Now, roads are on the high seas beyond low water mark; which shews that the legislature considered that the kingdom of *England* extended beyond low water mark. Besides, this is the case of a *British* subject, and not of a foreigner, and he is therefore precluded from denying the extent of the king's dominions. But, in point of fact, it is proved that the unshipping was in the river *Thames*, in the port of

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London; for, although they were put on board the hoy in the *Downs*, they were in the defendant's possession by means of his agent in the port of *London*.

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Platt and *W. Clarkson*, *contrà*.—In order to support this information, an illegal unshipping of goods must be shewn. This is not to be looked upon as a question concerning subjects only, because the term used in the statute is "every person," which would apply equally to foreigners, and they might be held liable to the penalties imposed by the act. The Court will, therefore, pause before they put the construction contended for by the Crown on this act. Every count in the information avers that the goods were illegally unshipped, and every branch of the section of the act upon which they are founded refers to goods which have been illegally unshipped. The harbouring and concealing applies only to such goods as have been illegally unshipped, and that must have taken place within the kingdom of *England*. Even admitting that the enactment in the statute of *Car. 2* has the meaning contended for, it cannot affect the limits of the kingdom of *England*. The commissioners might have had power to vary the limits of the ports, but they had no power to alter the ancient boundaries of the kingdom. [*Alderson*, B.—The *Downs* are within the ancient limits of *England*.] It is submitted that the narrow seas are not part of the kingdom of *England*. [*Alderson*, B.—The authority of Lord *Hale* (*a*) is to the contrary: he says they are within the kingdom.] No doubt they are part of the dominions of the king of *England*, and so are the colonies; but it is submitted they are not within the kingdom of *England*. If they were, they would be within some county, but that is not pretended. The jurisdiction of the admiralty and the common law judges divide between high and low water mark. The warrants of the Chief Justice of the *King's Bench*, which

(*a*) De Jure Maris, c. 4.

are tested "*England*, to wit," are of no authority in the *Downs*. [*Gurney*, B.—It is necessary to get the silver oar from the admiralty to authorize an arrest there.] Lord *Hale*, in his Treatise *De Jure Maris* (*a*), states, that a doubt existed whether a subsidy became due by the coming into the narrow seas, being the king's dominions. The statute 6 *Geo.* 4, c. 108, s. 2, which prohibits certain vessels from navigating within the distance of four leagues from the coast of that part of the United Kingdom which lies within the *North Foreland* and *Beachy Head*, shews that the legislature considered the coast, that is, the low water mark, as the verge of the kingdom of *England*. [*Bolland*, B.—The object of that statute was to prohibit the taking of goods into any coasting vessel at sea.] This is not charged as being a coasting vessel. [*Gurney*, B. —No; but may not the unshipment have been illegal on that account? The charge is, that these goods had been illegally unshipped.]

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The *Solicitor-General* in reply (*b*).—In the statute 6 *Geo.* 4, c. 107, the terms "port," and "limits of the port," are used in several clauses: but from the different provisions of the statute it is clear that the legislature did not confine the meaning of those terms to that which is within low water mark. In common understanding the port generally includes a considerable portion of the high seas, as is the case at *Portsmouth* and *Plymouth*. But even admitting that the port must be within the kingdom of *England*, there can be no reason why the legislature should not provide, that, within a circuit round the limits of the port, goods should not be unshipped; and if they have done so, that would be binding on a subject of this

(*a*) Pars tertia, c. 20.

(*b*) A considerable discussion took place as to the right of the Solicitor-General to reply; but the Court, on the authority of the *Attorney-General* v. *Courtiee*, 9 Price, 456, held that he was entitled to do so.

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country. [*Parke*, B.—Can there be an illegal unshipment without a putting on land? This would have been illegal within the statute 8 *Anne*, c. 7, s. 17, which prohibits goods from being unshipped with intention to be laid on land; but that statute is repealed by the 6 *Geo.* 4, c. 105; and that prohibition has not been re-enacted.] It is submitted that it has in effect been re-enacted by the 6 *Geo.* 4, c. 107, s. 2, which provides that bulk shall not be broken before report and entry of the goods.

Cur. adv. vult.

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The judgment of the Court was now delivered by—

PARKE, B.—After stating the information, he proceeded as follows: The information is founded upon the statute 6 *Geo.* 4, c. 108, s. 45, which enacts, "That every person not arrested and detained as hereinafter mentioned, who shall either in the United Kingdom, or the Isle of *Man*, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which have been illegally unshipped without payment of duties, or which have been illegally removed without payment of the same from any warehouse or place of security in which they may have been originally deposited, or shall knowingly harbour, keep, or conceal, or permit or suffer to be harboured, kept, or concealed, any goods prohibited to be imported, or to be used or consumed in the United Kingdom or in the Isle of *Man*; and every person either in the United Kingdom or the Isle of *Man* to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of his majesty's customs."

These goods were received from a boat into a *Dover*

hoy (in the course of her voyage to *London*, off *Deal*,) a mile or two from shore, within the limits of the port of *Dover* as these limits are set out by the commissioners under the statute 13 & 14 *Car.* 2, c. 11. They were brought into the river *Thames* in the *Dover* vessel, and were there seized by the officers of the customs. The objection taken by the counsel for the defendant is, that this is not an unshipping forbidden by the statute law, being upon the high seas; whereas the unshipping ought to be in the United Kingdom, and within the body of some county.

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We do not consider it necessary to decide upon the present occasion, whether the unshipping within the limits of the port of *Dover* assigned by order of the King's commission would be an unshipping in the United Kingdom, within the meaning of the said statute, because it was proved that the defendant *at Dover*, and therefore clearly within the United Kingdom in the narrowest sense of these words, was "*concerned* in the unshipping," inasmuch as he there hired the master of the hoy to take the foreign silk on board, which in pursuance of that hiring he afterwards did; and we think that there is no doubt but that the unshipping from the boat into the hoy with a view of laying on land without paying the duties, and no duties having been paid or secured, is an illegal unshipment within the meaning of this section.

But even supposing that the defendant's act of assistance or concern in the unshipment must be considered to have taken place through the agency of the master of the hoy, at the place where the unshipment was made, and that such place was not "in the United Kingdom," in the sense ascribed to that word in the section in question, there seems to us to be no doubt but that the offence described in the second count has been committed, for the goods were seized in the body of a county, in the possession of the master of the hoy, who was for this purpose the de-

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fendant's agent; and the master knew that they had been unshipped with intent to be laid on land, and without the payment of duties, and that such duties had not been paid or secured.

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If this construction be not correct, and to bring this case within this section the unshipment itself must be within some county, the consequence would be, that in a great many cases the penalty would not attach; for if uncustomed goods were actually seized on shore in the hands of a person who had himself unshipped them, he would not, according to the argument of the defendant, be liable, if such unshipment had taken place, or, as it often does, on the open coast, whilst the vessel itself from which they are unshipped is afloat or on the sea, and not within the common law jurisdiction of a county.

We therefore think that the rule which has been obtained for a new trial must be discharged.

Rule discharged.

MORRIS and Another *v.* PARKINSON.

Where the Master on taxation decided that one of the actions in which the costs had been incurred, had been improperly brought, and disallowed those costs, by which more than one-sixth of the bill was taken off:—*Held*, that the attorney was bound to pay the costs of taxation.

IN this case the Master, on taxation of the plaintiff's bill of costs, decided that one of the actions in which the costs had been incurred had been improperly brought, and on that ground disallowed those costs, by which more than one-sixth of the bill was taken off.

Dowling now moved for a rule to shew cause why the defendant should not be allowed the costs of taxation.—This is the ordinary application under the statute *2 Geo. 2*, c. *23*, s. *23*; and it was decided in *Higgins* v. *Woolcott* (*a*), that where an attorney's bill is reduced on taxation by a sixth part, that the client is entitled to the costs

(*a*) 5 B. & C. 760; S. C. 8 D. & R. 589.

of taxation, as they are not in the discretion of the Courts. He also cited *Elwood* v. *Pearce* (*a*), and *Baker* v. *Wills* (*b*).

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Chilton shewed cause in the first instance.—In *White* v. *Milner* (*c*) it was held that the attorney is not compellable to pay the costs of taxation where the deduction of one-sixth is occasioned, not by particular items being reduced by taxation, but by a whole branch of it being disallowed. That case is in point, as here the Master disallowed one branch of the bill. That decision was recognised by the Court of *King's Bench* in the case of *Mills* v. *Revett* (*d*).

Lord ABINGER, C. B.—It is not necessary for us to go the length of saying that the case of *White* v. *Milner* has been overruled. I take that case to have decided this, that where an attorney charges a person wrongfully with the costs, and the whole are disallowed, the bill is not to be considered as taxed. But if when, for a particular reason, the Master thinks that the attorney ought not to have charged a specific item, and disallows it, by which the bill is reduced by one-sixth, the attorney is not to pay the costs of taxation, it would follow that in every case where an item is inserted which the Master disallows as not chargeable at all, it would be said that that item was not taxed, and consequently the bill not reduced by taxation. We cannot lay down the rule as contended for, as such a decision would open the door to controversy in every case where the bill was reduced one-sixth on taxation.

PARKE, B.—It is not necessary to say whether the decision in the case of *White* v. *Milner* be right or wrong,

(*a*) 1 M. & Scott, 159; S. C. 8 Bing. 83.
(*b*) 2 Cr. & M. 415.
(*c*) 2 H. Bl. 357.
(*d*) 3 Nev. & Man. 767.

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because this is distinguishable from that case. There the sum was struck out because the defendant was not chargeable with it, and it ought to have been charged to another person. In the present case the sum in question was disallowed, because the attorney ought not to have charged this item at all, and therefore it ought never to have been inserted in the bill.

BOLLAND, B.—There was a case which came before this Court from the northern circuit, where a sum of 15*l.*, being the amount of fees to counsel advanced by the client to the attorney, was struck out of the bill; and the question whether the general rule on taxation applied was brought before this Court, and they decided that it did, and the attorney was compelled to pay the costs of taxation.

GURNEY, B., concurred.

Rule absolute, with costs.

PERCIVAL and Others *v.* FRAMPTON.

Action by the indorsees against the indorser of a promissory note for 500*l.*

ASSUMPSIT by the indorsee against the indorser of a promissory note made by *R. S. Atcheson*, dated the 1st of Plea, except as to the sum of 200*l.*, that the note was made and delivered to the defendant in order that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced to the amount of 200*l.*, and that there was no consideration for the residue.—Replication, that the plaintiffs were the holders of the note for good and valuable consideration given to the maker in respect of their being the holders of the note to the full amount thereof.

Held, first, on this issue, that it was not incumbent upon the plaintiffs, in the first instance, to prove the consideration given for the note; but that it was necessary for the defendant to begin, and impeach the plaintiff's title.

Held, secondly, it having been proved that more than 500*l.* being due from the maker to the plaintiffs at the time the note was paid in to them, they entered the note as a bill discounted to his credit, but that 198*l.* only was actually paid to him, that that was equivalent to their having advanced the amount mentioned in the note, and was a giving of a valuable consideration within the meaning of the issue.

Held, thirdly, that if the note were given to them as a security for a previous debt, the plaintiffs might be properly stated to be the holders for a valuable consideration.

November, 1834, for the sum of 500*l.*, payable to the order of the defendant, and by him indorsed to the plaintiffs.

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Plea to the whole declaration, except as to the sum of 200*l.*, that *Atcheson* made and delivered the note to the defendant for the purpose of being indorsed by him for the use and accommodation of the said *R. S. Atcheson*, and to enable him to obtain advances of money thereon, and without any other purpose or consideration. The plea then went on to aver, that the note was indorsed by the defendant to enable the said *R. S. Atcheson* to obtain advances from the plaintiffs, but that the plaintiffs had advanced only to the amount of 200*l.*, and that there was no consideration for the residue of the note.

Replication, that the said plaintiffs were and still are the holders of the said note for good and valuable consideration given by them the said plaintiffs to the said *R. S. Atcheson*, in respect of their being the holders of such note, to the full amount thereof.

At the trial before *Gurney*, B., at the *London* Sittings after last *Hilary* Term, it was insisted on the part of the defendant, that, upon these pleadings, the plaintiffs were bound to begin, and to prove the consideration which they had given for the note. The learned Judge, however, decided that the rule was otherwise. The plaintiffs, however, who were bankers, called one of their clerks, who proved that the note was entered in their books to the account of *Atcheson*, who was a customer at their bank, as a bill discounted to his credit, the discount being deducted. It was also proved that the sum of 198*l.* only was advanced after the note was paid in, but that there was a balance due from *Atcheson* at the time it was paid in exceeding the amount of the note. It was objected for the defendant that this evidence did not prove the issue raised by the pleadings, inasmuch as the note was not given to be applied to an antecedent account between the

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parties, but as a security for future advances. The learned Judge having overruled this objection, the jury found a verdict for the plaintiffs, with damages to the amount of 506*l.*

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J. Henderson now moved for a new trial.—On these pleadings it stands admitted that there was no consideration between the maker and the payee, or between the payee and the plaintiffs, his indorsees; and the plaintiffs have undertaken to prove that they gave consideration to the maker to the full amount, which they have failed in doing. *Primâ facie*, an indorsement implies a consideration, but here the presumption of law is repelled by the language of the pleadings, and the plaintiffs are bound to prove what they have alleged, *viz.* that they, the indorsees, gave full consideration to the maker, with whom they have no privity on the note. The affirmative of the issue in substance as well as in form lies upon the plaintiffs. The evidence which the plaintiffs adduced shewed that they did not give to the maker consideration "for and in respect of their being holders of the note" to a larger amount than the sum confessed, it having been proved that 198*l.* only was advanced. The act of writing the amount of the note on the credit side of the account, and the discount on the debit side, was not a giving of consideration. It left the parties in the same relative situations as before, and nothing but the sum of 198*l.* was advanced on the faith of this note. If so, the defendant, being admitted to be an accommodation indorser, is not liable beyond the sum actually paid to the maker on the credit of his indorsement.

PARKE, B.—In this case I think that there ought to be no rule. As to the first point raised, whether it was incumbent upon the plaintiffs in the first instance to have proved the consideration given for the note, I am of opinion that the learned Judge was clearly right in holding that it was not.

The only fact admitted on the pleadings is, that the indorsement was for the accommodation of the maker; but that raises no inference that the plaintiffs were holders without consideration. If it had been alleged that the bill or note had been obtained by fraud, or had been stolen, then the inference might perhaps arise that the holder had not given full consideration for it, because in such a case it would be probable that the person obtaining the instrument would pass it away for less than its full value. But where there is only the simple fact alleged of its being an accommodation bill or note, then the inference is, that the holder has given value for it, because that is the very object for which the note is given. The Court has therefore no difficulty in saying, that the defendant ought to have begun and to have impeached the plaintiffs' title to the note.

The plaintiffs, however, in the present case did adduce evidence of the consideration which they had given for the note, and it appeared from the evidence of their clerk, that after inspection of the accounts the plaintiffs discounted the note for *Atcheson*. That is equivalent to their having advanced the amount of the sum mentioned in the note to him. Supposing then that the limited construction contended for is to be put upon the replication, the averment of the note having been discounted is proved in fact. Besides, the replication would be sustained if that were not so; for if the note were given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be the holders for valuable consideration. I think it may be said that they held it for a good consideration, in respect of their being such holders, if they gave credit to *Atcheson* on the faith of the note.

ALDERSON, B.—I entirely concur in the opinion which has been expressed by my Brother *Parke*. The mere

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fact of a note being an accommodation note does not raise any inference that the holder has not given value for it.

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The rest of the Court concurred.

Rule refused.

WELLS *v.* ODY (*a*).

By the Building Act, 14 *Geo.* 3, c. 78, s. 100, it is enacted, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs. *Semble*, that in such a case it is not necessary for the defendant to enter a suggestion on the roll to entitle himself to treble costs.

THIS was an action of trespass for raising a wall, to which the defence set up under the general issue was, that the wall was a party fence wall, and that the defendant had acted in pursuance of the Building Act, 14 *Geo.* 3, c. 78. At the trial, the plaintiff was nonsuited, no notice of action having been given pursuant to the 100th section of that act. The defendant signed judgment in the general form, and the Master allowed him treble costs, according to the 100th section of the act. A rule having been obtained by *Bompas*, Serjt., for the Master to review his taxation,

Kelly now shewed cause.—It was decided in *Collins* v. *Poney* (*b*), which was a case precisely similar to the present, that the defendant is entitled to treble costs, under the 100th section of the 13 *Geo.* 3, c. 78, upon a nonsuit. But it is said, that the defendant, having signed judgment without entering any suggestion on the roll, and there being no justification pleaded, but the general issue only, he is only entitled to single costs. But it is not the practice to enter a suggestion on the roll, unless the Master requires it to be done before he taxes the costs. If the Master doubts whether treble costs are payable, then he may refuse to tax, unless a suggestion be entered. The costs are taxed as in any other case,

(*a*) See *ante*, 128. (*b*) 9 East, 322.

and if the party is entitled to treble costs, the Master allows them. But if it be necessary to enter a suggestion, it may be entered at any time before the roll is carried in; and the Court, if they think it is requisite, will permit this rule to be enlarged for that purpose.

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Bompas, Serjt. *contrà*.—Unless judgment is signed for treble costs, the Master cannot tax them; and it is too late now to enter a suggestion on the roll, final judgment having been signed. *Watchorn* v. *Cook* (*a*), *Calvert* v. *Everard* (*b*), *Hippesley* v. *Laying* (*c*). [*Parke*, B.—Those were cases where the defendant sought to deprive the plaintiff of costs, under the Court of Requests Acts, and where the defendant had suffered the plaintiff to incur a part of those costs, by not applying to the Court in time.] The statute enacts, that the defendant "shall have judgment of treble costs;" the award for treble costs is, therefore, a necessary part of that judgment, to entitle the defendant to them. There must be some statement on the record to warrant the judgment, otherwise it is erroneous. *Dunbar* v. *Hitchcock* (*d*). But there is, on this record, no authority to the Master to tax treble costs; and he ought not to have done so, without a suggestion being entered on the roll.

Lord ABINGER, C. B.—Even assuming, that, according to the words of the statute, there must be judgment entered up for treble costs, is it necessary that it should be entered up before taxation? If the defendant means to enter up judgment for treble costs, and the Master taxes treble costs, can there be any objection to that, in this stage of the proceeding? The only judgment now is the judgment of nonsuit. If the defendant signs final judgment for treble costs, and he enters up judgment,

(*a*) 2 M. & S. 348.
(*b*) 5 M. & S. 510.
(*c*) 7 D. & R. 265; 4 B. & C. 863.
(*d*) 3 M. & Selw. 591.

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without entering a suggestion, then the plaintiff may have a right to complain. If the defendant had now, or at any time before, applied for leave to enter a suggestion, the Court would grant it him.

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PARKE, B.—I have no difficulty in saying, that the Court would allow the defendant to enter a suggestion now, if he applied for leave to do so. There are some cases in which there must be a suggestion entered up, as where the defendant seeks to deprive the plaintiff of costs under the Court of Requests Acts; but here the judgment would be regular without such suggestion being entered. If the defendant entered up judgment for treble costs, the Court could not see, from the judgment, whether he had charged treble costs or not. It was held in *Finlay* v. *Seaton* (*a*), that neither a certificate from the Judge, nor a suggestion on the roll, is necessary to entitle a defendant to double costs, under the 11 *Geo.* 2, c. 19. There, the words in the statute are, shall "recover double costs." I do not say whether it is or is not necessary to enter a suggestion in the present case. If the words had been, "shall recover treble costs," it is quite clear, on the authority of that case, that it would not have been necessary to do so.

ALDERSON, B.—I think the judgment for treble costs means three times what the Court awards for costs.

Rule discharged.

(*a*) 1 Taunt. 210.

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ASSUMPSIT for goods sold and delivered, money lent, and on an account stated. Plea—as to the sum of 9*l.* 15*s.* 9½*d.*, that, after the making of the promise, as to that sum, and before the commencement of the suit, the said defendant, at the request of the said plaintiff, made, and drew, upon a piece of paper, having a bill of exchange stamp duty thereon of the sum of 1*s.* 6*d.*, a certain instrument, purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was requested to pay to such person, or his order, in *London*, who should place his name thereto as the drawer thereof, 20*l.*, two months after the date thereof, as for value received in goods and cash; that the plaintiff then requested the defendant to accept the same towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the said plaintiff's benefit and accommodation as to the rest; and that the defendant accordingly accepted the same, and delivered it to the plaintiff, and thereby became liable to pay to the plaintiff, or to such person who should place his name thereto as the drawer thereof, or his order, the sum of 20*l.*, that is to say, towards the payment of the said sum of 9*l.* 15*s.* 9½*d.*, and for the benefit and accommodation of the plaintiff as to the rest; and that the plaintiff then accepted and received the said bill in and towards the payment and satisfaction of the sum of 9*l.* 15*s.* 9½*d.* The plea then went on to aver the

Assumpsit for goods sold, &c. —Plea, as to 9*l.* 15*s.* 9½*d.*, that, after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew, upon a piece of paper having a bill of exchange stamp upon it of 1*s.* 6*d.*, an instrument, purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was required to pay to such person, or his order, who should place his name thereto as drawer, 20*l.*, two months after date, as for value received; which instrument the plaintiff requested the defendant to accept towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby became liable to the plaintiff, or to such person who should place his name thereto as drawer, or his order, the sum of 20*l.*, viz. towards payment of the sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.* 15*s.* 9½*d.*, and which bill was not due at the commencement of the suit.—Non-assumpsit to the residue.—Replication, that the bill remained unnegotiated in the hands of the plaintiff, without any drawer's name to it, and unpaid:—*Held*, on demurrer, that, under the circumstances alleged in the plea, the plaintiff's right to sue for the original debt was suspended until the expiration of the two months, and of the instrument's becoming due and being dishonoured.

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liability of the defendant to pay the bill to whoever might be the holder thereof, and that the bill was not due at the commencement of the suit. As to the residue of the money mentioned in the declaration, the defendant pleaded *non-assumpsit*. Replication, that the bill remained unnegotiated in the hands of the plaintiff, without any drawer's name having been put to it, and that it remained unpaid. Demurrer and joinder.

R. V. Richards in support of the demurrer.—The replication is bad, and is no answer to the plea. The record shews that this action was commenced before the bill would have become due, had it been negotiated. The allegation in the replication, that the bill remains unnegotiated in the hands of the plaintiff without any drawer's name attached to it, is immaterial, as the only thing necessary to render the defendant liable is the acceptance. This instrument operated either as a satisfaction of the debt, or, at least, as a suspension of the plaintiff's right to sue, until it became due, and was dishonoured. The plaintiff has received from the defendant, in satisfaction of the original debt, an instrument, by which the defendant has made himself liable to the amount of 20*l.*, and which the plaintiff may, at any time, put into circulation. It is of no consequence that the instrument is defective as a bill of exchange until a drawer's name be added to it, as that may be done at any time; and, even without that, it would still operate as a promissory note. It may, therefore, be put into circulation, and the defendant would be liable upon it to any *bonâ fide* holder to whom the plaintiff may transfer it. As long, therefore, as the plaintiff holds this coercive power over the defendant, the plaintiff's right to sue for the recovery of the original debt is suspended. If that be so, the replication is no answer to the plea.

J. Jervis, contrà.—The plea is bad, as the matter alleged in it is no answer to the plaintiff's cause of action. This

is distinguishable from *Kearslake* v. *Morgan* (*a*), because, in that case, the instrument was a complete instrument, which this is not. It is clear, that a simple contract debt cannot be extinguished, except by a contract of a higher nature as a specialty. It is said, however, that it may operate as an accord and satisfaction, but the plaintiff has received no satisfaction. He has merely had a blank acceptance, which is nothing but a promise to accept a bill when drawn, or at most, a mere promise, of no greater weight than the original contract. There is, therefore, no consideration for the plaintiff's agreement to take this bill as a satisfaction of his debt.

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PARKE, B.—The defendant, by putting his name to this paper as the acceptor, entered into a promise to pay the bill, which he cannot now get rid of, and gave an irrevocable authority to put to it the name of any person as a drawer, by which he has rendered himself liable for the amount. That is a valuable consideration for an agreement by the plaintiff, that his right to sue should be suspended. It is, in effect, an agreement not to sue for a certain time, in consideration of receiving an authority to use the defendant's name for a certain amount, during the period of two months. Suppose the plaintiff had said, if you will pay me my debt at the end of two months, and lend me 11*l.* for that period, I will not sue for the debt until the expiration of the two months; that would have operated as a suspension of the suit. That is, in substance, the present case.

J. Jervis then prayed leave to amend, by traversing the allegation in the plea, that the plaintiff accepted the bill in satisfaction; which the Court granted, on payment of costs as between attorney and client, the amendment to be made within a fortnight.

Leave to amend.

(*a*) 5 T. R. 513.

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PARRY *v.* FAIRHURST, TILSTON, SMITH, and JOHNSON.

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In an action on the case against the defendants, as *carriers*, for negligence, it appeared from the evidence, that the defendants, if liable at all, were liable as *wharfingers*, on a contract to *forward*. Just before the plaintiff's counsel commenced his reply, he applied to the Judge to amend the declaration, which, however, the learned Judge refused to do, but left it to the jury to say, whether there was a contract to forward, or a contract to carry, and they found that there was a contract to forward. He then directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the Court might proceed thereon according to the 3 & 4 W. 4, c. 42, s. 24. The Court allowed the amendment on payment of costs, and granted a new trial, on payment of costs, observing that the learned Judge might have allowed the amendment, and postponed the trial to a future day, pursuant to s. 23 of that statute.

CASE against carriers.—The first count of the declaration stated, that the defendants, before and at the time of the delivery of the goods and chattels to them, as thereinafter next mentioned, were, and thence hitherto have been, and still are, common carriers of goods and chattels for hire, to wit, in the county of *Chester*. That the plaintiff, whilst the defendants were such common carriers as aforesaid, to wit, on &c., at &c., caused to be delivered to the defendants, and the defendants then and there accepted and received of and from the plaintiff, divers goods and chattels; to wit, a pair of millstones of the plaintiff, of great value, to wit, of the value of 20*L*, to be safely and securely carried and conveyed by the defendants from *Chester* aforesaid, to *Newtown*, and there, to wit, at *Newtown* aforesaid, safely and securely to be delivered for the plaintiff, for certain reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty as such common carriers, but contriving, &c. did not nor would safely or securely carry or convey the said millstones from *Chester* to *Newtown* aforesaid, nor then, to wit, at *Newtown*, aforesaid, safely or securely deliver the same for the plaintiff; but, on the contrary thereof, they, the defendants, being such common carriers as aforesaid, so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence, and default of the defendants in the premises, the said millstones, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, became and were wholly lost to the plaintiff, to wit, in the county aforesaid.

The second count stated, that heretofore, to wit, on &c., to wit, in the county aforesaid, the plaintiff, at the request of the defendants, caused to be delivered to the defendants, a certain other pair of millstones of the plaintiff, of great value, to wit, of the value of 20*l.*, to be taken care of, and safely and securely carried and conveyed by the defendants to *Newtown* aforesaid, and there, to wit, at *Newtown* aforesaid, to be safely and securely delivered by the defendants for the plaintiff; and although the defendants then and there accepted and had and received the said last-mentioned millstones, for the purpose aforesaid, and undertook the carriage, conveyance, and delivery thereof, as aforesaid; yet the defendants, not regarding their duty in that behalf, did not, nor would, after such delivery, acceptance, and undertaking, as last aforesaid, take care of, or safely or securely carry or convey the said last-mentioned millstones to *Newtown* aforesaid, nor there, to wit, at *Newtown* aforesaid, safely or securely deliver the same for the plaintiff; but, on the contrary thereof, so carelessly, negligently, and improperly conducted themselves in the premises, that through and by means of the carelessness, negligence, and improper conduct of the defendants in that behalf, the said last-mentioned millstones, being of the value aforesaid, then and there became and were broken, damaged, injured, spoilt, and wholly lost to the plaintiff, to wit, in the county aforesaid.

The third count alleged that the defendants, at their request, had the care and custody of divers, to wit, two pairs of millstones of the plaintiff, of great value, to wit, of the value of 50*l.*; yet &c. The fourth count was in trover. The defendants pleaded the general issue.

At the trial before *Vaughan*, J., at the last summer assizes for the county of *Chester*, the plaintiff proved that the defendants were carriers and wharfingers, having a wharf on the *Ellesmere* and *Chester* Canal, at the city of *Chester*;

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and that they were in the habit of receiving goods at their wharf to be forwarded to various parts of the country, and amongst others into *North Wales*. In the year 1829, the plaintiff, who resided in *Anglesey*, entered into a contract with one *Jenkins*, to furnish him with two millstones, to be delivered at the plaintiff's expense at *Newtown*, in *Montgomeryshire*. Accordingly, the millstones were brought by the plaintiff from *Anglesey*, to a wharf in *Chester*, and were there placed by the plaintiff in the defendants' waggon, and carried to their wharf; but, as they were in the act of removing one of them from the waggon upon the wharf, the chain by which it was hoisted gave way, and the stone fell, and was materially injured. On the part of the defendant, it was proved by a person of the name of *Smith*, that he was agent to one *Groom*, a carrier from *Chester* to *Welchpool* and *Newtown*, as well as clerk to the defendants; and that the plaintiff came to him, at the defendants' office, to book the millstones to be forwarded to *Newtown*, and that he, *Smith*, employed the defendants' team for the purpose of bringing them to the defendants' wharf; and that the charge for the cartage was paid by him as *Groom's* agent. The defendants contended that they had not undertaken to carry the millstones, but that the contract to carry, if any, was made with *Groom*, through his agent, *Smith*. After the case was closed on both sides, but before the reply, *J. Jervis* applied to the learned Judge to allow the second count to be amended as a contract to forward. The learned Judge doubted his power to do so, but summed up the case to the jury, desiring them to find whether the defendants had undertaken to carry the goods, or had received them as wharfingers, and in that capacity had undertaken to forward them. The jury having found the latter to be the case, the learned Judge directed them to find a verdict for the defendants, but ordered the special finding of the jury to be indorsed on the *postea*,

in order that, if the Court should be of opinion that the amendment ought to have been allowed, the second count might be altered into a contract to forward.

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J. Jervis, in *Michaelmas* Term last, obtained a rule to shew cause why the second count should not be amended, on payment of costs, as on a contract to forward, and a verdict entered for the plaintiff with 15*l.* damages, or why a new trial should not be had. He relied upon *Hanbury* v. *Ella* (*a*), where such an amendment had been made.

J. Evans shewed cause.—First, the amendment ought not to be made. It is essentially necessary to the amendment that the matter proposed as a substitute should be proved to the satisfaction of the Judge; but here the learned Judge told the jury, that he thought the evidence of the plaintiff rather loose respecting the character of the defendants as carriers to *Newtown*, which shews that no contract had been proved to his satisfaction; and the Court, in the exercise of its discretion, will not allow the amendment to be made under such circumstances. Besides, the defendants were never heard by the jury upon this supposed contract to forward. [*Parke*, B.—Should you not have applied to the Judge to be allowed to address the jury upon the new contract?] Secondly, if the amendment prayed for be allowed, and the word "forward" be inserted, the second count will not charge the defendants in their character of wharfingers. It is no part of the duty of a wharfinger, as such, to forward or carry; his duty only is to deliver the goods to the carrier when called for. Therefore, being under no common law obligation to forward, some consideration for the defendants' undertaking this extra responsibility ought to appear on the face of this count. There would, however, be no

(*a*) 3 Nev. & M. 438; 1 Ad. & Ellis, 61.

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allegation of any consideration for it. [*Parke*, B.—Would not the delivery of the goods by the plaintiff to the defendants be a good consideration for such an undertaking to render them liable?] But even if the amendment were made, the evidence would not support the alleged contract by the defendants to forward, it having been proved that the goods were in fact delivered to *Smith*, the agent of *Groom*, the carrier, to be carried to *Newtown*.

It being then suggested to the Court that the defendants had issued bills announcing that they undertook to forward goods to all parts of *North Wales*, and that one of those bills had been given in evidence at the trial (*a*), but which was not now in Court, the case was ordered to stand over for its production. On a subsequent day the bill was produced accordingly, and in the bill the defendants stated themselves to be carriers to *Newtown*, and that they undertook to forward goods to all parts of *North Wales;* but the bill also contained a notice limiting their liability in all cases except where notice in writing of the loss were given within a certain time, which had not been done in the present instance. On this ground *J. Evans* contended, that, no notice having been given, the defendants could not be made responsible for the loss.

John Jervis in support of the rule.—There was no proof of that notice ever having come to the knowledge of the plaintiff, and therefore he cannot be affected by it. It is, however, sufficient for the plaintiff that the defendants hold themselves out as wharfingers without reference to this advertisement. The plaintiff may stand on the evidence given at the trial, that the defendants received

(*a*) This bill was not produced at the trial until after the plaintiff's case had been gone through. It was proved by one of the defendants' witnesses, on cross examination; and it being contended by the counsel for the defendants, that it could not be received as evidence, on the ground of its being new matter, the learned Judge did not read it to the jury.

goods at their wharf to be forwarded into *North Wales*. That renders them liable upon a contract to forward. The defendants' clerk received the goods at their wharf, and the plaintiff knew nothing of the double capacity which he filled.

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PARKE, B.—This declaration was before the new rules as to pleading, and the plaintiff had an advantage which since the new rules he has not, as by them he is confined to one count only; the plaintiff is, therefore, not so much entitled to this amendment as he would have been had the declaration been subsequent. But this is a case in which, if the matter had arisen before me at *Nisi Prius*, I should have allowed the amendment. The defendants, however, ought to have had an opportunity of shewing that there had been no notice in writing according to their advertisement, and that the notice had been communicated to the plaintiff. If the memorandum on the paper produced had been shewn to have come to the knowledge of the plaintiff, then it would have qualified their contract, and the defendants would have been entitled to a verdict. I should, therefore, have exercised the power of amendment given by the statute 3 & 4 *W.* 4, c. 42, s. 23, and should have postponed the trial to another day, in order to shew that they were not liable for losses unless due notice were given of them. That is the discretion which I should have exercised. In the present instance the learned Judge did not exercise that discretionary power, but he referred the matter to this Court to consider of the propriety of allowing the amendment. I think, however, it would be hard upon the defendants to send the case down again except upon payment of their costs of the trial.

BOLLAND, B., concurred.

ALDERSON, B.—I do not think that the plaintiff ought to have that option under the circumstances of this case.

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It is an application to the discretion of the Court, and we ought to consider what will be the result of the action. I am anxious to extend the doctrine of amendment to the utmost; and we should do great injustice, parties being bound down to one count or one plea, as they at present are, unless we were liberal in amending variances. But I do not think the special circumstances of this case would induce me to grant the amendment. The utmost amount which the plaintiff can recover is 15*l.* only; it seems to me, therefore, to fall within the spirit of the rule which prohibits the granting of a new trial where the damages are under 20*l.* In addition to this, the application for leave to amend ought to have been made in an earlier stage of the cause. It was not made until the plaintiff's counsel began to reply.

GURNEY, B.—I feel great difficulty in assenting to the amendment; but I think, under all the circumstances, that there ought to be a new trial on the terms mentioned.

Rule absolute for amending the second count on payment of the costs of the application and of the amendment, and for a new trial on payment of costs.

FINCH *v.* COCKEN and Others.

Where the sheriff arrested a person named *Cocken*, on a writ issued against him under the name of *Cocker*, such arrest is illegal, and a bail-bond taken upon it, reciting that the defendant *Cocken* had been arrested by the name of *Cocker*, is illegal also.

Where the pliantiff averred that a writ of *capias* issued against the defendant *Cocken* by the name of *Cocker*, and the defendant traversed this allegation:—*Held*, that, on proof of the writ being issued in the name of *Cocker*, and that the defendant was the party intended, the issue ought to be found for the plaintiff.

DEBT by the assignee of a bail-bond.—The declaration alleged that the plaintiff sued out of the Court of *Ex-*

chequer a writ of *capias* against the defendant, *William Cocken*, by the name of *William Cocker*, and directed to the sheriff of *Middlesex*, to arrest the said *William Cocken* by the name of *Cocker*, and delivered it to the sheriff; who arrested the said *William Cocken*, and delivered a copy of the writ to the said *William Cocken;* and he being so arrested, the defendants executed a bail-bond, the condition of which, (after reciting that the said *William Cocken*, sued as *William Cocker*, had been taken on a writ issued against him by the name of *William Cocker*), was for his putting in special bail to the action. It was then averred, that he did not put in special bail, and that the sheriff had assigned the bail-bond to the plaintiff.

The defendants pleaded, *first, non est factum; secondly*, that no such writ of *capias*, as in the declaration mentioned, ever issued out of his said Majesty's Court of *Exchequer* against the said *William Cocken*, in manner and form &c. Issue thereon.

At the trial before *Alderson*, B., at the sittings at *Westminster*, in *Michaelmas* Term, the following appeared to be the facts of the case:—The writ issued against the defendant *Cocken* in the name of *Cocker*. Upon this writ he was arrested; and on the arrest he executed a bail-bond in the name of *William Cocken*, sued and arrested by the name of *Cocker*. It was not denied that he was the real party to be arrested. For the defendants, the case of *Scandover* v. *Warne* (*a*) was cited; and, upon the authority of that case, the plaintiff was nonsuited, with leave to move to enter a verdict.

Barstow moved accordingly in *Hilary* Term, and stated that the authority of that case had been shaken in *Morgan* v. *Bridges* (*b*). When the defendant *Cocken* had been identified, it was clear that the writ had issued against

(*a*) 2 Campb. 270. (*b*) 1 Barn. & Ald. 647.

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him by the name of *Cocker*, and therefore the issue raised by the plaintiff was proved. The Court granted a rule *nisi*, intimating an opinion that the declaration could not be sustained.

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Afterwards in this term, *Dowling* having appeared to shew cause, the Court stated that the issue was proved, but desired to hear the question as to the validity of the declaration argued; it being understood that the defendants had obtained a rule to arrest the judgment.

Barstow now shewed cause.—This was an action against the defendant *Cocken*, on a bail-bond given by him under that name, (the name in which he is now sued), in an action in which he was sued by the name of *Cocker*. The present action, it is said, cannot be maintained, because the sheriff cannot justify the arrest of *Cocken*, when the name in the writ is *Cocker*. To this there are several answers: *First*, the objection is too late. The defendant, when arrested by the wrong name, should have immediately applied to the Court to have the bail-bond cancelled, and to be discharged out of custody. Indeed he did adopt that course, though he failed in his application from the defect in the affidavit, and the case is therefore the same as if no such application had been made. *Finch* v. *Cocker* (*a*). Another answer to the objection is, that since the new rules (*Hilary*, *2 Will.* 4), this point cannot be taken; for, according to Rule 32, where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. [*Alder-*

(*a*) 2 C. & M. 412.

son, B.—That applies only to the case where there is a wrong *Christian* name.] It does not appear from the terms of it that the rule should be so limited. [*Parke*, B.—This Court has no power to alter the law respecting writs. The statute 1 *Will.* 4, c. 70, only authorizes the Judges to make rules to render the practice of the Courts uniform. *Alderson*, B.—The act was for the purpose of giving the Judges a jurisdiction over all the Courts, whereas before it they had only authority in their own Courts.] This being the name in which the defendant executed the bail-bond, he could not have been sued in any other name. *Gould* v. *Barnes* (*a*). [*Parke*, B.—He must be sued by the name in which he subscribed the bail-bond; if the writ issued in a different name, it must be averred that he was as well known by one name as the other; and, on the production of the writ, the identity must be proved.] *Thirdly*, the effect of the statute 4 & 5 *Will.* 4, c. 42, s. 11, is to take away the illegality of the arrest of a person by a wrong name. By that statute it is enacted, that no plea in abatement for misnomer shall be allowed in future; but the defendant may apply to have the declaration amended by having the right name inserted. Previously to this enactment, in all cases where the sheriff was held liable to an action of trespass for arresting a man by a wrong name, it was an arrest on mesne process; and, as the party was entitled to take advantage of the misnomer by a plea in abatement, the sheriff was held to have done wrong in making the arrest; but, if there had been no plea in abatement, and the suit had proceeded to final judgment, the defendant precluded himself from disputing the identity, and the sheriff was not responsible for taking him in execution. *Crawford* v. *Satchwell* (*b*), *Cole* v. *Hindson* (*c*), *Shadgett* v. *Clipson* (*d*), *Dixie* v. *Scholey* (*e*). In cases of

(*a*) 3 Taunt. 504.
(*b*) 2 Stra. 1218.
(*c*) 6 T. R. 234.
(*d*) 8 East, 328.
(*e*) Ib. cit. 329.

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summary applications, also, the Courts proceeded on analogy to this principle, and refused to set aside the process where the defendant suffered the time for pleading in abatement to expire. *Binfield* v. *Maxwell* (*a*), *Smith* v. *Patten* (*b*). Even where the wrong person was arrested in the name of another, the Court would not interfere summarily. *Salter* v. *Shergold* (*c*). Before this act, therefore, the party had two remedies—he might plead in abatement, or might make a summary application to the Court to be discharged out of custody; but the new act has taken away the former remedy. The alteration was made in the criminal law in the first instance, where the plea in abatement was taken away (*d*); so that now, if there be an indictment, and a *capias* issue to the sheriff, he must take the party and bring him into Court, even though there be an error in the name. In such case the sheriff would not be liable. He might say, "You are the man, and now you must plead to the merits." [Lord *Abinger*, C. B.—This case becomes very important in the way you now put it. The question may arise in the case of murder, where it has occurred on a resistance to the officer. Do you mean to say that a man is bound to obey any warrant? You might make general warrants lawful by inserting the name of *John Doe*.] It will be necessary to identify the party; but that is all that is required. Even before that statute a man was indicted and tried without a name (*e*). The present question arises upon civil process, where the plea in abatement for misnomer has also been abolished; so that it follows that the sheriff was not a wrongdoer in taking the defendant. He has given a bond in another name, and has been liberated; but suppose he had remained in prison, and the proceedings had gone on to

(*a*) 15 East, 159.

(*b*) 6 Taunt. 115; 1 Marsh. 414; cited 1 Chit. 282, n.

(*c*) 3 T. R. 572.

(*d*) 7 Geo. 4, c. 64, s. 19.

(*e*) See *The King* v. ——, R. & R. C. C. 489.

judgment, he would have had no remedy. As to a summary application, Mr. Baron *Bayley* has already expressed an opinion that this statute will prevent the discharge on a summary application for a misnomer (*a*). Lastly, it is immaterial whether the arrest was legal or not, for the defendants have given the bond admitting the arrest; and proof of the actual arrest is immaterial, and need not be averred in the declaration; *Haley* v. *Fitzgerrald* (*b*); and, if averred, is not traversable. *Watkins* v. *Parry* (*c*). It may be that a party hearing of the writ may give a bail-bond. If he gives it in a name different from that in the writ, he cannot afterwards be allowed to object to the bond. [*Parke*, B.—Your proposition is of the highest importance. An officer may proceed to the last extremity, and, upon death ensuing, in case of resistance, it would only be justifiable homicide.]

Platt, and *Dowling*, *contrà*.—As to the last point, the arrest is not immaterial. In order to warrant the taking of the bail-bond there must be valid process. By the statute 23 *Hen.* 6, c. 9, the sheriff is to take a bail-bond from persons in his custody *on process*, which involves the question, whether the process be valid or not. Unless the writ be such as can be legally enforced, the bond cannot be sustained. All that the defendants admit is, that *Cocken* is in custody on an improper writ. [Lord *Abinger*, C. B.—They admit that he is the person sued, but in a wrong name.] *Coles* v. *Hindson*, and *Shadgett* v. *Clipson*, which have been cited on the other side, shew that this action cannot be supported. [Lord *Abinger*, C. B.—Nothing was done by the plaintiff in those two actions. In the case in *Strange* (*d*), it is stated, that, where a bond was given in

(*a*) *Callum* v. *Leeson*, 2 C. & M. 406.
(*b*) Stra. 643.
(*c*) Stra. 444.
(*d*) *Crawford* v. *Satchwell*, p. 1218.

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a wrong name, the party to the bond must be sued in that name. Supposing a person sued in a right name gives a bond in a wrong name, can he take any advantage of that? If the wrong person has been taken on a writ, and had been compelled by the sheriff to give a bail-bond, he might have pleaded that the bond was executed under duress; but such is not the present case.] There must be a proper writ to support the arrest. It is not enough that the right person is taken, if the writ be in a wrong name. In *Morgan* v. *Bridges* (*a*), it was held, that, if the sheriff takes such a person, and afterwards lets him go at large, he is not liable in an action for an escape. [*Parke*, B.—That case only shews that the sheriff is not bound to take the person, though he is known by the name in the writ. He is not compelled to take the risk of that issue upon himself.] The decisions referred to, in which the objection has been overruled on summary applications, only shew that the Courts will not interfere where the party does not take the objection at the proper time. Lastly, the arrest was illegal. This point is settled by the authorities above cited, and *Wilks* v. *Lorck* (*b*); and there is nothing in the statute to alter the form of the writs. According to the plaintiff's argument, there need be no name at all in the writ, but it may be in general terms, which never could have been the intent of the statute.

Lord ABINGER, C. B.—The present case has been argued on the ground that the late statute has introduced a very important alteration in the law of arrest; and, according to the law as it existed before that statute, it is clear that no warrant for the arrest of any person was legal that did not contain his name, or at least some *designatio personæ*, by which he might be ascertained. If we

(*a*) 1 B. & A. 647. (*b*) 2 Taunt. 399.

were now to hold otherwise, we should introduce once more all the notions that once prevailed on the subject of general warrants. If, because the modern acts have disposed of the plea in abatement, both in civil and criminal process, we were to infer that a sheriff or police officer may arrest with impunity a person whose name is not in the warrant, we should make a most violent alteration in the law of arrest. But my opinion is, that no such consequences can result from the alterations that have been effected in legal procedure. The object of the statutes referred to was simply to give a more expeditious course of process in such particular cases as are there referred to, without affecting in any degree cases like the present.

The question in issue here is, was this a legal bond? That question depends upon the arrest being legal or illegal, and we are of opinion that it was illegal. As between the plaintiff and the defendant in the original action, the objection might not have been sustained; for, supposing that the defendant might still have pleaded it in abatement, yet the plaintiff might have replied that the defendant was known by the one name as well as by the other. As between the sheriff and the defendant the case is different; for the latter, unless precluded by some admission, is at liberty to avail himself of the objection. The arrest being illegal, the bail-bond founded on the arrest is illegal also.

The argument that the defendants, by executing the bond, had precluded themselves from this objection, at first view appeared to me to have considerable force; but, on further consideration, I think it cannot be sustained. It assumes that the writ issued contained the right name. Had that been the case, and had the defendant, on being arrested, gone to the sheriff and given a bond in a wrong name, the case would be very different. There he would be justified in making the arrest, which he is not where there is a wrong name in the writ. In the present case

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there is nothing to shew that the name in the bail-bond is not the right name, and the name in the writ the wrong name, and that consequently the sheriff never had a right to arrest the defendant. The authorities cited also shew such an arrest to be illegal. It is true that such illegality may be waived, as where the defendant suffers the proceedings to go to execution, in which case he is precluded by the judgment from taking the objection. But there is nothing of the kind here to preclude the defendant from taking the objection against the sheriff. The consequences of a contrary doctrine would be very serious. If, in executing such a writ, the sheriff or his officer were killed by the party resisting it, should we hold the writ legal, the offence would be murder; and, on the other hand, the sheriff or his officer, on such resistance, would be justified in killing the party. It is very undesirable that the law of arrest on this point should be unsettled.

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PARKE, B.—The question raised upon this record is, whether the process mentioned in these pleadings issued against the defendant or not. Parol evidence was given for the purpose of shewing that *William Cocker* was the person really meant to be sued, but the plaintiff was nonsuited. The issue was proved, but the Court desired to have the question argued, whether, the arrest being invalid, the bail-bond was not invalid also. It was urged for the plaintiff that the bond might be good, though the arrest was bad; but the answer to that argument is, that the statute of *Hen.* 6 only authorizes the taking of a bail-bond where there is a valid writ. Nor does the new statute make any difference. Following up the principle before adopted in the statute 7 *Geo.* 4, c. 64, with reference to criminal cases, it abolishes the plea of misnomer, and directs a new course of proceeding, the effect of which merely is to afford a more expeditious remedy than the plea in abatement. To attribute any other effect to it

might be attended with very serious results. Were the law such as it is contended for on behalf of the defendants, it might justify the sheriff in the execution of a writ on which no name whatever is mentioned. But, in fact, the only effect of the new statute is to place the defendant in the same situation as if he had pleaded in abatement; but it has no effect on the validity of the bail-bond. Where the writ is in a wrong name, the statute does not compel an obedience to it; where it is in a right name, the party, as before, must obey it.

BOLLAND, B.—There is nothing to prevent the old rule of law from applying. The writ is bad, and consequently the bail-bond founded on that writ is bad also.

ALDERSON, B.—I am of the same opinion. In the old cases the plea in abatement was the test of the validity or invalidity of the arrest. That plea is taken away, but the question of the lawfulness of the writ remains as before.

Judgment arrested.

REX *v.* ARMSTRONG, Clerk.

Where a sheriff returned to a writ of *capias utlagatum* that the defendant had no goods, nor any lay fee in his bailiwick, but that he was possessed of a rectory, the Court awarded the writ of sequestration, although the sheriff did not return that he had seized the rectory into his hands.

IN this case *Tomlinson* applied for a writ of sequestration to be directed to the Bishop of *London*, requiring him to sequestrate the benefice of the defendant. It appeared that a special writ of *capias utlagatum* had been issued into *Essex*, to which the sheriff had returned that the defendant had no goods nor any lay fee within his bailiwick; but that the defendant was rector of the parish of ——. The sheriff, however, did not return that he had seized the rectory into his hands. On this ground the

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Court doubted as to the propriety of granting the writ, inasmuch as the rectory was not forfeited on the outlawry. The above application was made on reading a transcript of the outlawry and the sheriff's return.

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Tomlinson, on a subsequent day, having been requested to refer to the cases, cited *Rex* v. *Hind*(*a*), where, to a special *capias utlagatum* the sheriff had returned an inquisition, finding that the defendant had benefices, but no lay fee; and the Court awarded a writ of sequestration, on reading the transcript of the outlawry and inquisition. He also referred to *Rex* v. *Dr. Swinney* (*b*).

The Court awarded the writ of sequestration upon these authorities, and said that the profits of the living would be sequestered under it, and paid over to the Crown; and that the course then would be for the plaintiff in the action to apply for relief to the Treasury.

Motion granted.

(*a*) 1 C. & J. 389. (*b*) Ibid. in notis.

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A testator devised real estates to trustees for the benefit of several parties for life, and after their deaths to be distributed amongst their children, &c.; and the will contained a power by which the testator directed that it *should be lawful* for the trustees to sell the same, or part &c. "as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property and affairs."

Some portion was sold shortly after the testator's death, because, being suitable for building, it was advantageous to the estate to sell it: and the remainder, after being subject to the trusts for ten years, was sold under an order of a Court of Equity in a cause.

Held, that the money arising from neither sale was liable to legacy duty.

THE common rule had been obtained on the part of the Crown calling upon *George Batley* (the trustee for the sale of certain freehold and copyhold estates, and also the executor of the will of *John Evans*, deceased,) to shew cause why he should not render an account of the legacy

duties payable under such will, and why the same should not be paid, &c. The affidavit on which the rule was obtained, in addition to the usual matters, stated, according to the information and belief of the deponent, that the said *George Batley* had sold under and in pursuance of the authority contained in the will the testator's freehold and copyhold estates, or some part thereof.

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It appeared from the affidavits in opposition to the rule, that the said *John Evans* in and by his last will and testament in writing, bearing date on or about the 4th day of *August*, 1818, duly executed and attested, &c., after bequeathing certain pecuniary legacies and annuities, directed that if his just debts and funeral expenses, and all the legacies and annuities thereby given, could not be satisfied out of his personal estate (exclusive of his leasehold property), then the testator particularly charged his leasehold estates in *Clink-street* and *Stoney-street* in the parish of *Saint Saviour, Southwark*, with the payment of the deficiency; and the said testator by his said will gave, devised, and bequeathed all and singular his freehold, copyhold, and leasehold estates situate and being in the several counties of *Kent, Surrey*, and *Essex*, or elsewhere, and all his monies, securities for money, stocks and funds, furniture, goods, and chattels, and other his personal estate of what nature or kind soever, subject to the payment of his debts and legacies, unto his sister *Mary Batley* (who died in the testator's lifetime), and his brother *George Evans*, also since deceased, and *Fisher Evans*, their heirs, executors, administrators, and assigns, according to the nature thereof respectively, upon the trusts, intents, and purposes thereinafter mentioned; that is to say, as to one-third part or share of such residuary estate devised and bequeathed as aforesaid, the said testator willed that the said trustees, and their heirs, executors, and administrators, should stand seised and possessed of in trust to pay the rents, interests, dividends, and produce of such

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third, as the same should accrue, unto his sister ***Mary Batley***, during her life for her separate use, and after her decease the said testator gave and devised such third part of his residuary property unto the children of the said ***Mary Batley***, living at his death, equally to be divided between them as tenants in common, and their respective heirs, executors, administrators, and assigns; or should any of the then present five children of the said ***Mary Batley*** die in his the said testator's lifetime, leaving any issue living at his the said testator's decease, such issue should be entitled to the same share as the deceased parent might have claimed if living at his the said testator's death. And in the said will was contained a power for ***Benjamin Batley***, the husband of the said ***Mary Batley***, at any time during his life, by any writing under his hand attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature thereof, to require the trustees and executors of his the said testator's will to raise out of his the said ***Benjamin Batley***'s wife's said share of his the said testator's residuary property, any sum or sums of money not exceeding in the whole 1000*l.*, to be paid to the said ***Benjamin Batley*** for his own use absolutely, or to such person or persons, and for such purposes, as he should direct.

And the said testator further declared, that it should be lawful for the said ***Mary Batley***, at any time or times during her life, by writing in manner therein mentioned, to authorize and direct the trustees and executors of his said will to raise, advance, and apply out of her third part of his residuary estate, or any part thereof, by sale, mortgage, or such other means as should appear expedient, any sum or sums, or make over any property for the advancement or preferment, or on the marriage of any of her children, or their issue respectively, so as the same did not exceed for any one child, or the issue of any child, the value of the share to which such child would be

entitled on the death of the said *Mary Batley* as aforesaid.

And as to one other undivided third part of his said residuary property, the said testator willed that his said trustees and executors, and their heirs, executors, and administrators, should stand seised and possessed thereof, upon trust to permit his the said testator's brother *George Evans* to receive the rents, issues, and profits thereof during his life, subject nevertheless to the payment of the interest of any debt due from him to the testator at his the said testator's death, and which debt should be chargeable upon and considered as part of such third share of his residuary property, as far as might be requisite for the division, or other arrangement thereof; and after the decease of the said *George Evans* the said testator gave and devised such last-mentioned third part of his residuary property unto the children of the said *George Evans* living at his the said testator's decease, equally to be divided between them and their respective heirs, executors, administrators, and assigns: or should any of the children of the said *George Evans*, then living, die before him the said testator, leaving any issue living at the time of his death, such issue should be entitled to the same share as the deceased parent might have claimed if living at the time of his the said testator's death: and if any child of the said *George Evans*, living at his the said testator's death, should die under twenty-one years without issue, his or her part or share should go to the survivors or survivor in equal shares, if more than one, as tenants in common: and the said testator also expressly declared, that, notwithstanding any thing thereinafter contained, or any event which might happen, it should be lawful for the said *George Evans*, at any time or times during his life, after satisfying any debt due from him to his the said testator's estate, by any writing or writings under his hand, attested by two or more credible witnesses, to require and

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direct the trustees and executors for the time being of the said will, by sale or mortgage, or otherwise, as should appear expedient, to raise or advance, or apply any sum or sums of money, or make over any property for the advancement or preferment in life, or on the marriage of any of his children, so as the same did not exceed for any one such child the value of the share which such child would be entitled to upon the death of the said *George Evans* as aforesaid; and the testator thereby authorized and empowered the trustees or trustee for the time being, after the decease of the said *George Evans*, and during the minority of any of his children, to pay and apply the rents, interests, and annual profits of the presumptive shares of such children respectively, towards their maintenance and education, or to raise and apply any part of the principal for the advancement of any child in the world.

And as to the remaining or other third part or share of his residuary property, the said testator gave and devised the same as therein mentioned for the benefit of his brother *Fisher Evans*; but considering that he the said *Fisher Evans* had received from him the testator considerable advances and assistance beyond what he had afforded to the said *Mary Batley* and *George Evans*, the said testator thereby authorized and directed his said trustees and executors, their heirs, executors, and administrators, by such means as should appear expedient to them, to raise or set apart out of such last-mentioned third share of his residuary property the sum of 1000*l.*, or the value thereof, to be added to and applicable in the same manner as the third share of his property thereinbefore devised and bequeathed for the benefit of the said *Mary Batley* and her family; and also to raise and set apart the like sum of 1000*l.*, or the value thereof, to be added to and applicable in the same manner as the third share left for the benefit of the said *George Evans* and his family; and, subject to and chargeable with the payment of such two sums of 1000*l.* each for the purposes aforesaid,

the said testator directed that during the life of the said ***Fisher Evans*** he be paid the rents and produce of the surplus of such last-mentioned third share of his residuary property, or so much thereof as he should require towards his support and maintenance, in such manner as he should think proper: and that the said trustees should lay out and invest what should not be so received by him the said ***Fisher Evans***, upon any of the public funds or real securities to accumulate: and in the said will was contained a power for the said trustees and executors, at the request of the said ***Fisher Evans***, testified as therein mentioned, to raise by mortgage or sale, or other disposition of the said last-mentioned undivided third part of the said real or residuary personal estate, subject as aforesaid, or any part or parts thereof, or the accumulations, as should appear advisable, any sum or sums of money not exceeding 2000*l.*, and apply the same, or any part thereof, in or towards the payment or compensation of any debt or debts due from the said ***Fisher Evans***, or in such other manner, and to or for such person or persons, and for such intents and purposes as he the said ***Fisher Evans*** should in that behalf from time to time direct by writing as therein mentioned: and in consideration of the deduction thereby made from the share of the said ***Fisher Evans*** the said testator released him from any debt which might be due from him to the said testator at the time of his the said testator's death; and upon the decease of the said ***Fisher Evans*** the said testator declared that in case he should leave any widow, such widow should be entitled to enjoy for her separate use during her life the rents, interest, and produce of such share of his residuary property as the said ***Fisher Evans*** should be in the receipt of at the time of his the said ***Fisher Evans's*** death; and should the said ***Fisher Evans*** have any children, then, after the deaths of the said ***Fisher Evans*** and any widow, the said testator gave and devised such last-mentioned third part,

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or so much thereof as should not otherwise be disposed of under the powers thereinbefore contained, and all accumulations, if any, arising therefrom, and all future benefit thereof, unto all the children of the said *Fisher Evans* at their respective ages of twenty-one years, subject to the same powers for applying the rents, interests, dividends, and produce for maintenance and education, and such advances out of the principal of any share, for preferment in the world during minority, as thereinbefore given respecting the shares of the said *Mary Batley* and *George Evans* respectively; but in case the said *Fisher Evans* should not have any children who should live to become entitled to his share of his the said testator's residuary property as aforesaid, the said testator gave and devised the same unto all the children of his said sister *Mary Batley*, and his brothers *George Evans* and *Percival Evans*, who should be living at his the said testator's decease, in such parts, shares, and proportions, and to be vested at such ages, days or times as the said *Fisher Evans* should by any deed or writing, or by his last will and testament, signed by him in the presence of and attested by three or more credible witnesses, direct or appoint, give or devise the same; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, the testator gave, devised, and bequeathed such last-mentioned share of his residuary property, and all future benefit thereof, unto and among all the children of the said *Mary Batley*, *George Evans*, and *Percival Evans*, who should be living at his decease, and in equal shares and proportions, and to their heirs, executors, and administrators.

And the said testator by his will directed and declared that it should be lawful for the trustees or trustee for the time being to make and grant, or join in making and granting, any lease or leases of his freehold and leasehold estates (and also of his copyhold estates so far as the cus-

toms of the manors of which the same were held would permit), or any part or parts thereof respectively, unto any person or persons, for any term or number of years not exceeding fourteen years, and subject to the provisoes usually inserted in leases made by trustees or guardians for infants, and so as the lessee or lessees in such leases should seal and deliver counterparts thereof respectively; and the testator further declared and directed that the said trustees and executors should have authority and power to lay out and invest the residue of his personal estate thereinbefore bequeathed to them, or any part thereof remaining, subject to the trusts of his said will, on government or real securities, and from time to time to vary and alter the same until the same should become payable and transferable by virtue of the trusts thereinbefore contained.

And in the said will is contained a power in the words following, that is to say:—

"Provided also, and I do hereby further declare and direct, that, notwithstanding any of the trusts and directions hereinbefore contained, touching my freehold and copyhold estates, it shall be lawful for the trustees or trustee thereof for the time being, to sell the same, or any part thereof, by public sale or private contract, either together or in parcels; or make or agree to any exchange or partition thereof, either together or in parcels, or of any part thereof, as shall appear most expedient to my trustees or trustee for the time being, towards effecting the arrangement of my property and affairs.

"And I do declare, that neither of them shall, on account of such trusteeship, be precluded from becoming a purchaser of any part of my property by public sale or private contract, or in exchange, with the consent in writing of the other parties beneficially interested therein, and competent to consent thereto; and I particularly direct, that my brother, *George Evans*, if living, and resident in his present house, at *Balham*, at the time of

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my decease, shall have the option of purchasing my lands adjoining the fields belonging to the said house, at a price to be fixed upon the same by two competent persons; one of whom shall be nominated by him for the purpose within two months after my decease, and the other by my other trustees for the time being, with power for the two persons so appointed to name an umpire; and I further declare, that, upon paying to the trustees or trustee of this my will for the time being the price or consideration for the purchase or exchange of any part of my freehold, copyhold, or leasehold estate, or other property so sold or exchanged, such trustees or trustee shall thereupon convey, surrender, or assign the same, respectively, unto or to the use of the purchaser or purchasers thereof, his or their heirs, executors, administrators, or assigns, or join in so doing, and in all requisite acts, as he or they shall direct; and the money to arise by such sale or exchange shall be laid out and invested, by the trustees or trustee for the time being of this my will, in or upon government or real securities, at interest, or applied upon the trusts and for such purposes as are hereinbefore expressed and declared of and concerning the property so sold, or such of them as for the time being shall be subsisting, or capable of taking effect. And I do hereby expressly declare and direct, that the receipt or receipts of the trustees or trustee of this my will for the time being, shall be a good and sufficient discharge to the purchaser or respective purchasers or exchangers of any part of my property, for any money or other consideration payable for the same, or in respect thereof; and that such purchaser or purchasers, or other person or persons paying the same, shall not be liable to see to the application, or be answerable or accountable for the misapplication or non-application thereof."

And the said testator appointed the said *Mary Batley*, *George Evans*, and *Fisher Evans*, executors of his said will.

The said testator made and published two several

codicils to his said will, dated respectively the 6th day of *August*, 1818, and the 8th day of *October*, 1818; but such two codicils did not, in any manner, affect the disposition of the said testator's real estate, made by his said will.

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The said testator, *John Evans*, duly signed and published, as by law is required for passing real estates by devise, a third codicil to his said will, dated on or about the 4th day of *January*, 1819; and thereby, after reciting that he had, by his said will, devised his estates and property to his brothers *George Evans* and *Fisher Evans*, and his sister *Mary Batley*, his trustees, for the benefit of themselves respectively and their respective children, and with such powers over the same as therein mentioned, and appointed them executors of his said will, the said testator did, by the codicil now in recital, appoint, in their stead, *John Richard Baker*, of *Bedford Place*, and his nephew, *George Batley*, son of the said *Mary Batley*, to be trustees and executors thereof, upon the same trusts and for the same persons, intents, and purposes, as mentioned in his said will, and did thereby give and devise his said estates and property to the said *John Richard Baker* and *George Batley* accordingly.

The said testator departed this life on or about the 23rd *January*, 1823, without altering or revoking his said will, save as appears by the said codicils, and without revoking the said codicils, save as appears thereby; and the said will, together with the said three several codicils thereto, were duly proved by the said *George Batley* alone, in the Prerogative Court of the Archbishop of *Canterbury*, on or about the 20th day of *February* in the same year, the usual power to prove the said will and codicils at a future time being reserved to the said *John Richard Baker*, if he should think proper to execute the same.

The debts, legacies, annuities, funeral and testamentary expenses of the said testator were duly paid and satisfied,

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by the said *George Batley*, out of the said testator's personal estate; which, exclusive of, and without including the value or produce of the leasehold property, was more than sufficient for the purpose.

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As certain parts of the testator's real estates, situate at *Balham*, in the county of *Surrey*, were considered eligible for building on, it was deemed more beneficial for the parties interested in the said testator's property, that such parts of the said real estate should be sold; and in consequence thereof, the said *J. R. Baker* and *George Batley*, by virtue of the power given to them by the said will and codicils of the said testator, sold and disposed of the said parts of the real estate situate at *Balham* aforesaid, in the month of *April*, 1823, which produced, including the timber thereon, and after deducting the auctioneer's charges and expenses, the sum of 2839*l.* 1*s.* 8*d.*

The said *George Batley* hath, at different times, cut and sold timber on other parts of the real estate, which has produced together the sum of 337*l.* 17*s.* 4*d.*

The different real estates of the said testator remaining unsold, continued to be held by the said trustees, upon the trusts of the said testator's will, from the time of his decease in *January*, 1823, down to *Michaelmas-day* now last past; and during such time, being a period of more than ten years, the rents and profits received from the said real estates were applied or appropriated to or for the benefit of the parties entitled thereto or interested therein, according to the trusts aforesaid. And such execution of the trusts being effected without inconvenience, the said trustees did not find or deem it necessary to proceed to a sale of such real estates.

In pursuance of an order made on the equity side of this honourable Court, in a cause wherein *George Evans* the younger was plaintiff, and the said *John Batley*, *John Richard Baker*, and others, were defendants, dated on or about the 7th day of *May*, 1833, certain parts of the

said real estate, being a freehold farm, in the county of *Essex*, hath been sold to Mr. Serjeant *Arabin*, for the sum of 1500*l.*, and other parts thereof, being a copyhold farm, in the county of *Essex*, hath been sold to *William Southerby* Esq. for the sum of 375*l.*; and such two sums have been respectively paid into the Bank of *England*, in the name and with the privity of the Accountant-General of this honourable Court, in trust in the said cause.

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In further obedience to the said order, the real estate of the said testator, *John Evans*, then remaining unsold, was put up to auction, by Messrs. *Farebrother & Co.*, auctioneers, at *Garraway's Coffee House*, *Cornhill*, in the city of *London*, on the 30th day of *August* last, with the approbation of *Richard Richards*, Esq. the Master, to whom the said cause stood referred; and at such sale certain parts of the said estates, including the timber thereon, situate in the county of *Kent*, was sold to *Thomas Pemberton*, Esq. for 20,050*l.*; and certain other parts of the said estate, situate at *Dagenham*, in the county of *Essex*, including the timber thereon, were sold to *Samuel Avila*, gent., for the sum of 351*l.* 1*s.*; and such several purchases have since been duly confirmed; and the said sums of 20,050*l.*, and 351*l.* 1*s.*, have been paid by the said *Thomas Pemberton* and *Samuel Avila*, respectively, into the Bank of *England*, in the name and with the privity of the said Accountant-General of the said Court, in trust in the said cause.

The said *George Batley* is ready and willing to render all proper accounts, and to pay the necessary duty thereon to the Commissioners of Stamps; but the said *George Batley* is advised that no duty is payable for or in respect of the monies arising from the sale of the said real estates of the said testator, devised by his will as before mentioned; and which, since the said testator's decease, have been sold by the said *John Richard Baker* and *George Batley*, the trustees thereof, either of their own authority, or under the order and decree of this honourable Court.

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Merewether, Serjt., and *Follett*, shewed cause.—The only point in dispute is, whether the monies arising from part of the testator's real estates which were sold because they were suitable for building, and of other parts which were sold under a decree in equity, are chargeable with legacy duty, under the provisions of the 55 *Geo.* 3, c. 184, which impose a duty on "monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, *directed* to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person who shall have died," &c. &c.

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The executors of Mr. *Evans* need not contend that the word 'direct' is necessary, to enable the duty to attach; but the question is, whether the real and *bonâ fide* meaning to be collected from the will is, or is not, that the testator directs that the property should be converted into money. If such a clear intention can be collected from the face of the will the duty may attach, because there is an implied direction. There must, however, be a positive and absolute intention, so manifest on the face of the will as that a direction can be implied; and if a discretion be left to the trustees or executors, or if the sale is dependent upon a contingency, which may or may not happen, it surely cannot be said that there is a direction to sell within the words or meaning of the act of Parliament.

The difficulty of carrying the will into execution without a sale is not sufficient; nor will it be sufficient, that an expectation or impression appears to have existed in the testator's mind that a sale would eventually be probable or necessary; but to raise an implied *direction* within the meaning of the act, the provisions of the will must render a sale absolutely and inevitably necessary, without any discretionary power being vested in the trustees or executors.

The *Attorney General* v. *Halford* (*a*) will probably be

(*a*) 1 Price, 426.

relied on by the Crown; but in that case there was an express direction to sell; and though there was no actual sale, the Court held, according to the principle of equity referred to by *Thomson*, B., that, in equity, that which is directed to be done must be considered to be done.

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The case of the *Advocate-General* v. *Ramsay's Trustees* (*a*) is not in favour of the Crown. The principle there established was, that where a real estate is devised to form a fund for distribution, it must be considered as part of the personal estate, and the Court could not construe the will in that case in any other way than as containing an intention that the whole property should be converted into money; and so the direction or power to the trustees was imperative and not discretionary.

Now, in the present case it is clear, that the testator's intention was, that the real property should remain unconverted, if it should be practicable. Then the will contains provisoes, uses, and trusts, applicable to real property only. The option to the brother *George*, to purchase the land at *Balham*, is surely not alone sufficient to shew an intention that the whole property should be sold, when all the prior parts of the will shew the contrary intention; at all events, there is no such clear intention expressed, as that it can be predicated that there was a *direction* to sell in the will.

Neither does the difficulty of carrying the will into effect without a sale form such an intention. It only renders the trust more complicated; but the fact that the trust was administered for so many years without a sale, shews that such sale was not absolutely necessary; and without an absolute necessity there can be no implied direction; and there being no express direction to sell, the monies in question cannot be said to have arisen from

(*a*) We have been favoured with the special case and judgment, in the *Advocate-General* v. *Ramsay's Trustees*, from the Legacy Office. See note at the end of this case.

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the sale of real estates *directed* to be sold within the meaning of this act of Parliament.

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The *Solicitor-General*, *Amos*, and Sir *G. Grey*, in support of the rule.—Every testator might evade this duty, if monies arising from a sale, under a discretionary power, were held not subject to it. An implied direction may arise in many cases when the power is not to sell at all events. If it is clear from the disposition in the will, from the circumstances of the family, and from the nature of the property, that a sale will be necessary for the proper execution of the trusts, that amounts to an implied direction within the meaning of the act of Parliament. A party would otherwise only have to add a few words to evade the act of Parliament; and in this case, it might be, that the power was given in this shape to evade the duty, though the object and intention is so clear and express. When, however, the circumstances of the case render a sale advantageous, as the trustee is bound to do what is for the advantage of his *cestui que trusts*, the sale becomes a duty, and is imperative and not discretionary.

The Court of *Exchequer* in *Scotland*, in the case of the *Advocate-General* v. *Ramsay's Trustees*, expressed themselves thus, in giving their judgment:—" To see whether there was an option, it is necessary to attend to the price given, and to trace the leading intention in the mind of the testator: if converting into money be the fair meaning of the deed, though a power only is given, that power is imperative. In the present case it is submitted, that the fair meaning of this will is, that the real property should be converted into money. The number and classes of persons to be benefited by the decision, shew that such was the intention; and the arrangement of the testator's property and affairs, mentioned by him in the will, could not have been effectuated without such sale.

The word *directed* ought to be construed favourably to the Crown, according to the well known distinction between acts which impose a penalty on the subject, and those which grant a revenue to the Crown."

Lord LYNDHURST, C. B. observed, that every subject had a right so to shape the disposition of his property, as to avoid the legacy duty if possible, and that there was no fraud in so doing. He said, that according to his then opinion, it was not necessary to bring a case within the word "directed" in the act of Parliament, that the word directed should be found in the will, but that it was sufficient, if it was the object of the will, and the obvious intention of the testator, that a sale should be effected. That was the principle of the two cases cited in argument. The question in the present case was, whether there was such an obvious intention, and such a necessity for a sale to effectuate the purposes of the will, as that a sale could be said to be directed. His lordship then considered the different povisions of the will, and said that no case hitherto had gone so far as to say that the duty was payable where there was not either an express direction to sell, or a manifestation in the will of the intention of the testator that there should be a sale; and as the case was therefore new, and turned principally on the construction of the will, the Court would take time to search through the will, and consider their judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by—

BOLLAND, B.—This case was brought before the Court, on the motion of the Attorney-General, on an affidavit, filed in the above matter, by *Charles Palmer Dimond*, gentleman, solicitor for the acting executor of the last will and testament of *John Evans*, esquire, deceased, late of the borough of *Southwark*.

The question for our opinon is, whether legacy duty

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be payable upon the monies arising from the sale of the real and copyhold estates of the testator.

It was argued before Lord *Lyndhurst*, myself, and my Brothers *Alderson* and *Gurney*.

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It appeared by the affidavit of Mr. *Dimond*, that the testator, after providing for the payment, out of his personal estate, of his debts, funeral expenses, and legacies, and which were afterwards duly paid, bequeathed the residue of his property, consisting, amongst other things, of freehold and copyhold estates, to trustees, upon certain trusts mentioned in his will. The will contained a discretionary power of sale as to the estates comprised in the residue, and which is set out in the affidavit, but it contained no *direction* to sell.

By the 55 *Geo.* 3, c. 184, schedule, part 3, the legacy duty is made payable "upon monies to arise from the sale, mortgage, or other disposition of any real estate, *directed* to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument."

Shortly after the death of the testator, the trustees, by virtue of the power, sold a part of the residuary property, not because it was necessary for the purposes of the trust, but because, from the particular description of the property, a sale was considered beneficial to the parties interested in it.

We are of opinion that the sale, made under these circumstances, is not a sale of property, *directed* to be sold by the will of the testator, within the meaning of the act, and that the proceeds of the sale are therefore not liable to the legacy duty.

It is stated, that some timber was afterwards cut and sold, and that other small parts of the property were also disposed of, to which the same observation will apply.

The rest of the estates were held by the trustees, upon the trusts of the will, for a period of more than ten years, and the rents and profits were applied by them accord-

ingly, it not being deemed necessary for the purposes of the trust to proceed to a sale. A suit was afterwards instituted on the equity side of this Court, and orders were made in that suit for the sale of the real estates, forming part of the residue. It was stated at the bar, and not disputed, and it appears by the proceedings, that in that suit there was a reference to the Master to inquire whether it would be for the benefit of all parties interested in such estates that they should be sold. The Master reported in the affirmative, and they were ordered to be sold accordingly.

It appears to us that the sales made under such circumstances cannot be considered as sales *directed* by the testator, within the meaning of the act. Two cases were cited at the bar; the *Attorney-General* v. *Halford* (*a*), and the *Advocate-General* v. *Ramsay's Trustees*. In the former case, the testator had expressly directed the estate to be sold; but it not being necessary that it should be sold for the purposes of the will, the party beneficially interested elected to take the estate in specie. The Court was of opinion that, although no sale had taken place, yet, as the testator had expressly directed the property to be sold, the duty was payable. In the other case, which was a case before the Court of *Exchequer* in *Scotland*, the question turned upon the construction of the will, and the Court was of opinion that, taking the whole will together, it contained a direction to sell; and upon that ground it was adjudged that the legacy duty was payable. It is obvious that these cases have no application to the present.

We are of opinion, therefore, that the claim of the Attorney-General, on the part of the Crown, ought not to be allowed; and that the rule of the 24th *March*, 1834, should be discharged, as to the proceeds of the sale of

(*a*) 1 Price, 426.

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the real and copyhold estate, and made absolute as to the personal estate (*a*).

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(*a*) IN THE EXCHEQUER IN SCOTLAND.

ADVOCATE-GENERAL *v.* RAMSAY'S Trustees.

INFORMATION by the Advocate-General in debt for legacy duty.—A verdict was found for the Crown, subject to the opinion of the Court, on the following case:—

The defendants are trustees, who have accepted, and have been carrying into execution, the testamentary trust-dispositions and settlements of the deceased *Andrew Ramsay*, formerly *Andrew Balfour*, who died the 25th day of *April*, 1814.

The first of the said testamentary trust-dispositions and settlements bears date the 5th day of *August*, 1806, and thereby the said *Andrew Ramsay*, then *Andrew Balfour*, did give, grant, assign, and dispone to the said trustees and their assignees, in trust, for the uses and purposes therein mentioned, "All and sundry lands, tenements, houses, annual rents, and other heritages" then belonging to, or which should happen to belong to, the said *Andrew Ramsay* at the time of his death, with the rents and duties thereof, with certain specified exceptions; and did assign and convey to the said trustees, all and sundry debts, heritable and moveable, and sums of money and other moveable estate which might belong to him at the time of his death, with certain specified exceptions, surrogating and substituting the said trustees in his full right to the premises, under the specified exception, "with power to the said trustees, or such of them as shall accept hereof, and to the survivors or survivor of the said acceptors, or to any two of them, while two or more survive, whom I, the said *Andrew Ramsay*, hereby declare to be a quorum, immediately after my decease, to uplift and receive the whole heritable and moveable debts and sums of money then resting and owing to me, and to intromit with my whole moveable estate and effects before disponed; to grant receipts, discharges, renunciations or conveyances of the said debts, and use and dispose upon the said moveable estate and effects, and in general to do every thing in relation thereunto which I might have done in my own lifetime; as also to establish in their persons legal titles to the several lands and heritages that shall belong to me at my decease, excepting as aforesaid, and to sell and dispose of the same, or any part thereof, either by public roup or private sale, as to them shall seem most expedient, and to uplift and receive the rents and duties thereof, while unsold, and the prices and proceeds thereof when sold; and to grant

dispositions, and all other writs necessary, in favour of the purchasers, one or more, binding my heirs in absolute warrandice of the subjects sold; hereby declaring that the purchasers of my said lands and heritages, or of any part thereof, shall have no concern with the application of the prices of their respective purchases, but that a receipt and acquittance for the same, by the said trustees, or the quorum aforesaid, shall be to the said purchasers a full and sufficient exoneration; with power also to the said trustees, or the quorum aforesaid, to appoint factors or cashiers under them, from time to time, for uplifting and discharging the rents and duties of my said lands and heritages, the prices of the same when sold, and the debts due to me, and for managing my whole real and personal or heritable and moveable estate hereby disponed; and for rendering these presents the more effectual, I hereby nominate and appoint the trustees before named, and the survivors or survivor of such of them as shall accept hereof, to be my sole executors, universal legatories, and only intromitters with my moveable goods and effects, excepting as aforesaid, and the debts due to me, exclusive of my nearest of kin, and all other persons, with power to them, after my decease, to give inventories of the debts due and effects belonging to me; confirm the same if necessary, and in general to do every thing in relation thereunto, that I might have done in my own lifetime, or which any executors, general disponees or universal legatories may lawfully do in like cases; but providing always as it is hereby expressly provided and declared, that the said trustees shall be holden and obliged to account for and apply their whole intromissions with the trust subjects hereby disponed, and the rents, issues, and profits arising from the same, in manner following, viz. In the *first* place, for payment of the expense of completing their own titles to the said subjects, and of executing this present trust; *secondly*, for payment of the debts of the said *Andrew Ramsay; thirdly*, for payment of the several sums of money underwritten, which I hereby legate and bequeath to the persons after mentioned, and their respective heirs, executors, or assignees," among which are legacies of 500*l.* to each of his three nieces after mentioned, "declaring always that if the produce of my estate shall not be sufficient for paying all the above legacies, after discharging my debts and the expenses above mentioned, every legacy shall suffer an abatement in proportion to the extent thereof," with a single exception; *fourthly*, for some provisions to servants; "and, *lastly*, with regard to the residue and remainder of my whole real and personal, and heritable and moveable estate, and the value and proceeds thereof, when converted into money, after payment of the expenses, debts, and legacies before mentioned, I hereby will, appoint, and direct the said trustees, and the survivors or survivor of them, or the quorum aforesaid,

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to pay over such residue and remainder, if any be, and whatever it may be, or to assign the securities for the same to the said Mrs. *Elizabeth Balfour* or *Campbell*, *Ann Balfour*, her sister, and the said *Anne Ramsay Wardlaw*, my three nieces, equally among them, and their respective heirs, executors, or assignees."

Which said deed farther contains the following clause:—"And which heritable subjects before disposed, with the writs and title-deeds thereof, I bind and oblige myself, my heirs, and successors, to warrant to be good and effectual, free, safe, and sure to the purchasers thereof from my said trustees, from and against all debts, burdens, encumbrances, and grounds of eviction whatsoever, at all hands, and against all deadly, as law will."

The said *Andrew Ramsay*, formerly *Andrew Balfour*, executed a supplementary trust-disposition and settlement, which bears date the 30th of *January*, 1813, which bears, that upon the 5th day of *August*, 1806, he had executed the foresaid trust-disposition and settlement of his "estate, real and personal, since which time" (the said deed bears) "I have revoked some of the legacies; others have become lapsed by the death of the legatees, and, my funds having since increased, I have resolved to bequeath certain other legacies and annuities. Moreover, I have since acquired a house in *Frederick Street*, which it is proper to dispone specially to my trustees appointed by the said deed." Therefore he, the said *Andrew Ramsay*, did thereby give, grant, and dispone to and in favour of the trustees named and appointed by the said deed of settlement first above mentioned, and to a certain other trustee since deceased, "and that" (the said supplementary deed bears) "for the uses and purposes mentioned in the said former deed, which I hereby approve of in the whole heads, articles, and contents thereof," excepting in so far as the same had been, or might be revoked by writing; and to the assignees of the said trustees, all and whole, the said dwelling-house therein more particulary described, with the whole parts and pertinents, and rights and privileges thereof; and the said *Andrew Ramsay* did thereby direct his said trustees to pay the legacies and annuities therein mentioned.

In both of the said deeds the said *Andrew Ramsay*, formerly *Andrew Balfour*, reserved to himself power to revoke or alter the same, and the same contained declarations that the same should be effectual though remaining in his repositories undelivered at the time of his death, and that the same did remain so undelivered at the period of his death.

Part of the estate so conveyed to the said trustees by the said first-mentioned testamentary deed consisted of certain debts due to the said *Andrew Ramsay*, secured by bonds termed heritable bonds, in the usual forms of such bonds, each containing a personal obligation by the bor-

power to repay the sum lent to him, with interest and penalty upon a failure, and a disposition, in security thereof, of certain heritable subjects, in which subjects the said *Andrew Ramsay* was, at the time of his death, infeft in virtue of the said bonds, and which subjects were redeemable on payment of the respective debts, interests, and penalties, if incurred, in the usual manner; and that the said *Andrew Ramsay* had not used the proceedings necessary to entitle him to enter into the actual possession or management of the subjects so conveyed, but received the interest of the said debts from the persons so conveying the said heritable subjects, and who themselves continued to possess and manage the same.

At different times after the death of the said *Andrew Ramsay*, and before the first day of *January*, 1821, in the course of the trust-management of the said trustees, money arising from certain of the said heritable bonds came to the hands of the said trustees, the said trustees having obtained payment thereof, or assigned the same, or sold the same, the principal sums which so came into their hands amounting to 9606*l.* 13*s.* 4*d.* There also came to their hands, during the said period, of interest on the said heritable bonds, become due after the death of the said *Andrew Ramsay*, the sum of 1091*l.* 13*s.* 3*d.*

After the death of the said *Andrew Ramsay*, and before the said first day of *January*, 1821, the said trustees, in the course of their trust management, did sell certain houses, part of the said heritable estate so conveyed to them, and did receive the prices thereof, amounting to the sum of 975*l.* 5*s.*, and did also receive the rents thereof arising after the death of the said *Andrew Ramsay*, and before the period of selling the same, amounting to the sum of 332*l.* 10*s.* 10*d.*

And the said trustees did also receive of rents become due since the death of the said *Andrew Ramsay*, and before the said first day of *January*, 1821, of the third share of the lands of *Roseburn*, which belonged to the said *Andrew Ramsay*, and conveyed to them by the said testamentary disposition, amounting to the sum of 389*l.* 15*s.* 7*d.*

At the said date of 1st *January*, 1821, the said trustees did satisfy or pay to the said nieces of the said *Andrew Ramsay*, to whom the said residue was given as aforesaid, the residue of the monies in their hands arising from the said personal and moveable estate, and from the said heritable bonds and interests thereof, and the said prices of houses sold, and rents thereof, and said rents of *Roseburn*.

The said trustees paid legacy tax after the rate of three pounds for every hundred pounds of the part of the said residue which they admitted to be residue of the personal or moveable estate, but have not paid any such duty on the part thereof which they represented to be,

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and held to be the said principal sums and interest arising from the said heritable bonds, and prices and rents arising from the said houses sold, and said rents arising from the said lands of *Roseburn*, and the further sum of 1361*l.* 6*s.* 8*d.* of interest received by the said trustees, or due on the said principal sums of the said bonds, after the same came to their hands, up to 1st *January*, 1821, and the further sum of 145*l.* 17*s.* 11*d.*, of like interest on the said before-mentioned sum of interest from the said heritable bonds, and the further sum of 85*l.* 18*s.* 7*d.* of like interest on the said prices of the said houses, and the further sum of 43*l.* 15*s.* 11*d.* of like interest on the said rents of the said houses, and the further sum of 38*l.* 12*s.* 5*d.* of like interest on the rents of the said lands of *Roseburn*, all up to 1st *January*, 1821.

The estate of the said *Andrew Ramsay*, so admitted by the trustees to be personal or moveable estate, was sufficient to pay all his debts, funeral expenses, and the legacies and annuities left in his said settlement, other than the shares of residue to his said residuary legatees.

The case was argued by the *Lord Advocate* (Sir *William Rae*) and the *Solicitor-General* (Mr. *Hope*) for the Crown, and by Mr. *Archibald Murray* and Mr. *John Campbell* for the trustees.

The Court (*a*) took time to consider, and on *Monday*, *February* 3, 1823, judgment was delivered by—

The LORD CHIEF BARON.—This is an information in debt for legacy duty on the residue of the real estate given in equal shares to three nieces under the disposition of the deceased *Andrew Ramsay*, formerly *Balfour*. The defendants are trustees acting under the deed by which he settled his affairs.

[His Lordship then read the special case, as far as the clause relative to the heritable bonds inclusive. He noticed from that clause, that a question appears to be intended to be raised, whether the succession to heritable bonds is to subject the party benefited to the legacy duty.]

But the view of this case which the Court have taken renders it unnecessary to consider such a question; they will dispose of the case on the presumption that the heritable bonds were part of the real estate of the deceased. This deed disposes of the moveable and heritable estate of the testator, and the residue arises from the sale of both. There appears to have been sufficient moveable estate to pay the debts and legacies; and, although, in many cases, a sale of real estate in such cir-

(*a*) The case was heard and decided by the *Lord Chief Baron* (Sir *Samuel Shepherd*), Baron Clerk *Rattray*, Sir *P. Murray*, and Baron *Hume*.

cumstances would not have been necessary, so far as duty is at present claimed, it has here been actually sold by the trustees.

The question is, whether, under the acts, this residue, which I will take to be produced entirely from the sale of real property, is liable to legacy duty; or whether it is to stand as if the real estate had been conveyed to the trustees for the purpose of being re-conveyed to the donees.

One question has been mooted, which would go to free the whole of this from legacy duty, namely, that the deed stated in the special case was not a testamentary instrument; that, in terms of the act, the duty on residue from real estate is only due when a residue is gifted "of monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherways disposed of by any will or testamentary instrument."

It is said that, *quoad* real estate, this could not be deemed a testamentary instrument, because, according to the law of *Scotland*, one cannot dispose of real property by testament. It is admitted that this is a testament as to personal, but not as to real estate. What are the purposes of this deed? Are they not exclusively the disposal of his property after his decease? Were the argument good, residue from real estate could not be liable to this duty in any case, nor could legacies even out of land, or of money from the sale of land, be liable to it; such legacies, according to the argument, could not be given from real estate by a testamentary instrument, and it is only on legacies given by a will or testamentary instrument, that duty is exigible.

But the question is, what is meant by a testamentary instrument in the statutes? Does it mean such testament as will pass lands? and, because there is none such in *Scotland*, is there to be no duty? Or, does it mean such instrument, if sufficiently executed, which is only to begin to operate and have effect at the decease of the maker of it? Unless it means such is to be held a testamentary instrument, no residue from land nor legacy to be claimed from land, would be liable to duty, as such can only be made by some kind of deed, and it is argued that land cannot be charged by a testamentary instrument. Legacy and bequest of residue are, in their nature, precisely the same, only the amount of the one is ascertained, and that of the other cannot be ascertained at the time. Both are gifts only taking effect from the death of the testator.

I apprehend the act meant, by the term testamentary instrument, a writing, whatever the form, or however by law it might be required to be executed, if it remains dormant during the life of the person executing it, if it be revocable until his death, and if it only comes into active power at his death. Such writiug stands in place of a testament, and is to be viewed as a testamentary instrument.

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The deed, in the present case, the Court are of opinion is testamentary; and, provided gifts have been raised pursuant to the powers of the will, by a sale under the deed, the duty will be due.

When one considers the intention of the acts, as the Lord Advocate well pointed out, it is, that everything which comes, or is directed to come into the hands of the donee in the shape of a money gift or bequest, should pay the tax.

The argument against the duty here is, that there is said to be an alternative, and that the trustees had power either to sell or not to sell, but to distribute the residue in specie: that they had an option, and that it was not a direction. I will not say how it would be if an option merely is given. I have formed a strong opinion on that question, but do not think it necessary to state it now, because in this case, as I will proceed to shew, I do not conceive the trustees had the option not to convert the real estate into money.

To see whether there was an option, it is necessary to attend to the power given, and to trace the leading intention in the mind of the testator. If converting into money be the fair meaning of the deed, though a power is only given, that power is imperative. This intention, then, is to be collected from the deed. Is there here, then, any conception of the residue of real estate being divided in specie? It is necessary in law to use the term power, it is admitted, in order to carry into effect the objects of such a deed. But that term power is only once used in that part which applies to the trustees' duty as to the management of the property. It might as well be said, the other parts of that duty was optional, as that the uplifting the heritable bonds, or selling the heritable subjects, were so. The conveyance of the estate of the deceased is with power to uplift and receive moveable debts, and to intromit with goods. This power it was the bounden duty of the trustees to exercise. It is with power, also, to establish legal titles in their persons; there could be no discretion as to that; and to sell or dispose of heritable subjects, and to uplift rents while unsold, and to grant dispositions to purchasers. Reading only so far as that in the deed, though power only is used, it overrides the whole sentence, and he would say it must mean the same thing as to all the acts they have power to do. That it casts the duty of selling on the trustees, as well as the duty of uplifting the moveable debts. Then, after this power is committed, how does the deed provide for the disposal of the money? [His Lordship then went over the purposes or uses of the trust, and again read that clause as to the disposal of the residue, dwelling on the expressions, "when converted into money," and "to pay over."] It is impossible to be of any other opinion than that the only thing intended was to convert all into money, and that the residue, after such

conversion, was to be divided among the residuary legatees. The term power, when it is to be executed, is equivalent to empower and direct. These trustees would not have complied with the object of the testator, unless they had acted as they have done. That object was to give the legatees money, just in the same way as if he had been able to calculate the residue and to specify the sum. But, not being able to ascertain it, he gives them an uncertain sum. Even if the trustees had, by agreement or connivance, divided the real estate in specie, it would make no difference. In the case of *Halford* (*a*), this was decided. Unless, therefore, it could be shewn there was an option, or unless it could be shewn that it was in violation of their duty that the trustees sold, if they have converted into money, it follows that duty is due.

Direction and power are synonymous, when a certain thing is to be done; the subsequent deed in 1806, mentioned in the special case, confirms this view. It is the conveyance of a house to the trustees, and that for the uses and purposes of the former deed, that is, for being converted into money. The manifest intention was to make a pecuniary residue; only two expressions occur in the deed, which could be in any way relied on as importing a contrary intention. One is, that the trustees have power to sell the real estate, or any part thereof, by public roup or private bargain, as they shall think expedient. I consider these last words to relate to the mode of sale. The after expression, "when converted into money," is inconsistent with option, but it is wise to put in these words, "or any part thereof," to remove doubts as to powers. In *England* it is held that a power can be executed but once, and it might be questioned if a power to sell generally would admit of separate sales from time to time. The testator, to make it quite sure, would have directed a sale of the whole, but allowing the sale to be in whole or in parts, and from time to time, as they might think proper.

The other expression has been answered by anticipation, "or to assign the securities for the same:" the securities for what? for the money, not meaning the original title-deeds, but the securities which the trustees themselves had taken for money. They might have notes of bankers, or might have lent it on new heritable bonds, and, instead of making it necessary to reconvert these into money, these securities might be transferred. Even bank notes are securities for money. That expression does not mean that they were to convey the property as it came to them, but merely the money into which it should be converted, or the securities taken for that money; nothing was contemplated but a pecuniary benefit.

(*a*) 1 Price, 426.

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These trustees have converted the whole, upon which duty is claimed, into money, under that which is tantamount to a direction.

It was the object of the legislature to lay the duty on gifts which could not take effect till after death, if these gifts were in money from real estate, or were of personal estate. It is for that reason a *donatio mortis causa* is made liable to the duty. That is, a gift which the donor, if he lives, may resume.

Upon the whole, the Court are of opinion, there must be judgment for duty on the sums stated in the case, on the first count of the information, these sums being residue from real estate directed to be sold.

Baron HUME suggested that it should be added to the special case (and this was done), that the deeds in question contained a power of revocation, and clauses dispensing with the delivery, and that they were found in the repositories of the deceased undelivered.

Judgment for the Crown.

PORTER *v.* COOPER.

Where, upon the execution of a writ of inquiry, the under-sheriff improperly rejected some evidence, in consequence of which, on application, the Court ordered a new writ of inquiry, but the defendant, in order to avoid further expense, paid the amount assessed by the jury on the first inquiry:—. *Held*, that the plaintiff was not entitled to the costs of that inquiry.

IN this case *R. V. Richards* had obtained a rule to shew cause why the Master should not review his taxation. The action was for work and labour; and, the defendant, having suffered judgment by default, a writ of inquiry was executed. On the execution of the inquiry certain evidence tendered by the defendant was rejected by the under-sheriff, and the jury assessed the damages at the sum of *l.* The defendant applied to the Court for a fresh inquiry, on the ground of the rejection of this evidence, and obtained a rule for that purpose, which, after argument, was made absolute. The defendant, however, paid the amount assessed by the jury on the former inquiry, in order to avoid further expense. The Master, upon the taxation of costs, allowed the plaintiff the costs of that inquiry, which the defendant contended he ought not to have done.

J. Jervis shewed cause.—The defendant, having paid the amount found by the jury on the former inquiry, has admitted that it was right, and the plaintiff has succeeded, and ought therefore to have the costs of the inquiry. It was formerly held in this Court that, even in cases of misdirection, the party who ultimately succeeded was entitled to the costs of the trial at which the misdirection took place, but that was afterwards altered. This case is, however, decided by *Jackson* v. *Hallam* (*a*). There, the plaintiff having obtained a verdict, the Court, on the application of the defendant, granted a new trial, on the ground that the Judge had misdirected the jury in point of law, but the rule for the new trial was silent as to costs. The defendant, without going to trial, gave the plaintiff a cognovit, and the Court held that the defendant was liable to pay the costs of the trial. Here the defendant, instead of giving a cognovit, has paid the amount found by the jury. The provision in the new rules, *H.* T., *2 Will.* 4, s. 64, that "if a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeeded on the second," has no bearing upon this case.

R. V. Richards, in support of the rule.—The case of *Jackson* v. *Hallam* proceeds on the ground that the defendant, by giving a cognovit and authorizing judgment to be entered up against him, admitted that he was in the wrong; but no such conclusion can be drawn from the facts of the present case. It is not to be doubted, if the defendant had gone down to another inquiry of damages, that he would not have had to pay the costs of the first. [*Parke*, B.—The plaintiff says that, according to the old rule of this Court, he would.] The dis-

(*a*) 2 B. & Ald. 317.

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tinction in cases of trials before the new rules was this, that if the miscarriage on the trial arose from the fault of the jury, the losing party was to pay the costs, but not where it arose from the fault of the Judge. As this case does not come within the provision in the new rules, it must be decided upon this principle. It would be hard if, because the defendant, rather than take the cause down to another trial, pays the amount demanded, he should have to pay the costs, which if he had submitted to a second inquiry he would not have had to pay. In *Gray* v. *Cox* (*a*), it was held that, where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued, the defendant was not entitled to the costs of the trial. That decision is in point.

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Lord ABINGER, C. B.—The plaintiff is not in a worse situation than he would have been in had he gone down to a second trial and recovered the same amount of damages; and there is therefore nothing to take this case out of the general rule.

PARKE, B.—The case of *Jackson* v. *Hallam* is an exception to the general rule, and is distinguishable from the present case. The rule must be absolute; but, as this was the error of the Master, without costs on either side.

Rule absolute, without costs.

(*a*) 5 B. & C. 458; 8 Dowl. & R. 220.

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ASSUMPSIT.—The declaration stated, that before the making of the agreement, promise, and undertaking of the defendant thereinafter mentioned, to wit, on &c., the defendant had wrongfully taken and arrested the plaintiff, by his body, upon and by virtue of a certain process, issuing out of the Palace Court, at the suit of one *Joseph Cable*, and had rendered the plaintiff to the custody of the Marshal of the *Marshalsea* upon that occasion. And the said plaintiff saith, that, being in such custody as aforesaid, heretofore, to wit, on &c. a certain writ of our lord the King, called a writ of *habeas corpus cum causa*, was duly issued out of the Court of our lord the King, before the King himself at *Westminster*, directed to the Judges of the Palace Court of *Westminster*, and to each of them, by which said writ our said lord the King commanded them that they should have the body of him, the said plaintiff, then detained in his Majesty's prison of the *Marshalsea*, under the custody of the Marshal of the said prison, together with the day and cause of detaining him, before the Right Honourable *Thomas*, Lord *Denman*, Lord Chief Justice of his Majesty's Court of *King's Bench*, before him, at his chambers in *Serjeant's Inn, Chancery Lane*, immediately on the receipt of the said writ, to do and receive what the said Lord Chief Justice should then and there think fit to order concerning him the said plaintiff in that behalf; and the plaintiff further saith, that afterwards, to wit, on &c., he was brought before the Right Honourable Sir *James Parke*, Knight, one of the Justices of the Court of our lord the King before the King himself, at his chambers, in *Serjeant's Inn, Chancery Lane*, pursuant to the statute in that case made and provided, by virtue of the said writ of *habeas corpus*, directed as aforesaid; and thereupon the said Sir *James*

A. having been arrested whilst he was privileged, as attending on a summons at a Judge's chamber, the Judge made an order for his discharge out of custody, on condition that if B., the officer who made the arrest, paid A. his costs, to be taxed by the Master, A. should not bring any action for the arrest. The costs were taxed, and the amount was accordingly paid. A., however, subsequently obtained an order for the Master to review his taxation, which the Master accordingly did, and allowed A. a further sum for costs. This B. refused to pay, upon which A. brought an action of *assumpsit* against B. as upon an agreement by C. to pay the costs, in consideration that A. would relinquish all right of action against B., on occasion of the arrest:—*Held*, that under these circumstances the action was not maintainable.

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Parke, Knight, so being such Justice as aforesaid, upon hearing the parties, their attornies, and agents, ordered that the plaintiff should be forthwith discharged out of the custody of the keeper of the *Marshalsea* Prison as to the arrest at the suit of the said *Joseph Cable*, and whereupon the said plaintiff was discharged from the said custody; and thereupon, heretofore, to wit, on &c. in consideration of the premises, it was mutually agreed by and between the plaintiff and defendant, that the plaintiff should relinquish all right of action against the defendant, on the occasion of the said arrest and detainer, and also consent and agree not to bring any action against him, the said defendant, on occasion of the premises; and that the defendant should thereupon pay to the plaintiff all the costs, charges, and expenses which he had then sustained and been put unto, by reason of the said arrest and detainer by the defendant as aforesaid, and necessarily incurred by the plaintiff in obtaining his discharge therefrom, as the same should be taxed and allowed by the Master of the Court of *Exchequer*, and also the costs and charges of making the said order a rule of the said Court. And the said plaintiff in fact saith, that the costs which he sustained, by reason of the premises, were taxed by the said Master of the said Court of *Exchequer* at the sum of 12*l.* 16*s.* 7*d.*, and that the costs of making the said order a rule of the said Court of *Exchequer* amounted to a certain other large sum of money, to wit, 5*l.* 7*s.* 2*d.*, making together the sum of 18*l.* 3*s.* 9*d.* of lawful money of *Great Britain*, whereof the said defendant afterwards, to wit, on &c., had notice; and the plaintiff further saith, that, although he hath done and performed every thing in the said agreement mentioned on his part and behalf, and although the defendant, in part performance of his said agreement, promise, and undertaking aforesaid, to wit, on the day and year last aforesaid, paid to the plaintiff a certain sum of money, to wit, the sum of 7*l.* 13*s.* 3*d.*, on

account of the said costs and charges aforesaid; yet the defendant, not further regarding his said promise and undertaking, hath not at any time thence hitherto, although often requested by the plaintiff so to do, paid to the plaintiff the residue of the amount of the said costs, or any part thereof; but hath hitherto neglected and refused &c., and the said sum of 10*l.* 10*s.* 6*d.*, residue of the said sum of money, still remains due and owing to the plaintiff, contrary to the promise and undertaking of the defendant so by him in that behalf made as aforesaid. There was also a count upon an account stated. The defendant pleaded that he made no such promise.

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At the trial of this cause, before the Sheriff of *Middlesex*, on the 3rd of *February* last, it appeared that the plaintiff was taken upon an execution out of the Palace Court, by the defendant, an officer of that Court, whilst he was attending under a summons at a Judge's chambers, and taken to the *Marshalsea* Prison. The plaintiff obtained a writ of *habeas corpus*, upon which he was brought before Mr. Baron *Parke*, at chambers, on the 12th of *March*, 1834, and after hearing the case, Mr. Baron *Parke* made an order for the plaintiff's discharge out of custody, upon condition, that, if the defendant paid the plaintiff his costs, to be taxed by the Master, the plaintiff should not bring any action for the arrest. The costs were afterwards taxed by the Master at the sum of 7*l.* 13*s.* 3*d.*, and that sum was accordingly paid by the defendant to the plaintiff. The plaintiff, however, not being satisfied with the amount of costs allowed on taxation, applied to the learned Judge, on a summons, for an order for the Master to review his taxation. The defendant opposed this order; but the learned Judge, being of opinion that sufficient had not been allowed for costs, made the order, and the Master, on reviewing his taxation, allowed the sum of 12*l.* 16*s.* 7*d.* The defendant, however, refused to pay the balance of 5*l.* 3*s.* 4*d.* The plaintiff

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made the Judge's order a rule of Court, the cost of doing which was *5l. 7s. 2d.*; which, together with the sum of *5l. 3s. 4d.*, amounted to *10l. 10s. 6d.*, the sum sought to be recovered in the present action. At the trial it was contended, on the part of the defendant, that, upon the facts proved, the action could not be supported, there being no evidence of any agreement by the defendant to pay the costs, and that an action would not lie, either upon a Judge's order or a rule of Court, without such an agreement being shewn. The under-sheriff directed the jury to find for the plaintiff to the amount of *5l. 3s. 4d.*, which they accordingly did; but he gave the defendant leave to move to enter a nonsuit. On a former day in this term, *Knowles* obtained a rule accordingly: against which,—

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The plaintiff, in person, now shewed cause.—He contended that there was sufficient evidence of an agreement by the defendant to pay the costs for the purpose of maintaining the action, inasmuch as the defendant had attended the taxation, and on the first taxation had paid the sum allowed by the Master. That the plaintiff's forbearing to bring an action for the illegal arrest was a sufficient consideration for the defendant's promise, and that the payment of the costs allowed on the first taxation amounted to an assent to pay whatever should be found to be due for costs on a proper taxation by the Master. He cited *Porter* v. *Cooper* (*a*) as an authority in point.

Knowles, contrà, was stopped by the Court.

PER CURIAM.—In this case there was no evidence of any agreement by the defendant to pay the costs allowed by the Master on taxation. The plaintiff agreed not to bring any action if the defendant paid the costs; but a

(*a*) 1 C. M. & R. 387.

part only of the costs allowed have been paid. The Judge's order, therefore, has not been complied with, but there is no evidence of any agreement by the defendant to pay the costs, independently of that order, upon which an action cannot be maintained.

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Rule absolute.

HENNAH and Another *v.* WHYMAN.

Where the indorsement on a writ of summons was "This writ was issued by &c., attorney for the said plaintiffs," instead of "Attorney for the said A. B."—*Held*, good.

HUMFREY moved to set aside the service of a writ of summons, on the ground of irregularity. The copy of the writ served was indorsed, "This writ was issued by &c., attorney for the said *plaintiffs*;" whereas in the form given in the schedule to the Uniformity of Process Act it is, "This writ was issued by &c., attorney for the said *A. B.*" He said that a similar defect had been held fatal in the *Common Pleas*, citing *Petersdorff's Practice*, 264. The word "plaintiffs" is not mentioned in the body of the writ.

J. Jervis shewed cause in the first instance.—It is said that the word "plaintiffs" is not in the body of the writ; but neither is it in the form given of the writ of *capias*, and yet the form of the indorsement there is, "This writ was issued by *E. F.* of &c., attorney for the *plaintiff*," which shews that the legislature never could have intended that this should be considered a deviation from the form given.

Lord ABINGER, C. B.—It is important that the practice should be uniform; and if we had a precise account of the case in the *Common Pleas*, we might perhaps have been induced, for the sake of preserving a uniformity in our decisions, to have granted the motion. But having no precise account of that case, I can see no reason why the indorsement on the writ of summons should be different

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from that on the writ of *capias*. There is no pretence for saying that the defendant has been misled.

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PARKE, B.—This Court has acted upon the principle that where the act says that the process shall be in a particular form, that must be followed. The act says nothing about the indorsement, and the form of the indorsement given in the schedule is nothing but an example. The act does not say that the indorsement shall be in a precise form, and this indorsement gives all the information which the act requires.

The rest of the Court concurred.

Rule refused.

GOODENOUGH *v.* BEETLES.

After a general verdict for the defendant, the Court will not allow the plaintiff to discontinue by a side-bar rule.

ON the trial of this cause, the defendant obtained a general verdict; subsequently to which the plaintiff took out a side-bar rule to discontinue. *Knowles* having on a former day obtained a rule to shew cause why this side-bar rule should not be set aside,

Humfrey shewed cause.—The defendant will not be prejudiced by the plaintiff's being allowed to discontinue, as he will equally obtain his costs. It is laid down in 2 *Chitty's Archbold's Practice*, 898, that the Court may probably grant leave to discontinue after a special verdict. [Lord *Abinger*, C. B.—That is the distinction. In *Price* v. *Parker* (*a*) it was held, that after a general verdict there can be no leave given to discontinue; but, that after a special verdict there may, because that is not complete and final: and, it is added, that even in that case it is a great favor.] It was allowed after a general verdict, in *Sweeting* v. *Halse* (*b*).

(*a*) 1 Salk. 179. (*b*) 9 B. & C. 369, & 4 Man. & Ry. 287, S. C.

Knowles, contrà, was stopped by the Court

PARKE, B.—There must have been something peculiar in the circumstances of that case (*a*); at all events, this objection was not made. All the applications for leave to enter a nonsuit would be superfluous, if the plaintiff could discontinue by a side-bar rule.

Rule absolute.

(*a*) The Court had granted a rule for a new trial.

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WOOD *v.* WILSON.

ASSUMPSIT on an award. The declaration alleged, that certain differences had arisen and were depending between the plaintiff and defendant, touching and con-

An award recited, that by an agreement in writing between the plaintiff and defendant, reciting, that they had for some years carried on business as builders and excavators in copartnership, and that they had, in pursuance of the copartnership, become possessed of certain messuages, buildings, and premises, sum and sums of money, and other chattels and effects, and that divers disputes had arisen between them touching their accounts, reckonings, and dealings, and as to a division of the said copartnership messuages &c. and other their estate and effects, and that they had agreed to refer the matter to the decision &c., of *J. C.* and *W. B.*, and that the said arbitrators should have power to direct a division of the messuages, buildings, and premises, and other the partnership effects between them, and that each party thereby agreed to execute to the other a conveyance of the messuages &c. according to such division between them, as the arbitrators should award. The award further recited, that the partnership between the defendant and the plaintiff had been dissolved by mutual consent. The arbitrators then awarded that the defendant should pay to the plaintiff the sum of 223*l.* 4*s.* 6*d.*, in full of all demands, in respect of his one equal moiety, half part, or share of the said copartnership property, estate, and effects; and that, upon payment thereof, and upon having such conveyances as thereinafter mentioned tendered to him for execution, the plaintiff should, at the defendant's request, execute a proper conveyance unto and to the use of the defendant of, in, and to certain messuages &c. therein mentioned, subject to certain mortgage debts charged thereon. They also awarded, that all the debts then due and owing to and from the copartnership concern should be received and paid by the defendant and the plaintiff in equal proportions; and that, if either party should advance or pay any sum or sums of money over and above his half share or proportion of the copartnership debts, then the amount so overpaid should, on demand, be made good, and repaid to the party paying the same, by the party making default. To an action upon this award, to recover the sum of 223*l.* 4*s.* 6*d.* from the defendant, he pleaded, (after setting out the award as above), that the several messuages &c. in the said award mentioned, and directed to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there is not in the said award any other provision than those thereinbefore specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof:—*Held*, on demurrer to this plea, that the award was final; that it was sufficiently certain, and that it was not inconsistent.

Quære, whether, upon the supposition that there had been no arrangement between the partners, by which the premises were ultimately to become the property of one partner, subject to the mortgages, the arbitrators did not exceed their authority in awarding the messuages &c., to one of the parties, and not dividing them between both.

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cerning their accounts, reckonings, and dealings, and as to a division of certain copartnership messuages, lands, buildings, and other the estate and effects of the plaintiff and defendant, of which they were possessed in pursuance of a partnership between them. That these differences were referred to the arbitration of one *J. Cooper*, and *W. Barley*, with power to name an umpire, which they did; and the arbitrators afterwards awarded, that the defendant should pay to the plaintiff the sum of *223l. 4s. 6d.*, in full of all demands, in respect of his one equal moiety of the copartnership property. Breach, non-payment thereof.

Plea, that the award was a certain award "whereby, after reciting that, by an agreement in writing, duly signed, bearing date &c., made between the defendant of the one part and the plaintiff of the other part, which recited that the defendant and the plaintiff had, for some years then last past, carried on at &c., the business of builders and excavators in copartnership, and that the defendant and plaintiff during the said copartnership had become, in pursuance of the said copartnership, possessed of or entitled to certain messuages, lands, buildings and premises, sum and sums of money, and other chattels and effects; and that divers differences and disputes had arisen between the said parties touching their accounts, reckonings, and dealings, and as to a division of the said copartnership messuages, lands, buildings, and other their estate and effects; and that, for the amicable decision of such differences and disputes, the said parties thereby agreed to refer &c., and that the said arbitrators, or any two of them, should have power to direct a division of the said messuages, lands, buildings, and premises, and other the partnership effects between them, and that each of the said parties thereby further agreed to execute to the other a conveyance &c., according to such division between them &c.;" and after reciting the appointment of

the umpire and the enlargement of the time: " after further reciting that the said partnership between the defendant and the plaintiff was dissolved by mutual consent on &c., then last, they the said *J. C.* &c., &c., declared, that they having taken upon themselves the burthen &c., and having heard and examined &c., did thereby make and publish that their award in writing of and concerning the matters so referred to them, in the manner following; that is to say, they did thereby award, order, and direct, that the defendant should, on &c., then next, between the hours &c., well and truly pay or cause to be paid unto the plaintiff, at &c., the sum of 223*l.* 4*s.* 6*d.*, in full of all demands in respect of his one equal moiety, half part, or share of the said copartnership property, estate, and effects; and that upon payment thereof, and upon having such conveyances as thereinafter mentioned tendered to him for execution, the plaintiff should, at the request &c., of the defendant, execute and deliver a proper conveyance &c., unto and to the use of the defendant, his heirs and assigns, of all the right &c., of him the plaintiff of, in, and to certain messuages &c., therein mentioned, subject to certain mortgage debts of 700*l.* and interest, and 700*l.* and interest therein also mentioned, and charged on the said messuages &c., and in which said several conveyances should be contained proper covenants on the part of the defendant, his heirs, executors, &c., that he and they would pay and satisfy the said two several principal sums of 700*l.* and 700*l.*, and interest, and indemnify &c., for the same; and they did thereby further award &c., that all debts then due and owing to and from the said copartnership concern should be received and paid by the defendant and the plaintiff in equal proportions, share and share alike; and that, if either party should advance or pay any sum or sums of money over and above the half share or proportion of the said copartnership debts, then and in such case the amount so overpaid should, on

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demand, be made good, and repaid to the party paying the same, by the party making default in payment thereof; and that, upon such payments being made, and conveyances executed as aforesaid, each of the said parties respectively should, if required, execute and deliver to the party requiring the same, a general release," &c. Averment, that the said several messuages &c., in the said award mentioned and directed to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there is not in the said award any other provision than those therein before specified, concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof. Verification. General demurrer and joinder.

Cowling, in support of the demurrer.—The question turns on the validity of the award. From that award it may be collected, that the plaintiff and defendant, having been in partnership, differed as to their mutual accounts, and the sums received by each respectively; and that being the owners of certain property in mortgage, and having also other partnership effects, they resolved to submit these several matters to arbitration. Now, the first objection taken to the award is, that it is not final, because the debts are not ascertained, but the arbitrators direct, that they shall be paid and received in equal moieties; and therefore it is said there will be a necessity for a further settlement. But, it is to be observed that the dispute is said to be between the plaintiff and the defendant, not between them and their customers; and therefore there is nothing to shew that the debts to and from the firm required to be ascertained. [*Parke*, B.—It does not appear that there was any dispute as to them.] *Secondly*, it is said to be uncertain, because it is not specified how the debts due from and to the partnership are to be paid or received in equal moieties, and it is contended, that this is impossible. But it is not necessary to give such minute

directions, any more than where it directs the money to be paid to the plaintiff, it ought to direct in what carriage or other manner the defendant ought to proceed to the plaintiff. [*Alderson*, B.—How could it have been expressed otherwise? Something must be left to future arrangement; where one advances more than another, he is to be reimbursed.] *Thirdly*, it is said to be inconsistent, because it directs the 223*l.* 4*s.* 6*d.* to be paid to the plaintiff, in full of all demands, in respect of his moiety of the partnership effects, and yet afterwards gives him a moiety of the debts owing to the partnership, and the premises also, which are charged with the mortgages. [*Alderson*, B.—There is no inconsistency, if all the circumstances of the case are considered.] *Lastly*, it is said the arbitrators have exceeded their authority, because they have awarded the premises to one, and not divided them. But the submission does not direct in what proportion they were to be divided. The arbitrators were not merely appraisers, but were to divide in such manner as they thought best, which authorizes them to give the whole to one if they chose, particularly when they were burthened with mortgages. Even under a power to make leases, reserving such rents as should be thought fit, a lease reserving no rent is good. *Sugden on Powers*, 471, 5th edition.

Wightman, *contrà*.—The award is inconsistent. The defendant is to pay 223*l.* 4*s.* 6*d.*, as the value of the plaintiff's moiety of the partnership effects, and yet it is provided that the plaintiff is to have a moiety of the debts payable to the partnership. [*Alderson*, B.—"Effects" there does not include debts due and owing; nor does it include the mortgaged property. *Parke*, B.—Debts are choses in action; the "effects" rather mean the property in possession.] The arbitrators have exceeded their power, because they were not authorized to give all the mort-

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gaged premises to one partner. One of them must have had some share in them, and it ought to have been ascertained and awarded to him. Here, in effect, the arbitrators have made one partner purchase the share of the other in these premises. [*Parke*, B.—There may have been some arrangement between the partners, by which the premises were ultimately to become the property of one partner, subject to the mortgages, and which has been in dispute before the arbitrators. If there was nothing of the sort, the defendant ought to have moved to set aside the award on affidavits; and I doubt whether the plaintiff could then have supported the award on this point, and whether there ought not to have been some division of the mortgaged property; however, it is too late for the defendant to raise this point now.]

Cowling, in reply, was stopped by the Court, who gave

Judgment for the plaintiff.

BOND *v.* BAILEY.

In an action tried before the secondary, under the Writ of Trial Act, the plaintiff recovered a verdict for 4*l.* 10*s.* only, upon which the defendant applied to enter a suggestion on the roll to deprive the plaintiff of costs, under the *London* Court of Requests Act, 30 & 40 *Geo.* 3, c. 104, s. 12, on

ACTION for goods sold and delivered, tried before the secondary of *London*, on the 7th *April* last, when the plaintiff recovered a verdict for 4*l.* 10*s.* *Platt* had obtained a rule to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, to deprive the plaintiff of costs, under the *London* Court of Requests Act, 30 & 40 *Geo.* 3, c. 104, s. 12, on the affidavit of the defendant, stating that at the time the action accrued, and until *June* last, the defendant had a warehouse and counting-house in the city of *London*, where he carried on his business of a silk broker; that since that time, and down to the commencement of the action, he had a house and warehouse in *Crown Court, Old Broad Street*, where he and his brother carried on the business of silk brokers; that from the month of *January*, 1833, he had sought and still seeks his livelihood in the city of *London*, by carrying on his trade and business at those houses and warehouses respectively:—*Held*, sufficient to entitle the defendant to enter a suggestion.

Held, also, that the defendant having consented to the trial before the secondary, did not affect his right to enter a suggestion.

Held, also, the judgment having been signed and execution issued in vacation, that an application within the first four days of the ensuing term was not too late.

the ground, that the plaintiff had recovered less than 5*l.* in an action in the superior Courts. The affidavit upon which the rule was obtained stated, that at the time when the action accrued and until the month of *June* last, the defendant had a warehouse and counting-house in the city of *London*, where he carried on his business of a silk broker; that since that time and down to the commencement of the action he had a house and warehouse in *Crown Court, Old Broad Street*, where he and his brother carried on the business of silk brokers; that, from the month of *January*, 1833, he had sought and still seeks his livelihood by carrying on his trade and business at those said houses and warehouses respectively; that he had a lease of the house in *Crown Court*, and paid the rent for it, and constantly lived in it since *June* last, and that his name and that of his partner were over the door of the warehouse.

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G. T. White now shewed cause.—*First*, the affidavit does not shew that the defendant sought his livelihood in the city of *London*. His having a warehouse there, does not necessarily imply that he seeks a livelihood there. *Miller* v. *Williams* (*a*), *Jefferies* v. *Watts* (*b*), *Gray* v. *Cook* (*c*). [*Parke*, B.—Those cases are very different from the present.] In *Kensett* v. *West* (*d*) it was held, that a coal-merchant residing and carrying on business at *Lambeth*, but keeping a counting-house in the city of *London* for the purpose of receiving orders, was not entitled to this privilege, as a person seeking his livelihood in the city. [*Bolland*, B.—The affidavit here does not state that the defendant merely kept a servant for the purpose of receiving orders, but that he lives, and resides, and carries on his business of a silk broker in the city. The

(*a*) 5 Esp. 19.
(*b*) 1 New Rep. 153.
(*c*) 8 East, 336.
(*d*) 5 D. & R. 626.

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cases have gone much farther than the present case, in holding a defendant entitled to this privilege.] *Secondly*, it does not sufficiently appear that the defendant was seeking his livelihood in *London* at the time when the action was commenced, nor does it appear when the action was commenced, which ought to have been stated. *Moreau* v. *Hicks* (*a*). [*Parke*, B.—It is quite immaterial when the action was commenced; if the defendant states that he was residing within the city at the time of the commencement of the action, it is sufficient. Here he states, that since *June* and down to the commencement of the action, he had a house and warehouse in *Old Broad Street*, where he and his brother carried on their business as silk brokers.] *Thirdly*, the defendant has consented to the action being tried before the secondary on the writ of trial, and cannot after that insist upon a suggestion being entered. [*Parke*, B.—What difference can it make, that the case has been tried before the secondary by consent? The mode of trial cannot affect the provisions of the Court of Requests Act.] *Fourthly*, the application is too late, judgment having been signed, the costs taxed, and execution issued on the 14th *April*, before the application was made.

Per Curiam.—The judgment was signed and the execution issued in vacation, at which time the defendant could not apply to the Court. The application was made as early as possible. The rule must be absolute.

Rule absolute.

(*a*) 4 Nev. & Mann. 563.

CALDWELL *v.* BLAKE.

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A writ of summons was issued against two persons, but the declaration was against one only:—*Held*, no irregularity.

IN this case, *Cresswell* moved to set aside the declaration and subsequent proceedings for irregularity. It appeared that the writ of summons was against two, whereas the declaration was against one only. By the rule of *M. T.* 3 *Will.* 4, s. 1, it is provided "that every writ of summons, *capias*, and detainer, shall contain the names of all the defendants (if more than one) in the action; and shall not contain the name or names of any defendant or defendants in more actions than one." This is, therefore, an irregularity.

Per Curiam.—It does not yet appear that this writ does contain the name of a defendant in any other action. There is, therefore, at present no irregularity.

Rule refused (*a*).

(*a*) See *Pepper* v. *Whalley*, 1 Bing. N. C. 71.

GOODALL *v.* ENSELL.

Where in an action for slander spoken of a person in the way of his trade, the plaintiff recovered less than 40*s.* damages:—*Held*, that the plaintiff was entitled to no more costs than damages, and that the Judge had no power to certify to entitle the plaintiff to full costs.

THIS was an action for slander spoken of the plaintiff in his capacity of a schoolmaster, but no special damage was alleged in the declaration. The plaintiff obtained a verdict with 20*s.* damages, and upon application the Judge certified for full costs. The Master having allowed the plaintiff full costs accordingly, *Mellor*, in an early part of this term, obtained a rule to shew cause why the Master should not review his taxation.

Adams, Serjt. shewed cause, and insisted that the Judge having certified for full costs, the plaintiff was clearly entitled to them.

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Sed per Curiam.—We are of opinion, on the authority of *Turner* v. *Horton* (*a*), and *Grenfell* v. *Pierson* (*b*), that where the words are actionable in themselves, the plaintiff is entitled to no more costs than damages. The Judge who tries the cause has no power to certify in an action of slander. The rule must therefore be absolute for the Master to review his taxation.

Rule absolute.

(*a*) Willes, 438.

(*b*) 1 Dowl. P. C. 409, in which case the record in *Turner* v. *Horton* was examined, and an extract of it is given.

YRATH *v.* HOPKINS.

A writ of *fi. fa.* was delivered to a sheriff, to be executed, on the 20th of *December*, 1833, returnable on the 30th of the same month. The sheriff went out of office in the *February* following. On the 14th of *June* a rule to return the writ was served upon the new sheriff, and the writ not having been returned, another rule to return the writ was served upon the under-sheriff of the late sheriff on the 12th of *November*, which, however, was more than six months after the late sheriff had gone out of office:—*Held*, that an attachment against the late sheriff for not making a return could not be supported, he not having been duly ruled to return the writ.

IN this case *W. H. Watson* had obtained a rule for setting aside an attachment against the late sheriff of *Monmouthshire* for not returning a writ of *fi. fa.* It appeared from the affidavits, that a writ had been sued out on the 14th of *December*, 1833, returnable on the 30th of the same month, and which was delivered to the sheriff on the 20th. The sheriff went out of office in *February*, 1834. On the 14th of *June* a rule to return the writ was served upon the under-sheriff of the new sheriff, and on the 12th of *November* another rule was left at the office of the under-sheriff of the late sheriff, which, however, was more than six months after he had gone out of office. The writ not being returned, an attachment was obtained against the late sheriff. Against the above rule,

Crowder shewed cause.—The former sheriff having neglected to execute the writ, the attachment against him was regular. [*Parke*, B.—The former sheriff ought to

have executed the writ; and if he had not executed it, he ought to have handed it over to the new sheriff.] Certainly, and it is now by the 3 & 4 *Will.* 4, c. 99, s. 7, expressly provided, that the sheriff shall, at the expiration of his office, make out and deliver to the new or incoming sheriff a true and correct list and account, under his hand, of all prisoners in his custody, and of all writs and other processes in his hands not wholly executed by him. The old sheriff, by not executing the writ, had committed a contempt, which rendered him liable to an attachment. [*Alderson*, B.—How can you sustain an attachment against the former sheriff, when you have never ruled him to return the writ? *Parke*, B.—If the former sheriff had begun an execution, must he not have gone on with it?] The recent statute provides that he shall hand over all writs and processes not *wholly* executed, and the incoming sheriff is in a subsequent part of the clause charged with the execution of all the writs and processes so handed over to him. [*Parke*, B.—You have not moved for an attachment against the new sheriff. You might have taken the precaution of ruling both sheriffs. The difficulty is how can you have an attachment against the former sheriff, when you have not ruled him to return the writ?] Because he is in contempt for not returning the writ, even though not ruled to do so. That is to be inferred from *Tidd's Practice*, 307, where it is said, "If there be no return, it is a contempt for which the Court, on a proper affidavit, will grant an attachment; and this is the constant mode of proceeding against the late sheriff, as well as the present one; for, as to the former, he ought in strictness to have returned the writ before he was out of office, and therefore the contempt was absolutely committed whilst he was a servant of the Court." It is not said that he is not bound to return it without being ruled to do so, or that that is a preliminary step to entitle the plaintiff to an attachment.

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PARKE, B.—That is if he does not purge himself from the contempt on being ruled to return the writ. I think the passage cited from *Tidd's Practice* must mean where the late sheriff has been ruled (*a*). I am of opinion, that this attachment against the old sheriff cannot be supported, because he has not been served with a rule to return the writ.

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The rest of the Court concurred.

Rule absolute for setting aside the attachment, with costs.

(*a*) Vide, acc. Doug. 464, and 4 East, 604, the authority cited in Tidd's Practice.

TARRANT *v.* MORGAN.

The defendant pleaded payment of 1*l.* 18*s.* into Court in satisfaction of the cause of action, and the plaintiff took the money out of Court:—*Held*, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of costs on the ground that the action was brought to recover less sum than 40*s.*, and therefore recoverable in the County Court.

ACTION to recover the sum of 8*l.* 2*s.* for attendance as a witness on defendant's behalf. The defendant pleaded payment of the sum of 1*l.* 18*s.* into Court, under the 17th rule of *H.* 4 *Will.* 4, and the plaintiff accepted that sum in satisfaction of the action, according to s. 19. On the 7th *February*, an order was made by *Bolland*, B., for the defendant to have liberty to enter a suggestion on the roll that the action was brought for a debt recoverable in the County Court of *Carmarthen*, in order to deprive the plaintiff of costs. *Chilton* had obtained a rule for setting aside this order, against which

R. V. Richards shewed cause, that, by the plaintiff's taking the 1*l.* 18*s.* out of Court, he admits that the action was brought for a sum under 40*s.* It was therefore recoverable in the County Court, and ought not to have been

sued for in the superior Courts. The defendant was, therefore, entitled to enter a suggestion on the roll.

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Chilton, contrà.—It does not necessarily follow, that more than 40*s.* may not have been due, because the plaintiff has chosen to be satisfied with the sum of 1*l.* 18*s.* But, at all events, this is not the proper course to pursue. There is no such a suggestion as this allowed in practice; but when it is supposed that the action is brought for a sum recoverable in the County Court, an application is made to the Court to stay proceedings. If that had been done here, the plaintiff would have been able to shew that the action was brought for more than 40*s.* He also relied upon the 19th rule of *H. T.* 4 *Will.* 4.

Lord ABINGER, C. B.—The 19th rule expressly reserves to the plaintiff his costs; for it says, on accepting the money paid into Court, the plaintiff may tax his costs, and in cases of non-payment thereof within forty-eight hours, may sign judgment for his costs of suit so taxed.

PARKE, B.—The defendant should have applied in an earlier stage of the proceedings, and then probably he would have been answered.

Rule absolute.

TINN *v.* BILLINGSLEY and Others.

THIS was an action brought by the plaintiff to recover damages for an injury done to his ship in *Harwich Roads*. At the trial at the last *Newcastle* assizes, the plaintiff recovered a verdict. For the purpose of shew-

Where a notice to admit the execution of certain documents was given to the defendant's agent in *London* only four days before the commission day of the assizes at which the cause was to be tried, and the defendant's agent, on being applied to two days afterwards, refused to admit the execution, without objecting to the sufficiency of the notice, as to its having been given a reasonable time before trial:—*Held*, that the plaintiff, who succeeded at the trial, was entitled to the costs of proof.

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TINN v. BILLINGSLEY.

ing that the defendants were the owners of the vessel which caused the injury to the plaintiff's vessel, the plaintiff produced and proved examined copies of the ship's register, and the defendant's affidavit and declaration of ownership. On the taxation of costs, the plaintiff insisted that he was entitled to the costs of proving these documents under *R.* 20, *H. T.* 4 *Will.* 4; the Master, however, refused to allow them.

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Cresswell, on a former day in this term, obtained a rule for the Master to review his taxation, on an affidavit, stating that, on the 28th of *February*, the plaintiff's agent in *London* served a notice on the defendant's agent, to admit the documents, informing him that the documents would lie for inspection at the office of the plaintiff's attorney from one o'clock to six of that day. No one, however, came to inspect them. The affidavit further stated that, on *Monday*, the 2nd of *March*, a summons was taken out and served on the defendant's agent, but he, on being applied to, refused to admit the documents. The commission day at *Newcastle* was on the 4th *March*.

The affidavits in answer stated that the plea was pleaded on the 21st of *January*, and issue joined on the 4th *February*. That the defendant's original attorney had died in *February*, and that the defendant resided at *Harwich*. That the defendant's agent had another cause at *Hertford*, on the 2nd of *March*, which required his attendance there on that day.

W. H. Watson shewed cause.—The rule of *H. T.* 4 *Will.* 4, s. 20, provides, that after plea pleaded, and a *reasonable time* before trial, either party may give notice to the other of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent, by indorsement on such notice, within 48 hours, to make the admission specified, the party requiring such admission may call on the party required, by

summons, to shew cause before a Judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof. In a subsequent part of the same rule, it is provided, that "no costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence at the trial, unless he shall have given such notice as aforesaid." Now, the words "such notice as aforesaid," clearly refer to the notice mentioned in the former part of the rule, that is, a "reasonable time before the trial." In this case, issue was joined on the 4th of *February*, after which the plaintiff might at any time have given the notice; instead of which, the notice is not given till the 28th of *February*, and the summons is not taken out until the 2nd of *March*, only two days before the commission day at *Newcastle*. That was not a reasonable time before the trial, and the Master has so considered it, and was right in refusing to allow the costs of proving the documents in question. The defendant ought to have had time to examine the documents, but the application being made only in the evening of *Monday*, the 2nd of *March*, it was impossible he could have time to do so, when the case was to be tried in the county of *Northumberland* on the 4th of *March*. [*Parke*, B.—Why did you not object to the sufficiency of the notice?] If this had been a trial to take place in *London*, the time might have been reasonable. The defendant who signed the documents resided at *Harwich*, and therefore his attorney had no means of consulting him as to the general correctness of the documents.

Cresswell, contra.—It appears by the affidavits that the defendant's agent was the party employed to prepare the briefs, and he was therefore a person having full knowledge of the cause, and must have known whether these documents ought to be admitted or not. It was therefore not necessary that he should consult his client about the

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matter. The defendant's agent had notice on *Saturday*, the 28th of *February*, requiring him to admit the documents; and the rule says, that, unless the adverse party shall consent, by indorsement on the notice, within forty-eight hours, to make the admission, the party requiring the admission may call on the party required, by summons, to shew cause why he should not consent, or else be subject to pay the costs of proof. Here, the defendant's agent is informed on the *Saturday* that the documents are lying at the office of the plaintiff's attorney for inspection; and the answer which the defendant returns on the *Monday*, is a refusal to admit the documents.

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Lord ABINGER, C. B.—I think the justice of the case requires that the plaintiff should have the costs; and the rule is not sufficiently clear, to say that he should not.

PARKE, B.—More especially in this case, where the adverse party never objected to the sufficiency of the notice, or required further time.

BOLLAND, B.—The party did not assign that or any other reason for his refusal, but merely said that he would not agree to admit them.

Rule absolute.

REX *v.* WOOLLETT.

The rule of *Hil.* Term, 4 *Will.* 4, which requires the grounds of the demurrer to be stated in the margin, does not extend to revenue cases, in which the three Courts have not a concurrent jurisdiction.

A demurrer on the part of the Crown in a revenue cause must be signed by the Attorney-General.

A RULE had been obtained by *J. Jervis*, calling upon the Attorney-General to shew cause why the demurrer in this, which was a revenue cause, should not be set aside for irregularity, on the grounds that there was no marginal statement, and that the demurrer was not signed by counsel.

Kaye shewed cause.—The new rules as to demurrers do not apply to revenue cases. The king is not named in them, and therefore cannot be affected by them. It was decided by the Court of *Common Pleas*, in *Barnes* v. *Jackson* (*a*), that the new rules extend only to personal actions in which the three Courts exercise concurrent jurisdiction, which they do not do in revenue causes. [*Parke*, B.—The new rules certainly do not extend to revenue cases, the three Courts not having concurrent jurisdiction in them.] *Secondly*—It is not necessary that the demurrer should be signed by the Attorney-General. This demurrer does not fall within the principle upon which this rule, requiring demurrers to be signed by counsel, was formerly made, the object being to prevent frivolous demurrers, which cannot be supposed to occur in cases where the Crown is concerned, and the Attorney-General demurs.

He also produced an affidavit by the agent of the clerk in court of the Crown, which stated, that it had been usual to deliver demurrers and other pleadings to the defendant's clerk in court, without being first signed by the Attorney-General, to prevent delay; it being well known that the signature of the Attorney-General would be afterwards obtained thereto as a matter of course; and that it was usual for the clerk in court, by whom such pleadings were delivered over, to put the name of the Attorney-General to the fair copy of such pleadings as a matter of course, though the original be not signed at the time of delivering it over.

J. Jervis, in support of the rule.—The affidavit shews that it is necessary that the pleadings should be signed by the Attorney-General. If the Attorney-General had not signed them when first delivered, his signature was always

(*a*) 1 Bing. N. C. 545; 1 Scott, 520.

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afterwards required, and if not signed, the clerk in court put the name of the Attorney-General to the fair copy. The affidavit clearly shews that they ought to be signed.

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Lord ABINGER, C. B.—The demurrer is by the Attorney-General in person. He is supposed to be in Court when it is delivered. It seems to be ascertained, that, though demurrers are sometimes delivered without the signature, all other pleadings are signed by the Attorney-General. Even the former are often signed after they are delivered; yet, if the objection be taken, it seems that they ought to be signed before they are delivered. The rule must be made absolute.

Rule absolute.

RATCLIFFE *v.* HALL.

At the trial of an action for diverting a water-course, the cause and all matters in difference were referred to an arbitrator, with power to determine the right between the parties, the costs of the cause to abide the event. The arbitrator awarded, that a nonsuit should be entered, on the ground that there was no sufficient evidence of the defendant's having committed the injury, but he decided the right in favour of the plaintiff:—*Held*, that the defendant was entitled to the costs of all his witnesses, as well those relating to the commission of the injury, as those who came to speak to the question of right.

ACTION for a nuisance in diverting a water-course which passed through the plaintiff's land. The case was tried at the *York* Spring Assizes in 1834, when the cause and all matters in difference were referred to an arbitrator, with power to determine the right between the parties, the costs of the cause to abide the event. The arbitrator, on the ground that there was no sufficient evidence of the defendant's having committed the injury complained of, ordered a nonsuit to be entered; but determined the question of right in favour of the plaintiff, and directed the nuisance to be abated. The Master, on taxation, having allowed to the defendant the expenses of all his witnesses,

Wightman, in last term, obtained a rule to shew cause why the Master should not review his taxation, on the

ground that the defendant ought only to be allowed the costs of those witnesses who came to deny the fact of his having committed the injury, and not those who came to establish his right.

Starkie, on shewing cause, having stated the facts of the case, the Court called upon

Wightman to support the rule.—In this case there were in fact two issues; one, whether the nuisance was committed by the defendant; the other, on the right to the water-course. The arbitrator having found the latter issue in favour of the plaintiff, it shews that the defendant had no defence to the action on the right. He therefore succeeded on one issue only, and was only entitled to the costs of the witnesses called to prove that issue, and ought not to be allowed the costs of proving the right, which has been determined against him. In ordinary cases the Master may not be able to ascertain which of the witnesses were necessary, but here he can have no difficulty.

PARKE, B.—The plaintiff has brought an action against the defendant wrongfully, which he was at liberty to defend in any manner he could. If the trial had gone on, and the plaintiff had been nonsuited, the Master would have allowed the costs of all the witnesses. He reports that it is the practice to allow the costs of all that could have been brought forward in evidence under the general issue, whether the witnesses were called or not. The circumstance of this being a case where the arbitrator has ordered a nonsuit to be entered, can make no difference. The mischief which appears to exist in this case, will be cured by the new rules, which require distinct issues.

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ALDERSON, B.—You have agreed that the costs shall abide the event of the cause. The event is, that a non-suit is entered, and you must therefore pay the costs.

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It appearing, however, that the Master had allowed more for the expenses of the witnesses than had actually been paid, the rule was made absolute on this ground.

MEMORANDA.

ON the 23rd day of *April* in this Term, Lord *Lyndhurst* resigned the Great Seal, which was immediately put into commission—Sir *Charles Christopher Pepys*, Master of the Rolls; Sir *Launcelot Shadwell*, Vice Chancellor of *England*; and Sir *John Bernard Bosanquet*, one of the Justices of the Court of *Common Pleas*, being appointed the Lords Commissioners.

During the same Term, Sir *Edward Burtenshaw Sugden*, Knight, having resigned the office of Lord Chancellor of *Ireland*, he was succeeded by the Right Honourable Lord *Plunkett*.

In the same Term, Sir *Frederick Pollock*, Knight, resigned the office of his Majesty's Attorney-General, and was succeeded by Sir *John Campbell*, Knight.

Sir *William Webb Follett*, Knight, at the same time resigned the office of his Majesty's Solicitor-General, and was succeeded by *Robert Mounsey Rolfe*, Esq., one of his Majesty's Counsel, who was thereupon knighted.

In *Hilary* Vacation, 1835, *Basil Montagu*, and *Robert Alexander*, of *Lincoln's Inn*, Esqrs., were appointed his Majesty's Counsel; and in this Term, *Thomas Starkie*, of *Lincoln's Inn*, Esq., was also appointed one of his Majesty's Counsel.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 5 WILL. IV.

SWAIN and Others, Assignees, &c. *v.* LEWIS. 1835.

Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it.

ASSUMPSIT on a bill of exchange drawn by the defendant, and indorsed to the bankrupt before his bankruptcy. At the trial before *Arabin*, Serjt., at the Sheriff's Court in *London*, it was proved that notice of dishonour was given in due time to the defendant by a letter sent by post, but no notice to produce the letter had been given. The plaintiffs proposed to prove its contents by an entry of the terms of it made in a book at the time it was sent. The defendant's counsel objected that secondary evidence could not be given of the letter without a notice to produce it. The objection was overruled, and the plaintiffs had a verdict. In *Hilary* Term, *Mansel* obtained a rule *nisi* for a new trial on the same ground: against which, in *Easter* Term,

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SWAIN v. LEWIS.

Humfrey shewed cause, and relied on *Kine* v. *Beaumont* (*a*), as an express authority in favour of the plaintiffs, and which had been confirmed by several later cases at *Nisi Prius*.

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Mansel, contrà.—In that case, a *copy* of the original letter was produced, and it was considered in the nature of a duplicate original. Here, a mere entry of the letter in a book was the whole evidence. Besides, the authority of *Kine* v. *Beaumont* is very questionable. There were several earlier decisions the other way; *Langdon* v. *Hulls* (*b*), *Shaw* v. *Markham* (*c*), *Philipson* v. *Chase* (*d*). Nor is it consistent with the principles of law on which secondary evidence is admissible. The original notice itself ought primarily to be produced as the best evidence, and therefore the defendant ought to have notice to produce it. *Starkie on Evidence*, tit. *Notice*.

Lord ABINGER, C. B.—As this is a point of some importance in practice, and the case of *Kine* v. *Beaumont* has not, perhaps, been altogether approved of, we will take time to consider it.

Cur. adv. vult.

In the present term, his Lordship delivered the judgment of the Court.—In this case the question was, whether, in an action on a bill of exchange against the drawer or indorser, when it became essential to prove notice of dishonour, and it appeared that such notice was given by letter, it was necessary to give a notice to produce such letter, before secondary evidence could be given of its contents: and a case in the *Common Pleas* was discussed before us, in which it was decided, after consideration, and after conference with some others of the Judges, that no-

(*a*) 7 Moore, 112; 3 B. & B. 288, S. C.
(*b*) 5 Esp. 156.
(*c*) Peake's N. P. C. 165.
(*d*) 2 Campb. 110.

tice to produce was not necessary in such a case. The Judges have conferred together on the point, and it is considered best to adhere to that decision in the *Common Pleas:* and it is now, therefore, to be considered as settled, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange. The rule must consequently be discharged.

Rule discharged.

M'AULIFFE *v.* E. & J. BICKNELL, DEACON, and THORNTON.

Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles:—*Held*, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen.

The plaintiff's wages were adjusted, and the balance struck,

ASSUMPSIT for wages claimed to be due to the plaintiff for his services done and performed as a cooper and mariner on board a certain vessel, for the defendants, on their retainer, and at their request; with counts for work and labour generally, money had and received, and on an account stated. Plea—the general issue. The action was brought to recover the sum of 25*l.* 17*s.* consisting of the following sums, as specified in the particulars of demand:—15*l.* 10*s.* for the balance of wages due to the plaintiff as cooper and mariner on board a vessel, of which the defendants were owners, during the years 1827, 1828, and 1829; and 10*l.* 7*s.* for the balance due to him for money received by the defendants to his use in respect of his 90th lay or share of the net proceeds of the cargo of oil obtained by the same ship on her voyage to the *South Seas*, in the years 1830, 1831, and 1832. At the trial before *Gurney*, B., at the *London* Sittings after *Easter* Term, the following facts appeared:—The plaintiff, in the year 1827,

subject to certain deductions for insurance and interest on advances made to him before and during the voyage. It was proved that such charges were the usual ones in trading voyages, and that the accounts were always made out so. The plaintiff remonstrated against those deductions, but ultimately accepted the balance, and gave a receipt for the whole wages:—*Held*, that he could not recover the amount of such deductions.

So also, where, in another voyage, he had stipulated for a 90th share of the net proceeds of the cargo on a whaling adventure in lieu of wages, and was charged with insurance on such share.

Held also, that such deductions need not, under the circumstances, be made the subject of a set-off.

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M'Auliffe v. Bicknell.

entered into articles to go out as cooper on a whaling voyage to the *South Seas*, in the *Coquette*, of which the defendants were admitted to be the joint owners, at the wages of five guineas per month: an advance of 10*l.* 10*s.* being then made to him on account, according to the usual custom in trading voyages. The crew being assembled at *Gravesend*, on the 29th of *August*, 1827, the articles were there read over to them by the defendant *Thornton*, who was also the captain; and were then signed by him on the one part, and by the plaintiff and the rest of the seamen on the other. They were as follows:—

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"Articles of agreement indented, made, and fully agreed upon, the 29th day of *August*, 1827, between *Peter Thornton*, of &c. mariner, and commander of the ship *Coquette*, belonging to the port of *London*, and now lying at *Gravesend*, and bound on a voyage to the *South Seas* whale fishery and back to *London*, of the one part; and the officers, seamen, and others, now on board the said ship, or who shall hereafter enter on board the said ship, and whose names and seals are or shall be affixed to these presents, of the other part. [Then followed covenants on the part of the crew to obey the master's commands, fulfil their duty as seamen, &c. &c.; and then the following stipulations:] And in consideration thereof, the said *Peter Thornton* doth by these presents bind and oblige himself, his heirs, executors, administrators, and assigns, to pay or cause to be paid to the said officers, seamen, and others, such shares of the net proceeds of sales of oil, whalebone, and head matter, or seals, or other animals or substances whatever, the produce of the *South Seas*, caught and taken or obtained by the said ship's company (*after deducting the usual charges and expenses*), as are set opposite to their respective names and seals affixed to these presents. And it is hereby further declared and agreed by and between all the said parties to these presents, that nothing herein contained shall

extend to raise or create any debt or demand whatsoever to be due or owing unto the said officers, seamen, and others who have executed these presents, from or by the said ship called the *Coquette*, or the owners thereof, or any or either of such owners, for or on account of wages, or their respective shares of the net proceeds of such oil, &c. as aforesaid, or for or on account of any matter, cause, or thing whatsoever, respecting the same, or under or by virtue hereof: it being the true intent and meaning of these presents, that the agreement hereby entered into and made shall be considered as binding and affecting the parties hereto only, and not the said ship, or the said owners, or any or either of them, in any respect whatsoever." The articles then contained a clause for referring differences on the construction of them to arbitration. The signatures were affixed in a table arranged as under:

No.	Names.	Stations.	Shares.	Advance.			Monthly Money.			Seals.
4.	D. M'Auliffe.	Cooper.	5*l.* 5*s.* per Month.	10	10	0	2	10	0	L. S.

The vessel immediately afterwards proceeded on her voyage, and returned to the port of *London* in the month of *October*, 1829, with a valuable cargo; the defendant having served pursuant to the articles throughout the voyage. The wages were adjusted by one *Cooke*, the clerk of the defendant *Deacon*, who was the managing owner; he made a balance due to the plaintiff of about 25*l.*, after debiting him with the advance of 10*l.* 10*s.*, and the amount of monthly advances during the voyage, and also deducting (besides certain charges not in dispute), the sum of 15*l.* 10*s.*, for insurance and interest on those several advances, from the time of their payment to the termination of the voyage. The plaintiff, although he complained of these

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deductions, and said that his former owner had not charged them, accepted the balance, and gave a receipt for the whole amount of the wages. In *April*, 1830, he went out again in the same vessel on a similar voyage, agreeing to receive, instead of monthly wages, the 90th *lay* or share of the cargo obtained on the voyage. Articles in precisely the same terms as before (*mutatis mutandis*), were signed by him, and by *Thornton* on the other part, and the same advance of 10*l.* 10*s.* was again made to him. He served as cooper until the return of the ship to the port of *London* in the year 1832, with an unusually large and valuable cargo. The plaintiff's 90th share of the proceeds of the sale amounted to 141*l.* 14*s.* 8*d.*, which was reduced by the advances made to him, and deductions of the same kind as before, to 37*l.* 16*s.* 7*d.*: the sums of 4*l.* 2*s.* and 6*l.* 5*s.* being charged for the insurance of his share, and for interest on the advances. The plaintiff again remonstrated against these charges; but, on *Cooke's* assuring him the owners were entitled to them by the universal usage of the trade, he took the balance of 37*l.* 16*s.* 7*d.*, and gave, as before, a receipt for the whole wages. The ship and outfit had been insured, but not the freight. The present action was brought to recover back the sums so deducted, on the ground that the owners were not legally entitled to retain them out of the wages. *Cooke*, being called for the plaintiff, stated on cross-examination, that the charges were the usual ones in such cases, and that the accounts were always made out so. For the defendants it was objected, that the express stipulations of the articles precluded the plaintiff from maintaining the action against any of the owners except *Thornton;* and that even if that were otherwise, he could not recover after accepting the balance offered to him, and giving a receipt for it. The plaintiff's counsel contended that the crew were not bound in law by the stipulations in question, under all the circum-

stances of the case; and that at all events he was entitled to recover back the charge for insurance on the second voyage, as money had and received to his use. The learned Judge left it to the jury to say, first, whether the plaintiff entered into the contract contained in the articles, and, secondly, whether the settlements were made *bonâ fide:* and the jury having found in the affirmative on both points, he expressed his opinion that the action could not be maintained, and directed a nonsuit to be entered, giving the plaintiff leave to move to enter a verdict for *4l. 2s.*

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Addison now moved pursuant to the leave reserved, and also for a new trial on the ground of misdirection. First, as to the claim in respect of the first voyage. The plaintiff was not bound by the clause of the articles on which the defendants rely. The signature of the seamen was obtained by a kind of duress, when the ship was on the point of sailing from *Gravesend*, and they were under a sort of compulsion to proceed on the voyage. They are an ignorant and careless class of men, over whom the law should throw a peculiar protection. But even if the articles were binding under the circumstances, the clause in question is inconsistent with itself. If it is to be construed to preclude the seamen from suing any of the owners, they would be shut out from their remedy even against *Thornton* himself. [Lord *Abinger*, C. B.— It means any of the owners *as such*.] Yet they had, as such, received the fund out of which the wages were to come. The wages were adjusted, too, not by *Thornton*, but by *Deacon*, the managing owner. The owners thereby waived the objection arising on the terms of the contract. In *White* v. *Mattison* (*a*), Lord *Ellenborough* held that a clause of the same description did not apply,

(*a*) 2 Stark. N. P. C. 325.

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where the owners had made a tender of the wages. So here, they have waived it by taking upon themselves the payment. [Lord *Abinger*, C. B.—That was only a ruling at *Nisi Prius*. What law fetters a man from entering into a contract that nobody else shall be bound but the master? The waiver is nothing: no doubt the money was to come out of the pockets of the owners; but the master only was to be liable at law.] The 59 *Geo.* 3, c. 58, which was passed to facilitate the recovery of seamen's wages by proceedings before magistrates, applies to such a case as the present. By s. 3, it is enacted, that no seaman, by entering into or signing any contract or stipulation, as required by the several statutes then in force for that purpose, which shall have the effect of depriving him of the remedies given by that act for the recovery of his wages, should be deprived of or hindered from using any other means for their recovery against any ship, or the master *or owners* thereof, which he had before the passing of that act, or might afterwards make use of by law. [*Alderson*, B.—That means, that whereas before the act, under particular contracts, by a particular process, the party might enforce his right, the act enables him still to avail himself of it. It would be a strange thing to make an act of Parliament say, that, when one man binds himself, another should be liable.] In a recent case of *Gosling* v. *Smith* (*a*), where a bill was filed by a seaman against the owner for an account of the sale of the cargo, to which they pleaded similar articles to these, Sir *John Leach*, M. R. overruled the pleas, and decreed an account. [Lord *Abinger*, C. B.—In equity, perhaps, the parties might pursue the fund.] At all events, the plaintiff was entitled, on the count for money had and received, to recover back the deduction made for insurance on the last voyage. He had

(*a*) Not reported. But see *Spittal* v. *Smith*, Tamlyn, 45; *Cockle* v. *Whiting*, Ib. 55.

stipulated for a share in the proceeds; that was a claim *dehors* the stipulations in the articles. A valuable cargo was brought home, sold, and the proceeds received by the owners; the freight was never in fact insured: the plaintiff was entitled, therefore, to receive his share free of any charge for insurance; there having been, moreover, no mention of interest or insurance when the advances were made. Another objection is, that the deductions ought to have been made the subject of a set-off. [*Alderson*, B.—How can you insist on that, after having received the *balance?*] The seaman cannot have the benefit of an insurance; he cannot insure his wages; and what he cannot do directly for his own benefit, he ought not to be made to do indirectly for the benefit of others.

Lord ABINGER, C. B.—I am clearly of opinion that there is no colour for this rule. The action is brought against several parties, on a contract which binds one only. That is of itself an answer to all the objections, even to that which is raised on the count for money had and received. If a man stipulates to sue one only, he cannot sue others, even for money had and received. But neither was there any ground for the objection of there being no plea of set-off. The action, so far as it relates to the second voyage, is properly, not for wages, but by one joint adventurer against others: each party is therefore bound to pay his proportionable share of the usual charges, and the jury found that these were usual. Besides, it was left to them whether the settlement was a fair one between the parties, and they found that it was.

BOLLAND, B.—I am of the same opinion. The stipulations were the usual ones in such cases: all the usual charges are to be taken off, and the calculations made on the net proceeds clear of those deductions; all advances also are to be subject to the accustomed charges. That

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is the principle which appears to have been adopted in the present case.

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ALDERSON, and GURNEY, Bs., concurred.

Rule refused (*a*).

(*a*) See the 5 & 6 Will. 4, c. 19, ss. 2—5.

DRAKE and Another *v.* BROWN.

On an application to a Judge at chambers, under the Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers.

IN this case an application had been made by the defendant to *Gurney*, B., at chambers, under the first section of the Interpleader Act, when, by consent of all parties, the cause was, by an order of the learned Baron, referred to a gentleman of the bar, instead of an issue being directed under the statute; the question submitted to the arbitrator's determination being, whether a sum of money, which had been paid by the plaintiffs into the hands of the defendant, for the purpose of being paid over to the estate of an intestate, but which payment over had been subsequently countermanded by the plaintiffs, was in fact due from the plaintiffs to the estate of the intestate or not.

Wightman now applied, on behalf of the administratrix of the intestate (who was a party to the arrangement at chambers), for a rule *nisi* to vary the order, by making it an additional term of the reference that the arbitrator should inquire whether the defendant was not at all events liable to the administratrix for the amount received by him from the plaintiffs. He moved on an affidavit of the administratrix, stating that, since the application at chambers, she had been informed by the defendant that he had carried the money to the credit of the intestate in his (the

defendant's) books before the countermand; and that at the time of such application she was entirely ignorant of that fact, having then only just taken out administration. He contended, therefore, that the defendant, according to his own admission, no longer stood in the character of a mere stakeholder, but had rendered himself at all events liable to the administratrix; and by his act of charging himself as a debtor to the estate of the intestate, had so committed himself as to preclude him from the right of setting up the *jus tertii*. *Dixon* v. *Yates* (*a*). [Lord *Abinger*, C. B.—How can we vary this order, or enlarge the power of an arbitrator, except by consent? *Alderson*, B.—Unless the parties consent, the only way you can give the Court jurisdiction is by a motion to set aside the order. The Court cannot compel them to consent, and if they do not, that will be an answer to your application.] The rule may be to rescind the order, unless the parties consent to the variation. This is not the case of an ordinary person, who would be cognizant of his rights, but of an administratrix, who, when she consented, could not know them. No injury can be done to the defendant by the alteration, because, if he is liable to the administratrix, he is not liable to the plaintiffs, whose case is only that they countermanded the notice to pay over in due time: he cannot, therefore, be called on to pay twice.

Lord ABINGER, C. B.—This was a rule drawn up by consent of all the parties: now one of the consenting parties comes to ask of the Court the power to fix the defendant if she can, although he may not in equity be liable to her at all. The question to be decided in the cause is, whether the plaintiffs really owed the money to the intestate or not. The administratrix now seeks to introduce terms which may bind the defendant, although the plain-

(*a*) 5 B. & Adol. 313; 2 Nev. & M. 177, S. C.

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tiffs may not be indebted to the estate at all. If what she states be true, and the money has been paid over, or anything equivalent to that has been done, that will furnish the defendant with a clear defence to the claim of the plaintiffs; but we ought not to let her try whether the defendant may not have made some slip which renders him at all events liable at law to her, although she may not, as against the plaintiffs, have any title to the money whatever. That would be a manifest injustice.

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ALDERSON, B.—If, after all parties have agreed to an adjudication of the case on certain terms, the Court were to interfere *in any way*, I think they would be doing what was very improper, and establishing a very dangerous precedent.

The other Barons concurring—

Rule refused.

GOODAY, *qui tam*, &c. *v.* CLARK.

Quære, whether, since the statute 4 & 5 *Will.* 4, c. 51, the keeper of an excise office is an *officer of excise* within the meaning of the 7 & 8 *Geo.* 4, c. 53, s. 9, so as to be liable to the penalties imposed thereby on such officers for voting at elections for members of parliament.

Where, in an action for such penalties, the only evidence against the defendant was that he kept an inn, over the door of which was a board with the words "excise office" painted on it; that, his vote being objected to before the revising barrister in *October*, 1834, and his commission being called for, he had produced what the witnesses described as "something framed and glazed like a picture;" that he had received entries of buildings before the passing of the 4 & 5 *Will.* 4, c. 51 (*August*, 1834), but had since ceased to do so; and a witness stated that he had seen the defendant's commission, which was partly written and partly printed, and appointed him to collect duties of excise:—*Held*, that this was not evidence to go to the jury that on the 19th *January*, 1835, when the defendant voted at the election, he was an officer of excise.

DEBT, on the stat. 7 & 8 *Geo.* 4, c. 53, s. 9 (*a*), to recover a penalty of 500*l.*, alleged to have been incurred by

(*a*) Which enacts (inter alia), that no commissioner or assistant commissioner of excise, or officer of excise, or person employed in the charging, collecting, or managing of any part of the revenue of excise, shall be capable of giving his vote for the

the defendant in voting, on the 19th of *January*, 1835, at the election of knights of the shire for the county of *Suffolk*, he being then "an officer of the excise, to wit, a keeper of an office of excise in the said county, duly employed in that behalf." Pleas—*first, nunquam indebitatus; secondly*, that the defendant was not an officer of excise when he gave his vote at the said election: whereon issue was joined. At the trial before *Vaughan*, J., at the last *Suffolk* assizes, proof was given of the defendant's having tendered his vote, on the day stated in the declaration, at the election for the western division of that county; and the only question was, whether he was at that time an officer of excise within the prohibition of the statute. The evidence to prove him such was in substance as follows:—The defendant kept the *White Horse* inn at *Sudbury*, over the door of which was his name, and also the words "Excise Office," painted in large letters on a board. At the registration of voters for 1834, on the 3d of *October*, his

election of any person to serve in parliament; and if any person thereby made incapable of voting as aforesaid, shall nevertheless presume to give his vote during the time he shall hold, or within two calendar months next after he shall have ceased to hold or execute, any office or employment as aforesaid, such vote so given shall be held null and void to all intents and purposes whatsoever; and every such commissioner, &c., officer, or person, as aforesaid, who shall give any such vote, shall, for every such offence, (the same being proved by two or more credible witnesses upon oath), forfeit and lose the sum of 500*l*., one moiety whereof shall be paid to the informer, and the other moiety thereof to the poor of the parish in which such offence shall have been committed, and such penalty incurred:—and provides that such penalty may be recovered in an action of debt, to be commenced within twelve months.

S. 10 enacts, that no officer of excise, or person employed in the collection or management of, or accounting for the revenue of excise, or any part thereof, (except the keeper of an office of excise as thereinafter mentioned), shall, whilst he shall be such officer, or so employed as aforesaid, deal or trade in any goods or commodities subject to any duties of excise, &c. &c.

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vote being objected to as the keeper of an excise office, he was directed to produce his deputation, and thereupon produced what the witnesses stated was something like a picture, framed and glazed; and his name was expunged by the revising barrister from the list of voters. The excise collector attended at the defendant's house, and the pensioners were paid there. Notice was given to the defendant to produce his commission, and on its non-production, the surveyor of excise for *Sudbury* was called to give parol evidence of it; and he stated that he had seen and read it; that it was partly written and partly printed; that it appointed the defendant to collect duties of excise. The same witness also produced entries of rooms and buildings signed by the defendant, dated in *July*, 1832, *December*, 1833, and *March*, 1834, and one dated *October* 14, 1834; and stated that he gave the defendant notice not to receive any more entries after the last date, the act 4 & 5 *Will.* 4, c. 51, having then passed; that since that time the entries were not made at the excise office, and the duties were not collected by the defendant, but by the collector, who attended eight times a year at the defendant's house for the purpose; and that the defendant had now no more to do with the duties than any other person, except permitting the collector to come and receive them at his house; and received no remuneration in any way that the witness knew of. On this evidence the plaintiff was nonsuited, with liberty to him to move to enter a verdict for 500*l.* In *Michaelmas* term, *Biggs Andrews* obtained a rule *nisi* accordingly, against which

Storks, Serjt., *Wightman*, and *Byles*, now shewed cause.—The defendant was not an officer of excise within the meaning of the act of Parliament on which this action is brought, before the passing of the 4 & 5 *Will.* 4, c. 51; and if he was, he at all events ceased to be so by the operation of that act. An entirely different system of

collection and management has been introduced into the excise of late years from that which existed formerly. It may be admitted that the old statutes of 12 *Car.* 2, c. 23, and 15 *Car.* 2, c. 11, s. 9, under which there was to be a head office in *London*, and district offices in market towns, where many acts were to be performed, duties received, and entries made, and which were to be kept open daily for a certain number of hours for the performance of the matters required by those acts, might probably have the effect of making the keeper of the district office to all intents and purposes an excise officer. But by later acts of Parliament all the duties imposed upon the office keeper by the statutes of *Charles* have been successively abrogated. First, his authority to collect the duties is taken away by ss. 25 and 127 of the 7 & 8 *Geo.* 4, c. 53: the former directing that traders subject to the excise laws shall pay their duties at such time and place, and to such person, as shall be directed by act of Parliament or by the commissioners of excise; and the latter repealing all former inconsistent authorities and regulations. Secondly, his power to receive entries of buildings and utensils is taken away, if not by former acts, at all events by the 4 & 5 *Will.* 4, c. 51, s. 5, which expressly requires such entries to be made by delivering an account to the officer of excise. Thirdly, although he is, by the 15 *Car.* 2, c. 11, s. 9, required to attend at the excise office during certain hours of the day, that is for the purpose only of receiving entries and duties; if therefore he no longer receives either, his attendance has also ceased to be a duty, and is transferred to the collector. These are all the duties imposed on the office-keeper by the acts of *Car.* 2. The fact that the defendant receives no salary of itself leads to the conclusion that his appointment no longer exists. The exception in the 7 & 8 *Geo.* 4, c. 53, s. 10, may be relied upon as shewing that the office-keeper was included in the designation "officer of excise," in s. 9. But an exception,

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which may be introduced merely *ex abundanti cautelâ*, cannot extend the effect or meaning of the original words on which it is engrafted. Thus, the *Middlesex* Registry Act (*a*) is held not to apply to the city of *London*, although it exempts *Serjeant's Inn*, which is within the city. In *Smithett* v. *Blythe* (*b*), a proviso, exempting king's ships *of war* out of the operation of an act authorizing the taking of toll from ships and vessels passing a lighthouse, was held not to render the king's other ships chargeable by implication: and Lord *Tenterden* there says, "As the exception must be out of that which is previously granted, it cannot operate by intendment to impose a charge which the words of the grant are not extensive enough to comprehend." And again—"The exception cannot give a greater effect to the grant than its own terms admit of; and I think, therefore, that in exempting ships of war, which may have been *ex majori cautelâ*, it does not impose a liability on other vessels of the crown." So here, if the keeper of an excise office be not an officer of excise within s. 9, the exception in s. 10 will not make him so. The office-keeper is compellable to no duty, subject to no controlling power: any publican may put up a board with the words "excise office" upon it, but that confers no right, and subjects him to no control. To make him liable on so highly penal a statute as this, the proof should be of a definite office, and an officer duly appointed. It has been said, his remuneration may consist in the additional custom which the holding of the excise office at his inn draws to it. That would be as good a reason for charging his landlord. In the *Oakhampton* case (*c*) the vote of an excise office-keeper was sustained.

Talfourd, Serjt., *B. Andrews*, and *Gunning*, *contrà*.—

(*a*) 7 Ann. c. 20, s. 17. (*b*) 1 B. & Ad. 509.
(*c*) 1 Peckw. Elect. Cases, 373.

First, the defendant was an officer of excise before the passing of the 4 & 5 *Will.* 4, c. 51. He is appointed by the commissioners, liable to be controlled and dismissed by them: he is an officer at whose house certain duties were to be performed. It is true he receives no salary, but a salary is not necessary to an office of profit. *Delane* v. *Hillcoat* (*a*). The excise office still continues, and is still subject to the acts which require it to be kept open for certain hours. By the 108th and 110th sections of the 7 & 8 *Geo.* 4, c. 53, goods detained on suspicion of felony are to be deposited in the excise office, to be dealt with according to law. The office must be continued for these and other purposes. If it must, there must be an office-keeper. Then we must look to s. 9, and see whether the office-keeper was not intended to be included in the term "officer of excise." He is subject to the pressure of the commissioners in the manner contemplated by the prohibition against voting, which was directed to all who are under the influence of the crown, and who are appointed, or their appointment revoked, at the pleasure of the crown. It is conceded that the exception in s. 10 does not, *ex vi termini*, shew conclusively that he is within the terms of the original proposition in s. 9; but those terms are of themselves abundantly extensive to take in the office-keeper, if the Court think the legislature so intended. Then the exception is used, not to enlarge the original proposition, but as a key to the intention of the legislature. The office-keeper is almost always a publican, and remunerated by the additional custom he derives from his appointment: that accounts for the exception. In *Fitzwilliams* v. *Fitzwilliams* (*b*), by a devise of all the testator's goods, plate, and jewels, except the lease of *F.*, all the testator's other leases were held to pass, "because the intent appeared by the exception."

(*a*) 9 B. & C. 310; 4 Mann. & Ry. 175, S. C.

(*b*) Noy, 112; Dyer, 261 *b*, 27, note.

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Then, secondly, has the new act, even supposing it to have discharged him from the *duties* of his office, made the defendant cease to be an officer? In *Stokes* v. *White* (*a*), this Court held that, notwithstanding the statutes 1 *Will.* 4, c. 70, s. 10, and 2 & 3 *Will.* 4, c. 110, s. 3, which transferred the duties of the sworn and side clerks of the *Exchequer* to other officers, the side clerks continued to exist, and retained their former privileges. [Lord *Abinger*, C. B.—If it had been the case of a penalty instead of a privilege, it perhaps might not have been construed the same way.] The question is, has the *office* ceased or not; not whether the duties have been transferred. There is no proof that the defendant has resigned it, and he still holds out over his door that he enjoys it. It ought not therefore to be assumed that the appointment is not still in force.

Lord ABINGER, C. B.—The Court is called upon in this case to consider two questions, in their nature distinct. The first is, whether the keeper of an excise office is, *ex necessitate rei*, an officer of excise. My first impression, when this case was moved, was, that he must be taken to be so; that impression, however, has been in a certain degree removed by the argument, especially by what has been urged by Mr. *Byles* on the effect of the several statutes he has referred to, determining the duties imposed upon the keeper of an excise office by the statutes of *Charles 2.* Enough, at all events, appears upon the argument to raise a doubt whether he is or is not an officer of excise. The defendant may or may not, in fact, be such an officer; it may appear by the production of his commission, or by proof of some duties he has to perform, or of some privilege he enjoys by virtue of his commission, that he is. But

(*a*) 1 C. M. & R. 223.

does it so appear upon the evidence in this case? I think the proof is altogether defective. The proof amounts to this, that the defendant keeps an inn, and has the words "excise office" over the door; that his vote was rejected by the revising barrister, when something was produced, supposed to be his commission; then the surveyor is called to describe the commission, of which he gives an imperfect parol account, not stating any one duty or privilege the party was bound to perform or entitled to claim by virtue of it. It does not appear by whom it was granted, whether by the crown, or by the commissioners, or by the surveyor-general for the district. Then, the only duty which might have made the defendant an excise officer in *October*, he is proved to have ceased to perform. I think, therefore, the plaintiff has failed to make out what he was bound to do, in order to charge the defendant. This is a highly penal statute, in restraint of the exercise of a franchise, and imposing most severe disabilities, and ought to be construed very strictly. No doubt the offices were originally kept by officers having both duties and privileges. Even now, for aught I know, something of the same kind may be contained in their commissions. But the plaintiff has not satisfied my mind, that in the month of *January*, when the defendant tendered his vote, he was in any situation which rendered him liable to the penalties of this act of Parliament.

BOLLAND, B.—I am of the same opinion. I give no opinion on the general question, but confine myself to what has been proved, or rather not proved, on this occasion. It does not even appear clearly that the defendant was himself the keeper of the office, but only that there was the board over his door. It is shewn that in fact he does not collect the duties. But it is said that it must be taken, after the proof given of the commission, that he

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continues to discharge the duties of the office. I cannot assent to that, particularly on the construction of so highly penal an act of Parliament as this. It appears, moreover, that the defendant had been expressly informed by his superior officer that he was to cease to make entries after the 14th of *October*. In the absence of proof to satisfy my mind that he was in fact an officer, I think the rule ought to be discharged.

ALDERSON, B.—The only question for our determination is, whether at the time of his voting, on the 19th of *January*, the defendant was or was not an officer of excise. It certainly seems to have been considered, at the time of the passing of the 7 & 8 *Geo.* 4, c. 53, that the keeper of an excise office was an officer of excise. That seems to follow from the terms of the exception in the tenth section. But that was because he had then duties to perform: if they have been taken away, it seems to follow that he no longer remains an officer within the meaning of the clause imposing the penalty. Upon that question I give no definite or distinct opinion; but my impression is as I have stated. But I think the proof on the part of the plaintiff is defective. As to the board, as my Brother *Bolland* has observed, that does not even prove that the defendant kept the office. Then there is the loose evidence of what took place at the registration, and the surveyor's statement of his having read the commission, and of the defendant's having made entries. But the same witness proves also that the defendant did not collect duties; and that since the 4 & 5 *Will.* 4, c. 51, he had ceased to receive entries. The only proof of his keeping the office is the proof of his acting as an officer, and such acting had ceased in *October*. The only conclusion, therefore, is, that if he ever was an officer of excise, he ceased to be so on the 14th of *October*. I am very glad to be able to exempt a person from so heavy a penalty and so severe a disqualification,

to which it is sought to subject him only for doing what a committee of the House of Commons has said he may do lawfully.

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GURNEY, B.—I give no opinion on the general question. It is sufficient to say, that, if the plaintiff had a case, he has left it imperfect, and that under circumstances in which, by ordinary industry, he might have made it complete.

Rule discharged.

DOE *d.* BISHTON and Others *v.* HUGHES and Eleven Others.

EJECTMENT by mortgagees against tenants of the mortgagor. The defendants had entered into the common consent rule, by which they engaged to appear "for part of the premises in question, which part they admitted to consist of 50 messuages, &c. &c., 500 acres of land, &c. &c., in the parish of *Llanbeblig*, in the county of *Carnarvon*," and it was ordered in the usual terms that they should confess lease, entry, and ouster, and that they were in possession of the premises thereinbefore mentioned and specified. The lessors of the plaintiff had delivered, under a Judge's order, particulars of the premises sought to be recovered, which consisted of a great number of small tenements and encroachments on certain common lands in the parish of *Llanbeblig*, amounting altogether to above 2000 acres, and were described by their names, boundaries, and quantities. The cause being entered for trial at the last assizes for *Carnarvonshire*, before *Bolland*, B., an application was made to the learned Judge, on behalf of the defendants, that they might be allowed to withdraw their plea, and suffer judgment by default, as they had ten made out a complete defence:—*Held*, that the order did not virtually operate as an amendment of the consent rule also, and that the plaintiff was, notwithstanding the order, entitled to a verdict against all the defendants. But the Court directed that the ten defendants who went to trial should be allowed the costs of their defence on taxation.

Twelve defendants in ejectment entered into a general joint consent rule, not specifying the premises for which they severally defended. At the assizes the Judge made an order that the *record* should be amended, by allowing two of the defendants to withdraw their plea, and suffer judgment by default: but no express order was made as to any amendment of the consent rule. The trial proceeded; these two defendants did not appear, but the other

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half of two of the defendants, *William Owen* and *Owen Jones*, for an order that they should be at liberty to withdraw their plea, and suffer judgment by default, and that the record should be amended accordingly, on payment of the costs of the application and of the amendment: which order, after argument, the learned Judge made, and the cause proceeded to trial against the other ten defendants. As soon as the jury were sworn, the counsel for the plaintiff required that the defendants *Owen* and *Jones* should be called on the consent rule, to appear and confess lease, entry, and ouster; and they not appearing, he claimed to enter a verdict as against them, which the learned Judge refused to allow, as inconsistent with his previous order. The lessors of the plaintiff having proved their title as mortgagees, the ten defendants proved, on the other hand, that they had been in occupation of ten several tenements, part of the premises in question, being the whole of the premises occupied by them from a period antecedent to the date of the mortgage deed. The learned Baron thereupon directed a verdict for the defendants, giving the plaintiff's counsel leave to move to enter a verdict for the plaintiff, in case the Court should be of opinion that he had no power to make the order in question, or that it had not the effect of relieving the two defendants from the operation of the consent rule.

In the following term, *John Jervis* accordingly obtained a rule *nisi* to set aside the order of *Bolland*, B., and to enter a verdict for the plaintiff for one shilling.

Meeson and *Tomlinson* now shewed cause.—First, the learned Judge had power to make the order objected to. A Judge at chambers, or on circuit, has the right to allow any defendants to suffer judgment by default in ejectment as in other actions. That appears from the judgment of *Bayley*, J., in *Thrustout* v. *Shenton* (*a*). It is said he

(*a*) 10 B. & C. 111.

cannot vary a rule of Court. But in a case cited in *Adams on Ejectment* (*a*), *Wood*, B., is stated to have discharged the consent rule. The distinction as to a Judge's power in this respect is between solemn judgments and mere formal acts of the Court, which are often done at chambers, or are in fact merely the act of the officer. The latter a Judge has authority to vacate. Secondly, the order did in substance, though not in express terms, vary the consent rule. The consent rule is subordinate and ancillary to the record; and the order, being an amendment of the principal matter, is also in effect an amendment of that which is merely subordinate to it. But if not, the Court may amend the consent rule so as to make it conformable to the order. If the lessors of the plaintiff had agreed to take their judgment as to the premises in the possession of the two, and to proceed no further, they would have had all their costs up to that time; they did not do so, but chose to take their chance against the other defendants. According to the construction contended for on the other side, even if the two had not withdrawn, and had the same defence as the other ten, if they did not make a defence for all the premises mentioned in the consent rule, the plaintiff would be entitled to a formal judgment for 38 messuages, &c., the difference between the number of tenements declared for and for which there was a formal defence, and the number occupied by all the defendants in the action, which would entitle him to costs. The ten could in no way make a defence for the premises for which the two have disclaimed; it is therefore a great hardship to subject them to costs, when they have made a defence for themselves successfully.

J. Jervis, and *Welsby*, in support of the rule.—All the twelve defendants come in and defend jointly under the consent rule, and admit a joint possession of the whole

(*a*) P. 230.

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tenements. The lessors of the plaintiff thereupon go down to trial, knowing themselves to be secure of a verdict, because, as to the tenements in the occupation of *Owen* and *Jones*, they know the defendants cannot impeach their title. Then, at the trial, those two defendants having obtained an order to withdraw, the other ten continue to defend for the same premises for which the twelve did. A direct alteration of the consent rule would have been made only on the terms of the defendant's paying, not the mere costs of the amendment, but the general costs up to that time. The hardship is not upon the defendants, but upon the lessors of the plaintiff, who are subjected to difficulty and expense by the generality of the consent rule. Had the defendants, in obedience to the rule of Court (*a*), specified the premises for which they severally defended, the plaintiff might have entered a *nolle prosequi* as against the ten, and proceeded against the two only. The plaintiff is entitled, under the rule of Court, to recover for all that the ten defendants did not disprove his title to: *Doe* v. *Raby* (*b*).

BOLLAND, B.—We are of opinion that a verdict ought to be entered for the plaintiff. The consent rule remains unaltered; the plaintiff, therefore, is still entitled to recover for the same premises as the twelve defendants originally came in under the consent rule jointly to defend for.

ALDERSON, B.—I am of the same opinion. The consent rule was a joint admission of possession, on the part of all the defendants, of the whole premises claimed. Though two of them have withdrawn, the other ten continue to defend for the same premises, which still remain in the consent rule. The lessors of the plaintiff have proved a title to a certain portion of these premises, which the defendants

(*a*) M. T. 1820. (*b*) 2 B. & Ad. 948.

have not disproved. They would have a right, undoubtedly, to take out their writ of possession for that portion only. The only question at present is evidently about the costs; which seem to me both in equity and law to belong to the lessors of the plaintiff. The Master, in taxing them, may allow the ten defendants their costs of proving their title to the particular premises for which they defended.

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GURNEY, B., concurred.

Rule absolute to enter a verdict for one shilling.

On the following day, *Tomlinson* applied to the Court to vary the minutes of the rule, by introducing a direction that the verdict should be entered for the ten defendants who appeared, as to the ten messuages to which they proved title; contending that the case fell within the operation of the rule of *H. T. 2 Will.* 4 (*a*) as to costs, where some issues were found for the plaintiff and some for the defendant.

J. Jervis, and *Welsby*, *contrà*, insisted that the verdict in ejectment was general, and could not be apportioned; that in every case where the plaintiff's title was not disproved as to all the premises, he was entitled to a verdict generally, and it was then at his peril to take out his writ of possession only for the premises to which he made out an unimpeached title. In *Roe* v. *Street* (*b*), the Court of *King's Bench* refused to alter the postea by entering up the verdict for one of two defendants, though he had disproved the plaintiff's title as to the premises in his occupation.

The Court ultimately pronounced the following rule:—

(*a*) Pl. 74. (*b*) 4 Nev. & Man. 42.

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That a verdict should be entered for the plaintiff for one shilling; that the writ of possession should be taken out only for the premises in the possession of the defendants *Owen* and *Jones*; that the plaintiff should have the general costs of the cause; and that the other ten defendants should have the costs of defending for the premises to which they proved title.

Rule accordingly.

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Revenue.

A vessel which comes within a league of the coast of the United Kingdom, having had contraband goods on board in the same voyage, though she has unshipped them before coming within the league, is liable to forfeiture under the 3 & 4 *Will.* 4, c. 53, s. 2.

ATTORNEY-GENERAL *v.* SCHIERS and Another.

THIS was an information filed by the Attorney-General, upon the stat. 3 & 4 *Will.* 4, c. 53, s. 2 (*a*), praying the forfeiture of a vessel called the *Bien Aimé*, of *Cherbourg*, seized by the officers of customs; for that, being a foreign vessel, not being square rigged, she was, on the 6th of *July*, 1834, found on the high seas within one league of the coast of the United Kingdom, that is to say, within one league of the coast of *Dorset*, to wit, at *Ratcliff*, the said vessel then and there having had on board certain parcels of foreign spirits, in casks of prohibited size, &c. Another count stated that the vessel was *discovered to have been* on the high seas, within one league &c., having had on board the contraband spirits. At the trial before Lord *Abinger*, C. B., at the *Middlesex* sittings after *Easter* term, the facts proved were in substance as fol-

(*a*) Enacting (inter alia), that if any foreign vessel or boat shall be found, or discovered to have been within one league of the coast of the United Kingdom, any such vessel or boat so found or discovered, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits not being in a cask or package containing forty gallons at the least, &c., then and in such case the said spirits, &c., and the casks or packages containing the same, &c., and also the vessel or boat, shall be forfeited.

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lows. Some of the officers of the *Portland* coast guard station, being out in boats on the night of the 6th of *July*, 1834, between twelve and one o'clock, boarded a boat called the *La Marie*, about half a mile from the shore, and found in her three *French* and two *English* sailors, without provisions or compass, and seventy-one casks of foreign spirits, in half ankers, slung. They took her to *Chisel Cove*, but before arriving there, and about half an hour after her capture, saw the *Bien Aimé* lying becalmed at the distance of three quarters of a mile from them, and about half a mile from the shore. The chief officer of the coast guard immediately went off to her, and, on boarding and searching her, found marks of casks in the hold, a strong smell of spirits, the clothes of the boat's crew, and other appearances, which left no doubt that the *La Marie* had put off from her with the contraband spirits. The defendant's counsel, however, contended that, to support a condemnation on the statute on which the information was founded, it must appear that the vessel had the prohibited goods actually on board within a league of the coast, of which there was no proof in this case. The Lord Chief Baron told the jury, that, in his opinion, the vessel was liable to forfeiture, if she unshipped the prohibited goods more than a league off the coast, and afterwards came within that distance. A verdict having been found for the Crown,

John Jervis moved for a new trial, and submitted that the learned Judge had put an erroneous construction on the act of Parliament. The words "having had on board" must be taken in connection with the words "so found or discovered," that is, found or discovered "to have been within one league of the coast." The object of the enactment was to provide against the floating or sinking of the contraband goods within the distance. It is not sufficient to subject the vessel to forfeiture, that she has unshipped

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the goods at a greater distance, and afterwards come, as an innocent vessel, within the prohibited limits: otherwise it will follow that if a vessel, having had contraband goods on board in the *East Indies*, comes at any time afterwards within the prohibited distance; or if, having put off from a *French* port with them on board, she has repented, and sent them back, but proceeds herself, she will be forfeited. [Lord *Abinger*, C. B.—You put an extreme case one way, let us put one the other: suppose she unships them a hundred yards beyond the league? I apprehend the object of the statute was to make the vessel seizable if found within a league, having had the prohibited goods on board in that voyage. The being found within a league is taken as evidence of the guilty intention to land them.] Here, however, the Crown have, in their information, put a construction on the statute which binds them; the words "then and there" must be referred to the former words, "within a league &c.," and import that the vessel had the goods on board within that limit.

The Court, having intimated that there was nothing in the latter objection, took time to look into the act of Parliament; and, on a subsequent day,

Lord ABINGER, C. B., said—In this case we delayed granting a rule until we had looked more fully into the statute. On looking into it we think there is no foundation for the distinction taken by Mr. *Jervis*. The provision which renders a vessel liable to forfeiture, having had contraband goods on board before entering the prohibited limits, is applicable only to the particular voyage in which she both discharges the goods and enters the prohibited limits. It cannot be supposed that the legislature contemplated anything so absurd as to provide against the case of a vessel having had prohibited goods on board somewhere or other twenty years before, and

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then coming, twenty years afterwards, within a league of the coast. The statute seems indeed to be directed against the very case of a vessel, having had goods on board in prohibited packages, discharging them before she enters the specified limits, and then following, to assist in the landing or receive back the crew. There will therefore be no rule.

Rule refused.

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SCOTT, Assignee of JONES, a Bankrupt, *v.* LEWIS, Esq.

The sheriff cannot apply to the Court under the Interpleader Act, unless the goods or money in dispute are actually in his hands.

THIS was an action of trover against the late sheriff of *Carmarthenshire*, to recover the value of goods of the bankrupt, seized by the defendant under a *fieri facias* at the suit of one *Rees James*. The writ was issued on the 29th of *January*, 1834, returnable on the 15th of *April*, indorsed to levy 2019*l.* 18*s.* 6*d.* The seizure was made on the first of *February*, the goods were sold by auction on the 10th, and on the 12th the proceeds were handed over to the execution creditor. The sheriff had no notice of the fiat against *Jones*, or of any act of bankruptcy committed by him, until the service of the process in the present action, on the 12th of *May*, 1835.

Chilton moved, on the part of the sheriff, on an affidavit stating the above facts, for a rule under the Interpleader Act, 1 *Will.* 4, c. 58, s. 6. The difficulty is, whether the sheriff can make this application after he has actually paid the money over. It was certainly said, in *Anderson* v. *Calloway* (*a*), that he could not; but there the money was paid over after notice of an adverse claim, not, as in this case, long before. The language of the first and sixth

(*a*) 1 C. & M. 182.

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sections differs materially: the latter does not contain the clause which is found in the former, requiring the party applying to state that he is ready to bring into Court, or to pay or dispose of, the subject-matter of the suit as the Court may direct. It was undoubtedly assumed, in *Anderson* v. *Calloway*, that the sixth section must be read with reference to the first. The strictness of this construction has, however, been relaxed in one point; for it has now been held, in opposition to the rule first adopted, that the sheriff need not deny collusion, though a mere private stakeholder must. *Donniger* v. *Hinxman* (*a*), *Dobbins* v. *Green* (*b*). The statute was intended to give a more extensive measure of relief to the sheriff than to a mere private stakeholder; and he is still in the jeopardy from which it meant to relieve him, since he may be liable in trover, even though a secret act of bankruptcy has been committed. He is even more entitled to indulgence, having been lulled into security by the delay, than if the parties had made their claim promptly. [*Parke*, B.—You do not shew when the fiat issued; if it was not until two months after the payment, the sheriff may be protected.]

Lord ABINGER, C. B.—I should be much disposed to relieve the sheriff if it were possible, but I think this is not a case within the act: I think the act implies that the money or goods must be in the hands of the sheriff at the time of his application to the Court. The cases cited as to the denial of collusion have no bearing on the present question. The language of Mr. Baron *Bayley*, in *Anderson* v. *Calloway*, is clear and express against this application. One of the most important questions to be determined under the act is, what is to be done with the goods or money in dispute.

(*a*) 2 Dowl. P. C. 424. (*b*) Id. 509.

BOLLAND, B.—The officer has executed his writ, and done his duty, on paying the money over, and is no longer a party to the proceedings. I should be very glad to relieve him if I could, especially as I was one of those who differed as to the sheriff's liability in such a case as this (*a*).

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The other Barons concurring—

Rule refused.

(*a*) *Garland* v. *Carlisle*, 2 C. & M. 55.

COCK *v.* COXWELL.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, dated 15th *December*, 1834, payable two months after date. Plea—that the defendant never accepted the bill of exchange in the declaration mentioned. At the trial, before the undersheriff of *Middlesex*, the defence was, that the bill had been altered in its date after the acceptance, and without the knowledge of the defendant. A verdict having been found for the defendant,

An alteration in a bill of exchange, after acceptance, may be taken advantage of on a plea that the defendant did not accept the bill.

Thomas now moved for a new trial, on the ground that the defence on which the defendant relied was not open to him on the plea of non-acceptance. That plea only put in issue the fact whether the defendant accepted or not: the alteration after acceptance ought to have been specially pleaded, as it was in *Atkinson* v. *Hawdon* (*a*); it is strictly a matter in confession and avoidance. [*Alderson*, B.—He *has* pleaded it specially, by saying that he did not accept the bill you declared upon and produced in evidence, but a different

(*a*) 4 Nev. & M. 409.

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one.] The plea of *non est factum* would not put in issue fraud or misrepresentation in obtaining the deed. [*Gurney*, B.—It would put in issue an alteration after the execution.] In a late case in the *Common Pleas* (*a*), it was held, that an objection that the contract declared on (an assignment of copyright) ought to have been in writing, could not be taken without being specially pleaded.—He urged also that the alteration, having been made before the indorsement to the plaintiff, was immaterial, this being an accommodation bill, which could not be said to have been negotiated till it came into the hands of a holder for value.

BOLLAND, B.—We think the only point we need consider is, whether the plea in question is a sufficient answer. The defendant says in substance, the instrument on which you claim against me I never accepted. It cannot be said to be the same instrument if there has been any alteration.

ALDERSON, B.—It amounts to saying that he did not accept the bill set out in the declaration.

Rule refused.

(*a*) *Barnett* v. *Glossop*, 1 Bing. N. S. 633; 1 Scott, 621; 3 Dowl. P. C. 625.

ROBERTS and Others, Assignees, *v.* HARRIS.

A party made a composition with his principal creditors, paying the smaller ones in full. He afterwards became bankrupt, and did not pay 15*s.* in the pound:—*Held*, that (having obtained his certificate and released his surplus) he was a competent witness to support an action by his assignees.

ASSUMPSIT for goods supplied by the bankrupt to the defendant before the bankruptcy. At the trial before *Parke*, B., at the last sittings at *Westminster*, the bankrupt, who had obtained his certificate and released the surplus of his estate, being tendered as a witness for the

plaintiffs, was examined on the *voir dire;* when he stated, that, before he became bankrupt, he had made a composition with his principal creditors; and that he had applied to all with whom he thought it worth while to compound, but had paid other small creditors in full. It appeared, also, that he had not paid 15*s.* in the pound under the fiat. The counsel for the defendant thereupon contended that the witness was rendered incompetent by the 127th section of the Bankrupt Act. The learned Judge overruled the objection, and the plaintiffs had a verdict.

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Mansel now moved for a new trial, and renewed the same objection. *Slaughter* v. *Cheyne* (*a*), and *Norton* v. *Shakespeare* (*b*), establish that the composition which is to render the bankrupt an incompetent witness need not be with all the creditors, if it be not in terms limited to a particular class of them. Here the bankrupt intended the composition to extend to all the creditors who were likely to press him. If it be otherwise, the greatest facility will be given to evasions of the statute, because the bankrupt may always render himself competent by excluding one or two creditors from the composition.

PARKE, B.—It is clear this was not a general composition. The bankrupt said he did not call all the creditors together, but only the larger ones. He never proposed a general composition, and never meant to make one. In *Slaughter* v. *Cheyne* the party proposed, as far as in him lay, to make it general. It is quite clear the witness was admissible.

The rest of the Court concurring—

Rule refused.

(*a*) 1 M. & Selw. 182. (*b*) 15 East, 619.

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PIERCE *v.* EVANS.

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ASSUMPSIT for the use and occupation of a skin-house and yard, with counts for money had and received, interest, and on an account stated. The particulars of demand stated that the plaintiff sought to recover 17*l.* 10*s.* for rent of the skin-house and premises, 50*l.* for money had and received by the defendant of one *Humphrey Pugh* for the use of the plaintiff, on the 8th *April*, 1831, and 3*l.* 7*s.* for interest on the last-mentioned sum, from the 1st *July*, 1833, to the commencement of the action. The defendant paid into Court the amount of the rent, and the only question at the trial, which took place at the last *Carnarvon* assizes, before *Bolland*, B., was as to the plaintiff's right to recover the 50*l.* and interest. The plaintiff relied on the account stated, and gave evidence of applications by him to the defendant, in *July*, 1834, for payment of the balance of an account, including the 50*l.* and interest then due, (the defendant having already paid interest for several years), and that the defendant admitted its correctness, and promised to settle with the plaintiff on a day specified. A witness stated that on that day the plaintiff came over to *Carnarvon* for the purpose, and went with the defendant to his house, but shortly returned to the witness's house, and told him that the defendant and his wife had torn to pieces the security he had for the 50*l.* On the day before the trial of this cause, the defendant had been tried on an indictment for stealing that security, and the plaintiff then gave evidence of its contents. A note taken of that evidence was now put in on the part of the defendant, as proof of the contents of the paper; which, according to the plaintiff's statement, was in the following terms:—

The plaintiff sought to recover 50*l.* from the defendant on the account stated, and gave evidence of an admitted account between them, in which that sum appeared as an item against the defendant, and of payment of interest in respect of it, and promises to pay the principal. The defendant proved that the debt arose out of a written undertaking on his part (which he had obtained from the plaintiff and destroyed) "to remit the plaintiff 50*l.*, which sum he, the defendant, held of H. P., and by him authorized to pay" the plaintiff; and called H. P., who swore that he never authorized the defendant to pay the money for him, and that he had since settled all his accounts with the plaintiff:—*Held*, that the defendant was not precluded from giving this evidence, and that, if believed, it entitled him to a nonsuit.

"Mr. *William Pierce*,

"Soon after I return home I undertake to remit you *50l.*, which sum I hold of *Humphrey Pugh*, my father-in-law, and *by him authorized to pay you.*

April 8th, 1831." "*William Evans.*

Humphrey Pugh was then called, and stated that in *April*, 1831, the defendant was indebted to him in about *400l.* on the sale of a house; that at the same time the witness owed the plaintiff money, but that he never authorized the defendant to remit or pay the plaintiff *50l.* or any other sum, nor was any agreement made to that effect; that the plaintiff did apply to the defendant to become surety for the witness, but he refused; and that he, *Pugh*, had since settled all his accounts with the plaintiff. On this evidence the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that, as it appeared by the terms of the document by which the *50l.* was secured, that this was a mere transfer of *Pugh's* debt to the defendant, the plaintiff could not maintain the action; first, because the debt of the defendant to *Pugh* was not one in respect of which *Pugh* could have sued for money had and received—*Wharton* v. *Walker* (*a*); secondly, because there was not the concurrent assent of the three parties to the transfer. The learned Judge, with the concurrence of the counsel on both sides, directed a verdict for the plaintiff for *53l. 7s.*, giving the defendant leave to move to enter a nonsuit. In the following term, accordingly, *John Jervis* obtained a rule *nisi* for a nonsuit or new trial; against which

Sir *W. Follett* now shewed cause.—The plaintiff does not seek to recover on the written agreement at all, but

(*a*) 4 B. & C. 163; 6 D. & R. 288.

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on the account stated, of which he has given ample evidence. The case might be different if it were an action on any special agreement; but, when a party agrees to pay a sum of money, or admits that he owes it, what answer is it to shew that the debt originally arose out of the debt of a third party? There might be many considerations to induce the defendant to admit the debt, and assume payment of it. But further, the defendant having stated, by his written agreement, that he had *Pugh's* authority to pay the plaintiff, and the plaintiff having acted on the faith of that statement, he is not at liberty now to turn round and say, that his own representation was false, and that he had no such authority. *Shaw* v. *Picton* (*a*). [*Alderson*, B.—That was a question of refunding; it would be a parallel case, if the defendant here had actually paid over the money.] The defendant cannot say it was a mistake; he made the acknowledgment with full knowledge of the facts. Besides, it is consistent with *Pugh's* evidence (even supposing the whole of it worthy of belief), that in his settlement with the plaintiff he had credit for the 50*l.* as to be paid by the defendant.

J. Jervis, and *Welsby*, *contrà*.—It is true the plaintiff went on the account stated; but, as soon as it appeared that the original consideration was such as could not confer a right of action, the account stated in respect of it could not advance his claim. Nor was there anything to preclude the defendant from shewing the real character of the transaction. There was no estoppel by matter of record or deed. Neither has the rule of law, which disables a party from taking advantage of his own wrong, any operation against the defendant in this case; for, though his representation might be untrue, the plaintiff is not thereby in a worse condition, since *Pugh* has either paid him or

(*a*) 7 D. & R. 201; 4 B. & C. 715.

continues liable to him. The evidence then being admitted, it clearly appears that the plaintiff could not recover, *Pugh* having distinctly negatived the agreement for the transfer of his debt. But even if *Pugh* had authorized the defendant, the action will not lie, because *Pugh* could not have sued the defendant for money had and received: *Wharton* v. *Walker* (*a*), *Cuxon* v. *Chadley* (*b*), *Fairlie* v. *Denton* (*c*). At all events, the defendant is entitled to a new trial, in order that the question, whether there was a transfer of the debt by agreement among the three, may be submitted to the jury.

BOLLAND, B.—I think the rule for entering a nonsuit must be made absolute. It appears that the only question in dispute at the trial was, whether the plaintiff's case was so far met by the evidence given on the part of the defendant, as to shew that, in law, the plaintiff could not maintain the action. I understood that both parties agreed to withdraw the question entirely from the jury, and raise it as it has now been raised before us. I should not otherwise have stated the point to the jury as I did, but should have left the whole case to them on *Pugh's* evidence. That evidence goes to shew that the plaintiff could not maintain the action, and therefore I think the rule must be absolute for a nonsuit.

ALDERSON, B.—The agreement at the trial must have proceeded on the ground that *Pugh* was a credible witness, or the parties would not have consented to it. If that be so, the admissions of the defendant, as far as they relate to the 50*l.*, which alone remains in dispute, amount only to saying, "that item I promised to pay under a misapprehension of my liability." And he shews that this was so, both by the evidence of the document itself, and

(*a*) 4 B. & C. 163; 6 D. & R. 288. (*b*) 5 D. & R. 417; 3 B. & C. 591.
(*c*) 8 B. & C. 395; and 2 M. & R. 353, S. C.

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by the evidence of *Pugh*, who negatives his authority, and proves payment of his debt to the plaintiff. If then the plaintiff is to recover, he will have the money, first from *Pugh*, and then from the defendant. Taking, therefore, the evidence to be credible, as we must do under the circumstances, it amounts to a complete defence to the action. The defendant is consequently entitled to have a nonsuit entered.

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GURNEY, B., concurred.

Rule absolute for a nonsuit.

TUNNO *v.* MORRIS.

The sheriff is a constituent part of the county court, and acts as such in issuing process of execution, and is not liable for the wrongful act of the bailiff, done in the execution of such process.

TROVER for cattle, goods, and chattels. Plea—that before and at the said time when &c. the defendant was sheriff of the county of *Carmarthen*, and that one *John Meredith*, residing within the jurisdiction of the county court holden in and for the said county, had been, by virtue of his Majesty's writ of justicies, summoned before the suitors of the said Court to answer *Henry Thomas*, also residing within the said jurisdiction; and that, according to the custom of the said Court, the said *H. T.* levied his plaint against the said *J. M.* of and concerning a certain cause of action arising within the said jurisdiction, and such proceedings were thereupon had that afterwards the said *H. T.* recovered against the said *J. M.* 63*l.* for his debt, &c. &c.; and that the defendant, so being such sheriff as aforesaid, afterwards, to wit, on &c., at the suit and instance of the said *H. T.*, authorized and commanded all and singular his bailiffs, and also *W. H.*, *D. D.*, and *J. G.*, special bailiffs for that purpose appointed, and each and every of them, to levy of the goods and chat-

tels of *J. M.*, in the county of him the said defendant, as well the said debt of 63*l.* which the said *H. T.*, in the said county court, had recovered against the said *J. M.*, as also, &c., and to have that money at the next county court to be holden in and for the said county, to render to the said *H. T.*, for his debt and damages, together with the said precept, which said precept was delivered to the said *W. H.*, *D. D.*, and *J. G.*, as such special bailiffs, to be executed in form of law; and, by virtue of the said precept, the said goods were by them seized, which was the same supposed conversion whereof the plaintiff had complained. Demurrer and joinder.

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Crowder, for the plaintiff.—The plea contains no justification. It does not justify taking the plaintiff's goods, but only those of *Meredith* (*a*). Nay, it does not even state that the goods taken were in fact the goods of *Meredith*. The Court then called upon

Chilton, to support the plea.—Undoubtedly the plea admits that the goods of the plaintiff were taken, and that the precept authorized only the taking of *Meredith's*. But the defendant sufficiently justifies the part *he* took in the transaction: and he is not in this case liable for the acts of the bailiffs. The sheriff is responsible for the acts of his officers when executing the process of the superior Courts, because he is supposed to execute it himself. [Lord *Abinger*, C. B.—If you say the sheriff is not liable in law, you ought to have pleaded the general issue.] That is not stated as a ground of demurrer. But the defendant has a right to put his defence arising out of matter of law upon the record (*b*). Here the sheriff, acting as a constituent part of the county court, not as a mere ministerial

(*a*) This was the ground of demurrer stated in the margin.
(*b*) See *Carr* v. *Hinchliffe*, 4 B. & C. 547; 7 D. & R. 42, S. C.

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officer, puts his subordinate officers in motion, in the same manner as, in process from the superior Courts, those Courts set him in motion. *Holroyd* v. *Breare* (*a*) is an authority to shew that in such case he is not liable for their wrongful acts. It was there held that trespass could not be maintained against the steward of a court baron, where his bailiff in mistake took the goods of *B.*, under a precept commanding him to take those of *A.*, because the steward is a judicial officer. It was argued that he was merely the minister of the court to execute its process, and that his warrant to the officer was analogous to that of the sheriff to his bailiff, and rendered him equally responsible for the mis-execution of it. But to that argument *Abbott*, C. J., answers, "The steward is not merely a minister of the court, but a constituent and essential part of it. The court cannot be held without him. No mandate is directed to him as an officer, but he makes his mandate to the bailiff. And there is this material distinction between the mandate of the sheriff and that of a steward of a court baron; in the former the sheriff commands the bailiff to make the levy, and it concludes thus:—'So that I may have the same before the court.' But, in the warrant of the steward, the bailiff is directed to levy, so that he, the bailiff, may have the same before the court on the day appointed. This, therefore, is more like the writ of the superior Court to the sheriff than the warrant of the sheriff to the bailiff. That seems to be decisive to shew that the bailiff, and not the steward, is the minister of the court baron for the execution of its process, and that he is not the servant of the steward in this respect." Those observations are strictly applicable to the present case. The precept from the sheriff pursues the same form as that of the steward. The county court cannot be held without the sheriff as a constituent and essential part of it. *Tinsley* v. *Nassau* (*b*) is even a more direct authority for the

(*a*) 2 B. & Ald. 473. (*b*) M. & Malk. 52.

defendant; where *Best*, C. J., ruled that trespass would not lie against the sheriff for the act of his bailiff in taking the goods of the wrong party in execution of the judgment of the county court, on the express ground that he was a constituent part of the court. [He was then stopped by the Court.]

Crowder, contrà.—The sheriff is the ministerial officer of the county court. The suitors are the judges, and the sheriff does not fill any judicial capacity. *Jentleman's case* (*a*) was not cited in *Holroyd* v. *Breare*. It is there said, "On good consideration of all the books, it was resolved, that in none of the said cases," (that is, in proceedings in ancient demesne, court baron, or county court, either by plea without writ, or by writ to the lord, bailiffs, or sheriffs,) "the lord of the manor, or the bailiff, or sheriffs, are judges; but be the plea held by writ, or without writ, the suitors are judges." [Lord *Abinger*, C. B.—Lord *Tenterden* does not question that case, for he says the suitors are the judges, but that the sheriff is a constituent part of the court. *Alderson*, B.—The question is, whether the officer seizes for the sheriff or for the court.] It is submitted that he seizes for the sheriff, as in the ordinary case; and that the sheriff is one with the bailiff, wherever he looks to the bailiff for the execution of the process. It is otherwise in the case of the bailiff of a liberty, over whom the sheriff has no authority; here he alone appoints the officers, and exercises a control over them; he therefore ought to be responsible. The sheriff may have a writ against him to do execution as an officer of the county court, which may go on even to attachment (*b*). Could that be the case if he were a judicial officer? Both *Blackstone* (*c*) and Lord *Coke* (*d*) describe him as a ministerial officer merely. [Lord *Abinger*, C. B.—The

(*a*) 6 Co. Rep. 11 a.
(*b*) Com. Dig. County Court, C. 13.
(*c*) 3 Com. 36.
(*d*) 4 Inst. 266.

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writ is sent to him, because the suitors are a fluctuating body, and because he is the person to see the process executed. He is a ministerial officer just in the same way as the entering clerk of a court of record, who is to enter up judgment, and see the process of execution issued.] It is submitted that the more correct view of the question is to consider whether he is or is not the person having the appointment of the officers; if he has, what he does by his servants he does by himself, and is responsible for their acts. If they also were a part of the court, the case would be different; but the general rule ought to prevail, unless where the officer is in some way independent of the sheriff.

Lord ABINGER, C. B.—This plea certainly amounts to the general issue; but, as that is not made a ground of demurrer, we must consider the case upon the grounds stated in the plea. *Holroyd* v. *Breare* is strongly, and *Tinsley* v. *Nassau* (*a*) directly, in point for the defendant. The distinction is well taken in the former case by Lord *Tenterden*, as to the form of the writ, differing, as it does, from the ordinary warrant of the sheriff to the bailiff. There is also another well-known distinction, that bailiffs employed in the execution of process from the superior courts give security to the sheriff for the due execution of it, but that is not so in the case of process issuing from the county court. They are in fact appointed, not by him, but by the plaintiff in the suit: the plea here states that the officers in question were special bailiffs, that is, persons named by the plaintiff himself; he, therefore, and not the sheriff, is answerable for any wrong done by them. Besides, the sheriff, if not the judge, is the assistant of the county court, and as much a constituent part of it as the entering clerk of a court of record. Nobody ever supposed that that officer would be liable for the mis-

(*a*) M. & Malk. 52.

execution of its process. I think we may consider the authorities cited as having sufficiently established the distinction between the sheriff, as an officer of the superior courts, and as an officer of the county court, which is in fact the court of the sheriff. The defendant, therefore, was not responsible in this case for the acts of the bailiff. The plea is consequently good, because it amounts to a good general issue.

BOLLAND, B.—I am of the same opinion. The authority of *Holroyd* v. *Breare*, which underwent much consideration, is not at all impeached by *Jentleman's case;* and, though *Tinsley* v. *Nassau* was only a *Nisi Prius* decision, it does not appear that any attempt was made to disturb the ruling in that case. The sheriff is in truth the real effective judge of the county court; at all events, an essential part of it: he is therefore in a very different situation from that in which he stands as an officer of the courts at *Westminster*.

ALDERSON, B.—I am of the same opinion. The sheriff is the party primarily ordered by the superior courts to execute their process, and he deputes the subordinate officers to perform his duty; he, therefore, is properly responsible for their acts. But in the county court the sheriff is not the party ordered to execute the writ; but, acting under the directions of the suitors, he orders the bailiff to execute it, and to have the money to be brought by him, the bailiff, before the court. He stands, therefore, in quite a different situation from that in which he executes the process of the superior courts.

GURNEY, B., concurred.

Judgment for the defendant.

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PAINE and Others, Executors of JAMES PAINE, deceased, *v.* EMERY.

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Where a declaration in covenant sets out the deed according to its legal effect, and the defendant sets it out on oyer *in hæc verba*, he cannot demur to the declaration on the mere ground of *variance*; because the deed, as set out on oyer, becomes part of the declaration.

DEBT on an indenture of mortgage, made between the plaintiff's testator and the defendant, whereby the defendant covenanted to pay or cause to be paid to the said *James Paine*, his executors, &c., the sum of 100*l.* and interest at the rate of 5*l. per cent. per annum*, on the third day of *June* next ensuing the date of the said indenture. The breach alleged nonpayment generally. The defendant, after setting out the indenture on oyer, from which it appeared that the covenant was to pay the principal and interest on a specified day at or in the porch of the parish church of *Gamlingay*, in the county of *Cambridge*, demurred specially to the declaration, assigning for cause that there was a material variance between the covenant set forth in the declaration and the covenant in the deed read on oyer, inasmuch as the former was a covenant for the payment by the defendant of the money generally, whereas the latter was a covenant to pay it at a particular time and place; and, for anything that appeared on the face of the declaration, the defendant might have been at the time and place specified in the covenant, ready with his money and willing to pay it to the plaintiff, if the plaintiff had been there to receive it; so that, on the face of the record, it did not appear that any breach of covenant had been committed by the defendant. Joinder in demurrer.

Platt, in support of the demurrer.—This is a material variance. The obligation imposed on the covenantor by a general covenant to pay is essentially different from that to which he subjects himself by a covenant to pay at a particular time and place. By the former, he assumes the duty of finding out the creditor, in order to make the payment; by the latter, he is bound only to be ready to pay at the time and place limited. The deed

stated in the declaration, therefore, would impose a greater burden on the defendant than that set out on oyer: if so, the variance is a substantial and material one. The authorities on the subject are collected in *Comyns's Digest, Condition, G.* 9. Suppose there were a covenant to load goods at a particular place, and it were laid as a covenant to load generally, would not that variance be material? [*Alderson*, B.—The covenant stated in the declaration includes both cases; how then can it be a variance?] The defendant says it includes more than he agreed to do. In *Rowe* v. *Young* (*a*), where a bill was accepted payable at a particular place, it was held necessary to aver and prove a presentment at that place. [Lord *Abinger*, C. B.—But if the allegation there had been of a general acceptance, and it turned out to be an acceptance payable at a particular place, would that have been a variance?] If the two contracts are substantially different, that is sufficient. The defendant could not discharge himself from the general covenant stated in the declaration, by shewing payment at the particular time and place, unless it were accepted by the creditor.

Wightman, contrà.—Even if this were admitted to be a variance, the objection to it merely as such cannot be taken on demurrer, because, by setting out the deed on oyer, the defendant has made it a part of the declaration. If, indeed, when it was set out on oyer, it had appeared to be such a qualified covenant, that, taking the deed as stated on oyer and the breach laid in the declaration together, it appeared that the plaintiff could not maintain the action, that would be ground of demurrer; but a mere variance is no longer so. *Snell* v. *Snell* (*b*), *Sacheverell* v. *Froggatt* (*c*), *Ross* v. *Parker* (*d*), *Abney* v. *White* (*e*),

(*a*) 2 Brod. & Bing. 165.
(*b*) 4 B. & C. 741; 7 D. & R. 249.
(*c*) 2 Saund. 366.
(*d*) 1 B. & C. 358; 2 D. & R. 662.
(*e*) Carth. 301.

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Gage v. *Acton* (*a*). [Lord *Abinger*, C. B.—I have always understood that a deed set out on oyer becomes part of the declaration, and is in fact the statement of the plaintiff. That is inconsistent with the notion of the defendant's taking advantage of a variance. If, on setting it forth on oyer, it appeared that the breach alleged was no breach of the covenant set out on oyer, though it was of that stated in the declaration, that would be good ground of demurrer.] The breach in this case being general, applies equally to both. In *Rowe* v. *Young*, *Bayley*, J., puts this very case by way of analogy. He says,—"So, in covenant on a mortgage deed to pay the mortgage money on a given day, in *Lincoln's Inn Hall*, or any other place, the declaration never alleges an attendance or demand by the plaintiff, but merely alleges nonpayment by the defendant."

Lord ABINGER, C. B.—The deed being set out on oyer, it becomes the same thing as if the plaintiff, instead of stating its legal effect, had set it forth *in hæc verba*. That being so, the general breach is clearly good; if the defendant has not paid at all, it is clear he has not paid at the particular time and place.

The other Barons concurring—

Judgment for the plaintiff.

(*a*) Carth. 513.

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JOHN JERVIS had obtained a rule to shew cause why the bail-bond given in this cause should not be delivered up to be cancelled, and the defendant discharged out of custody on entering a common appearance, on the ground of a defect in the *capias*, which described the defendant as "*Francis Harvey, late* of *Devonshire Terrace, New Road;*" the form given by the Uniformity of Process Act (*2 Will.* 4, c. 39, schedule No. 4) being "*C. D.*, of ——," which he contended could only designate a place of present residence.

"*F. H., late* of *Devonshire Terrace, New Road,*" *held* a sufficient description in a *capias*, where it appeared that the party had been found by that description, and that he had no settled residence at the time of the arrest, and no other means of identification appeared.

Godson shewed cause on an affidavit of the plaintiff's attorney, stating that, on inquiry of the defendant's attorney, it was found that the defendant was lately resident in *Devonshire Terrace*, but had left it; and that, to the best of the deponent's belief, he had at the time of the arrest no settled place of residence at all. He contended that the plaintiff did all that was required of him by the statute, by giving the best description he could of the defendant, and such a one as enabled the sheriff to find and take him, which was the only object of the description in the *capias;* that it was different from the case of a writ of summons, which was to be served on the party himself at his residence, and to which he was to appear; that the words "of late" &c. would clearly have been sufficient, and the words actually used were in effect the same; and that though the sheriff, in case proceedings had been taken against him, might perhaps have said this was an insufficient description, the defendant could not, who had been actually found by that description: and he cited *Welsh* v. *Langford* (*a*), and *Buffle* v. *Jackson* (*b*), in the

(*a*) 2 Dowl. P. C. 498. (*b*) Id. 505.

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former of which *Taunton*, J., held the description "Captain *J.*, of the Honourable *East India* Company's ship *K.*, and now most likely to be found at the *East India* House, *London*," sufficient in a *capias*, and said it was enough to satisfy the form, if the defendant was so described as to enable the officer executing the process to find him. The defendant here did not shew that he had in fact any subsequent residence.

J. Jervis, in support of the rule, urged that the safest course was to adhere strictly to the form given by the statute; that the fourth section contained a distinct and substantive enactment that the writ should be in a precise form; that the cases cited were only cases where the blank left in the schedule was filled up in a particular way; but here the plaintiff had introduced a word not in the schedule, and in a place where no blank was given; that the direction to the sheriff was given by the words "if he be found in your bailiwick;" the "of," therefore, must apply to the present residence of the defendant; that if inquiry were necessary, the plaintiff should have shewn that he made it at the late residence, whereas he had only inquired of the attorney, who was not bound to know whether the defendant had shifted his residence: that the reasoning of *Taunton*, J., in *Welsh* v. *Langford*, was incorrect, inasmuch as it was not the form in the schedule only by which parties were bound, but the express words of the statute itself.

Lord ABINGER, C. B.—This case may be taken as an illustration of the perils which await a change in the law; and imposes on us the necessity of considering how far a statutory provision for an express form of writ is to exclude all regard to the many varying cases and circumstances for which it was impossible the legislature could in terms provide. I wish we knew precisely what the legis-

lature meant by the word "of;" whether they meant it as a designation simply of some place, or as to be followed with any words that might amount to a sufficient *descriptio personæ*. In this difficulty I am glad to find sufficient authority in the case which has been cited, for the conclusion at which we have arrived. In the clause giving the writ of summons, the precise and immediate place of the party's residence is clearly made essential to be stated; and the reason is good,—that being addressed to the party, it is to be served upon him, and he is to do the act consequent upon it, namely, to enter an appearance. The writ of *capias*, on the other hand, is addressed to the sheriff, and may be sufficient for enabling him to take the person of the defendant, though it contain only a *descriptio personæ*. The language of *Taunton*, J., in *Welsh* v. *Langford*, amounts to this; that the blank is sufficiently supplied by whatever gives a clear and definite *descriptio personæ*; and that the house, county, or parish where the defendant resides is not necessarily part of it. So, where he is a captain or colonel of a regiment, it is difficult to describe any place of his residence, and it would be sufficient to say, "of the —— Regiment, Captain." Considering ourselves absolved by that decision from laying it down that the blank must be filled up with the place of the present residence of the party, it seems to me, that where he has none, nor has any trade, profession, or other means of identification, it may be filled up with the place of his last residence. I hesitated at first, because much expense and trouble are saved by adhering strictly to the form given by the statute; but the extreme difficulty and injustice of doing so in many supposable cases compel me to come to a different conclusion: otherwise we must hold that, if a man left his residence under the immediate apprehension of the arrest, and was wandering about the country, he could not be arrested. I am glad to be able to let a little common sense in upon the matter; and, upon

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the whole, I think this writ is sufficient, and that the rule should be discharged with costs.

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ALDERSON, B.—I think it would be just as well to describe a man "Captain of the —— Regiment," as "of the —— Regiment, Captain:" and so in this case, that "late of" is just as good as "of late."

The other Judges concurred.

Rule discharged with costs.

KERRY *v.* REYNOLDS.

If the issue be delivered with a notice of trial indorsed for one day, and with it a separate notice of trial for a different day, it is an irregularity.

IN this case the issue had been delivered with a notice of trial indorsed for the Sittings after *Easter* Term. A negotiation was subsequently commenced between the parties, but went off. The issue was then made up again without striking out the notice for the *Easter* Sittings, but a notice for the first Sittings in *Trinity* Term was delivered with it on a separate paper, on the 15th of *May*, which was the second day of the Sittings after *Easter* Term. The cause was tried accordingly at the Sittings in *Trinity* Term, and the plaintiff had a verdict. A rule *nisi* having been obtained to set aside the verdict, and for a new trial, on the ground that the notice of trial was insufficient,

Miller shewed cause, and contended that the defendant could not be misled or prejudiced by the proceeding, and went into the affidavits to shew that in fact he was fully prepared to try at the Sittings in *Trinity* Term.

PARKE, B.—The Master states to us, that it is an irregularity to deliver an issue indorsed with a notice for one

Sittings, and a separate notice of trial for a different day, because it tends to mislead. There can be no after question raised upon the effect of a notice indorsed on the issue, but there may as to one contained in a separate paper. The rule must therefore be absolute, but without costs.

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Wordsworth in support of the rule.

Rule absolute.

PELLECAT *v.* ANGELL.

DRAWER against acceptor of a bill of exchange for 63*l.* 4*s.* made at *Paris*, dated 5th *April*, 1830, payable three months after date to the plaintiff or his order. Plea, that before the acceptance of the said bill of exchange, it was, in parts beyond the seas, in *France*, agreed between the plaintiff and the defendant, then being a subject of our lord the King, as the plaintiff well knew, that the defendant should buy of the plaintiff divers of his goods, and at a small price, being less than the real value of the same, for the purpose of the defendant getting the same, against the laws of this realm, smuggled into this kingdom, and without any of the duty then payable on the importation thereof being paid thereon: and that the plaintiff did, in pursuance of such unlawful contract, in the said parts beyond the seas, sell the said goods to the defendant for the purpose aforesaid, and the defendant, in the said parts beyond the seas, afterwards, and in payment of the said goods, and for no other consideration whatever, accepted the said bill of exchange; and that he never had any other consideration for accepting or paying the same, or any part thereof. Special demurrer, assigning for cause, that the plea did not state or shew that the plaintiff had any participation in the alleged smuggling of the said goods

A foreigner selling and delivering goods abroad to a *British* subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country.

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into *England*, and did not state or shew any other matter or thing to invalidate the contract so made between the plaintiff and the defendant. Joinder.

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Humfrey, for the plaintiff.—This plea is no answer to the action, inasmuch as it does not shew that the plaintiff took any part in the illegal transaction in question; but, at the most, only that he knew of the illegal purpose. That knowledge does not invalidate the contract. *Holman* v. *Johnson* (*a*) is a direct authority for the plaintiff. It was there held, that an action lay for goods sold abroad, which were prohibited here, if the delivery was complete abroad, though the vendor knew they were to be run into *England*. *Biggs* v. *Lawrence* (*b*), *Hodgson* v. *Temple* (*c*), *Brown* v. *Duncan* (*d*), and *Wetherell* v. *Jones* (*e*), are additional authorities in favour of the plaintiff. The plaintiff is not a British subject, and owes no allegiance to the revenue laws of this country. [*Bolland*, B., referred to *Waymell* v. *Reed* (*f*).] There the seller took part in the illegal transaction, by packing the goods in prohibited packages.

Mansel, for the defendant.—The contract stated in the plea, and admitted by the demurrer, is a contract to sell the goods at less than their real value, for the purpose of promoting the illegal purpose of smuggling them. It was a part of the contract itself, therefore, that they were to be sold for the express purpose of defrauding the revenue laws. Nor does it appear that the contract was complete abroad; no delivery abroad is stated, or averred in reply by the plaintiff. [Lord *Abinger*, C. B.—You do not say the goods were delivered in *England*—*you* ought to have made

(*a*) Cowp. 341.
(*b*) 3 T. R. 454.
(*c*) 5 Taunt. 181.
(*d*) 10 B. & C. 93; 5 M. & R. 114, S. C.
(*e*) 3 B. & Ad. 221.
(*f*) 5 T. R. 599.

out the illegality.] The contract is illegal if the seller is privy to the illegal purpose. *Catlin* v. *Bell* (*a*). Where premises are let for an immoral or illegal purpose, whether it is carried into effect or not, that is sufficient to disable the party from recovering for the occupation of them.

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Lord ABINGER, C. B.—I am of opinion that this plea is bad. It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void: but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; except, indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country. It would have been most unfortunate if it were so in this country, where, for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states. The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act; but it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. If the position were true which is contended for on the part of the defendant, that this appears upon the plea to have been a contract for the express purpose of smuggling the goods, it would follow that it would be a breach of the contract if the goods were not smuggled: but nothing of the kind appears upon the plea; it only states a transaction which occurs about once a week in *Paris;* the plaintiff sold the goods, the defendant might smuggle them

(*a*) 4 Campb. 183.

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if he liked, or he might change his mind the next day: it does not at all import a contract of which the smuggling was an essential part. I think, therefore, the plea is no answer to the action.

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BOLLAND, B.—I am of the same opinion. The position advanced by Mr. *Mansel* was taken in *Biggs* v. *Lawrence,* and is fully answered in the judgment of Lord *Kenyon* and Mr. Justice *Lawrence.* I think the distinction pointed out by the Lord Chief Baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one.

ALDERSON, B.—I am of the same opinion. If the plea disclosed circumstances from which it followed that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although *he* may intend to commit an illegal act, is no breach of the law.

GURNEY, B. concurred.

Judgment for the plaintiff.

MORRIS *v.* SMITH.

It is no irregularity to declare before the expiration of eight days after service of the writ of summons, if the defendant has appeared.

BUSBY shewed cause against a rule for setting aside the declaration for irregularity. The defendant having appeared to the writ of summons on the seventh day after service, the plaintiff, on the evening of the same day, served him with the declaration. The defendant contended that this was irregular, and that the plaintiff was bound to wait until the expiration of the eight days after service

of the writ, before he took a further step. [Lord *Abinger*, C. B.—Why is the declaration irregular because it is delivered a day or two sooner than was necessary, the party having appeared?] The Court then called on

Miller, in support of the rule.—The proceeding by writ of summons being altogether founded on the Uniformity of Process Act, the party is constrained to act precisely according to the provisions of the statute; and by the proper construction of the 11th and 16th sections taken together, the plaintiff cannot declare until the expiration of eight days after service of the writ.

Per Curiam.—The only purpose of sect. 11 was to expedite proceedings, by enabling a party to declare at the expiration of eight days in vacation, instead of being thrown over to the next term. The defendant may wait eight days before he appears; but if he chooses to appear sooner, why should not the plaintiff go on? By the general law of the land, a party may declare as soon as the defendant is in Court.

Rule discharged with costs.

WORTHINGTON *v.* ——.

An affidavit of merits is not sufficient, which states that both the defendant and his attorney "are advised and believe" that there is a good defence on the merits.

If an application made at chambers be referred to the Court, an affidavit sworn in answer to the application at chambers may be used on shewing cause before the Court.

GEORGE moved for a rule *nisi* to set aside a regular judgment, signed for want of a plea, on payment of costs, upon an affidavit of merits. The affidavit was made by the defendant and his attorney; the former deposing that "he was advised and believed," the latter that "he was instructed and advised and believed," that the defendant had a good defence on the merits. The Court directed that the affidavit should be re-sworn in the usual form.

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The affidavit having been amended accordingly, a rule was granted, and on a subsequent day

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Sir *F. Pollock* shewed cause, and claimed to use an affidavit sworn in opposition to the same application previously made at chambers. The Court doubted whether it could be used, and *Parke*, B., referred to *Quelle* v. *Boucher* (*a*). It being stated, however, that the application had been expressly referred by the learned Judge at chambers to the Court, the affidavit was allowed to be used, *Alderson*, B., saying, that in such case perjury might be assigned upon it. The rule was eventually made absolute on terms.

(*a*) 1 Scott, 283.

DOE *v.* Sir JOSEPH HUDDART, Knt.

A judgment in ejectment is not *conclusive* evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary form) that the premises in the declaration mentioned were not the premises of the plaintiff, it was held, that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment.

Where there is judgment by default in an ejectment, the plaintiff may, in the action for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party.

TRESPASS for mesne profits. The declaration was in the ordinary form. Pleas, *first*, as to the trespasses on and prior to the 1st *March*, 1834, not guilty; *second*, that the premises in the declaration mentioned were not, nor was any part thereof, the premises of the plaintiff, as in the declaration mentioned; concluding to the country; *third*, that the defendant committed the alleged trespasses on and prior to the 1st *March*, 1834, by the leave and licence of the plaintiff; *fourth*, as to the trespasses since the 1st *March*, 1834, the defendant brought into Court the sum of 55*l.* to be paid to the plaintiff, and denied that he had sustained damages in respect of those trespasses to a greater amount. On all these pleas issues were taken

and joined. At the trial before *Bolland*, B., at the last *Carnarvonshire* Assizes, the plaintiff put in and proved the judgment in ejectment against the defendant, and the writ of possession. The declaration in ejectment was of *Easter* Term, 1834, and contained five counts: the *three first* on the respective demises of *William Roberts*, of *Lowry Roberts*, and of *Henry William*, bishop of *Bangor*, all dated the 18th *June*, 1831; the *fourth* and *fifth* on the demise of *William Roberts*, dated respectively the 20th *March* and 1st *May*, 1834. Judgment was taken by default against the casual ejector, and a writ of possession issued, which was executed on the 28th *January*, 1835: *William Roberts*, the real plaintiff, had, however, obtained possession on the 17th *May*, 1834. The plaintiff gave evidence of the value of the property, and proved also that the bill of costs in the ejectment amounted to 99*l.*; and several attorneys, who were called to speak to the propriety of the charges, stated, that looking at it as between attorney and client, they should not tax off more than about 4*l.* The bill contained a charge for general retainers to two counsel for the plaintiff in the ejectment, and also several items for expenses incurred by the plaintiff's attorney on a journey to *Dolgelley*, to obtain evidence of the title to the premises; on which occasion, however, it appeared that he was employed as an advocate at the quarter sessions there. The defendant's counsel then proposed, under the second plea, to give evidence of title in the defendant by purchase from an assignee of *Lowry Roberts* of her life-interest in the premises, and that she died on the 1st *March*, 1834, and contended that the judgment in ejectment was not conclusive evidence of the plaintiff's title even since the day of the demise, unless it were pleaded by way of estoppel; for which they cited *Vooght* v. *Winch* (*a*). They urged

(*a*) 2 B. & Ald. 662.

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that the proposed evidence would meet the plaintiff's claim in respect of all the mesne profits up to the 1st *March*, 1834, and that the money paid into Court was sufficient to cover the amount subsequent to that time, and also the costs of the ejectment. The learned Baron, however, ruled that the judgment in ejectment and writ of possession were conclusive, and refused to allow the proposed evidence to be given. The defendant then called several professional persons, who said that considering the bill of costs as between party and party, in their judgment no more than about *22l.* ought to be allowed, or would be allowed on taxation before the Master. The learned Judge told the jury, with reference to the bill of costs, that he thought they were not bound to adopt the confined scale applied to it by the defendant's witnesses; that the party driven to bring an action of ejectment was entitled to recover the expenses he was put to in the assertion of his right, except for charges that were unnecessary, and referred to the item for the retainers and the journey as charges which he thought unnecessary. The jury found a verdict for the plaintiff, with *360l.* damages (beyond the *55l.* paid into Court) for the mesne profits from the 18th *June*, 1831, to the 17th *May*, 1834, and *45l.* in respect of the bill of costs.

In the following term, *R. V. Richards* obtained a rule *nisi* for a new trial, on the ground, *first*, that the evidence rejected ought to have been received, the judgment not being conclusive unless pleaded as an estoppel; *Outram* v. *Morewood* (*a*), *Vooght* v. *Winch*; *2dly*, that the plaintiff was entitled to recover only taxed costs as between party and party. *Doe* v. *Hare* (*b*). Cause was now shewn by

J. Jervis and *Welsby*.—First, the judgment in ejectment, and writ of possession, were *conclusive* evidence of

(*a*) 3 East, 346. (*b*) 2 Dowl. P. C. 245.

the plaintiff's title from the day of the first demise. The plea under which the defendant seeks to give evidence of title amounts to no more than to a part of the general issue; and by concluding it to the country, as he necessarily must, he has precluded the plaintiff from *replying* any title in himself; he must, therefore, contend that the judgment ought to have been alleged by way of estoppel *in the declaration;* so that the case is unaffected by the new rules of pleading, and may be considered as if it had arisen on the general issue, before they were introduced. Now, in the first place, an estoppel in a declaration, that is to say, an estoppel by anticipation, before the plaintiff knows what the plea will be, or whether the defendant will have any title to set up, is wholly unprecedented. There is no case in which an estoppel has been pleaded otherwise than in bar of a *previous* allegation of title; and it is difficult to see how such a declaration is to be framed. But, independently of this difficulty, the proposition contended for on the other side is opposed to a uniform current of authority, ever since, and indeed before, the case of *Aslin* v. *Parkin* (*a*). The Court in that case, and all the text writers since, treat the action of trespass for mesne profits as a dependent and consequential action; a part of the fictitious remedy introduced under the sanction of the Courts by means of the action of ejectment. The title being first tried in the ejectment, and that having been determined, as the party cannot recover damages in that action, but only the possession, he has the further action of trespass to obtain the profits of the land in the shape of damages. To allow the title to be tried over again in the action for mesne profits would be defeating the whole object of the fiction. *Aslin* v. *Parkin* was not an ordinary case: it was decided on conference with all the judges; and the question being, whe-

(*a*) 2 Burr. 665.

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ther the action for mesne profits could be brought in the name of the nominal plaintiff, after judgment by default in the ejectment, they determined that it might; on the ground that the lessor of the plaintiff on the one part, and the tenant in possession on the other, were in fact the only real parties to the ejectment. It was admitted that if the defendant had come in under the consent rule, the judgment would be conclusive upon him; but it was said that the judgment having been against the casual ejector, the tenant was no party to it, and could not be concluded by it. Lord *Mansfield* disposes of that objection in these words:—"An action for the mesne profits is *consequential* to the recovery in ejectment. In either shape it is equally the action of the lessor of the plaintiff. The tenant is concluded by the judgment, and cannot controvert the title; consequently he cannot controvert the plaintiff's possession, because that possession is part of the title." Nothing is suggested as to the necessity of *pleading* the judgment. The authority of *Outram* v. *Morewood*, and *Vooght* v. *Winch*, is not disputed; nor is it denied that in ordinary actions of trespass, or as a general principle of law, a former judgment upon the same point, between the same parties, is not conclusive unless pleaded by way of estoppel; but it is contended that the action for mesne profits is not a new and substantive action, but in truth the completion only of the same remedy given by the action of ejectment. [*Alderson*, B.—Is it not best to adhere to general principles? it is that which makes the law a science. The general principle is, that if the form of the pleadings be such that the case goes to the jury, *they* are not estopped to find the truth.] But here the plaintiff has not, by the form of the pleadings, the election of withdrawing the question from the jury. There are many other cases in which a judgment is conclusive without being pleaded, as judgments of condemnation in this Court, sentences of the Ecclesiastical Courts, judgments

in cases of prize, in *scire facias*, in previous criminal proceedings, &c. [*Alderson*, B.—They are conclusive against all persons, not merely against the same parties.] That would seem to furnish a greater reason for their being shewn by pleading.

Secondly, the direction of the learned Judge, as to the costs, was right. In *Doe* v. *Davis* (*a*), Lord *Kenyon* took the distinction, that where there is judgment by default in the ejectment, the plaintiff might, in the action for mesne profits, go into evidence, and recover the actual costs of the judgment; but that where the ejectment was defended, and the plaintiff recovered, and taxed his costs, he was bound by that taxation, and could not recover more. That distinction was recognised and acted on in *Brook* v. *Bridges* (*b*).

R. V. Richards, *contrà*.—The judgment is not conclusive by way of evidence. It is impossible to distinguish this case in principle from any ordinary action of trespass. In *Lloyd* v. *Peell* (*c*), it was held, that a discharge under the Insolvent Debtors' Act was no bar to a declaration in trepass for mesne profits. That case shews that the action is treated hy the Courts as an independent action, governed by the same rules as other cases of trespass. But it is said that *Aslin* v. *Parkin* is decisive of the point. Now, the only question directly submitted to the Court in that case was, whether the action was maintainable in the name of the nominal plaintiff, which had been doubted in several earlier cases; no question arose as to the *mode* in which the judgment was to be made conclusive on the defendant. But since the decision in *Vooght* v. *Winch*, in which all the authorities were reviewed, the subject has been considered much more with

(*a*) 1 Esp. 358. (*b*) 7 B. Moore, 471.
(*c*) 3 B. & Ald. 407.

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reference to sound legal principles than before. There is, indeed, on strict legal grounds, no reason why the title should not be tried in the first instance in an action of trespass. Nay, there is no reason *on the record*, why the party should not recover damages in the ejectment, as well as the term. It is admitted, that where he seeks damages for any period anterior to the date of the demise, the judgment in ejectment does not furnish conclusive evidence of his title; and there is no difference *in principle* between that and the ordinary case. At all events, if he choose to let the question go before the jury, they are at liberty to find the truth, whatever might be the estoppel on the parties. [He gave up the question as to the costs.]

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by—

BOLLAND, B.—There was a case of *Doe* v. *Huddart*, in which the Court took time to consider. It was an action of trespass for mesne profits, tried before me at the last assizes for the county of *Carnarvon*. The declaration was in the ordinary form. The defendant pleaded, as to all the trespasses alleged to have been committed before 1834, that the plaintiff had no title to the possession of the land at that time; and as to all the subsequent trespasses, he paid 55*l*. into Court, and denied damages *ultra* that sum. At the trial the judgment in ejectment, which had been suffered by default, was produced in evidence. The record contained (in effect) two demises, one in 1834, and one at an earlier period. The mesne profits accruing subsequent to the demise in 1834 were fully covered by the money paid into Court. At the trial, it was proposed to shew by evidence, that the title of the lessor of the plaintiff did not accrue before the time of the demise in 1834. I refused to admit this evidence, on

the ground that the judgment in ejectment was conclusive against the defendant. A rule *nisi* was obtained for a new trial; and, upon cause being shewn, the Court took time to consider of its judgment. On full consideration, we are now of opinion that the evidence was receivable, and that the rule ought to be made absolute. The general rule of law, since the case of *Vooght* v. *Winch*, must, we think, be taken to be clearly established; and that is, that a judgment between the same parties is not conclusive, unless pleaded as an estoppel. There are two modes, as Mr. Justice *Holroyd* there observes, which a party may adopt: he may say, the other party is not at liberty to call upon me to answer for what has been previously decided; or he may say, that his opponent has no such ground of action as he has alleged. In the latter case, he refers the question to the jury, who are to determine, not whether it has been previously so decided, but whether the right be as alleged in the pleadings of the parties. And, in *Goddard's* case (*a*), it is laid down, that although in pleading the obligee cannot allege delivery before the date, because he is estopped from taking an averment against any thing expressed in the deed, yet the *jurors*, who are sworn to say the truth, shall not be estopped. Now, if this be the general proposition of law, it is difficult to understand upon what principle there should be any difference between an action of ejectment and any other action. It is said, that the action of ejectment is a creature of the Court; and that, therefore, there is a sufficient ground of distinction; but it would surely be more reasonable to conclude, that the Courts, in creating these actions, would, as far as possible, follow the course in other actions, and not unnecessarily create an anomaly to the general rules of evidence upon trials. If the jury are sworn to try the issue in this case, why is the effect of their oaths to be different, in the trial of an action of this

(*a*) 2 Rep. 4 b.

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description, from its effect in any other? We can see no reason for such a conclusion; and, consequently, we think that the cases of *Vooght* v. *Winch* and *Outram* v. *Morewood* are not distinguishable in principle from the present case. Then, if so, although undoubtedly there are to be found *dicta* of learned Judges, and particularly of Lord *Mansfield* in *Aslin* v. *Parkin*, which have been transferred to the treatises upon evidence, as establishing that a judgment in ejectment is conclusive as to the right of possession at the time laid in the declaration, and that is laid down by Mr. *Phillipps*, in his *Law of Evidence*, (7th edition, page 324,) and upon which I acted at the trial, yet the Court think that these authorities are not entitled to so much weight, because they may be explained on the supposition that the point was not specifically presented to the Court, and the circumstances of those cases were such as would make it immaterial for those learned Judges to distinguish between what is very *cogent*, and what is *conclusive* evidence in the cause; and more especially between cases where it may be conclusive if pleaded, but not so unless it is put on the record. A similar *dictum* of Lord *Mansfield*, in *Bird* v. *Randall* (*a*), is adverted to and overruled by Lord *Tenterden*, in his judgment in *Vooght* v. *Winch*; although it is due to Lord *Mansfield* to say, that the report in *Burrow* does not seem to justify the argument founded on it by counsel in later cases. Upon the whole, therefore, we think that, in this case, the record of the judgment in ejectment, although of some weight, was not conclusive evidence in the cause; and that, consequently, the defendant should not have been precluded, in this state of the pleadings, from giving the evidence he proposed to give. For these reasons, we are of opinion that the rule for a new trial must be made absolute.

Rule absolute.

(*a*) 3 Burr. 1353.

BAISLEY *v.* NEWBOLD.

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WIGHTMAN had obtained a rule *nisi* in the last term for staying proceedings on a bail-bond, on payment of costs. The writ was dated *February* 18th, and the defendant was arrested on that day. The bail ought to have justified on the 4th *March*, but failed to do so. At one o'clock on that day a declaration was delivered, indorsed conditionally. The time for putting in bail had expired. The only question was, whether the bail-bond was to stand as a security.

Notwithstanding the rule of *M. T.* 3 *Will.* 4, s. 11, a plaintiff may still declare *de bene esse* wherever bail have not been perfected, and whether they have been put in or not.

Chandless shewed cause, and contended that the plaintiff could not declare conditionally after the time for putting in bail had expired, but only within the time allowed for appearance; that the rule of *M. T.*, 3 *Will.* 4, s. 11, which required that the plaintiff should declare *de bene esse*, if he intended that the bail-bond should stand as a security, was to give notice to the bail that he meant to look to them, and that he ought therefore to use due diligence.

PARKE, B.—It was decided in *Wendover* v. *Cooper* (*a*), that the plaintiff may declare conditionally in a bailable action, at any time before the bail are perfected. A doubt, however, has suggested itself to some of the Judges, whether, since the new rules, a plaintiff can in any case declare *de bene esse*. The rule, therefore, will at present be absolute only for staying the proceedings, and we will take time to consult the Judges of the other Courts on the question whether the bail-bond is to stand as a security.

Cur. adv. vult.

(*a*) 10 B. & C. 614.

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The judgment of the Court was now delivered by—

PARKE, B.—This case stood over for consideration and conference with the Judges of the other Courts, on the construction of the eleventh rule of *M. T.*, 3 *Will.* 4. A doubt was entertained whether the meaning of the rule was to give a plaintiff the opportunity of declaring *de bene esse*, whether special bail had been put in or not, or only where bail had been put in and not perfected. On the interpretation to be put upon the rule the one way or the other depends the application of it as to the bail-bond's standing as a security. If the latter construction were the right one, we should have to consider of some other rule which might be framed to meet the difficulty. But the Judges, on conference, think that the right to declare *de bene esse* is not taken away or limited, and that the plaintiff may still declare *de bene esse* at any time after the expiration of the eight days, and before bail above are perfected, and whether they have been put in or not. In this case, it will follow that the bail-bond is to stand as a security.

Rule absolute accordingly.

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WILSON *v.* NORTHOP.

A Judge at chambers has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of Court as of course, without a rule to shew cause.

RAWLINSON moved for a rule *nisi* to make a Judge's order, which directed the plaintiff's attorney to pay a sum of money, a rule of Court. He stated that some doubt existed whether such an order could be made at chambers.

ALDERSON, B.—Why so? the Judge's power at chambers is the power of the Court.

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Lord ABINGER, C. B.—Why do you ask for a rule *nisi*? It is a matter of course, and you are entitled to a rule absolute in the first instance.

Rule absolute.

EARDLEY *v.* STEER.

THIS cause and all matters in difference between the parties were referred to two arbitrators, the costs of the cause, and of the reference and award, to abide the event of the award: the submission reciting that this action was pending between the parties, and that the defendant had a cross demand against the plaintiff for a sum of money exceeding the plaintiff's claim. The action had only proceeded as far as appearance. The arbitrators awarded "that the action should cease, and be no further prosecuted; and that, on the balance of accounts exhibited to them, there was due from the plaintiff to the defendant the sum of 661*l.*, and they awarded that the plaintiff should pay the said sum to the defendant." In *Easter* Term *Erle* obtained a rule *nisi* to set aside the award, on the ground, amongst others, that it did not finally determine the action; and relied on *In re Leeming & Fearnley* (*a*), where, on a reference of a replevin suit, the costs to abide the event, an award that the plaintiff should pay

A cause and all matters in difference were referred, costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrators awarded that the action should cease and be no farther prosecuted; that, on the balance of accounts, 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. The Court refused to set aside the award on the ground that it did not sufficiently determine the action.

(*a*) 5 B. & Ad. 403; 2 Nev. & M. 232, S. C.

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the defendant a sum of 6*l.* due for rent, and that the action should be no further prosecuted, was held not to be sufficiently final.

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Sir *W. W. Follett* and *Newman* now shewed cause.—This case is distinguishable from *In re Leeming & Fearnley.* That was decided on the supposition that the costs were to abide the event of the *action;* here, by the express terms of the submission, they are to abide the event of the *award.* [*Parke,* B.—That must mean the event of the action as determined by the award.] The award does determine the action as far as it was possible under the circumstances. There had been no plea; all, therefore, that the arbitrators could do as to the action was to direct it to be discontinued: they could not award a verdict either way, because there were no issues for them to determine. Where a suit in equity was referred, and the arbitrator directed that the bill should be dismissed, and all proceedings therein should cease and utterly determine, that was held a sufficiently final determination of the suit. *Pearse* v. *Pearse* (*a*). Moreover, the arbitrators, having investigated the accounts, award a balance to be paid by the plaintiff to the defendant. That shews that the event was decided in his favour.

Erle and *J. B. Greenwood, contrà.—In re Leeming & Fearnley* is precisely in point in favour of this application. The arbitrators have in effect awarded nothing more than a *stet processus;* there is no determination of the cause one way or the other. They were bound to have decided which party should pay the costs. As to the award of the 661*l.* to the defendant, it does not appear but that that sum was due in respect of some merely equitable claim,

(*a*) 9 B. & C. 484.

which could not have been enforced by set-off in the action at law. *Pearse* v. *Pearse* is distinguishable; the dismissal of a bill *is* a determination of the suit. [*Parke*, B.—Perhaps it would have been more correct to say that the plaintiff had no cause of action; but what the arbitrators have stated is tantamount to saying that the suit is determined in favour of the defendant.] There is no adjudication to the same effect as, if the action had gone on, would have been a determination of it in favour of the defendant. *Thornton* v. *Hornby* (*a*), and *Norris* v. *Daniel* (*b*), the former of which was decided before, and the other after *In re Leeming & Fearnley*, are additional authorities against the sufficiency of this award.

PARKE, B.—I am of opinion that this rule ought to be discharged. The principal objection to the award is, that it is not final, inasmuch as it does not sufficiently decide the cause referred. That objection was mainly rested on the authority of the cases of *In re Leeming & Fearnley*, and *Norris* v. *Daniel*. As to the former, I think it may be collected from the report that there were some pleadings on the record which rendered it essential to the determination of the suit that there should be an express adjudication upon it, because the action might be maintainable although the landlord was entitled to receive the rent; and the judgment of the Court may have been formed on that ground. Here there seems sufficient on the face of the award to enable us to say that the suit is definitively determined in favour of the defendant. The arbitrators had not only to determine the suit, but to pronounce who was the successful party, in whose favour the balance was to be awarded; and this they have done in effect, by the clause which directs that the plaintiff

(*a*) 8 Bing. 13, S. C. 1 M. & Scott, 48.
(*b*) 10 Bing. 507, S. C. 4 M. & Scott, 383.

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shall pay the sum of money therein mentioned to the defendant. It is said they have not shewn who is to pay the costs of the action; that depends on the question whether they have sufficiently determined the event, since the costs are to follow the event; and I think we may reasonably intend that they meant to determine the event in favour of the defendant. I think, also, that it sufficiently appears, from the recitals of the submission, that all the matters in dispute were of a legal nature: they were supported by evidence on both sides, and I see nothing from which to infer that there was any demand of an equitable nature existing between the parties. The more correct form would undoubtedly have been to state that the plaintiff had no legal cause of action; but it seems to me that the arbitrators have in effect said, that the suit shall be no further prosecuted because the plaintiff has no cause of action. At all events there is doubt enough on the point to prevent us from setting aside the award; if the defendant should apply to enforce it by attachment, perhaps we may decline to interfere, as the Court did under similar circumstances in *Thornton* v. *Hornby*.

The rest of the Court concurred: and the other objections having also been disposed of in favour of the defendant, the rule was

Discharged with costs.

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JOHN HUGHES, and ELIZABETH his Wife, Administratrix of JOHN WILLIAMS, deceased, *v.* WILLIAMS.

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In a declaration by an administratrix, the plaintiff made profert of letters of administration, "duly granted by the *Consistory Court* of *St. Asaph*," without making the usual statement of the grant of the letters of administration in the body of the declaration:—*Held*, bad on special demurrer, as not sufficiently shewing that the letters of administration were granted by the proper authority.

Held, also, that the omission of the *date* of the grant was immaterial.

ASSUMPSIT on a promissory note given by the defendant to the intestate, with counts on an account stated with him, and also with the plaintiff *Elizabeth* as administratrix. The declaration commenced thus:—"*J. H.* and *Elizabeth* his wife, who is administratrix of all and singular the goods, chattels, and credits, which were of *J. W.*, deceased, at the time of his death, complain," &c. The declaration did not contain the usual statement of the grant of the letters of administration, but concluded with a profert in the following terms:—"And the said plaintiffs bring into Court here the letters of administration of the goods, chattels, credits and effects, of the said *J. W.* deceased, *duly granted* to the said *Elizabeth* by *the Consistory Court of St. Asaph*, which give sufficient evidence to the said Court here of the grant of administration aforesaid to the said *Elizabeth*," &c. Special demurrer, assigning for cause, that it was not stated in the declaration on what day of the month or year the letters of administration were granted, nor by what Judge or officer they were granted, nor the name of such Judge or officer. Joinder.

John Jervis, in support of the demurrer.—The declaration is bad on two grounds. *First*, it does not appear that the plaintiff *Elizabeth* was administratrix at the commencement of the action. Her title does not, like that of an executor, relate back to the death, but accrues only from the time of the grant of administration; and the date of the grant is not stated. [Lord *Abinger*, C. B.—It will appear on the face of the letters of administration. If the defendant, on craving oyer, finds that they are not of such date as to warrant the action, he can demur.]

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Secondly, it is not shewn that they were granted by the proper authority. It is the ordinary, and not any *court*, that grants letters of administration. The proper and usual form is, to state the name of the bishop, together with the date of the grant, in the introductory part of the declaration; and in the profert, to state that the plaintiff brings into Court the letters of administration "of the said bishop, the date whereof is the day and year in that behalf above mentioned." If the *Court* of *St. Asaph* has any special power to grant administration, that should have been expressly alleged.

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R. V. Richards, contrà.—The objection is premature. The profert is only to enable the defendant to have oyer of the letters of administration themselves; he should crave oyer, and then it would appear, on production of the letters, whether they were granted by the proper authority. If they were, then, inasmuch as, being set out on oyer, they would become part of the declaration, the plaintiffs would sustain their suit; if not, they would fail for want of title. That is the invariable course pursued in regard to deeds of which profert is made in the declaration. The plaintiffs shew a sufficient *primâ facie* title, by alleging that the letters of administration were *duly* granted; and they tender the production of the document itself, so that the Court may have an opportunity of looking at it, to see whether it be formal and sufficient.

J. Jervis, in reply.—The rule respecting deeds does not apply; because here the plaintiffs are bound to allege a good title on the face of their declaration, of which the letters of administration granted by the proper authority, viz. the ordinary, form a necessary part. Without such an allegation, even if the Court were to look at the letters of administration themselves, they could not take notice that they were properly granted.

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Lord ABINGER, C. B.—I think this latter objection must prevail, and that we are compelled to say this declaration cannot be supported. Unless the ordinary has granted the letters of administration, they have not been granted by the proper authority. It is possible, indeed, that there may be some other mode of granting administration; and these letters, if so obtained, may be available; but in such case there should be an express allegation to that effect. As it is, the letters must be taken to correspond with the description given of them; and if so, according to the general law, they are insufficient.

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ALDERSON, B.—It must be assumed against the party making profert, that the document, when produced on oyer, will correspond with the effect of it, as he has stated it in his declaration.

The other Barons concurred. The plaintiff, however, had

Leave to amend, on payment of costs.

GRIFFITHS *v.* JONES and Others.

Where there are several defendants, and a verdict passes against some and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40*s.* each (*b*).

THIS was an action against four defendants for an irregular distress. The defendant *Jones* pleaded by one attorney, the other three defendants by another; the only plea being the general issue. There was a verdict against *Jones* and one of the other defendants, and for the other two. The Master taxed the latter their full costs.

Cowling moved for a review of the taxation, submitting, on the authority of *Hughes* v. *Chitty* (*a*), that the defendants acquitted were entitled to no more than 40*s.* costs.

(*a*) 2 M. & Sel. 172.

(*b*) See 3 & 4 Will. 4, c. 42, s. 32. The 8 & 9 Will. 3, c. 11, s. 1, only applied to trespass, assault, false imprisonment, or ejectment. See *Murray* v. *Nichols*, 6 Bing. 380; M. & P. 280. The recent enactment extends to cases like the present.

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PARKE, B.—That case was under consideration some time ago (*a*), and the Court was of opinion, that the old rule of allowing only 40*s.* was unjust, and that the defendants acquitted ought to be allowed their aliquot proportion of the full costs incurred on the joint retainer.

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Rule refused.

(*a*) *Griffiths* v. *Kynaston*, 2 Tyrw. 757.

REX *v.* ROBINSON.

Under a writ of extent for penalties under the excise laws, the sheriff levied goods of the defendant of the value of 824*l.* A negotiation took place; the sheriff remained in possession, and ultimately the Crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1000*l.*:—*Held*, that the sheriff was entitled to poundage only on 500*l.*

TANCRED had obtained a rule calling upon the sheriff of *Staffordshire*, or his under-sheriff, to pay over into the hands of the collector of excise for the district, for the use of the Crown, the sum of 472*l.* 10*s.*, being the balance of a sum of 500*l.* levied on the defendant's goods under an extent, after deducting the sum of 27*l.* 10*s.* for the sheriff's poundage thereon. The facts, as admitted between the parties, were, that judgment having been obtained for the Crown against the defendant for the sum of 7000*l.*, to secure penalties amounting to 1000*l.*, under the Excise laws, a writ of extent, indorsed to levy 1000*l.*, was issued to the sheriff of *Staffordshire*, under which he seized the defendant's goods. They were appraised at the sum of 824*l.* The sheriff continued in possession about seven weeks after the seizure, in consequence of a treaty being commenced between the defendant and the Excise for a compromise. The Excise ultimately agreed to take 500*l.* in satisfaction of the penalties. The question now was, whether the sheriff was entitled to poundage only on this sum of 500*l.*, or on 824*l.*, the whole value of the goods taken.

Jervis shewed cause.—The sheriff is entitled to poundage on the whole amount of the goods levied. The question depends on the construction to be put upon the statute

3 *Geo.* 1, c. 15, s. 3, which first gave the sheriff poundage on extents, and which enacts, that sheriffs levying debts due to the Crown shall, "for their care, pains, and charges, and *for their encouragement therein*," have an allowance upon their accounts, according to the several scales therein set forth, on the sums "so by them *levied and collected*." These last words are strongly in favour of the sheriff's claim; and the statute being expressly "for their encouragement," ought to receive a liberal construction. There are no cases bearing directly on the present question, but several may be referred to as containing analogies and *dicta* favourable to the sheriff. In *Rex* v. *Jetherell* (*a*), he was held entitled to poundage, in the case of an extent in aid, on the whole debt paid over by him to the prosecutor, although he went out of office before a *venditioni exponas* could have issued; the money having been received after the seizure from the assignees of the debtor, who had become bankrupt. The Court said it was clearly *levied and collected* within the meaning of the statute. So, in *Norton's case* (*b*), the receipt of money from the Crown debtor by the undersheriff, by the discharge of his own debt, was held a good levy under an extent, so as to entitle him to poundage. That is a stronger case than the present, for there was there no seizure at all. [*Parke*, B.—No doubt 500*l.* was levied here; the cases you have cited only go to that extent.] In *Rex* v. *Burrell* (*c*), the Court were clearly of opinion that the sheriff was entitled to retain his poundage on a *levari facias*, where the defendant had obtained an order for time to plead, and to have restitution of the value of the levy on giving security. In *Alchin* v. *Wells* (*d*), which was decided on the 29 *Eliz.* c. 4, (which contains similar words with the 3 *Geo.* 1), the sheriff was held entitled to poundage, although the parties compro-

(*a*) Parker, 177.
(*b*) Lane, 74.
(*c*) Bunb. 305.
(*d*) 5 T. R. 470.

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mised before he sold any of the goods. [*Parke*, B.—The defendant might have given security to pay the whole debt at some other time.] That does not appear from the report. [*Alderson*, B.—It seems so to be inferred from Sir *Vicary Gibbs's* argument.] *Bullen* v. *Ansley* (*a*), and *Rawstorne* v. *Wilkinson* (*b*), are also authorities to shew, that wherever the sheriff has regularly levied, he is entitled to poundage, even though the extent be set aside for some other irregularity. The term "levy" does not necessarily import a *sale;* nor does the extent of itself *authorise* a sale, but only the writ of *venditioni exponas.*

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Tancred, in support of the rule, was stopped by the Court.

PARKE, B.—The authorities cited go thus far—that the sheriff is entitled to poundage on all the amount obtained under the compulsion of the process; but there is no case which goes to the extent of saying, that, with respect to Crown process, poundage is to be paid on more than came to the hands of the Crown by means of the process; and the only case on civil process which seems to bear that construction is that of *Alchin* v. *Wells;* but when it is looked at more precisely, it certainly does not go to the extent Mr. *Jervis* contends for: all that the Court decided was, that after such a compromise as took place in that case, they would not allow the private arrangement of the parties to defeat the sheriff of his poundage. There is no other case even apparently deciding that he is entitled to poundage on a greater amount than is actually obtained under the compulsion of the writ.

ALDERSON, B.—The very principle on which the sheriff is entitled to poundage at all, shews that he is not entitled

(*a*) 6 Esp. 111. (*b*) 4 M. & Selw. 256.

to more than on the sum actually received. What the Crown actually obtains, although not under the *direct* compulsion of the process, is considered as being in fact the amount levied by the hands of the sheriff. If, therefore, the amount received by the Crown is to be taken as the criterion for one purpose, it must be so also for another.

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Rule absolute.

HART *v.* NASH.

ASSUMPSIT by indorsee against indorser of a bill of exchange. Plea, *actio non accrevit infra sex annos*, and issue thereon. At the trial before Lord *Denman*, C. J., at the last *Surrey* assizes, the plaintiff had a verdict, the learned Judge ruling that the delivery of certain hats by the defendant to the plaintiff amounted, under the circumstances, to part payment of the bill, (which was above six years old) so as to take the case out of the operation of the statute of limitations. *Platt* having subsequently obtained a rule *nisi* for a new trial, *Comyn* now appeared to shew cause; but it appearing from the report of the learned Judge, that there was an agreement between the plaintiff and defendant, at the time of the transfer of the bill, that the defendant should supply the plaintiff and his family with hats till he could pay it, and that the hats "should be paid on account," *Platt* admitted that he could not support his rule;

If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that *is* part payment, so as to prevent the operation of the Statute of Limitations.

ALDERSON, B., observing:—Here was an agreement to take goods in part payment; when they were taken on that agreement, it *was* part payment, and was a continuation of the old promise, so as to bring the case within the exception in Lord *Tenterden*'s act.

Rule discharged (*a*).

(*a*) See *Williams* v. *Griffiths*, ante, 45.

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Trespass for assault and battery. Plea, that plaintiff was defendant's apprentice, and conducted himself improperly, wherefore defendant *moderately* chastised him. Replication, *de injuriâ*: —*Held*, that on these pleadings the plaintiff could not recover on the ground of the chastisement being *excessive*; for the replication *de injuriâ* puts in issue only the *cause* alleged in the plea; that is, in this case, whether the plaintiff misconducted himself as an apprentice.

TRESPASS for assault and battery. Pleas, *first*, not guilty; *secondly*, that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he was justified in doing, &c. Replication to the latter plea, *de injuriâ*; on which issue was joined. At the trial, before *Tindal*, C. J., at the last *Warwick* Assizes, it was proved that the plaintiff was the defendant's apprentice, and having behaved in a saucy manner, was beaten by the defendant; and the plaintiff's counsel proposed to shew that the defendant, in beating him, had used excessive and unjustifiable violence. It was objected that such evidence could not be given on these pleadings, there being no replication of excess. The learned Judge, however, admitted the evidence, and left it to the jury, who found a verdict for the plaintiff, damages one shilling.

In *Easter* Term, *Adams*, Serjt., obtained a rule *nisi* for a new trial on the ground of misdirection, contending that the question of excess was not open on these pleadings; and cited *Dale* v. *Wood* (*a*), *Franks* v. *Morris* (*b*), *Piggott* v. *Kemp* (*c*), *Selby* v. *Bardons* (*d*), *Bowen* v. *Parry* (*e*), *Lamb* v. *Burnett* (*f*). Cause was now shewn by

Humfrey and *Miller*.—The jury have found that the defendant corrected the plaintiff as an apprentice, but not moderately. And it is submitted that, on these pleadings, not only the cause alleged in the plea, but also the moderateness of the chastisement, is put in issue. The re-

(*a*) 7 B. Moore, 33.
(*b*) 10 East, 81, n.
(*c*) 1 C. & M. 197.
(*d*) 3 B. & Ad. 1; 1 Cr. & M. 500.
(*e*) 1 Carr. & P. 394.
(*f*) 1 C. & J. 291.

plication *de injuriâ* is a good answer to any plea which justifies on matter of fact only; *Com. Dig. Pleader*, F. 19; *Jones* v. *Kitchin* (*a*). One of the facts stated by the defendant in his plea, and indeed the essential part of his excuse, was, that the chastisement was moderate; that fact he was bound to establish, and it was properly left to the jury to decide upon. [*Alderson*, B.—The party states certain grounds on which he says he was authorized to inflict a moderate punishment; does the replication do more than deny the existence of those grounds?] A chastisement disproportionate to the offence is not excused by any cause. Lord Chief Baron *Gilbert*, in his *History of the Common Pleas* (*b*), puts a case expressly in point:—"So, in an action of assault and battery, the defendant pleads that the plaintiff neglected his service, *per quod moderate castigavit;* the plaintiff replies *quod non moderate castigavit*, and the issue was found for the plaintiff; for, though this be an informal traverse, and bad on demurrer, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuriâ suâ propriâ absque tali causâ;* yet after verdict it is good, because the jury have ascertained that he did beat him immoderately." [*Alderson*, B.—No doubt *de injuriâ* puts in issue the whole cause; the question is, whether the *moderate* chastisement is part of the cause. Suppose the case of a plea of *son assault demesne;* do you mean to say that the replication *de injuriâ* would put in issue the allegation that the defendant *molliter manus imposuit*, and a little unavoidably, and so forth?] In a late case of *Reece* v. *Taylor* (*c*), to a declaration for assault and false imprisonment, the defendant justified in defence of his possession, with an additional allegation that the plaintiff assaulted him in the presence

(*a*) 1 Bos. & P. 76.
(*b*) P. 154; referring to *Awbry* v. *James*, 1 Sid. 444; 1 Ventr. 70.
(*c*) 4 Nev. & Man. 469.

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of a police officer; and the Court held, on a replication *de injuriâ*, that the defendant was bound to prove the latter allegation; and *Littledale*, J., is reported to have said, that, under the plea of *son assault demesne*, the defendant must shew an assault by the plaintiff commensurate with the act complained of by him. So, in *Phillips* v. *Howgate* (*a*), where the defendant justified an arrest under process of the Court, and alleged that the plaintiff, having conducted himself violently while in custody, he therefore struck him to prevent his escape, it was held, on the replication *de injuriâ*, that the defendant was bound to prove the violent conduct of the plaintiff. [*Alderson*, B.—There the violent conduct alone could justify the striking of which the plaintiff complained, so that it went to form a material part of the excuse.] In *Cockcroft* v. *Smith* (*b*), the Court appears to have been of opinion that immoderate violence could not be justified under a plea of *son assault demesne*. The cases cited on the other side are not conclusive against the plaintiff. In *Dale* v. *Wood*, and *Piggott* v. *Kemp*, the point under consideration was quite different. In *Lamb* v. *Burnett*, the only question was, whether the justification was made out in other respects, independently of the point now in dispute. [*Alderson*, B.—Mr. Baron *Bayley* only left it to the jury in that case to consider the cause alleged by the defendant, and not the excessive violence; and Lord *Lyndhurst* appears to have thought the excess ought to have been replied. So far, therefore, that case is an authority.]

Adams, Serjt., and *G. Hayes*, in support of the rule, were stopped by the Court.

BOLLAND, B.—The Court is of opinion that, on these pleadings, the plaintiff had no power to put in issue the

(*a*) 5 B. & Ald. 220. (*b*) 11 Mod. 43.

moderateness of the chastisement inflicted by the defendant, but was bound to reply the excess. The case cited from Lord Chief Baron *Gilbert* would undoubtedly have been an authority for the plaintiff, if it had not been impeached by later decisions, which have laid it down that the excess must be replied. I may observe that, since the case of *Reece* v. *Taylor* was decided, my Brother *Littledale* has altered the opinion which he is reported to have expressed on that occasion, that the plea of *son assault demesne* required the defendant to prove the moderation of his conduct. The only question is, whether this replication does more than put in issue the cause alleged in the plea. What is that cause? The right which the defendant had, under the circumstances, to inflict a moderate chastisement on his apprentice. The plea says in effect, "I had a right to beat my apprentice because he misconducted himself." That is, on the face of it, a satisfactory answer to the plaintiff's complaint; and if he meant to admit that he had misconducted himself, but to charge the defendant with unwarrantable violence, he should have replied that he had not so misconducted himself as to warrant such a beating. I think, therefore, that the direction of the learned Judge was wrong, and that the rule must be made absolute for a new trial.

ALDERSON, B.—The plaintiff complains of a battery; the defendant says it was the fruit of a moderate and suitable chastisement, and goes on to assign the cause for which he had a right to inflict it. That cause is, that the plaintiff, being his apprentice, behaved himself improperly and disobediently; and, being proved, it amounted to a good justification. The plaintiff, by his replication, denies that cause, and says the defendant acted, not for the cause he has assigned, but of his own wrong. He puts in issue the cause, not the character, of the chastisement—that is to say, whether or no he misconducted himself as

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an apprentice. He had no right, therefore, to go beyond this issue, and raise a question before the jury as to the excess.

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GURNEY, B., concurred.

Rule absolute.

SIMPSON *v.* CLARKE.

In an action on a bill of exchange (for 98*l.* 5*s.* 3*d.*) by a second indorsee against the acceptor, the pleadings admitted that the acceptance and first indorsement were without consideration, and the issue was whether the plaintiff gave value for the indorsement to him. He relied in the first instance on the mere production of the bill, but on the defendant's objecting that he was bound to prove consideration, he gave evidence of a debt to the amount of 57*l.* due to him from the first indorser, and of another debt to the amount of 20*l.* 18*s.*, due to him from his immediate indorser, for goods sold:—*Held*, that he was entitled to a verdict only for the latter amount.

Quære, whether the indorsee of an accommodation bill is bound to prove consideration in the first instance, or whether the indorsement of itself *primâ facie* imports consideration, until the defendant proves the contrary.

ASSUMPSIT on a bill of exchange for 98*l.* 5*s.* 3*d.*, drawn by one *Walker* upon, and accepted by the defendant, payable three months after date to the order of *Walker*, indorsed by *Walker* to one *Carter*, and by *Carter* to the plaintiff. Pleas—*first*, non-acceptance; *secondly*, that the defendant accepted the bill for the accommodation of *Walker*, without any consideration or value for his acceptance; that *Walker* indorsed it to *Carter* without any consideration or value; that *Carter* indorsed it to the plaintiff without any consideration or value; and that the plaintiff, at the time of the commencement of the suit, was the holder of the same without any consideration or value. Replication to the latter plea, that *Carter* had a good consideration and value for indorsing the bill to the plaintiff, and that the plaintiff, at the time &c., was not a holder of the same without consideration and value: on which issue was joined. At the trial before *Gurney*, B., at the *London* sittings in *Easter* Term, the plaintiff having produced the bill, with the defendant's signature thereon as acceptor, was about to rest his case there. The defendant's counsel contended that, this being admitted on the record to be an accommodation bill, the plaintiff was bound to give evidence of consideration. The learned Judge de-

clined to compel the plaintiff to produce such evidence, but left it to his discretion to do so or not; whereupon the plaintiff's counsel called witnesses, from whose evidence it appeared that *Walker* owed the plaintiff the sum of 57*l.*, and that *Carter*, at the time of the indorsement by him to the plaintiff, owed him 20*l.* 18*s.*, for goods. The learned Judge directed a verdict to be entered for the plaintiff for the whole amount of the bill, giving the defendant leave to move to enter a nonsuit, or to reduce the damages to the sum of 20*l.* 18*s.* A rule having been obtained accordingly,

Sir *F. Pollock* and *Channel* now shewed cause.—The plaintiff is entitled to retain his verdict to the full extent. The indorsee of a bill of exchange for value has nothing to do with the transactions between the previous parties to it; and the indorsement of itself imports value, until the defendant impeaches it by evidence to the contrary. Every indorsement is in point of law a fresh drawing. If in an action directly between the original parties to the bill, the proof of want of consideration is upon the defendant, it is equally so in cases between all subsequent parties, whenever the question arises. Here the drawing by *Walker*, and the acceptance by the defendant, would have been sufficient to put the proof of want of consideration on the defendant, in an action by *Walker*. The principle that the indorsement is of itself sufficient *primâ facie* evidence of value, is established by many authorities. *Stratton* v. *Hill* (*a*), which is referred to and explained by *Bayley*, J., in *Priddy* v. *Henbrey* (*b*); *Wyatt* v. *Bulmer* (*c*). In the last case Lord *Kenyon* says, "The indorsement was of itself *primâ facie* evidence of a good consideration; and if the defendant meant to call upon the holder to

(*a*) 3 Price, 253. (*b*) 1 B. & C. 681; 3 D. & R. 165.
(*c*) 2 Esp. 538.

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prove the consideration, it would be necessary to implicate him some way in the transaction, or to shew some degree of privity or knowledge respecting it." In a recent case of *Morgan* v. *Cresswell* (*a*), where *Littledale*, J., had ruled at *Nisi Prius* that the issue of consideration in such circumstances lay on the plaintiff, that ruling was set aside by the Court, on an application for a new trial, without argument. [Lord *Abinger*, C. B.—I concede that, according to the general law merchant, acceptance imports value; but, according to my experience, I question whether indorsement does. I have no doubt that nine hundred out of a thousand of the bills that come into the hands of *London* bankers are indorsed without any value at all, but merely transmitted to them as agents to receive the amount. If a banker were sued on such a bill, would he not be entitled to shew in answer that he had a balance of the plaintiff's overriding the bill?] The same principle of law, which says that as between drawer and acceptor the bill imports consideration, applies also, in the same terms, to the case of an indorsement. [Lord *Abinger*, C. B.—No doubt the indorsee may recover without proving consideration to himself, if he prove consideration for the acceptance; and the reason given is, because the payee may make any body his agent to receive the proceeds of the bill. The presumption is, first, that the acceptor owes the drawer; then the law merchant makes that debt assignable by indorsement; then the same presumption is extended to the subsequent parties.] The original want of consideration in no way impeaches the consideration to the indorsee. An exception is admitted by the law in the case of a bill originally obtained by fraud and felony; and it is reasonably said, that the first party having been dishonest, it lies upon the subsequent parties to remove themselves from the suspicion of being acces-

(*a*) Not reported.

sary to the same fraud. In *Fentum* v. *Pocock* (*a*), the Judges even expressed their regret that questions upon accommodation bills were ever allowed to find their way into the Courts of law at all. *Heath* v. *Sansom* (*b*) will be referred to on the other side. There *Parke*, J., dissented from the opinion of the other Judges; and *Patteson*, J., has since retracted the opinion expressed by him in that case as it is reported; *Whittaker* v. *Edmunds* (*c*). It is said that the replication admits that the bill was an accommodation bill as between all the parties except *Carter* and the plaintiff. That is not so; the replication concludes with a general averment that the plaintiff was a holder for value, and he may derive his title either from his immediate indorsee or from a prior one.

But, at all events, there was evidence of value as between the plaintiff and *Carter* to the extent of 20*l.* 18*s.* It was objected that it does not appear that the bill was indorsed to secure that debt; but it has been repeatedly held that it is quite sufficient to shew a debt actually existing between the parties; there cannot be an accommodation bill as between debtor and creditor.

Humfrey, *contrà*.—The only issue on these pleadings is, whether *Carter* indorsed to the plaintiff without consideration; all the other facts stated in the plea are admitted by the replication. It is admitted, therefore, that the bill was accepted, and indorsed by *Walker*, without consideration; and the case thus falls directly within the judgment of the majority of the Court in *Heath* v. *Sansom*. And it is difficult to see the reason for the distinction taken by *Parke*, J., in that case. It is just as probable that the holder of a bill which had been stolen, but has

(*a*) 5 Taunt. 192. (*b*) 2 B. & Ad. 291.
(*c*) 1 M. & Rob. 367.

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since perhaps passed through many hands, should have given value for it, as the holder of an accommodation bill. If, then, the plaintiff was bound to prove consideration, he has failed to do so, at all events to any greater extent than the amount of *Carter's* debt; the value given to *Walker* cannot be treated as a consideration for the indorsement by *Carter*.

Lord ABINGER, C. B.—It appears to me that the facts of this case call upon the Court to give a decision not of necessity involving the general question that has been raised. That question is, whether upon an admission that the acceptance and first indorsement were without consideration, the holder, who claims by a second indorsement, is bound to prove that he gave consideration, or whether the party impeaching the bill must go farther, and shew want of consideration in every hand through which it passed. That question is important in itself, and has become more so by reason of the difference of opinion prevailing upon it among the Judges. For myself, I must own that it rather surprised me to hear that those doubts exist; for through a very long experience I can certainly say the practice, where the defendant has proved original want of consideration, has been to call upon the holder to prove consideration given by himself. In no instance, so far as I remember, has this rule been brought into question. And this view is confirmed on looking into the cases. For instance, in the case which has been referred to, of *Fentum* v. *Pocock*, it plainly appears that the plaintiff proved consideration. The defence there set up was that the bill was an accommodation bill; and the report states that the plaintiff gave value for it, without knowing that it was an accommodation bill. How could the question in that case have been raised, unless the practice had been for the plaintiff to prove consideration? The facts would otherwise never have appeared

before the Court at all. That case, therefore, shews the practice to have been as I have stated it: the indorsee is bound to prove consideration, in the case of an accommodation bill, in order to remove the suspicion that he was an agent of the drawer; and if you look into the history of the cases, you will find that the same proof has uniformly been given as in the instance I have referred to. A distinction is attempted to be made between the case of an accommodation bill and that of a bill obtained by fraud; and it is admitted that, in the latter case, the plaintiff must prove consideration. That argument proceeds upon the principle that *contrà spoliatorem omnia præsumuntur*; and it is said we ought to infer that every subsequent party to the bill has also been guilty of fraud, and is bound to purge himself of it. Sir *F. Pollock* says, this is an exception to the general rule. But suppose that to be true, is it so clear that an accommodation bill has nothing of fraud in it? I remember Lord *Kenyon* used to alarm the juries at *Guildhall* by the vigour with which he poured out his eloquence against the toleration of accommodation bills at all. At all events, they do not deserve much encouragement. A bill of exchange purports on the face of it to be a transaction between the parties for value; it imports *primâ facie* payment of a debt, or an acceptance by way of security for goods delivered. But in what case is the public, if bills of exchange, which are taken to be great indications of the flourishing state of commerce, and evidences of *bonâ fide* mercantile transactions, turn out to be mere nullities, indicative of no value whatsoever? It may be said that it is more convenient to have several persons lending their names, in order that parties may advance their money as safely upon such an instrument as on a bond. But among the parties privy to such an arrangement there is always an understanding that the acceptor is not to be called upon, although he is no doubt liable to a *bonâ fide* holder, who

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has advanced his money upon the bill, and made the transaction a reality which was before a nullity. Then the effect of an accommodation bill is to make it a mere nullity as between the parties to its concoction. Why then should we infer that every indorsee by a blank indorsement gave value? The inference is rather that he is an agent; at all events the presumption is as strong the one way as the other. To shew that the Judges have viewed accommodation bills in this light, I may refer to the language of *Mansfield*, C. J., in *Fentum* v. *Pocock*. In fact it was the opinion at that time, more indeed as a question of political economy than of law, that to use a mercantile instrument, which may have a very extensive circulation, and be supposed to represent a real transaction, but which had in fact no reality at all, was hardly moral, and bore with it something of actual fraud. If, then, the effect is that no bill exists between the two parties to its creation, I see no danger to the negotiability of bills in disabling a party from recovering who receives a bill without value, and who attempts to take shelter under a presumption of law that he has given value, and may so defraud both the drawer and acceptor. We cannot so get rid of our experience as to suppose that there is something in accommodation bills so intrinsically precious that the presumption is always to be in favour of the holder.

But this is a case not necessarily involving the point I have been referring to. Upon the pleadings and facts before us, the question is, whether the plaintiff is a mere agent of *Carter* or of *Walker*, or a *bonâ fide* holder. He admits that *Walker* gave no consideration to the defendant, and that *Carter* gave none to *Walker;* but he says, I gave value to *Carter*. It was said that on this issue the defendant was bound to prove that the plaintiff gave no value; that is, to prove a negative. If the learned Judge had so decided, the general question would have arisen: but he gave the plaintiff an option, and the plaintiff chose to be-

gin, and to prove his consideration. He has proved that he gave value to *Carter* to the extent of *20l.* 18*s.* and no more; yet he asks for the whole amount, because he says it must be presumed that he gave the whole value. That would indeed be too violent a presumption in the face of these facts. To that amount the plaintiff is doubtless entitled to retain his verdict. But it is said, *Walker* also owed the plaintiff money. That very circumstance illustrates the suspicion lurking in my mind about accommodation bills; for it seems that *Walker*, who gave nothing for the bill, was disposed, if he could, to pay his own debt with it. But the plaintiff is not entitled to take advantage of the bill to pay himself *Walker's* debt; he has alleged no dealing at all between *Walker* and himself. On this state of facts, and on this record, I think the rule must be absolute to reduce the damages to the sum of *20l.* 18*s.*

BOLLAND, B.—I am of the same opinion. It is unnecessary to enter into the general question, which does not directly arise in this case. The plaintiff is entitled to a verdict for *20l.* 18*s.*; to that extent he clearly proved consideration. If it were necessary to dispose of the general question, as at present advised, I should incline to the opinion of the majority of the Court in *Heath* v. *Sansom*. The ruling of Lord *Tenterden*, in *Thomas* v. *Newton* (*a*), goes to the same extent; and the doctrine there laid down is that, so far as my experience goes, on which the Courts have always proceeded in practice.

GURNEY, B.—Undoubtedly the general practice has been as stated by the Lord Chief Baron, and it is but lately that the distinction has been taken, which appears to me a very important one, between accommodation bills

(*a*) 2 Carr. & P. 606.

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and bills obtained by fraud or felony. In the case of an accommodation bill, it is sent into the world for the purpose of raising money upon it, and therefore the presumption may not unreasonably be, that money has in fact been raised. However, I hope an occasion will soon arise for bringing the question under the consideration of all the Judges, that no doubt may rest upon it, being as it is not only very important, but also of every day's occurrence. But here the question does not arise; the plaintiff chose to begin, and to prove consideration; he has proved consideration to the amount of *20l.* 18*s.* to *Carter*, and it is impossible, on these pleadings, to import into the case the consideration given to *Walker*.

Rule absolute to reduce the damages.

SMITH *v.* JOHNSON.

The plaintiff sued out a *fi. fa.* into *Bedfordshire*, and lodged it in the office of the deputy undersheriff in *London*. On the receipt of it the undersheriff wrote to say the defendant had no effects; the plaintiff thereupon immediately sued out a *ca. sa.*, and lodged it at the same office. Before the return of the *fi. fa.*, finding that the defendant had effects, the plaintiff's attorney wrote to the undersheriff not to execute the *ca. sa.*:—*Held*, that the sheriff was bound to return the *fi. fa.*

And, *semble*, the issuing of the *ca. sa.* was not a countermand of the *fi. fa.*

A RULE had been obtained to set aside the side-bar rule for returning the *fieri facias* issued in this cause, on the ground that it had been suspended by a *capias ad satisfaciendum* subsequently sued out. It appeared from the affidavits that the *fi. fa.* was issued into *Bedfordshire*, and lodged at the office of the deputy undersheriff in *London*, on the 23rd *April;* on the 25th a letter was received by the plaintiff's attorney from the undersheriff, stating that the defendant was a lodger, and had no effects; in consequence a *ca. sa.* was sued out the same day, which also was lodged at the office in town; but, on the 29th, the plaintiff's attorney, finding that the defendant had effects, wrote to the undersheriff, directing him

not to execute the *ca. sa.* On the 1st *May* the side-bar rule to return the *fi. fa.* was obtained.

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Kelly and *Theobald* shewed cause.—This rule has been obtained on the ground that the sheriff's duty to return the *fi. fa.* was suspended or determined by the issuing of the *ca. sa.* But there is nothing in the issuing of the latter writ which necessarily, and by force of law, determines or even suspends the operation of the former. The plaintiff may have concurrent writs against both the goods and the person, although, if he actually execute the one, he cannot resort to the other until after the return of the former. *Miller* v. *Parnell* (*a*), *Primrose* v. *Gibson* (*b*). [*Parke*, B.—If you send one after the other, it may be said you intend the second to be executed, unless it be otherwise expressed.] It may be so put, but it does not appear that it follows as matter of law. But here the *ca. sa.* was in effect superseded by the letter desiring the sheriff not to execute it; then it became his duty to execute the other writ, which he had still in his hands. At any rate, the plaintiff has a right to call upon him for a return; if he can shew any cause, well; at all events there is nothing irregular or unfair in the proceedings at present.

W. H. Watson, *contrà*.—The cases cited have no bearing upon the present. Here both the writs are lodged with the deputy at the office in *London*, who is bound to receive all writs; and the latter is in law a countermand of the former, unless the party expressly gives notice that it is not so to operate. Suppose the defendant were in custody in any part of the county of *Bedford*, on any other writ at the suit of any plaintiff; then he is in custody at the suit of every plaintiff who has lodged a writ

(*a*) 6 Taunt. 370. (*b*) 2 Dowl. & R. 193.

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at the sheriff's office in *London*. *Lord Arundel* v. *Chitty* (*a*). If, therefore, the sheriff had gone over the next day, and seized the goods under the *fi. fa.* before he could possibly have heard of the lodging of the *ca. sa.*, he would nevertheless have been a trespasser. [*Parke*, B.—The inconvenience you state arises just as much where both writs are issued and delivered together; you do not mean to say that might not be done? At all events, the plaintiff may go against the sheriff for his neglect in not executing the *fi. fa.* in the interval after the receipt of it and before the issuing of thec *a. sa.*] As soon as the warrant on the *fi. fa.* arrived, the letter was written which suspended its operation. Besides, the sheriff has till the return of the writ to execute the *fi. fa.* [*Parke*, B.—No such thing. If the defendant became bankrupt the day before the return day, and the sheriff might have taken the goods before, would not he be liable? Lord *Abinger*, C. B.—Could a return of *nulla bona* be upheld, when it appeared that the defendant had goods on the first, second, or third day, though not on the seventh?]

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged with costs. If the sheriff thinks the *ca. sa.* is a countermand of the *fi. fa.*, let him so return, and that may be determined; but that is no ground for his not returning the *fi. fa.* The only ground alleged by him for not executing it, was that he thought the defendant had no goods, which turned out to be untrue. The sheriff must in common sense have supposed that the plaintiff would rather have the *fi. fa.* made available than the *ca. sa.*, and that he was to enforce the latter only in case he could not execute the other with advantage. But the case is even stronger; because it moved

(*a*) 1 Dowl. P. C. 499.

from the sheriff himself that the plaintiff had recourse to the *ca. sa.* at all.

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PARKE, B.—It is not necessary to decide in what cases the lodging a *ca. sa.* may or may not be a supersedeas of a prior writ of *fi. fa.* In the present case there was a period during which the sheriff ought to have executed the *fi. fa.*, and when there were, to his knowledge, goods of the defendant which he might have taken. We cannot preclude the plaintiff from having the advantage of that default in an action against the sheriff.

BOLLAND, B.—I am also of opinion that this rule ought to be discharged. There is no doubt that a plaintiff may have both writs, and avail himself of either as he can: that sufficiently appears from *Miller* v. *Parnell*. Then there is nothing done here to deprive the plaintiff of the operation of the first. The sheriff is not told, when the *ca. sa.* goes, that he is not to execute the *fi. fa.* if he can; and, when the *ca. sa.* is withdrawn, that leaves the *fi. fa.* to its ordinary operation. *Primrose* v. *Gibson* shews that the sheriff, having the two writs, has a right to execute either.

GURNEY, B., concurred.

Rule discharged with costs.

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WILLIAMS *v.* WARING.

In debt on bond in a penalty of 312*l.*, the *ca. sa.* was indorsed to satisfy 188*l.* 9*s.*, *with further interest upon* 156*l. until paid*:—*Held*, sufficient. Judgment was issued in *Michaelmas* vacation; on the last day of *Hilary* term a warrant to take the defendant on a *ca. sa.* was delivered to the deputy in *London* of the sheriff of *Denbighshire*:—*Held*, that the defendant was charged in execution in due time.

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JOHN JERVIS had obtained a rule for setting aside the writ of *capias ad satisfaciendum* in this cause, and discharging the defendant out of custody, on the ground that the indorsement was insufficient. The action was debt on bond, conditioned in a penalty of 312*l.* Judgment was signed in last *Michaelmas* vacation, and a *ca. sa.* issued into *Denbighshire*, which recited the judgment obtained for 312*l.*, and was indorsed to satisfy the sum of 188*l.* 9*s.*, "with further interest, from the 31st *January* then instant, upon 156*l.*, until paid."

Miller shewed cause.—The indorsement is sufficient. The sum indorsed does not exceed the judgment; and even if it were excessive, the defendant would have no right to set it aside altogether, but only for the excess.

J. Jervis, contrà.—The sum for which the defendant has been taken is left entirely in uncertainty, so that the sheriff cannot know when he is to discharge him; he is to keep him until payment of the interest as well as principal, which may grow at length to exceed the penalty.

Per Curiam.—The defendant can easily pay or tender what he considers to be the whole amount due; if that is refused, it will be time enough for him to apply to the Court. The writ ought not at all events to be set aside altogether, but only for so much as is excessive.

J. Jervis then objected, that the defendant had not been charged in execution in due time. The judgment has reference to *Michaelmas* Term; the defendant must be charged within two terms inclusive. Here, the warrant

was delivered on the last day of *Hilary* Term, but only to the deputy-sheriff in *London*.

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Lord ABINGER, C. B.—It is the same thing as to the sheriff himself.

Rule discharged with costs.

SOLLY and Another *v.* NEISH.

Assumpsit, to recover 5000*l.*, for money had and received.—Plea, as to the sum of 5000*l.* in the declaration mentioned, stated to have been received by the defendant to the plaintiff's use, that the money so received by the defendant was the amount of the proceeds of the sale of goods consigned to him by Messrs. *P. & C.* as their own goods, with the plaintiff's knowledge and assent, (but which, in fact, were the goods of *P. & C.* and the plaintiffs jointly,) as a security for any money the defendant might advance to *P. & C.*; with power of sale to reimburse himself for such advances; that he, not knowing that the plaintiffs had any interest in the goods, made advances to *P. & C.* to the amount of 6000*l.*, on the security of the goods, which he afterwards sold, and thereby offered to set off the amount of the advances against the damages claimed by the plaintiff. Replication, *de injuriâ*; and new assignment, that the plaintiffs brought their suit, not only for the proceeds of the sale of the goods mentioned in the plea, but also for money received by the defendant to the plaintiff's use, being the proceeds of other goods, which the defendant, by a letter to the plaintiffs, declared to be under his care on their account.

Held, on demurrer to the replication, that, as the plea was not matter of excuse, but a denial of the promise to the plaintiff, and also as it claimed an interest in the money, and derived an authority from the plaintiff, the replication was bad.

Held, also, that the plea would have been bad on special demurrer.

ASSUMPSIT to recover the sum of 5000*l.*, for money had and received to the use of the plaintiffs. Plea, as to so much of the said declaration as relates to the sum of 5000*l.*, therein stated to have been received by the defendant for the use of the plaintiff, *actio non*; because he says &c., that the said money so received by the defendant was the amount of the proceeds of the sale by him of divers goods and chattels; to wit, 200 tons of flax, consigned to and deposited with the said defendant, by certain persons trading under the style and firm of *Petrie & Chapman*, as and for their own goods and chattels, with the knowledge and assent of the said plaintiffs; but which, in fact, were the goods and chattels of the said *Petrie & Chapman*, and the said plaintiffs jointly, upon the terms and conditions of the said goods and chattels being a security for any money the said defendant might advance to the said Messrs. *Petrie & Chapman*; with power of sale to

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reimburse himself for any such advances. And the said defendant further says, that he, believing the said goods and chattels to belong to the said *Petrie & Chapman*, and not knowing that the said plaintiffs were interested therein, did, after the said consignment and deposit, and before the sale of the said goods, and before he knew that the said plaintiffs had any interest in the same, make divers advances of money to the said *P. & C.* to a large amount, to wit, to the amount of 6000*l.*, on the credit and security of the said goods and chattels; and the same remaining unpaid, he did afterwards, and before the commencement of this suit, to wit, on &c., sell the said goods and chattels, and receive the said money in the said declaration and commencement of this plea mentioned, such being the proceeds thereof. And he further says, that he is ready and willing, and hereby offers, to set-off and allow to the said plaintiffs the said amount of the said advances, which still remains due, owing, and unpaid, to the said defendant, and greatly exceeds the said money in the said declaration and commencement of this plea mentioned, against the amount of the damages sought to be recovered by the plaintiffs, in respect of the sum of money in the said declaration first mentioned. Verification.

Replication, as to the said plea of the said defendant by him above pleaded to the said sum of 5000*l.* therein mentioned, the said plaintiffs say, *precludi non*, &c.; because they say, that he, the said defendant, of his own wrong, and without the cause by him in that plea alleged, broke his said promise and undertaking, as to the last-mentioned sum of money, in manner and form as the said plaintiffs have, in their said declaration, in that behalf complained against him: concluding to the country. And the said plaintiffs further say, that they, the said plaintiffs, brought their said suit against the said defendant, not only for the recovery of the money, the proceeds of the

sales of the said goods and chattels in the introductory part of the said second plea mentioned, but also for that, the defendant, on the day and year aforesaid, was indebted to the said plaintiffs in 5000*l.* for money before then received by the said defendant to the use of the plaintiffs, and being the proceeds of certain sales before then made and effected by the said defendant of divers, to wit, 200 tons of flax, the respective cargoes of certain vessels, called the *Orb* and *Eliza*, respectively, and which said flax, before the said sales thereof so made by the said defendant, to wit, on &c., the said defendant, by a certain letter, addressed by him to the said plaintiffs, declared to be under his, the said defendant's, care, on the account of the said plaintiffs; and that he, the said defendant, should hold the same, according to any instructions the said plaintiffs might be pleased to give the said defendant for the sale thereof. And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on &c., promised to pay the last-mentioned sum of money to the said plaintiffs, in manner and form as the said plaintiffs in their said declaration have complained against him; and which said last-mentioned money, so had and received by the defendant for the said plaintiffs' use, and above newly assigned, is other and different money, and the proceeds of other and different sales than those in the said plea of the said defendant mentioned. Verification.

Demurrer, assigning for cause, that the replication and new assignment were double, and contained several and distinct answers to the said last plea of the said defendant, and that the replication did not traverse or deny any distinct fact or facts, but put the whole of the allegations in the plea in issue, and also in the new assignment alleged matter in avoidance of the plea, and so proposed a double answer thereto. And also for that the plaintiffs had not expressly or distinctly denied or confessed and avoided any of the allegations in the plea, &c.

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Joinder in demurrer.

The points stated for argument on the part of the plaintiff were, that the replication and new assignment were not double, inasmuch as the replication applied to a different subject from that in the new assignment; and further, that the replication was right in traversing the whole matter of the plea, which, though consisting of several facts, amounted to one defence only. The plaintiffs further submitted that the defendant's plea was bad, inasmuch as it admitted a sale of the plaintiffs' goods, and a receipt of the proceeds by the defendant, but did not shew any authority to sell.

The case was argued in *Easter* Term last, by *Wightman,* in support of the demurrer, and by *Maule contra.* The Court took time to consider, and the judgment of the Court was now delivered by

Lord ABINGER, C. B.—On the argument of this case during the last term, the principal question discussed was, whether the plaintiff could make a new assignment, as well as traverse the allegations in the plea, by the general replication. The objection to the form of that general replication was not much pressed by the learned counsel for the defendant, but it appearing to the Court to be very doubtful at least whether the form of it was proper, it was suggested to the counsel on both sides, that they should amend; but as we understand that they decline to do so, it is now necessary to give the judgment of the Court.

The plea is clearly bad as amounting to the general issue. It denies the plaintiffs' sole right to the money said to be had and received to their use in the declaration. It consists therefore of a traverse of the promise to the plaintiffs, which is in effect the general issue; and it goes on afterwards to allege, that the defendant retains the money sought to be recovered as his own, to pay his advances,

and that pursuant to the plaintiffs' licence or authority; for such is the effect of the plea. But the mode of stating this is again the general issue; because it amounts to a denial that the proceeds of the sale were money had and received to the plaintiffs' use, and consequently to a denial of the facts from which any promise could be implied. But, supposing this to be otherwise, and that the latter part of the plea could be considered as pleaded by way of confession and avoidance, this plea would still unquestionably be bad, on special demurrer, both as amounting to the general issue, and on the other ground for duplicity.

The replication appears to us to be bad for two reasons.

First, The plea does not contain matter of excuse for the defendant's breach of promise, but a denial of the promise to the plaintiffs. If the replication was framed with an intention to put in issue all the matters alleged in the plea, it has failed of its object; for it cannot be considered as part of the cause of the breach of promise to the plaintiffs, that the promise was not made to them; and if it be not traversed in the replication, but confessed, it is not avoided; and then the said fact, stated in the plea and confessed by the replication, is an answer to the action. This objection falls under the last cause of special demurrer.

Secondly, If we are to apply the same rules of pleading to actions of assumpsit, which have been established, as to actions of trespass, by *Crogate's case* (*a*), and to replevin, by others, this plea falls under two of the exceptions therein mentioned, for the defendant claims an interest in the money, and also by the defendant's plea, authority is immediately derived from the plaintiffs.

The general replication is therefore bad.

The other question, whether the new assignment is bad as being double, it is unnecessary to decide, as we think

(*a*) 8 Coke, 66.

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the replication bad. The plaintiffs may, however, still amend on payment of costs, as there is, no doubt, a real question between the parties to be tried.

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NOEL *v.* RICH.

Indorsee against drawer of a bill of exchange. Plea—that the defendant's indorsement was in blank; that the defendant delivered the bill to *A.* (not a party to the bill) only to get it discounted for him; that *A.* fraudulently, and in violation of that special purpose, delivered it to *B.* to secure a debt due from *A.* to *B.*; of all which the plaintiff had notice.—*Held*, on general demurrer, that the plea was bad for not shewing distinctly that the defendant never had value for the bill. *Semble*, that a replication to such plea, "that the defendant broke his promise without the cause alleged by him in his plea," is good.

ASSUMPSIT on a bill of exchange for 100*l.*, dated 11th *October*, 1834, drawn by the defendant upon and accepted by *William Boyd*, Esq., payable six months after date to the defendant's order, indorsed by him to *M. Newton*, by *Newton* to *John Lewis*, and by *Lewis* to the plaintiff. Plea—that *Boyd* accepted the bill for the accommodation of the defendant, and without any value or consideration; that the indorsement by the defendant was an indorsement in blank; that the defendant never delivered the bill to *Newton*, but delivered it to one *Lewis Levy*, and the said *Lewis Levy* then received, and from thence until one *Lawrence Levy*, as thereinafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the defendant, and not otherwise; to wit, for the purpose and in order that he the said *Lewis Levy* might get the bill discounted for the defendant, and that he should deliver and pay the proceeds thereof upon such discounting to the defendant; of all which the said *Lawrence Levy*, before and at the time when the said bill was delivered to him as thereinafter mentioned, had notice; that the said *Lewis Levy* fraudulently and covinously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit, on the 12th *October*, 1834, delivered the same to the said *Lawrence Levy*, and the said *Lawrence Levy* took and received the same from the said *Lewis Levy*, upon other and different terms, and without discounting the same for the defendant, and

contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose, and under colour and pretence of securing a debt then alleged to be due from the said *Lewis Levy* to the said *Lawrence Levy:* and that the said *M. Newton*, *John Lewis*, and the plaintiff, before and at the time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid; and this the said defendant is ready to verify, &c. Replication, that the defendant broke his promise without such cause as was by him in his said plea alleged; concluding to the country.—Demurrer and joinder. The ground of demurrer stated in the margin was, that the general denial or replication of *de injuriâ*, in an action of assumpsit, to a plea consisting of several matters and causes, constituting one entire defence, was not admissible, and could not be replied.

Crowder, in support of the demurrer.—First, the plea is good. It shews that the bill has passed into the plaintiff's hands by means of a fraud, contrary to the special purpose for which it was indorsed by the defendant, and there is an averment of notice to the plaintiff; so that he is suing on a bill which he knew got into *Lawrence Levy's* hands in violation of good faith. He cannot, therefore, maintain his action, even if he has given value.

Secondly, The replication is bad. It is an experiment to introduce into cases of contract a form of pleading applicable to cases of tort. This is in effect a replication *de injuriâ;* and all the authorities in which that replication has been the subject of discussion, from *Crogate's case* (*a*) downwards, apply only to torts. [Lord *Abinger*, C. B.—This is not in the ordinary form of the replication *de injuriâ;* it does not say that the defendant acted *of his own wrong*, but that he *broke his promise*,

(*a*) 8 Rep. 66. See 2 Saund. 295 b.

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without the cause alleged. The real question is, whether the plaintiff had a right to put in issue all the facts stated in the plea.] Wherever the defendant claims an interest, or justifies the act complained of, the plaintiff is not allowed to reply *de injuriâ*. [Lord *Abinger*, C. B.—Is not this plea wholly matter of excuse?] It is a plea equivalent to the general issue, not in confession and avoidance; the defendant says, in effect, that he never *made* the implied promise to the plaintiff alleged in the declaration, and *therefore* he did not break it. That denial the plaintiff does not meet, but only says the defendant *broke* his promise without the cause alleged. If the plea had been a defence arising out of matter subsequent to a *bonâ fide* holding of the bill, the case would have been different; as it is, it amounts to saying, that before action brought something occurred which justified him, the defendant, in withholding payment of it altogether. The replication is opposed to the principle of the new rules, which was to get rid of cumulative issues, and put the specific points in issue on the record. *Hooker* v. *Nye* (*a*) is an authority that it is bad, if at all, on *general* demurrer.

J. Bayley, contra.—The plea is clearly bad. There is no allegation from which it appears that the bill never was discounted for the defendant, or that he has not in fact received the proceeds. For aught that appears, he may have had the whole value of the bill from *Lewis Levy*. But the replication is also good. All the matters stated in the plea constitute but one ground of defence. *Crisp* v. *Griffith* (*b*). The plaintiff could not put in issue less than the whole of that entire defence. Of all the facts alleged in the plea, there is but one only, viz. that of notice, which is not more within the defendant's knowledge than the plaintiff's. The Court will hardly drive the plaintiff

(*a*) 1 C. M. & R. 258. (*b*) *Ante*, 159.

to the injustice of taking issue on the one only fact which he knows of, when all the others may be equally false. *O'Brien* v. *Saxon* (*a*), *Selby* v. *Bardons* (*b*), *Piggott* v. *Kemp* (*c*), are authorities to show that this replication is good.—The Court here called on

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Crowder to support the plea.—The question is, whether this plea is not, at all events, good on general demurrer. [Lord *Abinger*, C. B.—It is quite consistent with every thing alleged in it, that *Lewis Levy*, after all this, told you what he had done, held himself accountable to you, and paid you the amount before the commencement of the action.] In that case there could be no fraud on the defendant; but this plea amounts to a general allegation of fraud. It is not necessary to exclude every possibility: the plea discloses, at all events, enough to call upon the plaintiff to show that the defendant had value.

Lord ABINGER, C. B.—I am of opinion that this plea is bad. The substantial defence is, that the defendant was a party to the bill without receiving any consideration; but every fact stated by him may be true, and yet it may be true that he had a good and sufficient consideration for the bill, and that *Lewis Levy* paid him the amount after all the transactions stated in the plea. All he says is, that the bill was not discounted for him by *Lewis Levy* according to his undertaking. Perhaps, on the old plea of the general issue, that might have been sufficient *primâ facie* evidence to cast on *Lewis Levy* the obligation of showing that he gave consideration; but, in pleading, the party must allege all that substantially amounts to a defence. Here he does not do so, and on that ground it appears to me that the plea is bad. And if it were good, I am very much disposed to think that the

(*a*) 2 B. & C. 908; 4 D. & R. 579. (*b*) 3 B. & Ad. 19; 1 C. & M. 500.
(*c*) 1 C. & M. 197.

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replication is also good. The objection to it is one merely of form: it is said the plaintiff alleges only that the defendant broke his promise, whereas the plea goes to show he never made it. Under the general issue, no doubt, a party might defend himself by showing either that he did not make, or that he did not break, the promise alleged. But the new rules have introduced greater strictness and precision; and if a defendant intends to allege that he had a reason for breaking his promise, he must shew that distinctly on the face of his plea. Now, if a man puts his name to a bill of exchange, that is *primâ facie* a promise, as it is a transferable security, to pay the holder; a promise resulting, as matter of law, from the nature of the instrument. All the cases, therefore, except where the promise is denied by denying the handwriting, are properly matter of excuse for the non-performance of the promise. Then the question is, whether the plaintiff is not at liberty to put in issue all the facts which make up that excuse, and conclude to the country? if he is, it matters not by what form of words it is done, if he substantially puts all the facts in issue. I think he may so reply, and that the replication in this case sufficiently supports the declaration. The defendant does not deny the indorsement, which is the *primâ facie* promise; then the plaintiff says, the reason given by the defendant for breaking that promise is not true.

BOLLAND, B.—I am also of opinion that this plea is bad. The defence of want of consideration is only stated argumentatively, and the Court is called upon to draw an inference in favour of the defendant from the facts stated. But it is consistent with those facts, that *Lewis Levy* may have gone back to the drawer, and told him all he had done, and said, "I will pay you notwithstanding." It does not at all appear that the defendant has not been paid: that ought to have been shewn distinctly.

ALDERSON, B.—I agree that the plea is bad, for the reasons that have been given. I think also that the replication is good. The plea amounts, in truth, to an allegation that the plaintiff is not a person who has a right to sue. The replication says, the defendant did break his promise, and the cause alleged by him why the plaintiff is not a person having a right to sue, is not true. In substance it is good, though it is not, perhaps, in the precise form suited to the case.

GURNEY, B.—I am clearly of opinion that the plea is bad.

Judgment for the plaintiff.

BATE *v.* BOTTEN.

JOHN JERVIS shewed cause against a rule which had been obtained by *R. V. Richards,* for setting aside the judgment of *non-pros.* signed in this cause, for irregularity, with costs. It appeared from the affidavits, that the writ of summons was served on the 4th *November;* the defendant entered an appearance in due time, but with a mistake in the names of the parties. The plaintiff's attorney gave the defendant's attorney notice that the appearance was irregular, and desired him to examine and correct it, which he promised should be done. On the 30th *January,* however, a new appearance was entered at the office in a fresh book, and a declaration demanded; and the plaintiff not declaring within the following term, judgment of *non-pros.* was signed.—He contended that that judgment was regular. The defendant could not alter the appearance in the office-book; all that could be done was to have been corrected in the book, and set aside the judgment of *non-pros,* the costs to be costs in the cause.

The defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct it; but instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of *non-pros.* The Court held that the irregular appearance might have

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enter a new appearance, and that was done within time, according to the statute; for though the plaintiff may enter an appearance for the defendant after the expiration of the eight days, the defendant himself has until the end of the next term to do so. Then the plaintiff, instead of searching for the new appearance, chose to go back to the old one, which the defendant had no power to alter. [*Parke*, B.—The officer tells us that in such a case the old appearance would be corrected]. At all events the proceedings are in no respect *irregular*.

Lord ABINGER, C. B.—The justice of the case will be to set aside the *non-pros*, and let the costs be costs in the cause.

Rule absolute accordingly (*a*).

(*a*) This case again came before the Court in Michaelmas Term, when the Court repeated what they before said, that the defendant ought in such a case to apply to amend the appearance, and that the officer had so certified in this case in Trinity Term last.

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THORP *v.* COLE and Others.

ASSUMPSIT. The declaration stated, that whereas heretofore, to wit, on the 15th *April*, 1834, by a certain

An agreement of submission recited that a rate had been made and allowed for the relief of the poor of the parish of *H.*; and that the plaintiff, a parishioner, was rated for several messuages &c. in aid of such rate; and that the plaintiff, conceiving himself to be overrated, had given notice to the defendants, the churchwardens and overseers of the parish, of his intention to appeal against the rate at the next general sessions of the peace for the county; and that the defendants did intend to defend the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them as stated in the said notices, to arbitration, no appeal was entered against the rate as by law required; and that the parties, in order to put an end to all further expense, and to prevent litigation respecting such poors' rate, and in order to settle and ascertain the subject of the said poors' rate, and the equality or inequality thereof, so far as related to the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the same matters in difference between the parties thereto to arbitration. The agreement then witnessed that the defendants, (as far as they lawfully might or could as such churchwardens and overseers,) and the plaintiff, did thereby severally and respectively mutually promise and agree to abide by the award of *W. A.*, *R. D.*, and *P. B.*, or any two of them, to award and determine of and concerning the above-mentioned matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement, and the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers, in consequence of such notices of appeal, and of their preparation to resist such appeal and to support the rate, and all matters relating thereto respectively, so that they or any two of them made their award before the 5th of *May* then next; the costs of the arbitration and the award to be in the discretion of the arbitrators: and it was thereby further agreed that that agreement and submission should be made a rule of the Court of *K. B.* The arbitrators took upon themselves the burthen of the award, and the time for making the award was by agreement enlarged to the 5th of *June*, before which day they published their award of and concerning the premises and matters to them referred, whereby they awarded that the defendants should, on delivery of that award, pay unto *T. E. F.*, attorney for the plaintiff, 16*l.* 12*s.*—his bill already delivered, and the amount of the costs of the said *T. E. F.* attending that arbitration, and of the procuring the signatures of his client and the other parties to the said enlargement of time; and they further directed that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation. The award further directed, that, as a dispute was made with regard to the quantity of the lake occupied by the plaintiff, the quantity should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by the arbitrators in a schedule to the award. To a declaration on the above award, the defendants, after setting out the submission and award at full length, pleaded as follows:—"And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

On demurrer to this plea, *held* that it was good in point of form and substance.

Held, also (*Parke*, B., *dissentiente*), that the submission and award were bad, inasmuch as the main object of the reference, namely, the rate, was not by law capable of being referred to the decision of an arbitrator; that the costs incurred were merely incidental to the determination of the former question; and that the consideration for the submission therefore wholly failed.

Held, also, by Lord *Abinger*, C. B., that the award was bad, in directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that was not binding upon them, inasmuch as they could not by law do so, and there was no power to make them obey the award in this respect. That the direction, that the quantity of the lake occupied by the plaintiff should be ascertained by *the parish*, was also too vague and uncertain, and left it in doubt by whom it was to be done.

Held, by *Parke*, B., that, notwithstanding the reference of the rate was not binding on the churchwardens and overseers, the submission and award were still valid as to the other matters in difference referred to the arbitrators:—and that the ascertaining the quantity of the lake was a mere ministerial act, which might be delegated to another, and the award was not invalid in this respect.

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agreement then made and entered into between the defendants, therein described as the churchwardens and overseers of the poor of the parish of *Holywell with Needingworth*, in the county of *Huntingdon*, of the one part, and the plaintiff and *Edward Thorp* of the other part:—after reciting, that, on or about the 20th day of *January* then last past, a rate was made and allowed for the relief of the poor of the above-named parish; and that the said plaintiff and *Edward Thorp* were respectively rated for several messuages, cottages, lands, pastures, closes, and garden grounds there, in aid of the said rate; and that the said plaintiff and *Edward Thorp*, conceiving themselves to be overrated for the said property, and much more in proportion than several other parishioners named in their respective notices of appeal thereinafter mentioned for their messuages, lands, and hereditaments there, and conceiving the said rate in many other respects to be unjust, unfair, and partial, did, on the 26th *March* then last, severally give a notice to the defendants, the above-named churchwardens and overseers, of their respective intentions to appeal at the next general quarter sessions of the peace for the county of *Huntingdon* against the said rate or assessment, and alleging in their respective notices certain specified grievances and grounds of complaint: and that the defendants, the said churchwardens and overseers, believing the said rate to be a fair and equal one, did intend to defend the same, but, in consequence of the said parties thereto agreeing to leave the examination of the said rate, and all matters in dispute between them as stated in the said notices, to arbitration, as thereinafter mentioned, no appeal was entered with the clerk of the peace for the said county against the said rate, as by law was required; and that the said parties, in order to put an end to all further expense, and to prevent litigation respecting such poor's rate, and in order to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as the

same related to the charges therein made on the said plaintiff and the said *Edward Thorp* respectively, as compared with the rate made on the property occupied by *Simon Cole, Samuel Thorp, Richard Daintree, Joseph Crosen*, and the several other persons named in the said notices of appeal, had agreed and did thereby agree to leave the same matters in difference between the said parties thereto as stated in the said notices of appeal, and all things relating thereto, to the order, arbitrament, and final award of *William Abbott, Robert Daintree*, and *Thomas Bowyer*, as thereinafter was mentioned: it was by the said agreement witnessed, that the said defendants, as far as they lawfully might or could as such churchwardens and overseers, did thereby, for themselves and their successors, and they the said plaintiff and *Edward Thorp* did thereby, for themselves severally and respectively and for their several and respective heirs, executors, and administrators, mutually promise and agree to and with each other, that they the defendants, the said churchwardens and overseers, and the said plaintiff and *Edward Thorp*, and each and every of them, should and would from time to time and at all times thereafter obey, abide by, perform, fulfil, and keep the award, order, final end, and determination of the said *William Abbott, Robert Daintree*, and *Thomas Bowyer*, or any two of them, elected and named as aforesaid by the said parties in difference to award, order, and determine of and concerning the above matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement and of the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers in consequence of such notices of appeal, and of their preparations to resist such appeal and support the said rate, and of all and every matters relating thereto respectively; so that the said arbitrators, or any two of them, should make and publish their award, order, or determination, of

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and concerning the premises in writing under their hands ready to be delivered to the said parties, or to either of them requiring the same, on or before the 5th day of *May* then next ensuing. And the said parties thereto further agreed, that the costs of the said arbitration, and award to be made in pursuance thereof, should be in the discretion of the said arbitrators, or such two of them as might give in their award concerning the same, who should award by whom, to whom, and in what manner the same should be paid. And it was thereby further agreed, by and between all the said parties to that agreement, that that agreement and submission to arbitration should be made a rule of his Majesty's Court of *King's Bench* at *Westminster*, to the end that the said parties in difference should be finally concluded by the said arbitration by the said agreement intended, pursuant to the statute in such case made and provided. The declaration then alleged mutual promises for the performance of the agreement, and then averred, that the said *William Abbott*, *Robert Daintree*, and *Thomas Bowyer*, did afterwards, to wit, on the day and year first aforesaid, take upon themselves the burthen of the said award and arbitrament; and that afterwards, and before the 5th of *May*, 1834, it was further mutually agreed between the defendants and the plaintiff and the said *Edward Thorp*, that the time for the said arbitrators making their said award should be enlarged until the 5th of *June*, 1834. And the plaintiff in fact says, that the said *William Abbott*, *Robert Daintree*, and *Thomas Bowyer*, did afterwards, to wit, on the 5th of *May*, 1834, by writing under their hands, enlarge the time for making their award unto the said 5th of *June*, 1834. And they did afterwards, and before the said 5th of *June*, 1834, to wit, on the 14th of *May*, 1834, make and publish their award in writing under their hands, of and concerning the premises and matters to them referred as aforesaid, ready to be delivered to the said parties, or either of them

requiring the same: whereby they the said *William Abbott*, *Robert Daintree*, and *Thomas Bowyer*, did award, adjudge, and declare that the defendants should, on delivery of that award, well and truly pay or cause to be paid unto *Thomas Escoline Fisher*, attorney of the plaintiff and *Edward Thorp*, the sum of 16*l.* 12*s.*, his bill already delivered, and the amount of the costs and charges of the said *T. E. Fisher* attending that arbitration, and of the procuring the signatures of his said clients and the other parties to the said enlargement of time; and they did thereby further direct, that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and should return to him (the plaintiff) the sum of 10*s.* for every rate granted and paid by him (the plaintiff) since the then scheme had been in operation: of which said award the defendants afterwards, to wit, on &c., had notice, and the said award was then delivered to them. Yet the defendants, although often requested so to do, have not, nor hath either of them, as yet paid to the said *T. E. Fisher* the said sum of 16*l.* 12*s.*, his said bill delivered, or any part thereof; and although the costs and charges of the said *T. E. Fisher* attending the said arbitration, and of procuring the signatures of his said clients and the other parties to the said enlargement of time amounted to a large sum, to wit, 4*l.* 18*s.* 6*d.*, whereof the defendants afterwards, and after the making and delivery of the said award, to wit, on &c., had notice, and were thereupon requested by the said *T. E. Fisher* to pay him the same; yet they did not nor would then, or at any other time, pay him the same or any part thereof, but they so to do have, and each of them hath, hitherto wholly neglected and refused. And the plaintiff in fact further saith, that, although, before the making and entering into the said first mentioned agreement, divers, to wit, one hundred rates had been granted and paid by the plaintiff since the scheme existing at the time of the making the said award had been

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in operation, so that, under and by virtue of the said award, the defendants became liable to return and pay to the plaintiff a large sum, to wit, 50*l.*, being the sum of 10*s.* for every rate so granted and paid as aforesaid; of which premises the defendants afterwards and after the making and delivery of the said award, to wit, on &c., had notice; yet the defendants have not, nor hath either of them, as yet returned or paid to the plaintiff the said sum of 50*l.* or any part thereof, but have and each of them hath hitherto wholly neglected and refused, and still neglect and refuse so to do, &c.

The defendants pleaded, setting out the agreement and the award at full length. The agreement was in the terms stated in the declaration; the award recited the agreement, and, after awarding the sum of 16*l.* 12*s.* and the costs of the said *T. E. Fisher* attending the arbitration, to be paid to him, directed that the defendants should pay to Messrs. *Allpress & Lawrence* the sum of 20*l.* 4*s.* for their costs attending the reference, and the sum of 57*l.* 19*s.* to them for the charges of the arbitrators. The defendants were then ordered to deduct the sum of 10*s.* for the future rates, and refund it for the past. The award went on to direct, that, as a dispute was made with regard to the quantity of the lake occupied by the said *William Thorp*, the quantity thereof should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by them (the arbitrators) in schedule A. A deduction of 5*s.* a rate was ordered in favour of *E. Thorp*. The plea concluded as follows:—"And the defendants in fact say that the award is bad and void in law; and this they are ready to verify." Demurrer, alleging for cause, that the award is good and sufficient in law, and that the plea attempted to put in issue to be tried by a jury matter of law, namely, the sufficiency or insufficiency of the award, and that the defendants ought to have demurred, instead of pleading the insufficiency of the award.

Erle, in support of the demurrer, first contended, that the plea was informally concluded; but he was directed by the Court to consider whether the declaration could be supported.—It must be conceded that the parish officers have no power to submit the rate to arbitration, and, therefore, so far as the award proceeds to make any alteration therein, it is invalid, and, with reference to some portion of it, it exceeds the submission; yet so much of it as directs the defendants to pay the costs of preparing for the appeal, and the expenses of the arbitration, is free from objection. It will perhaps be contended, that the reference of the rate formed the material part of the reference, and therefore, as that fails, the residue must also fail. But the arbitration with regard to this part of the submission is not wholly inoperative and useless. The arbitrators were put into the situation of the justices at the quarter sessions, who had power to decide upon the validity of the rate. As it must be taken that the parties were aware that the rate itself was not the subject matter of an arbitration, the Court can see a distinct purpose for the reference, which is not to be objected to; which was to obtain the judgment of competent persons upon the proper scheme or mode of laying the rate in future. All that the award amounts to, therefore, is, an opinion upon the scheme of rating, and not a judgment upon the particular rate itself. There is, accordingly, a good consideration for the overseers entering into such a reference. Besides, it appears that the parties had incurred expenses in preparing for the appeal, and the defendants induced the plaintiff to abandon the appeal in consideration of their submitting that certain arbitrators shall settle the rate,—which it is said, and may be conceded for the purpose of the present argument, is a nugatory act,—and shall also determine who is to pay those expenses. The defendants derive a benefit from this contract, for the appeal is aban-

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doned, and it might have been awarded that their costs should be paid. The submission of this matter, and the award upon it, is consequently good.

Kelly, contrà.—It is submitted that the award is wholly void. When several matters are submitted to arbitration, and the obligation on the one party depends upon the promise by the other to abide by the award on all the matters, and it turns out that the submission of one of them is void or illegal, neither party can enforce the award. Here, the consideration for the defendants' agreement was, that there should be an award upon *all* the matters contained in the submission; it is so alleged in the declaration, and the plaintiff must have so proved his case. If that be so, and any part of the whole consideration be proved to be void in law, whether it be shewn by evidence or appear on demurrer, it will fail altogether. In this case a material part of the consideration, namely, the reference of the rate, is void, and cannot be established; and the award is therefore wholly void. The distinction which prevails is this—where the consideration is entire, but the promise is to do several things, the contract is binding, though some of them cannot be performed; but, if the consideration consist of several distinct matters, and one of them fail, it renders the whole contract invalid. The case of *Biddell* v. *Dowse* (*a*) is a decisive authority for the defendants. It was there said by *Abbott*, C. J.—" If the submission fail as to one important part, we think it cannot stand as to the residue." As to the costs of preparing for the appeal, it is evident that they are only incidental to the main question of the rate, and are like the costs of a cause which is referred. In the present case, if the appeal had been heard before the court of quarter sessions, that court would have adjudi-

(*a*) 9 D. & R. 415; 6 B. & C. 266.

cated upon those costs as incidental to the appeal, and necessarily involved in the consideration of it. They cannot, therefore, be treated as forming a distinct subject-matter of the reference, sufficient to raise an obligation to perform the award. There are some minor objections apparent on the award. It is not complete; for there is no award regarding the counterpart of the agreement. Besides, it is uncertain; for it directs a sum of 16*l.* 12*s.* to be paid to *Fisher*, but does not state on what account the money is to be paid.

Erle, in reply.—The Court will infer that the sum of 16*l.* 12*s.* is the amount of the expenses incurred by *Fisher* in preparing for the appeal; for every intendment is to be made in favour of awards. With respect to the general question, the case of *Biddell* v. *Dowse* has no applicability to the present case. There, the object and intention of the parties was, to put an end to a suit in equity; and that object must wholly fail unless all the parties to the suit were bound by the submission. Consequently, where some of the parties to the suit were not bound by the submission, being infants and married women, that object wholly failed. In the present case, however, the intention of the parties can be effectuated in part, if not altogether. Much of the costs which are the subject of the reference, were not recoverable by either party; and the object was to refer those preparatory expenses, in order that the arbitrators might determine who ought to bear them. [*Parke*, B.—There is one part of the award which seems not to be final, supposing the reference to be on the whole rate. The arbitrators find that there is a dispute about the quantity of the lake occupied by the plaintiff, but they have not determined it; they have only given the price per acre at which it is to be rated: the quantity of the land is to be ascertained by the parish.] It does not appear that

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that was a matter in dispute at the time of the submission, and there is no allegation in the plea that it was so; and therefore the arbitrators were not bound to award upon it.

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Cur. adv. vult.

There being a difference of opinion amongst the Judges, they now delivered their judgments *seriatim*.

BOLLAND, B.—The question in this case is raised by a demurrer to the plea. The action was brought by the plaintiff upon an award, and it will be necessary for me to refer fully to the pleadings. (The learned Baron here stated the declaration).

The defendants in their plea admitted the submission and award, and set both out fully, and concluded—"And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

It does not appear to me that the plea is objectionable either in substance or form; but then the question which the Court has to decide is, whether the award can be supported; and I am of opinion that it cannot, as much the greater part of the subject matters referred are such as the parties could not, by any agreement between themselves, without the intervention and authority of the justices in quarter sessions, submit to the decision of arbitrators. I am aware that appeals against poor's rates, where the matters in dispute can be more satisfactorily discussed and inquired into before a private tribunal, are frequently, by the consent of the parties litigant, and with the sanction of the justices after such appeals are entered, referred to a competent person or persons, to make his or their report to the Court, to give it information and guide its judgment; but the magistrates only can decide between the parties. *Rex* v. *Justices of Southampton* (*a*),

(*a*) Caldecot, 30.

and *Rex* v. *Natland* (*a*). In the case before the Court, the plaintiff appealed against the rate, not on the ground solely of being overrated for the property in his occupation, with reference only to the value of that property; but his further complaint was, that he was overrated with respect to and in comparison with the sums at which other persons named in his notice of appeal were assessed. Those persons were no parties to the reference; the award of the arbitrators could not be binding upon them; and, as I am of opinion that the arbitrament could not in law be made available in favour of the plaintiff, either as against the churchwardens and overseers, the defendants, the parishioners then being, or future parishioners, or the successors in office of the defendants, the award cannot in any part be supported, but is in my judgment altogether void. There is no sufficient consideration for the promise alleged in the declaration. Nothing appears to shew a legal obligation to abide by and perform the award. Such legal obligation must arise out of a valid and competent submission to the authority of the arbitrators, and that authority does not exist here. Upon this point the case of *Biddell* v. *Dowse* (*b*) is a well considered and decisive authority. For the above reasons I am of opinion, that the defendants are entitled to judgment.

PARKE, B.—The plea is good in point of form and substance. It admits the submission and award, so far as stated in the declaration, but sets out both at full length, and thereby raises a question, whether the award be valid in law. The conclusion which is objected to, as referring matter of law to the jury, is either the statement of an inference of law from the premises, as if it had said, "and *so* the defendants say, that the said award is bad, and void in law;" or it may be rejected as surplusage.

(*a*) Burr. S. C. 793. (*b*) 6 Barn. & Cress. 255; 9 D. & R. 404.

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The question then to be decided is, whether the award, compared with the submission, be void altogether.

The submission is of three things:—

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First, The examination of the rate, and all matters in dispute, as stated in the notices of appeal; the object being to settle and ascertain the subject of the poor's rate, and the equality or inequality thereof, so far as relates to the charges on *William Thorp* and *Edward Thorp* respectively, compared with other individuals named in the notices of appeal; *secondly*, the expenses on both sides, of the agreement, counterpart, and notices of appeal, and preparations to resist the same; and there is the usual clause—so that the arbitrators should make their award and determination of and concerning *the premises*, which include both these matters, at a certain time:—and, *thirdly*, there is an agreement, that the costs of the arbitration and award should be in the discretion of the arbitrators.

It was argued by the learned counsel for the defendants, that the whole award was void, because the churchwardens and overseers had no power to bind themselves, or the magistrates at quarter sessions, existing or future, by such a submission; and that the submission and award were in this respect wholly nugatory; and, the other questions being merely ancillary to this, the whole award was void.

On the part of the plaintiff, it was not disputed that neither the churchwardens and overseers nor the magistrates were bound in this respect by the award; but it was nevertheless insisted, that the award was good as to the other matters in difference; that, in construing contracts, the parties to them must be assumed to be cognisant of the law; that no binding settlement of the rate could be made by the arbitrators; and that they must, therefore, be intended to have submitted that question

only so far as by law it could be; and that the special manner in which the defendants have bound themselves, is a confirmation of that view of the case. The defendants therefore must be taken to have agreed, in consideration of the plaintiff and *Edward Thorp* agreeing to withdraw their notices of appeal, and jointly employing the arbitrators to make a valuation of the property in the rate, so far as related to the comparative amount assessed on the plaintiff and the other persons named, to abide by their award on the question as to the costs of preparing to litigate the rate at the quarter sessions, and the expenses of the agreement to refer, and reference; and it is contended that such a contract is good in law.

It appears to me, that this view of the case is right, and that the agreement of submission is valid and binding, for the reasons thus stated in the argument on behalf of the plaintiff.

There is no doubt, that, if the parties had both agreed to withdraw the notices of appeal, and to abandon all objection to the validity of the rate, they might also have agreed to leave to arbitration the question which of the parties should pay the expenses of the preparations for the appeal; and if this be a fit subject of reference, can such a reference be rendered invalid, by uniting with it an agreement that the arbitrators are to make a valuation for their information and guidance? I should say it cannot.

The case of *Biddell* v. *Dowse* is distinguishable. There some parties to the reference were not bound at all; and unless they were, there was no mutuality. Here, they were bound on both sides; both have agreed: and the only question is, what is the meaning of the contract between them: and I must say, that I think the reasonable and proper construction of the contract is, not that the arbitrators shall do what both parties must know to be by law impossible, but that which they can do; that is, merely make

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a valuation as a guide to the parties for their future conduct. This is the only doubtful part of the contract, for the residue is clear, and admitted on both sides, viz. that they shall determine and decide the other questions.

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I am of opinion, therefore, that the award is not void on this ground. In the course of the argument, however, two other objections were suggested at the Bar or from the Court, which at the time appeared to me to be of considerable weight; but, on subsequent reflection, I do not think they ought to prevail.

First.—It was stated, that the submission is conditional, with an *ita quod* so far as relates to the settlement of the rate, and to the expenses of the agreement and notices of appeal; and, admitting that the construction which I have put on the submission was correct, and that the churchwardens and overseers are not and could not be legally bound by the settlement of the rate by the arbitrators; and that the award is, therefore, as to its legal consequences in this respect, void, yet it is said that the final settlement of the rate, in respect of the proportions mentioned, by a complete and perfect valuation, is a matter which the parties have stipulated for, and made their submission to the award in every respect conditional on such a valuation being in fact made, and the other questions submitted finally determined. And it is said, that such complete and perfect valuation has not been made; for it appears by the award, that they have left the *quantity* of the lake *occupied* by the plaintiff, on which the amount of the rate in part depends, unsettled.

But I think that the construction of this part of the award, which is set out in the plea, unexplained by any averment on the record, is, that the *whole lake* is occupied by the plaintiff, and the only matter deferred is its measurement, which is a mere ministerial act, and which, even where a matter is referred to be finally decided by arbitrators, and not simply a valuation to be made, may be

delegated to another. *Winch and Saunders' case* (*a*). The award, therefore, appears to me not to be void in this respect.

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A second objection was, that the award is void, as the amount of the costs to be paid by the defendants, on account of the plaintiff's expenses of notices of appeal, as well as of the agreement or counterpart, is unascertained. The award directs the defendants to pay to *T. E. Fisher*, the attorney of the plaintiff, and *Edward Thorp*, the sum of 16*l.* 12*s.*, his bill already delivered, and also *Fisher's* charges attending the arbitration, and of procuring the signatures of his clients and the other parties to the enlargement of time, which latter charges are not ascertained. As there is a stipulation that the submission is to be made a rule of the Court of *King's Bench*, the amount of these last costs may be taxed; and therefore it is no objection that they are not settled by the arbitrators themselves. And as to the bill of *Fisher* for 16*l.* 12*s.*, that must be considered as being on account of costs relating to the notices of appeal; because, as the award is made *de premissis*, and the context shews the costs of the agreement and of the reference not to be included in the 16*l.* 12*s.*, the Court ought to intend that this sum is for one of the matters submitted, and therefore is for the costs of the notices, according to the rule laid down in *Rose* v. *Spark* (*b*), that these words have the effect of applying the general words of the award to the particular things submitted. And though the amount of the plaintiff's share of that sum is unascertained, yet, as the 16*l.* 12*s.* is stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill; and therefore the award is sufficiently certain in this respect.

I am therefore of opinion, that the plaintiff is entitled to judgment.

(*a*) 2 Roll's Rep. 214. (*b*) Alleyn, 51; 1 Saund. 324.

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Lord ABINGER, C. B.—I am of opinion that in this case the plea is good, and that the award and submission are bad. I shall give the grounds for my opinion very shortly. The submission to arbitration recites, that the plaintiff, conceiving himself to be over-rated by means of the rate made upon him, had given notice of appeal, specifying in such notice the grievances complained of. The parties entered into an arrangement on this occasion. Now, I do not mean to state, that, if the notice of appeal had been withdrawn upon collateral grounds, and the question of costs had been the only remaining question to be decided between the parties, that question might not have been referred to some arbitrator to ascertain what was the amount of the costs which each party ought to pay; but, in this case, the agreement of submission to arbitration shows, that the cause of difference was a cause which could not be made the subject of a submission to arbitration, because it recites it to be the amount of the rate, and *that* it is which these parties propose to refer, and which the churchwardens and overseers consent to refer so far as in law they can. It appears to me that the costs are merely incidental to the subject-matter in dispute; they arise incidentally out of the general subject-matter of the reference. Now, it can never be supposed that a party intends to bind himself by an arbitration respecting a matter incidental to that which was the real point in dispute, when the latter wholly fails. It has always appeared to me, that a submission to arbitration is in the nature of a contract founded on a consideration of a final and valid determination of all the matters described in the bond of submission, and therefore I have always been of opinion that if the main part of the object of the arbitration fails, either by its being illegal to refer it, or by reason of any other cause of failure, then the whole submission is void. That doctrine is the foundation of the decision which has been referred to, in *Biddell* v.

Dowse. It is very true that that case is not exactly similar to this, but the principle is the same. It was there determined, that as the object of the parties could not be obtained by the reference, by reason that certain infants ought to have been made parties, who could not be so made by law, the object the parties had in view failed, and therefore the whole submission was void. This was distinctly laid down in that case, and that principle is applicable to the present case; the parties here intending, so far as they could, to refer that, which it turned out was not in law capable of a reference, namely, the rate. The costs incidentally arising out of the matter submitted never could have been meant to be made the subject-matter of reference alone. The consideration for the submission therefore fails. If a man refers all matters in difference, and it turns out that they are not properly referred, the submission is a nullity, and he is not bound by the award. On these grounds I think the submission to arbitration is void. I think also that the award itself is bad. It directs that the churchwardens and overseers shall return ten shillings back on each rate, and goes no further: that is clearly not binding upon them; they cannot do it by law, and there is no power to make them obey it at all. The award on this, therefore, is of no avail; and yet this is a material point referred. Then the arbitrators direct that the quantity of the lake occupied by the plaintiff should be ascertained by the parish, and the rate altered accordingly. That, I think, might not of itself vitiate an award. But this is a point which is to be ascertained by *the parish*. Now, what is the meaning of the word "parish?" That is left in doubt. It may mean the churchwardens and overseers; or it may mean that the parishioners themselves are to make the settlement. It seems to me the matter is left so much in doubt, that it cannot entitle the parties to any benefit from the award of the arbitrators. Supposing the parish were disposed to accede to the adjustment

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pointed out by the arbitrators, the parties cannot have the benefit of the award, as the parish are no definite persons, and could not set out the quantity of the property occupied by the plaintiff. It is said by my Brother *Parke*, and undoubtedly if that were so I could go along with him, that he considers that this substantially is only an agreement to refer the matter in dispute to the arbitrators, to make a valuation of the property in the lake on which the rate is to be made, which may be afterwards adopted by the parish officers or not; but the proper mode of making a valuation of a parish is to assess the parishioners equally, and if there be any dispute as to the rate, the quarter sessions ought to settle it. It is a common practice to arrest the adjudication at sessions until the parties have an opportunity of making a new valuation; but the validity of that depends on the sessions adopting it, and not upon the opinion of an arbitrator. I do not think that this was a subject on which an arbitrator was competent to award. On these grounds it appears to me the award is bad, and that judgment ought to be for the defendants.

Judgment for the defendants.

HEMMING *v.* TRENERY and MALIM.

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One *R. S.*, a builder, having contracted to perform certain works for government, and given a bond to the Crown for the due performance of the work, in which the defendants were his sureties, applied to the plaintiff to supply him with bricks to carry on the works, which the plaintiff accordingly did to the amount of 560*l.* on the faith of the following guarantee signed by the defendants: "Please to deliver to Mr. *R. S.* for the completion of his contracts at *Deptford* and *Woolwich* yards, 500,000 best stock bricks, to be delivered at the said dockyards at 32*s.* per thousand; and we, as his sureties, do hereby consent that the proper officer, *Navy-office, Somerset House*, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered, and we do hereby agree to become guarantees for the payment of the same to you, *when the amount of the contract is paid.*" After the bricks were delivered, *R. S.* partially performed the work, and requiring an advance of money, applied to and received from the Crown, with the plaintiff's consent, 300*l.* on account. After this payment, *R. S.* performed extra work for the Crown beyond that stipulated for in the contract, for which he was entitled to 284*l.* 5*s.* *R. S.* was subsequently dismissed by the Crown for neglect, the contract having been only partially executed, and the Crown employed other persons to complete it on their own terms, and paid them for it accordingly, without the assent of either *R. S.* or the defendants. After all the works had been completed, an arrangement took place between the Crown and *M.*, one of the defendants, on behalf of himself and his co-surety, and with the privity of *R. S.*, and an account was stated by the proper officer between the Crown and *R. S.*, in which account *R. S.* was credited with the amount of the contract prices, and 284*l.* 5*s.* for extras, and debited with the 300*l.* paid him, and the amount paid to the persons who were employed by the Crown to complete the contract, leaving a balance of 241*l.* 16*s.* 11*d.*, for which a bill was made out payable to *R. S.* as being "the balance upon a final settlement of all claims, which he or any one through him might have on the public, in respect of works undertaken and partly performed by him at *W.* and *D.*;" which bill was given to *M.*, who gave a receipt in the terms of the bill:—

Held, that, under these circumstances, the money paid to the persons who completed the contract was not money paid to *R. S.* or his agents, and the whole amount of the contract not having been paid to *R. S.*, the plaintiff was not entitled to recover upon the guarantee.

Held, also, that even if that were not so, the plaintiff had no claim on the 300*l.* paid to *R. S.*, as he had expressly waived it by his consent to the payment.

Held, also, that if the balance of 241*l.* was to be considered as part of the allowance for extras, the plaintiff could have no claim on that balance; and that if it was a sum partly composed of extras and partly of money due for work done under the contract, it being impossible to say what amount was due on the latter, the plaintiff could only be entitled to nominal damages.

ASSUMPSIT.—The declaration stated, that before &c., one *Robert Streather* had contracted for the performance of divers works and services, and for the finding and providing therein of divers materials, at *Deptford* and *Woolwich* dock-yards, in the county of *Kent*. And thereupon, theretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, would deliver to the said *R. Streather*, for the completion of his said contract at *Deptford* and *Woolwich* dock-yards aforesaid, 500,000 best stock bricks, and deliver the same at the said dock-yards at 1*l.* 12*s.* per thousand, they the said defendants consented, that the proper officer of the

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Navy-Office, Somerset House, who should or might have the payment of the contract when finished, should and might stop the amount of such account for bricks delivered; and they did then agree with and promise the plaintiff to become guarantees for the payment of the same to him when the amount of the contract was paid. The declaration then averred the delivery to *Streather* of a large quantity of bricks, amounting to the sum of 800*l.*; and that although the credit and time for payment thereof had long since elapsed, and though payment of the amount of monies payable to the said *R. Streather* under and by virtue of the said contract was afterwards made, whereof the defendants had notice; yet &c., (breach in nonpayment, either by *Streather* or the defendants, of the price of the bricks).

The defendants pleaded separately:—*First,* the general issue; *secondly,* that payment of the amount of the monies payable to *Streather* under the contract had not been made; *thirdly,* that the defendants had no notice of the payment so made under the contract. On these pleas the plaintiff took issue. The defendants pleaded, *fourthly,* that the amount of the monies payable to *Streather* under the contract was unpaid at the time when the action was commenced, concluding with a verification. This last allegation the plaintiff traversed in his replication, and issue was joined thereon. The cause was tried before *Parke,* B., at the *Guildhall* sittings after last *Hilary* Term, when the learned Baron directed a verdict to be entered for the plaintiff, but gave the defendants leave to move to enter a nonsuit. A rule having been accordingly obtained in *Easter* Term last, by Sir *W. W. Follett*—

Andrews, Serjt., and *Archbold,* shewed cause against the rule, and

Sir *W. W. Follett* was heard in support of it: but the facts of the case, and the grounds upon which it was argued, are so fully stated in the judgment, that it has been thought unnecessary to state them. The Court took time to consider, and the judgment of the Court was now delivered by

PARKE, B.—This is an action upon a guarantie, which was tried before me at the sittings after *Hilary* Term, at *Guildhall*. I directed a verdict for the plaintiff, reserving liberty to the defendants to move to enter a nonsuit.

A motion was accordingly made, a rule *nisi* granted, and cause was shewn in last term, before my Brothers *Bolland*, *Alderson*, *Gurney*, and myself; after which the Court took time to consider of their judgment.

It appeared in evidence on the trial, that *Streather*, with the defendants as his sureties, on the 11th of *July*, 1833, gave a bond to the Crown, for the erection of a wall at *Woolwich* for the sum of 1569*l.*, and cellars at *Deptford* for 1089*l.*, both to be completed in a certain manner and time. That *Streather* commenced the work, and, wanting bricks, applied to the plaintiff, who supplied them to the amount of 560*l.*, on the faith of a guarantie to this effect:—

"Mr. *H. K. Hemming*,

"Please to deliver to Mr. *Robert Streather*, for the completion of his contracts at *Deptford* and *Woolwich Yards*, 500,000 best stock bricks, to be delivered at the said dock-yards, at 32*s.* per thousand, and we, as his sureties, do hereby consent that the proper officer, *Navy-Office*, *Somerset House*, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we do hereby agree to become guarantees for the payment of

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the same to you when the amount of the contract is paid. Dated this 21st day of *August*, 1833.

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" Yours, &c.

Sureties for Mr. *Streather's* performance of his contract. } *Mark Malim*, *Samuel Trenery*,

" *Robert Streather.*"

After these bricks were supplied, *Streather* partially performed the work, according to the contract; and, requiring an advance of money from the Crown, the Crown surveyor certified that works to the value of 900*l.* were then done by him. The plaintiff, on being applied to, gave a conditional consent to the payment of 300*l.* by the Crown to *Streather*, and 300*l.* was accordingly paid to him in *October* 1833.

After this payment, *Streather* was employed by the Crown to make the wall of a greater depth than that stipulated for in the contract, and he did so, and was entitled on this account to receive 284*l.* 5*s.* from the Crown, for extra work. Subsequently *Streather* was dismissed by the Crown for neglect, the contract having been only partially executed; and then the officers of the department employed Sir *Edward Bankes* and Mr. *Baker* to complete it, engaging them on their own terms; and, when they had finished the works, paid to Sir *Edward Bankes* 797*l.* 12*s.* 4*d.*, and to Mr. *Baker* 1602*l.* 15*s.* 9*d.* *Streather* in no way consented to this measure at the time, nor did the defendants.

In *April*, 1834, after all the works had been completed, an arrangement took place between the Crown and the defendant *Malim*, on behalf of himself and his co-surety, and with the privity of *Streather*. In making this arrangement, the proper officer stated an account as between the Crown and *Streather*. In that account *Streather* was credited with 1569*l.*, and 1089*l.*, the amount of the con-

tract prices, and 284*l.* 5*s.* for extras, and debited with 300*l.* paid to himself in *October*, 797*l.* 12*s.* 4*d.* paid to Sir *Edward Banks*, 1602*l.* 15*s.* 9*d.* paid to *Baker*, leaving a balance of 241*l.* 16*s.* 11*d.*, for which a bill was made out, payable to *Streather*, as being "the balance upon a final settlement of all claims which he, or any one through him, might have on the public in respect of works undertaken and *partly performed* by him, at *Woolwich* and *Deptford*;" and this bill was given to the defendant *Malim*, and he, acting for both defendants, on the 10th of *April*, 1834, gave a receipt in the same terms as contained in the bill.

Upon these facts, the question was, whether the plaintiff was entitled to recover.

The guarantie on which the action was brought, appears to have been framed with a full expectation on both sides that the contract would certainly be performed. The defendants are stated on the face of it to be sureties to the Crown, and the plaintiff, no doubt, must have relied upon the defendants seeing to the fulfilment of the contract by *Streather*; but there is no *contract* between the defendants and the plaintiff that *Streather* shall fulfil it, nor any engagement that the money for the bricks shall *at all events* be paid. This money is payable only upon the condition that the amount of the contract should be paid.

The question then is, whether the amount of the contract was paid to *Streather*; and that was, substantially, the only question in the case; and it was raised on the fourth issue.

The full amount of the contract price certainly never was, in fact, paid to *Streather* himself; but it was contended that the effect of the arrangement with Government was, to place *Streather* and the defendant in the same situation as if it had been actually paid.

The whole question, therefore, turns upon the effect of that arrangement.

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On both sides it must be admitted, that, at the time it was entered into, *Streather* had broken his contract, and was not *legally* entitled to anything, under that contract, from the Crown; and was liable, as also were the defendants, to the full amount of the penalty of the bond.

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Under these circumstances, the plaintiff contends, that as *Streather*, with the defendants' concurrence, received 241*l.* 16*s.* 11*d.*, as a balance on a final settlement of all claims on the Government, both he and the defendants must be taken to have agreed with the Crown that *Streather* should be considered as having fulfilled his contract and done all the works; and, therefore, that Sir *Edward Bankes* and *Baker* must of consequence be treated as his agents, and the payment to them as a part payment of the contract price to *Streather* himself.

The argument for the defendants, on the other hand, is, that the arrangement amounts to no more than this, that the Crown is satisfied to reimburse itself the extra expense beyond the contract price occasioned by the breach of the contract, and that the credit given to *Streather* in the account of the full contract prices is merely a mode of calculating the amount of that extra expense; and that the effect of the settlement is, that the Crown pays itself that amount out of the allowance for extras legally due to *Streather*, and really does no more than pay the balance of the allowance for extras, after such deduction.

On the trial, it appeared to me that the plaintiff's view of the effect of the arrangement was the true one; but the case did not undergo so much discussion as it has since received, and I must own that I am now satisfied that I was wrong, and my Brothers concur in opinion that I was.

To give to this arrangement the effect contended for by the plaintiff, would be to make Sir *Edward Bankes* and *Baker Streather's* agents, contrary to the fact: for most certainly they never were authorized or intended to be authorized to act on his behalf. We ought not unneces-

sarily to give a meaning to the settlement which would lead to that result. If, indeed, the settlement could not otherwise have been explained, or the balance received on any other supposition than that it was a balance of payment for a contract fully completed by *Streather*, and consequently involved an admission that those who did the work were his agents, that consequence must have followed; but it is certainly not necessary to put that construction upon the conduct of the parties to the settlement, for that may be well explained on the supposition contended for by the defendants; and the latter seems to us to be the more natural and satisfactory explanation; and it also accords with the language of the receipt, which clearly treats the contract as having been *partly* and not fully executed.

We therefore think that *Streather* is not to be taken to have received the *full amount* of the contract by himself or his agents, and therefore the issue which involves that question should be found against the plaintiff.

We do not think that the plaintiff could have successfully contended upon the words of the guarantie that he was entitled to any thing, if the *full* amount of the contract was not paid. But, supposing he was entitled to such part as Government chose to pay, on the 300*l.* paid in *October* the plaintiff had no claim, for he expressly waived it, as appears by his letter, conditionally, "provided sufficient was then left to discharge his claim;" and sufficient was then left to discharge his claim, for 900*l.* was reported due. It is true that the balance (600*l.*) was afterwards lost by *Streather's* neglect to fulfil the contract; but it is clear that the condition referred to the *then* state of the account—to a matter which could at that moment be decided; and, according to the state of the account, more was due. The license was therefore absolute, and the plaintiff's claim was waived on this 300*l.*

And if the defendants be right (as we are inclined to

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think they are,) in saying that the balance of *241l.* 15*s.* 4*d.* was really paid as part of the allowance for extras, then the plaintiff could have no claim on that balance; and if it was a sum partly composed of extras, and partly of a portion of the sum reported due for work done under the contract, it is impossible to say what amount is to be ascribed to the latter; and in that view of the case the plaintiff could only claim nominal damages.

The question in the case, however, is, whether the whole amount has been paid, and we are of opinion that it has not; and therefore the rule must be made absolute for entering a nonsuit.

Rule absolute.

BOUCHER *v.* SIMS.

A prisoner in custody of the marshal cannot be brought up to be charged in execution on an attachment, but it must be lodged with the sheriff, who will take him upon it as soon as he is out of the custody of the marshal.

THE defendant, who was a prisoner in custody of the marshal, being brought up to the Court for the purpose of being charged with an attachment for non-payment of costs—

Addison moved to charge him in execution accordingly.

ALDERSON, B. (after conferring with the Master):—The Master states that this is not the proper course to be pursued. The attachment must be lodged with the sheriff, who may take the defendant upon it as soon as he is out of custody on the present process.

Motion refused.

JENKINS *v.* HARVEY.

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THIS cause having been sent down for a second trial (*a*), was tried again before *Gurney*, B., at the last *Spring* Assizes for *Cornwall*. The evidence was in substance the same as before, except that the charter of the 31st *Eliz.* was not produced, and that witnesses were called to shew the disorderly and insecure manner in which the books of the corporation of *Truro* had been kept until the last few years, in order to account for the non-production of any documents relating to the dues in question of earlier date than the lease of 1752. It was proved also that dues had been for many years received by the corporation on the importation of flour in sacks, as well as of coals, and that

The first count of the declaration stated, that the mayor and burgesses of the borough of *Truro* had from time whereof the memory of man was not to the contrary held and exercised, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor and burgesses for the time being, or their deputy or deputies, a certain ancient office or place of meter, for the measuring of all coal imported by sea and brought within the limits of the port of *Truro*, to be there disposed of; and that from time whereof &c. there had belonged to the said mayor and burgesses &c. by reason of the said office, an ancient fee, reward, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, &c. *i. e.* the fee, &c. of 4*d.* the chaldron, to be received for the measuring, or being ready and willing to measure, each chaldron of coal imported as aforesaid, to be disposed of by measure: and the fee &c. of 8*d.* by the three tons, to be received for the weighing, or being ready and willing to weigh, each three tons of coal imported, &c. as aforesaid, to be disposed of by measure. The count then stated a demise by the corporation to the plaintiff of the office of meter, with the fees and privileges belonging to it, under which the plaintiff claimed a toll from the defendant in respect of a cargo of coals imported by him into the port of *Truro*. The second count claimed the same fee as a perquisite of the office, not stating it to be immemorial. The third count claimed a reasonable fee. Other counts claimed the toll as a duty receivable by the corporation or their lessees, from all merchants importing coal by sea within the limits of the port.

The jury found a written verdict in these terms:—"We find for the plaintiff: and that the corporation of *T.* 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:"—*Held*, that the finding sufficiently supported the first count of the declaration; that it did not import that the corporation were entitled only on actually measuring the coals, and that it did not disconnect their right to the toll from their ownership of the port, and their obligation to maintain it, in respect of which ownership and obligation only they could be entitled to the payment without performing some actual service for it.

Held, also, that the toll being due to the corporation as owners of the port, as well as for the measuring, no objection could be maintained against it on the ground of its rankness.

Two leases from the corporation of the office and dues in question were put in, the first dated in 1752 (in consideration of 631*l.*), the second in 1795. It was proved that the fee of 4*d.* a chaldron had been paid without interruption, from the year 1772 to 1828, although the meter never actually measured them himself, the only measurement being for the purpose of ascertaining the custom-house duties payable on them. A corporation book of the date of 1630 was also produced at the trial. *Held*, that this was sufficient *primâ facie* evidence that the corporation and the office of meter were immemorial: and that it sufficiently supported the immemorial claim for coals not actually meted.

(*a*) See the report of this case on the former argument, 1 C. M. & R. 877.

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the flour was never measured by the meter. The learned Judge, in summing up, left it to the jury to decide, *first*, whether the corporation of *Truro*, and their lessees and deputies, had from time immemorial held and exercised the office of meter of coals entering the harbour, for a toll, fee, or reward of 4*d.* per chaldron, or 8*d.* for three tons, for measuring and weighing; *secondly*, whether they had held such immemorial office, and were entitled to a reasonable fee, and whether 4*d.*, or any smaller sum, was reasonable; *thirdly*, whether the corporation were entitled to this fee as a port duty, in which case it was not necessary that it should have existed from time immemorial. The jury, after having continued in deliberation the whole night, came into court with a "verdict for the plaintiff on the metage." The learned Judge asked them whether they found that the mayor and corporation of *Truro* possessed the office of meter, and were entitled to a reasonable reward for measuring, and that 4*d.* was that reasonable reward. The foreman answered, "Yes." He then asked them if they found for the plaintiff on the port duty. The foreman said, "No." Another of the jury then said, "We think the corporation entitled only on the due performance of the office." Another said, "We find the office immemorial, and the fee also immemorial, but they are to do all the work for the money." A third said, "We find but one thing." The counsel on either side differing as to the manner in which the verdict should be taken, the learned Judge desired the jury to retire again, and to give him their verdict in writing; and after some time they returned with the following written verdict:—"We find for the plaintiff; and that the corporation of the borough 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. We do not find for the plaintiff on

any other count." The verdict was thereupon entered for the plaintiff on the first count only, damages 16*s.*

In *Easter* Term the *Attorney-General* (Sir *John Campbell*) obtained a rule *nisi* for a new trial, on two grounds—*first*, that the written finding of the jury amounted to a finding that no fee was due, unless there was an *actual measurement* of the coal by the meter, and therefore did not support the first count of the declaration, which claimed a fee for measuring or *weighing*, or *being ready and willing* to measure or weigh; and, *secondly*, that even if the jury had found simply for the plaintiff on that count, or had found in terms all the facts alleged in it, there was no evidence to warrant such finding, inasmuch as there was no sufficient proof to support the immemorial right stated in the first count. In the present term, cause was shewn by

Sir *W. Follett* and *Rowe.*—*First*, the written finding sufficiently supports the first count. There is a fallacy in considering the immemorial claim of metage, and the claim as for a port duty, as distinct and separate rights: they are in fact the same, and were so presented to the jury. The metage is in truth a port duty; it must be derived out of the ownership of the port: both have the same origin and foundation, the only difference being that the one must be immemorial, while the other need not. The corporation might have received the 4*d.* without doing any thing specially for it; or, on the other hand, they might be bound to do something for it. [*Parke*, B.—That would seem to be what the jury meant; they may be considered as having found that the corporation were not entitled to the 4*d.* without doing something besides cleansing the port.] It is not a payment for work done; it is a *duty*, and there is a corresponding obligation on the other side. It would be no answer to the claim for toll, that the corporation did not perform the duties imposed on them,

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although it would subject them to a distinct action. The reasons given by the jury are perfectly consistent with a finding for the plaintiff. The question is, what is "the performance of the duties of the office." A party cannot, in point of law, resist the claim of the toll on the score of the non-performance of the duties of the office; the jury, therefore, could not *so* find in law. Then it was distinctly in evidence, that, as far back as living memory went, the lessees had received the fee, although the officer had not in fact measured or weighed. How then could the jury find for the plaintiff, unless they considered the being ready and willing to measure as equivalent to actual measuring? What they intended to negative was the title of the corporation to a port duty as a modern grant. If they had adopted the argument insisted on for the defendant, that there must be an actual measurement to entitle the plaintiff to the fee, they would have found for the defendant; but they find for the plaintiff, because they deem the evidence so cogent as to compel them to do so, notwithstanding there was no actual measurement.

And, secondly, the evidence sufficiently warranted such a finding. It is proved that the corporation has existed, and the office has been exercised, as far back as living memory can go. That is evidence sufficient, being uncontradicted, that both are immemorial. There is no pretence for saying that any body ever heard of the commencement of this claim; and the same evidence which proves the immemoriality of the usage to receive the toll, proves also the immemoriality of the corporation and of the office. [*Parke*, B.—The jury have said nothing as to the 8*d.* for every three tons.] It cannot be necessary that they should advert to every specific matter stated in the declaration; but it is in fact the same proposition. The authorities in favour of the legality of this demand are to be found collected in *Hale's* treatise *De Portibus Maris* (*a*),

(*a*) Cap. 6; Hargrave's Law Tracts, p. 74.

and in the cases of the *Mayor of London* v. *Hunt* (*a*), *Mayor of Yarmouth* v. *Eaton* (*b*), and *Mayor of Exeter* v. *Trinlet* (*c*). The general principle resulting from those authorities is, that the ownership of the port, and the general benefit accruing from its being kept up in a proper state for the use of vessels resorting to it, constitute a sufficient consideration for the claims of metage. In *Lord Falmouth* v. *George* (*d*), the plaintiff was not even the owner of the port, or of any manor or estate in respect of which he claimed the dues in question; but his being bound to keep up a capstern and rope in a cove, to assist boats in landing in foul weather, was held to entitle him to claim a toll from all boats frequenting the cove, whether they used the capstern or not, by reason of the general benefit arising from its being always in readiness in case it were required; and his right was referred to the presumption of his having been at some former period owner of the port. So it is also in the common case of toll traverse, receivable by a lord of the manor from persons landing within the manor; they are bound in law to pay, although they do not land at the wharf. They may indeed have an action against the lord if he do not keep up the wharf, but that constitutes no answer to the claim of toll. Indeed, any person, not merely those who come into the port, might sue the corporation for not keeping it up. *Mayor of London* v. *Hunt* (*a*). It has been said that this cannot have been an immemorial usage, because coals have not been sea-borne time out of mind. But it appears from the case of *Rex* v. *Carpenter* (*e*), that they were not only sea-borne, but a matter of litigation in *London*, as early as the 34 *Edw.* 1; and Mr. *M'Culloch*, in his *Dictionary of Commerce*, title *Coal*, states, that in the time of *Henry* 3, the town

(*a*) 3 Lev. 37.
(*b*) 3 Burr. 1402.
(*c*) Cited 3 Burr. 1405, 1407.
(*d*) 2 Moo. & P. 457; 5 Bing. 286.
(*e*) 2 Show. 49.

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of *Newcastle* had a considerable trade in coals; and that about the end of the thirteenth century they began to be imported into *London*, and used in different manufactures. It has been urged also that this toll is bad for rankness. But it is no larger than has been sustained in many other cases. In *Vinkersterne* v. *Ebden* (*a*), the toll claimed by the corporation of *Newcastle* was 5*d.* a chaldron; in a case mentioned in *Brownlow's Entries* (*b*), 4*d.*; in the *Mayor of London* v. *Hunt* (*c*), 8*d.* a ton for cheese. From the statute 9 *Hen.* 5, c. 10, it appears that a customary toll was then due to the crown of 2*d.* a chaldron on coals brought from the land into the port of *Newcastle*, and sold to persons not franchised within the port. [*Alderson*, B.—In the *Boroughbridge toll case* (*d*), it was 4*d.*, and was immemorial.] In questions as to the rankness of moduses, the Courts have always manifested a great disinclination to interfere with the verdicts of juries. In *Pyke* v. *Dowling* (*e*), the Court said that a question as to the immemorial existence of a modus was a question of fact, and not of law. Here the jury have found expressly that this was a reasonable fee.

The *Attorney-General*, *Merewether*, Serjt., and *Crowder*, in support of the rule.—This corporation claims a toll or payment, in the name of metage, on all coals imported within an ambit of forty or fifty miles, where no beneficial service is performed, and where no benefit can be derived from the meter's being ready to measure, since the coals are invariably measured or weighed again when delivered from the coal-merchant's premises to the purchaser. It is a claim without consideration, and so against common right. If so, the verdict of the jury is not sufficient to establish it. But, at all events, the Court ought

(*a*) Ld. Raym. 384.
(*b*) P. 119.
(*c*) 3 Lev. 37.
(*d*) Lord *Pelham* v. *Pickersgill*, 1 T. R. 660.
(*e*) 2 Blk. Rep. 1257.

to put a reasonable construction on the words of their finding. They find in effect, that the corporation have been entitled to, and have received, the metage for the measuring. The "performance of the duties of the office" cannot merely mean the being ready to measure, which is the only ground on which the plaintiff can rest his claim, as alleged in the first count. This is in no respect, as it has been represented on the other side, a toll connected with the port. The plaintiff has no title but under his lease, and that treats it merely as a reward, a fee for measuring, and has nothing whatever to do with the port. It is a grant of the office of meter of the borough, with the fees and duties incident to it. If, therefore, this is a fee connected with the exercise of an office, it cannot be claimed unless the duty is performed, and the benefit received; and the verdict in fact negatives any claim arising out of the ownership of the port, or the obligation to keep it in repair. The cases cited on the other side are all, in truth, cases of payment for benefits actually received. [*Parke*, B.—Does it not appear that the corporation were paid for the sacks of flour brought in, although it was neither measured nor weighed?] It does; but there the quantity is defined by the sack, where a sack of the proper dimensions is used; and in such case, the officer does his duty where he satisfies himself that the sack is of those dimensions. It is a strong construction to say, that it is to be assumed the jury meant that this duty was to be paid for performing no service of any kind.

But the immemoriality of the claim is in no respect supported by the evidence. There was no sufficient proof of the immemorial existence either of the corporation or of the office. The charter of *Reginald* (the only one now put in) was not a charter of incorporation, but only of immunities and exemptions. It was not even a royal charter; for the Earls of *Cornwall* had not *jura regalia;* and a

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subject cannot create a corporation. All the remainder of the evidence applied to the period subsequent to the year 1752. The lease of 1752 contains no reference to any prior demise of the dues in question; if the office had existed immemorially, there must have been some earlier documents relating to them. It is true, that where there is evidence, extending through a considerable period of time, of a right or exemption which may well be supposed to have existed immemorially, juries may properly be called upon to act on such evidence, without more; but this is a case where the immemorial existence of the usage set up is hardly credible in any of its circumstances. No doubt, coals were won before the time of *Richard* 1; but were they then imported into the little port of *Truro*, which was not then a town? was there then a meter? and were coals then measured by the chaldron? The great change in the value of money since that period is of itself strongly against the possibility of this payment being immemorial. In *Lyttelton's History of the Reign of Henry* 2 (*a*), the author, after referring to various authorities, concludes that the value of silver at that day was at least five times greater than when he wrote. From the tables subjoined to Sir *F. Morton Eden's* work on the state of the poor in 1797, it appears that the price of coal in 1296, when the use of it was first introduced into *London*, was only 6*d.* per quarter. The cases as to the rankness of *moduses* are analogous to the present, because there also the question is in effect the same—whether the amount of the payment is inconsistent with the state of circumstances at the commencement of the time of legal memory. The law on that subject is collected in *Eagle on Tithes* (*b*); and the conclusion stated is, that though rankness is no objection in point of law to a *modus*, it is evidence against the immemoriality of the payment. The

(*a*) Vol. 1, p. 420, 4to. ed. 1767. (*b*) Vol. 2, p. 185.

argument need not, however, rest merely on the improbability, however strong, of this payment having had an immemorial origin; for it may be referred to a reasonable origin within the time of legal memory. The statute 8 *Hen.* 6, c. 5 (A. D. 1429), enacted, "that in every city, borough, and town in *England*, a common balance and common weights should be kept, in the keeping of the mayor or constable, at which all the inhabitants that had not such weight, and others that had, if they would, should freely weigh, without payment: taking nevertheless of *foreigns*, for every draught within the weight of forty pounds, a farthing; and for every draught betwixt forty and one hundred pounds, a halfpenny; and for every draught betwixt one hundred and one thousand pounds, a penny, at the most;" and that the officer lawfully weighing should be rewarded by the discretion of the chief men of the city, &c., "according to his attendance to his said business, be it more or less." And by the *22 Car. 2*, c. 8, the provisions of the former act were extended to ports. Now the fee there mentioned would be very nearly equivalent to 4*d.* per chaldron; and all the provisions of the act agree with the circumstances of the office in *Truro*. It is true, there has been no weighing for a long period; but the act gives parties the option to use the weights or not; and the claim might easily be extended, by usurpation, to measuring also. The meter's oath, "faithfully to perform the office for the said borough, and to do justice between man and man," seems also to refer to the public duty imposed by the act. If, then, the statute of *Hen.* 6 supplies a reasonable origin, on legal grounds, for these payments, the principle, that where the origin cannot be traced, it will be referred to immemorial usage, has no longer any application. Not a single instance was proved of the actual receipt of the toll where there had not been actual measurement.

Cur. adv. vult.

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On a subsequent day in this term, the judgment of the Court was delivered by

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PARKE, B.—[After stating the circumstances before mentioned, as to the several statements of the jury to the learned Judge, and the terms of the written verdict, and that no objection was made to the mode in which the case was left to the jury, his Lordship proceeded as follows:]—The objections made on the argument in support of the rule for the new trial in this case, were two:—

First, that the finding of the jury does not support the first, nor, indeed, any other count in the declaration; and if it does, *secondly*, that the evidence does not support the finding.

The first count claims, that the corporation have immemorially exercised the office of meter, for an immemorial fee or reward of 4*d.* per chaldron, for the measuring or being ready and willing to measure by measure each chaldron of coals imported by sea and brought into the port, and for the keeping and maintaining weights and measures; and the plaintiff claims as the lessee of the corporation of the office and toll, averring that he was ready, and offered, to measure by deputy; and there is a similar claim of 8*d.* for every three tons' weight. In other counts, the office is not stated to be immemorial. And the fifth count claims a duty or toll, called metage, from every merchant importing coal by sea within the limits of the port, to be there unloaded and delivered or disposed of, without any averment of the measuring, or being ready to measure the coal. And in part of the sixth or indebitatus count, it is claimed in a similar mode. It is obvious that the finding of the jury was meant to be on the first count. It is contended for the defendant, that the claim for metage, a sa fee or perquisite of office for measuring or being ready to measure, is not supported by the verdict, because the jury have found that the corporation have

received, for the performance of the duties of the office, the sum of 4*d.*; and it is said, that the "performance of the duties of the office," means the actual measurement of the coals. The Court have never had the least doubt as to the meaning of the finding of the jury in this respect.

The great point in controversy at the trial was, whether the plaintiff was entitled to a payment of 4*d.* for all coals imported, though he did not actually measure; the plaintiff contending that he was, the defendant that he was not: but the defendant, at the same time, not disputing that the plaintiff might have the sole right of measuring all coals imported, which were required by the parties to be measured within the limits of the borough; nor that he was entitled to a fee of 4*d.*, if they were measured by him, or damages for an infringement of the right of his office, if they were measured by another. The question then being, whether the plaintiff had a right to the fee without actual measuring, it is impossible to suppose that the jury could have found a verdict for him, if they had been of opinion that he was not entitled, unless he did actually measure. "The performance of the duties of the office" must therefore mean something else, in order to be consistent with the finding for the plaintiff; and the only meaning which can consistently be attributed to these words is, that the corporation is not entitled, unless by their officer they measure, or are ready to measure. They are not entitled to the 4*d.* a chaldron, absolutely and unconditionally. Another objection, not strongly insisted on, was, that the jury do not say whether the corporation are entitled to 8*d.* per three tons for weighing; but there can be no doubt that they intended to include both the 4*d.* metage, and its equivalent sum of 8*d.* for weighing. It is also contended, that the jury meant to negative the right of the corporation to the metage, as connected with their interest as owners of the port, or their obligation to maintain it; and if they did so intend, it

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appears to us, that there would be an insurmountable difficulty in supporting the verdict on the first count. Taking the office of meter to be simply an ancient and prescriptive office in the borough, to which the exclusive right of meting is attached, and in respect of which the public derive no benefit, unless their goods are actually meted by him, we cannot think a custom would be good, which gives the officer a fee for doing nothing. It would be a custom, obliging all persons bringing coal within the bounds of the port, to be there unloaded or delivered, to have them measured, whether they chose it or not—whether they intended to use them in their own houses, or to send them into the country to be there sold; and the only consideration for that obligation would be, the keeping a measure by the corporation, and the being ready to use it; and this case would resemble that of *Warren* v. *Prideaux* (*a*), and *Haspurt* v. *Wells* (*b*); and would differ from that of *Lord Falmouth* v. *George*, in which the keeping up a rope and capstern in a cove, to draw boats through the breakers, was held to be a benefit to all who frequented the cove, though they did not use either, because it was to their safety that they should be kept up ready for them. In this case, no importers who did not require their coals to be measured, could possibly derive any advantage from the maintenance of the bushel, or the establishment of the office of meter. But if the office of meter is connected with the rights of the corporation to the port, or their obligation to repair and cleanse it, the public have undoubtedly a sufficient consideration to oblige them to pay a toll, or duty, to the owners of the port, for services not performed. They have an equivalent, in the use of the port, for any reasonable toll on the goods imported; and as such a toll could be granted now by the Crown, there could be no doubt of the validity of a prescriptive claim to it. The case of the *Mayor of Lon-*

(*a*) 1 Mod. 104. (*b*) Ibid. 47.

don v. *Hunt* (*a*), which was a claim of weighage of cheese, and the *Mayor of Yarmouth* v. *Eaton* (*b*), which was one of measurage of corn, are decisive authorities to this effect. The present case differs in some respects from those, but falls within the same principle, if the right be connected with the ownership of the port; for here the right of the corporation to the toll is not merely in consideration of the use of the port, but also of the obligation to repair and cleanse it, and the additional obligations, not merely to provide measures, but also a competent person to perform the duty of measuring faithfully and justly, if required to do so.

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The only question, therefore, on this part of the case, is, whether the jury, by the mode in which they found for the plaintiff, and the observations accompanying it, meant to disconnect the right to the office of meter from the right of the corporation to the port; and to find, that the corporation were not entitled to the metage in respect of their ownership of the port, and obligation to cleanse it. Now, if the ultimate written finding of the jury be considered by itself, there is no reason whatever to suppose that they intended to negative the title to the metage, as connected with the port. They must be considered as having found the plaintiff's claim to the metage upon the grounds on which alone it can be supported in law, and on which it is clear, from the statement at the bar, and from a very full note by the learned Judge of the speech of the counsel for the plaintiff, the case was mainly rested in behalf of the plaintiff. But there is an answer by the jury to a question of the learned Judge, which on the first view seems to shew that the jury negatived the claim to this duty or toll, as connected with the port; for the learned Judge had previously asked the question, whether they found for the plaintiff on the port duty, and they answered in the negative. But it appears to us, on

(*a*) 3 Lev. 38. (*b*) 3 Burr. 1402.

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considering the whole of the learned Judge's note of that which passed, that the jury could have meant no more than to find against the plaintiff's right to any duty or toll on coals, merely as a port duty; that is, imported simply for the use of the port, and without the further obligation on the part of the corporation to do something more; which is the mode in which the toll is claimed in the fifth and part of the sixth counts of the declaration. They have found in effect, that the corporation were bound to measure, if the measurement should be required. We therefore think, that the finding of the jury supports the claim in the first count, as a toll connected with the ownership of the port.

The next question is, whether there is sufficient evidence to support the finding. It is contended that there was—

First, none that the corporation was immemorial;

Secondly, none that the office was immemorial;

Thirdly, that the fee was too great to be immemorial; and

Fourthly, that the evidence did not support the right to a toll, in respect of coals imported, whether meted or not.

It appears to us, that there was sufficient evidence to warrant the verdict for the plaintiff on all these points; so that we cannot set aside the verdict as being against evidence. 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 (*a*); and that, uncontradicted, is certainly evidence from which

(*a*) A corporation book of that date was produced at the trial, and stated to be the earliest that could be found; but no part of it was read in evidence.

a jury may presume that it had existence beyond time of legal memory. This point is one which was hardly in dispute in the cause.

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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.

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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.

It may be observed, that the usage, if established, cannot be referred to the statute of *Hen.* 6, as its legal origin; for, in the first place, that statute applies to weight only, not to measures; and if it did, its provisions would give no legal right without actual measurement; whereas, in this case, a right to toll without measuring is to be referred to some legal origin.

For these reasons, we think the verdict ought not to be disturbed, and the rule for a new trial must be discharged.

Rule discharged.

ALLIES and Others *v.* PROBYN.

To a declaration in assumpsit, the defendant pleaded as to 83*l.* &c., that after the several causes of action in respect of that sum had accrued, the plaintiffs, by agreement with the defendant, in consideration that the defendant would secure the above sum by executing a mortgage of certain premises, when called upon to do so, the amount to carry interest and to be payable by instalments, undertook that no proceedings in respect of that sum should be instituted against the defendant, unless default were made in payment of the instalments. The defendant then averred, that he had been always ready to execute the mortgage, but had never been called upon so to do:—*Held*, on special demurrer, that the plea was bad.

ASSUMPSIT.—The *first* count was upon a bill of exchange drawn by the plaintiffs upon and accepted by the defendant for 50*l.*, payable three months after date. *Second* count, *indebitatus assumpsit* in 500*l.*, for goods sold, and for money found to be due upon an account stated. Plea to the said declaration so far as the same relates to

83*l.*, *actionem non;* because the defendant says, that, before the commencement of this suit, and after the several causes of action, in respect of the said sum of money in the introductory part of this plea mentioned, had accrued to the plaintiff, by a certain memorandum of agreement in writing, bearing date the 14th day of *August*, 1833, and signed by *William Foster Geach*, being the agent of the plaintiffs thereunto by them lawfully authorized, in consideration that the defendant would secure the said sum of money in the introductory part of this plea referred to, by further mortgage upon a certain property at *Pontypool*, in mortgage to Messrs. *Henry Fox* and the said *William Foster Geach* respectively, and would execute such further mortgage, which should contain a power of sale of the premises mortgaged, when called upon so to do; 80*l.*, parcel of the same money, to carry interest at 5*l.* per cent. from the said 14th day of *August*, and to be paid off by annual instalments of 15*l.*; the first payment to be made on the 14th day of *August* then and now next—the plaintiffs undertook and promised the defendant, that no proceedings in respect of the said sum of money in the introductory part of this plea mentioned, should be instituted against the defendant, unless in case of default of the payment of the amount due by the said instalments. And the defendant, in fact, says, that although he (the defendant) has been always ready and willing to execute such further mortgage as aforesaid, whenever called upon so to do, yet he hath not been called upon so to do. Verification.

To this plea there was a special demurrer, assigning for cause that the defendant has, in his plea to 83*l.* parcel, &c., pleaded matters in bar to the plaintiff's action in respect of 83*l.* parcel, &c., which in form amount merely to matter of accord, and has not pleaded the same by way of satisfaction.

W. H. Watson, in support of the demurrer, was stopped by the Court, who called upon—

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John Henderson, to support the plea.—The defence disclosed in this plea is not one of accord and satisfaction, which bars the action altogether; but one of suspension of the action by a valid and still subsisting contract. If the agreement not to sue for a limited time not yet expired, which is stated in the plea and admitted by the demurrer, be such as would support an action for now suing on the original cause of action, then, to prevent circuity of action, this agreement may be well pleaded as an answer to the present action. In this case, as in that of *Stracy* v. *The Bank of England* (*a*), the plaintiff, before the commencement of the action, entered into an agreement with the defendant, upon good consideration, under which agreement the right of action is suspended. The judgment of the Court, in that case, distinctly recognises the principle on which the present plea is founded. The Court there observed, that "the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the plaintiffs have, for a good consideration, restrained themselves from suing, not perpetually, but only until they have first done a particular act. Under these circumstances, we think the defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the plaintiff's right to sue in the present action, and that they are not confined to a remedy by a cross action thereon. The case of *Longridge* v. *Dorville* (*b*) appears to us strongly in favour of the validity of such an agreement." *Tatlock* v. *Smith* (*c*) is another among many instances of a right of action suspended by the effect of an agreement. By the same rule, the receiving a bill of exchange in renewal of another, raises the presumption of an agreement

(*a*) 6 Bing. 754; 4 M. & P. 639.

(*b*) 5 B. & Ald. 117.

(*c*) 6 Bing. 339; 3 M. & P. 676.

suspending the remedy on the first till the second is dishonoured. *Kendrick* v. *Lomax* (*a*). The test of the sufficiency of the agreement admitted in these pleadings to suspend the right of action, may be, its sufficiency to support a cross action. For the plaintiff's promise not to sue until default in the instalments, none of which are yet due, there is a sufficient consideration—viz. the defendant's promise to secure the money by a further mortgage, with interest on 80*l.*, the amount of the debt bearing interest being only 50*l.*, and the rest of the claim being of a nature not to bear interest. The promise is then supported by a sufficient consideration; the present action is in violation of that promise; and to overrule this plea, would be to defeat a valid contract between the parties, and lead to circuity of action.

W. H. Watson, in reply.—The plea is nothing more than accord without satisfaction. The cases of delivering bills of exchange for a prior debt, are no authorities against the plea; for they are always pleaded to be delivered and accepted on account of the prior debt. Compositions must be pleaded to have been accepted in satisfaction; moreover, there must be a third party liable, or a fund to pay the composition; and that alleged to have been received in *satisfaction*, otherwise it is no answer.—*Heathcote* v. *Crookshanks* (*b*). He was then stopped by the Court.

Lord ABINGER, C. B.—I am of opinion that this plea is clearly bad. It appears to be an ingenious attempt to plead an accord without satisfaction. The case of *Stracy* v. *The Bank of England*, stands on different grounds; in that case, the agreement had been acted upon. The

(*a*) 2 Cr. & Jerv. 405; and see *Emes* v. *Widowson*, 4 Car. & P. 151.
(*b*) 2 T. R. 24.

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Bank of *England* had, by the conduct of a party, been put in a situation which could not be altered. They had allowed the stock to be transferred, and had paid over the proceeds to the party transferring. It was but fair that the owners of the stock should gain what they could from the estate of that party; and the Bank accordingly agreed, if they would do so, to guarantee the residue, without compelling them to bring an action. The agreement entered into was, therefore, perfectly fair. It did not operate as an extinction of the debt, but a suspension of the suit until a certain act was done by one of the parties. The plaintiffs, who assented to that suspension, received in return a complete satisfaction, because their debt was guaranteed by the Bank. Here there was nothing but a simple engagement to execute a mortgage when called upon to do so. If they never called upon him, the defendant could never execute at all, and then the right of action would be suspended during their whole lives. All, however, that the contract amounts to, is, that the plaintiffs may have the mortgage if they like; but it is not itself a satisfaction of the previous debt. If the mortgage had been executed, then the debt would have been merged; but that is not the present plea.

The rest of the Court concurred, and there was

Judgment for the plaintiffs.

BLUNT *v.* BEAUMONT.

A declaration in trespass for assault and battery stated that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick, and with his fists, gave the plaintiff many violent blows, &c. &c. Plea, as to the assaulting the plaintiff with the said stick and with his fists giving him blows, &c., *son assault demesne.*—*Held*, after verdict, that the plea sufficiently justified the *battery* with the stick as well as the assault with it.

TRESPASS for assault and battery.—The declaration stated, that the defendant assaulted the plaintiff, and

wrenched and pulled a certain stick from his hands, and *with the said stick*, and with his (the defendant's) hands and fists, gave and struck the plaintiff a great many violent blows and strokes, and shook and pulled him about, and gave and struck him many other blows and strokes, &c. The defendant pleaded, *first*, not guilty; *secondly*, as to the assaulting the plaintiff with the said stick and with his (the defendant's) hands and fists giving and striking the plaintiff blows and strokes, and shaking and pulling about the plaintiff, as in the declaration mentioned, *son assault demesne*. At the trial before *Parke*, B., at the *Middlesex* Sittings in this term, the case on the part of the plaintiff having been proved, the defendant called witnesses, who swore that the plaintiff had committed the first assault, and that the defendant did not wrench the stick from the plaintiff's hands. It was contended on behalf of the plaintiff, that he was at all events entitled to some damages in respect of the blow with the stick, which was not covered by the justification, and was not denied by the defendant's witnesses. The learned Judge left it to the jury to say what damages the plaintiff would be entitled to in respect of that blow; and they assessed such damages at 1*s*.; and, subject to a motion to enter a verdict for the plaintiff on that ground, they found a general verdict for the defendant.

Wallinger now moved accordingly.—The plea professes only to answer an assaulting with the stick; but an assault does not amount to a battery, which is charged in the declaration to have been committed with the stick. The justification, therefore, is incomplete. [*Parke*, B.—There is no allegation in the declaration of an assault with the stick, *simpliciter*. Is not the plea merely an informal mode of pleading to the battery?] In all the books, a distinction is taken between an assault and a battery; the former is no more than *inchoate*, the latter *actual*, violence.

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In *Page* v. *Creed* (*a*), the assault was justified, and the battery denied; in *Smith* v. *Neesam* (*b*), where the Judge certified that an *assault* was proved, that was held insufficient to give the plaintiff costs under *22 & 23 Car. 2.* [*Parke*, B.—But here is no charge of *inchoate* violence; must not the plea then be taken to be a justification of *actual* violence?] The plea cannot be construed as the defendant would have it, without confounding a battery and an assault, or introducing a word, or at least a stop; the natural and grammatical construction is in favour of the plaintiff. If it be doubtful, it must be taken most strongly against the pleader.

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Lord ABINGER, C. B.—I think the utmost that can be made of the argument is, that on special demurrer it might have been urged that the plea is informally pleaded only to the assault; whereas every battery includes an assault. But it is in substance an answer, because the plaintiff only charges an assault consisting of beating and striking.

PARKE, B.—If the breath be suspended after the word "plaintiff," the same construction may be given to the sentence as if the word "and" were there; and it appears to have been a mere clerical error in omitting that word. It is clear the defendant meant to justify the battery with the stick as well as the assault.

Rule refused.

(*a*) 3 T. R. 391. (*b*) 2 Lev. 102.

EDGE *v.* SHAW and Wife.

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An order was obtained for a trial before the sheriff under the Writ of Trial Act. The bill of particulars claimed 16*l.* 10*s.* 8*d.* The writ of summons, when produced in evidence, appeared to be indorsed for 58*l.* After verdict for the defendant, the Court, in directing a new trial on the ground of misdirection, gave the plaintiff leave to amend the writ of summons by reducing the indorsement to 16*l.* 10*s.* 8*d.*, without applying to a judge.

THIS was an action to recover the sum (as stated in the particulars) of 16*l.* 10*s.* 8*d.*, for goods supplied to the female defendant before her marriage. Plea—the general issue. The cause was tried before the under-sheriff of *Middlesex*, and the defendants had a verdict. *Humfrey* obtained a rule *nisi* for a new trial, on the ground that evidence had been stated to the jury which was properly admissible only under a plea of payment; and also, that the sheriff had no jurisdiction; it appearing from his notes of the evidence, that the writ of summons, when produced, appeared to be indorsed for 58*l.*

Archbold shewed cause, and argued, that as the writ was put in by the plaintiff, it might be taken that he obtained the order to try before the sheriff; and therefore he ought not now to be permitted to say that it was not a proper cause to be so tried.

Humfrey, contrà, contended, that the plaintiff was clearly entitled to a verdict on the evidence; and also that the sheriff had no jurisdiction to try the case at all. [*Alderson*, B.—The sheriff has nothing to do with it; he tries the case because it is sent to him. The application should have been to amend the writ.] Perhaps the Court will now amend it.

The Court made the rule absolute for a new trial, giving the plaintiff leave to alter the writ of summons, by reducing the indorsement to 16*l.* 10*s.* 8*d.*, without applying to a judge; the defendants being also at liberty to plead payment.

Rule accordingly.

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Where a verdict has been found with damages in an action of defamation for words imputing felony, the Court will not stay the proceedings, or grant a new trial, on the ground that, since the trial, the plaintiff has been convicted and attainted of the same felony; *a fortiori* where the defendant has been examined as a witness upon the trial of the indictment.

The Court will not interfere upon motion to give that relief to which it is suggested that the parties applying would be entitled under an *auditâ querelâ*, unless, upon the facts appearing on the affidavit, it is clear that the party would be entitled to such remedy.

Where a defendant is entitled, as against the plaintiff, to be relieved from a verdict obtained against him, the Court will not abstain from interfering on the ground of the lien of the plaintiff's attorney upon the verdict for his costs.

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THIS was an action of slander, for words spoken by the defendant, imputing that the plaintiff had feloniously stolen certain bullocks belonging to him, the defendant. Plea—not guilty. At the trial before *Patteson*, J., at the last assizes for the county of *Cornwall*, the plaintiff recovered a verdict with 60*s.* damages.

In *Easter* Term last, *Erle* moved for a rule *nisi* for a new trial, or why the proceedings should not be stayed, upon affidavits stating, that, subsequently to the trial of the cause, the plaintiff had been indicted on the prosecution of the defendant at the general quarter sessions of the peace for the county of *Cornwall*, for stealing the bullocks in question; that, on the trial, the defendant was examined as a witness to prove the loss of the bullocks, but that the most material facts were proved by other witnesses; that the plaintiff was thereupon convicted, and sentenced to be transported for life. He contended that the defendant was entitled to bring a writ of *auditâ querelâ*, and that the Court would, in such a case, interfere summarily upon motion to stay the proceedings, citing *Wicket* v. *Cremer* (*a*). The Court granted a rule nisi, directing it to be served upon the Attorney-General.

The Crown declined to interfere, but cause was shewn by

Bompas, Serjt., and *Manning*, on behalf of the plaintiff's attorney.—The Court will not grant this application, unless they are satisfied, not only that an *auditâ querelâ* would lie, but that it would ultimately succeed. That is laid down in *2 Wms. Saunders*, 148 *a*. [*Alderson*, B.—

(*a*) 1 Ld. Raym. 439.

The same point also occurred in *Wicket* v. *Cremer*.]— An *auditâ querelâ* could not be supported in the present case, because the conviction being obtained upon the testimony of the defendant, the Courts would not allow it to be given in evidence. They will not allow a criminal proceeding to be used in a civil cause where the party himself has been examined as a witness in the criminal proceeding. *Bartlett* v. *Pickersgill* (*a*), *Rex* v. *Boston* (*b*), *Gibson* v. *M'Carty* (*c*). The declaration in the *auditâ querelâ* must state the guilt and the conviction of the party; and if denied by the plea, the guilt must be proved. [*Alderson*, B.—It would not be necessary to prove the guilt of the plaintiff, but only the fact of the conviction having taken place.] Still the defendant would obtain the benefit of his own testimony, upon which the conviction was founded; and the proof of the property in the bullocks in question was as material as the felonious taking. If a conviction so obtained were held admissible, it would be a strong inducement to persons to perjure themselves on the trial of prosecutions. [*Alderson*, B.—In *Blakemore* v. *Glamorganshire Canal Company* (*a*), this subject was lately considered by this Court, and the reason why judgments in criminal proceedings were held not admissible in civil proceedings was stated to be, because they were *res inter alios actæ*.] *Secondly*, the attainder does not divest the plaintiff's right to the damages. Undoubtedly, all debts due to the felon, and all his choses in action, and his judgments, vest in the Crown on attainder; but the rule is otherwise in the case of what is no debt, but merely unliquidated damages. If there had been a judgment in the present case, it might have vested in the Crown; but although the amount of damages has been brought to a degree of certainty by the verdict of the jury,

(*a*) Stra. 577.
(*b*) 4 East, 572.
(*c*) Ca. Temp. Hardw. 311.
(*d*) See ante, 139.

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yet it must pass *in rem judicatam*, to constitute a debt. *Bullock* v. *Dodds* (*a*). That case was decided on the distinction, as to what vested in the Crown on attainder, between debts and choses in action, and cases of tort, where the damages do not vest in the Crown until they have passed *in rem judicatam*. The effect of an attainder on the personal property of a felon was there much considered, but no authority was cited to shew the right of the Crown to damages for personal injuries sustained by the felon; but it is expressly stated, that, in outlawry for felony, the right to damages is not forfeited; and the rights of the parties are the same in attainder for felony as in outlawry. *Thirdly*, the personal disqualification of the plaintiff cannot now be objected to. When the action is brought by a party who has been attainted of felony, or outlawed for felony, the defendant may plead either in abatement or in bar, if the action is brought for a debt, because the debt is vested in the Crown; but if brought for tort or trespass, the objection can only be pleaded in abatement, in respect of the disability of the person, and not in bar, because the right is not vested in the Crown, but remains in the plaintiff. Being matter in abatement only, it is not sufficient to support an *auditâ querelâ*. The Court will not grant relief upon motion for matter which is the subject of an *auditâ querelâ*, unless the remedy by *auditâ querelâ* be quite clear and undeniable. Here, if an *auditâ querelâ* were brought, many questions upon the law of forfeiture might be raised upon the record, which it would be consistent neither with convenience nor with justice to dispose of in a summary way upon motion. *Bullock* v. *Dodds*, and the cases there referred to (*b*).

Erle, and *W. C. Rowe*, in support of the rule.—It is

(*a*) 2 B. & Ald. 258.

(*b*) Ibid. 270. See also Gilb. C. P. 205; 2 Roll. Abr. 195. *Batty* v. *Fay*, Ridgw. Irish Term Rep. 511.

immaterial that this conviction was obtained partly on the evidence of the defendant. In an *auditâ querelâ*, the pleadings would set out the record of the conviction, and that could only be disputed by the plea of *nul tiel record;* and upon an issue raised by that plea it would only be necessary to produce the record, and no inquiry could be entered into as to the evidence upon which it proceeded. As to the cases of perjury, where the conviction has been held inadmissible in a cause in favour of a witness, upon whose testimony the conviction was obtained, they rest upon a peculiar ground, because there the conviction was sought to be used to disprove the answers on which the perjury was assigned; and, in effect, to use it as evidence of the falsehood of the answers. In this case, it is only proposed to use the record of conviction to prove the fact of the conviction having taken place. *Secondly,* as to the objection that the plaintiff's interest in the damages does not vest in the Crown, there is no authority for the distinction which has been taken between the right to unliquidated damages, and debts and choses in action. In *Hawkins's Pleas of the Crown* (*a*), it is laid down, that "all things whatsoever, which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to forfeiture." This must be considered in the same light as if judgment had been entered up, as that would follow as a matter of course. Besides, attainder is not only retrospective, but prospective also in its effects, and would, therefore, reach the judgment signed after it. *Bullock* v. *Dodds.* If the plaintiff's right to execution is gone, his attorney cannot be in a better situation, and the Court will not interfere to assist him. *George* v. *Elston* (*b*).

Cur. adv. vult.

(*a*) 2 Hawk. P. C. c. 49, s. 18. See also Bacon's Abr. Forfeiture, B.

(*b*) 1 Bingh. N. S. 513; 1 Scott, 518, S. C.

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The judgment of the Court was afterwards delivered by—

BOLLAND, B.—This was an application to stay all the proceedings in this cause. The action was tried at the last *Cornwall* assizes, before my brother *Patteson*. The declaration complained of the defendant having spoken words of the plaintiff, imputing to him the commission of a felony. The defendant pleaded the general issue only; and on the trial the plaintiff had a verdict, with 60*s*. damages.

Subsequently to this trial, the plaintiff has been tried and attainted, upon a charge made against him by the defendant, and at that trial the defendant was examined as one of the witnesses for the prosecution. Upon these facts disclosed by the affidavits, the defendant applied for and obtained the present rule, and the Court directed that it should be served on the Attorney-General. It now appears that the Crown declines to interfere on either side; and the question is, whether the attorney for the plaintiff, on behalf of whom cause has been shewn, is to be deprived of his chance of obtaining the fruits of the verdict, by the present rule being made absolute.

We think that he is in no better situation than his client would be; the lien of the attorney depends on the right of the client to judgment. Where the client is entitled to it, as against the opposite party, the Court permits the attorney to carry on the suit for his own benefit, even where the client declines to do so himself; but where there is no collusion, and the client, either by his own act, or by the act of the law, is deprived of the means of further enforcing his claim against the opposite party, the lien of the attorney is altogether at an end. If, therefore, we were clearly satisfied that the plaintiff in this case was in that situation, it would be proper to grant the present application.

Now it is said that he is so, because the defendant has a right to sue out a writ of *auditâ querelâ*, and to de-

prive the attorney, by so doing, of the power of taking out execution under the judgment, when signed. And there is no doubt that the Courts have laid it down, that where a defendant is entitled to such redress by writ of *auditâ querelâ*, they will give relief by motion, in order to prevent the necessity for such a writ. But it is also laid down, that such cases must be clear; for the Court, by granting such summary relief, precludes the party from the chances of the failure of proof when the facts are properly investigated, and the benefit of the judgment of a court of error on any question of law arising therefrom. It is on this ground, therefore, that we think the Court ought not to grant this application. In the first place, it may be very questionable how far, in the absence of any active interference on the part of the Crown, the defendant will be enabled effectually to pursue his redress by writ of *auditâ querelâ;* and, in the next place, there are several questions relating to the law of forfeiture, ingeniously put by the learned counsel, Mr. *Manning*, in shewing cause, which may well deserve consideration. And lastly, although this Court entertains no doubt, that, for the purpose of proving the fact of the attainder, the record of conviction would be admissible evidence in a writ of *auditâ querelâ*, even though the defendant was a witness in the prosecution on which the plaintiff was convicted; yet we do not think it right, in this case, which is an application to the extraordinary interference of the Court, to grant summary and conclusive relief under such circumstances, and to lend our assistance to a party who has, to a certain extent at least, been a witness in his own cause. Upon the whole, therefore, we think that this rule must be discharged, and the defendant left to his remedy by writ of *auditâ querelâ.*

Rule discharged.

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JOHN REAY, JOHN REAY the Younger, and HENRY REAY, *v.* WALTER RICHARDSON.

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To a declaration on three bills of exchange, the defendant pleaded, that he was also indebted to *E. F.*, and to divers other persons, in divers other sums of money, of which the plaintiffs had notice; and that afterwards, and before the said bills became due, and whilst he was so indebted to the said *E. F.*, and the said other persons, he, the defendant, became insolvent, and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce, the other creditors of the defendant to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the said plaintiffs, half the amount of the said bills, when the same respectively became due, the said plaintiffs agreed to accept a composition of one half of the amount of the bills as they became due; and that afterwards the said agreement, so made and entered into by the plaintiffs, was, by the defendant, with their knowledge, and by their direction, represented and made known to the said *E. F.*, so being such creditor as aforesaid; who thereupon, in consideration of the premises, and in faith of that agreement, was lured and induced to accept that composition; and that he, the said *E. F.*, had not at any time since recovered or received, or sought to recover or receive, any greater or other sum than half the amount of his said debt:—*Held*, in arrest of judgment, that this plea was bad, inasmuch as it did not shew that all, or the great body of the defendant's creditors, had come into the arrangement, and agreed to take the composition.

In order to prove the agreement stated in the plea, the defendant put in a letter from one of the plaintiffs, containing the terms of the agreement for the composition:—*Held*, that evidence of a previous conversation, when the plaintiff made inquiries as to what the other creditors were likely to do, was admissible to shew the motive which induced him to write the letter, and the intention with which the agreement was entered into.

ASSUMPSIT by the drawers and payees against the acceptor, to recover the amount of three bills of exchange.

The defendant pleaded, that, before the making of the agreement thereinafter mentioned, the plaintiffs had drawn four several bills of exchange (setting them out) upon the defendant, which he had accepted; that the plaintiffs had also drawn, and the defendant had accepted, the bills of exchange mentioned in the declaration; that the plaintiffs had also drawn four other bills of exchange (setting them out) upon the defendant, which were accepted by him. The plea then alleged, that heretofore, and before and at the time of the making of the said agreement between the plaintiffs and the defendant—to wit, on the day and year next hereinafter mentioned—he, the said defendant, was also indebted to one Sir *William Henry Richardson*, Knight, in a very large sum of money, to wit, the sum of 2450*l.*, and also to divers other persons in divers other sums of money, amounting in the whole to a very large sum of money, to wit, the sum of 20,000*l.*, of which the plaintiffs then had notice; and that afterwards, and before any or either of the said bills of exchange so

accepted by the said defendant as aforesaid, and in this plea mentioned, had become due and payable, according to the tenor and effect thereof, and whilst the said defendant was so indebted to the said Sir *William Henry Richardson* and the said other persons thereinafter mentioned, to wit, on &c., the said defendant was in insolvent circumstances, and unable fully to pay and discharge the amount of the said debts so due and owing by him as aforesaid, and was not, nor would have been able to pay and discharge in full the amount of the said several and respective bills of exchange so accepted by him, as therein before mentioned, as the same would respectively become due and payable, or of any or either of them; of all which premises the said plaintiffs then had notice; and thereupon, in consideration of the premises, and with the view and intention of inducing and of enabling the said defendant to induce other persons, being creditors of the defendant, to accept and receive respectively a certain small sum of money, to wit, one half of the amount of their respective debts, in full satisfaction and discharge of the same debts respectively; and also in consideration that the said defendant would pay to the said plaintiffs half the amount of the said several and respective bills of exchange so drawn by the said plaintiffs, and accepted by the said defendant, as therein before mentioned, as and when the same bills should respectively become due, the said plaintiffs then agreed with the defendant to accept and receive payment of one half of the amount of the said several and respective bills of exchange, as and when the same should respectively become due, in full satisfaction and discharge of the same bills of exchange respectively, and of the sum of money in which the defendant was or would become indebted to the said plaintiffs by reason thereof. And the said defendant, in consideration of the premises, then agreed to pay the said plaintiffs one half of the amounts of the said several respective bills of exchange,

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in manner aforesaid. And that afterwards, and before any of the said bills of exchange became payable, to wit, on the day and year aforesaid, the said agreement, so made and entered into by the said plaintiffs with the said defendant as aforesaid, was, by the said defendant, with the knowledge and consent and by the direction of the said plaintiffs, represented and made known to a certain other person, then being a creditor of the said defendant, to wit, to the said Sir *William Henry Richardson*, so being such creditor as aforesaid; and thereupon, in consideration of the premises, and upon the faith of the said plaintiffs having made and entered into such agreement with the said defendant as aforesaid, he, the said Sir *William Henry Richardson*, so being such creditor as aforesaid, was lured and induced to agree, and did then agree with the defendant, to accept and receive payment of one half of the said debt, so due and owing to him, the said Sir *William Henry Richardson*, as aforesaid, in full satisfaction and discharge of the same debt; and the defendant, in consideration thereof, then promised the said Sir *William Henry Richardson* to pay to him such one half of his said debt, when thereunto afterwards requested. And the said Sir *William Henry Richardson*, by reason of the premises, hath not at any time since recovered or received, or sought to recover or receive, of or from the defendant, any greater or other sum than one half of the amount of his said debt; of all which premises the plaintiffs, before any of the bills of exchange in this plea mentioned became due and payable, and before and at the time of the commencement of this suit, had notice. And the defendant further saith, that before and at the time of the commencement of this suit, the said several and respective bills of exchange in this plea firstly mentioned, and the three latter whereof are the said bills in the said declaration mentioned, had alone become or were due or payable; the remaining four of such bills, or any or either of them,

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not having arrived at maturity, or become due or payable, according to the tenor and effect thereof, at the said time of the commencement of this suit. And the defendant further saith, that he, the defendant, did, in pursuance of the said agreement so entered into between him and the plaintiffs as aforesaid, well and truly pay to the plaintiffs one half of the amount of the said several and respective seven bills of exchange in this plea firstly mentioned, in full satisfaction and discharge thereof, as and when and on the respective days and times on which the same seven bills of exchange respectively became due and payable, according to the tenor and effect thereof, and of the several and respective sums of money secured thereby. And the defendant always, from the time of the making of the said agreement between the plaintiffs and the defendant, to the time of the commencement of this suit, was ready and willing, and still is ready and willing, to observe and perform the same agreement in all respects, so far as the same was or is to be observed or performed on the part of the defendant; of all which the plaintiffs have always had notice. Verification.

Replication.—That the plaintiffs did not, with the view or intention in the said plea in that behalf mentioned, agree with the said defendant to accept or receive payment of one half of the amount of the said several and respective bills of exchange so drawn by the said plaintiffs, and accepted by the said defendant, as in the same plea mentioned, as and when the same bills respectively became due, or of the sum of money which the defendant was or would become indebted to the said plaintiffs by reason thereof, in manner and form as the defendant has above in the same plea alleged.

At the trial before Lord *Denman*, C. J., at the last *Spring* Assizes for the county of *Surrey*, it was proved by one *Read*, a witness on behalf of the defendant, that whilst the bills drawn by the plaintiffs, and accepted by

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the defendant, and which were in the plaintiffs' hands, were running, he had called upon the plaintiffs, at the request of the defendant, and had stated to them that the defendant was insolvent, and applied to them to know if they would take a composition. He left a statement of the defendant's accounts with one of the plaintiffs, and called again the following day, accompanied by the defendant, when they had an interview with the same person, who inquired what the other creditors were willing to do; and he was informed, that there was no doubt they would come into any arrangement which he made. He then agreed to accept a composition of ten shillings in the pound, and, at their request, wrote the following letter, addressed to the witness:—"Sir, I hereby agree, that, upon payment of half the amount of our bills upon *Richardson,* as they become due, that is to say, ten shillings upon our debt, to give him a full and complete discharge for the same.—*J. Reay.*" It was objected at the trial, that as this letter contained the agreement entered into by *J. Reay,* evidence of the previous conversation, and of the inquiries as to the other creditors, was not admissible. The Lord Chief Justice, however, overruled the objection, and the jury found a verdict for the defendant.

In *Easter* Term last, *Platt* moved for a new trial, or for judgment *non obstante veredicto.* The evidence of the conversation and of the inquiries as to the other creditors, previously to the agreement being entered into, ought not to have been admitted, as the effect of it was to add other terms and conditions to the agreement which the plaintiffs had entered into. [*Parke,* B.—The evidence was not given for the purpose of adding to or qualifying the terms of the agreement, but to shew with what view the paper was written—viz. to be shewn to the other creditors. There are two objects for which it might have been given; either to bind the plaintiffs to the composition, or for the purpose of being shewn to

the other creditors. Then is not the conversation evidence to shew the intention with which the paper was given, and the object for which the agreement was made? The effect of the conversation would be for the jury, as to which of the two objects the parties had in view. I think the jury would have no difficulty in saying, that the intention with which it was given was, that it might be shewn to Sir *W. H. Richardson* and the other creditors.] In *Lewis* v. *Jones* (*a*), it was held, that evidence of a conversation was inadmissible, when it was proposed to shew a representation made to a creditor who had signed an agreement for a composition, that a surety would still be liable, and that, unless all the other creditors would sign it, it would be void. [*Parke*, B.—That case is not applicable to the present. I entertain not the slightest doubt, that the conversation was evidence to shew the intention with which the agreement was entered into.]—He then applied for judgment *non obstante veredicto*, on the ground that the plea was no answer to the action; and upon this the Court granted a rule *nisi*.

Channell and *Petersdorff* now shewed cause. One objection here is, that the agreement to take the composition of ten shillings in the pound was not binding on Sir *W. H. Richardson*. A second objection is, that Sir *W. H. Richardson* has not sustained any prejudice; and that there is no sufficient consideration for the plaintiffs' promise to render it binding upon them. It may be admitted, that an agreement by a creditor to take less than the full amount due, is not binding upon him. But where the creditor obtains an additional security for his debt, or induces other creditors to enter into an agreement to take a composition, he cannot afterwards maintain an action to recover more than he has already agreed to

(*a*) 4 B. & C. 506; 6 D. & R. 567.

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accept. *Steinman* v. *Magnus* (*a*); *Fawcett* v. *Gee* (*b*). The plea here states, that upon the faith of the plaintiffs having entered into this agreement, Sir *W. H. Richardson* was *lured and induced* to agree, and did agree, to accept and receive one half of his debt, in full satisfaction for the same. That is a prejudice to Sir *W. H. Richardson*, and is a sufficient consideration for the plaintiffs' promise. [Lord *Abinger*, C. B.—The plea does not state that the other creditors came in; if they did not come in, then Sir *W. H. Richardson* is not bound; and if he is not bound, clearly the plaintiffs are not.] It is not necessary that all the creditors should come in. It was decided in *Woods* v. *Roberts* (*c*), that if *one* creditor, by undertaking to discharge his debtor, induces *another* creditor to discharge that debtor, on receiving a compensation for his debt, he cannot afterwards recover from that debtor. In that case, only one creditor is mentioned as having been induced by the other to come into the arrangement. [Lord *Abinger*, C. B.—That must have been decided on the particular facts of the case, and there must have been evidence that the other creditors came in. The object of such an agreement is, that the debtor shall be a free man, liberated from *all* claims upon him. If that object is not effected, with what reason can it be decided that one or two creditors who enter into the arrangement shall be entitled only to a composition, while all the other creditors are to receive the full amount of their debts? I do not say that *all* the creditors must enter into the arrangement, but that it is necessary that a sufficient number of them to satisfy the object, should do so. *Gurney*, B.—The plea states the agreement to have been entered into with the view of inducing the other creditors to accept the composition, and then states that one creditor agreed; but it does not even say that any other creditor was ever ap-

(*a*) 11 East, 390. (*b*) 3 Anstr. 910. (*c*) 2 Stark. 417.

plied to to come in.] There is no such condition stated in the plaintiffs' agreement, and therefore the defendant was not obliged to do so. It is submitted, that if one creditor is induced to come in, and suffers a prejudice, it is a sufficient consideration. There is no one case in which it is shewn, that all the creditors came in. [Lord *Abinger*, C. B.—I own I should have been surprised if a Judge at *Nisi Prius* had held, that if two out of twenty creditors had agreed to accept a composition, it was binding on them, if the others did not come in.] In *Good* v. *Cheeseman* (*a*), the plaintiff and three other creditors entered into an agreement to accept a composition; and yet it was held, that they were each of them bound by it, though it did not profess to be a general agreement between all the creditors. *Littledale*, J., there says, "It would be unjust, that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under the persuasion that none of the parties to the memorandum would proceed against the defendant." Lord *Tenterden* thought, that this, though not strictly an accord and satisfaction, was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance. If it is to be laid down as a rule, that all or a majority of the creditors shall sign the agreement to render it binding, when is it to become so? When the first, second, or third creditor signs, or not until all have signed? If the latter were held necessary, and five or six of the creditors signed the agreement, they would not be bound during the interval between their signing and that of all the other creditors.

Platt, and *C. R. Turner*, *contrà*, were stopped by the Court.

(*a*) 2 B. & Adol. 328.

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Lord ABINGER, C. B.—I am by no means prepared to say, that, if several creditors were to sign an agreement for a composition, on the faith of the others coming in, and they afterwards repented before the others came into the arrangement, it would still be binding on them, and that there could be no *locus pœnitentiæ* for them. But it is unnecessary to decide that in the present case. It is quite consistent with that which is stated in this plea, that the plaintiffs, on application, agreed to enter into this arrangement for a composition, which was to be made known to Sir *W. H. Richardson* and all the other creditors, with a view to induce them to enter into the arrangement; and that the other creditors, on being applied to, refused to enter into the arrangement. The consideration for the plaintiffs entering into such an agreement would be the benefit derived to the defendant from his being exonerated from the claims of the general body of his creditors: but if that object is not obtained, why are the plaintiffs and Sir *W. H. Richardson* to be bound to take the composition? It is consistent with this plea, that every other creditor refused to enter into the arrangement; and if that be so, neither Sir *W. H. Richardson* nor the plaintiffs can be bound by it. Judges and juries are disposed to look with a favourable eye upon agreements of this nature; but I do not know of any case in which it has been held, that, after such an agreement has been entered into by some of the creditors, and a considerable creditor has stood out, the others who had signed it were bound. If, indeed, the main object of the agreement has been obtained, by the principal part of the creditors assenting to it, but some one creditor has refused his assent, it *may* be binding upon the others. Upon that, however, I offer no opinion, though I have always considered that there ought to be evidence of the assent of all the creditors to the arrangement. Upon this plea it only appears, that the plaintiffs and another creditor

entered into this agreement with a view to induce the other creditors to consent to the composition; but it does not appear that that object was effected. The condition, therefore, upon which they entered into the agreement does not appear to have been performed; and the plea is, therefore, insufficient.

BOLLAND, B.—It appears on the plea, that there were other creditors, who it was intended should become parties to the agreement; but the plea does not state that they did so. The consideration for the agreement, therefore, failed, and neither of the parties are bound.

ALDERSON, B.—I am of opinion that this plea is bad. It states, in substance, that, in order to induce the other creditors of the defendant to come into an arrangement, the plaintiffs agreed to accept ten shillings in the pound on their debts. Then it only states, that one other creditor was induced to agree to accept the composition; not that he has accepted it in full satisfaction of his debt, but that he has agreed to accept it only. That is an agreement which is not binding upon him. It seems to me, that the plaintiffs contemplated the assent of all the creditors to the composition, and not the assent of one only.

GURNEY, B.—It is clear, that the object which all the parties had in view has not been attained. The creditors did not all consent. The reason why the case of one creditor refusing to come into an arrangement of this nature does not often occur, is, because the agreement usually contains a clause, that it shall not be binding unless all the creditors above a certain amount come into the arrangement.

Rule absolute.

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HUZZEY *v.* FIELD.

Where there is an ancient ferry from *A.* to *B.*, which leads to a public highway, and another constructs a landing-place at *C.*, a short distance from *B.*, and carries passengers over from *A.* to *C.*, from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, does not preclude persons from using the river as a public highway, from or to all the towns or places upon [illegible] banks [illegible] are [illegible] line leading from one *terminus* of the ferry to the other.

ACTION upon the case for the infringement of a ferry. The *first* count of the declaration stated, that the plaintiff was possessed of a certain ancient ferry, called *Burton Ferry*, otherwise *Pembroke Ferry*, across and over a certain branch of a certain haven, called *Milford Haven*, for the conveying and ferrying over and across the said branch of the said haven, backwards and forwards within the said ferry, all persons, &c., in boats kept for that purpose by the plaintiff; he, the said plaintiff, taking and receiving reasonable freights and ferryages to him of right payable therefore. It then averred that the defendant, intending to deprive him of the profits of his ferry, wrongfully carried and conveyed and ferryed, for hire, in certain boats, divers persons, &c., over and across the said branch of the said haven, at and within the said ferry, whereby the plaintiff had been and was greatly injured in the enjoyment of his said ferry. The *second* count was similar to the first, but calling the ferry an ancient ferry (without giving any name to it) across *Milford Haven*, and stated as a breach that the defendant had ferried over, &c., *at or near* to the said last-mentioned ferry. The *third* was similar to the second, omitting the keeping of boats by the plaintiff. The *fourth* count stated that the plaintiff was possessed of a certain ancient ferry, called *Nayland Ferry*, across and over *Milford Haven*; and alleged that the defendant carried and conveyed passengers over and across the haven, and upon the part of the said haven where the said plaintiff had such ferry, over, upon, within,

[illegible] owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master:—*Held*, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.

and across the same. The fifth count called the ferry *Pembroke Ferry*, and the sixth *Burton Ferry*. The defendant pleaded not guilty (*a*).

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The cause was tried before *Parke*, B., at the last *Summer* Assizes for the county of *Pembroke*, when it appeared that the plaintiff was the lessee, under Sir *John Owen*, Bart., of a horse and foot ferry, called *Pembroke Ferry*, across *Milford Haven*, from a place called *Burton* to a point on the opposite shore where the road from *Pembroke* town terminated, and also of another ferry from a place called *Nayland* to the same point. The town of *Pembroke* is at the distance of two miles from the shore. In consequence of an extensive dock-yard having been constructed lower down the haven, called *Pater Dock*, a new road had been made from *Pembroke* town to *Pater Dock*, and which road passed by or near a place called *Hobbes's Point*, where a hard or pier had been constructed, and which was about half a mile lower down on the haven than the *Pembroke Ferry-house*. It appeared that the defendant had for some time kept a boat on the haven, and had frequently carried passengers from *Nayland* to *Pater Dock;* but on one occasion, when the defendant's boy was plying at *Nayland*, a person named *Llewelyn* got into the defendant's boat, and, after the boy had pushed off from the shore, desired to be taken to *Hobbes's Point*, saying he was going to *Pembroke*. Since the new road had been made, it was nearer to go from *Nayland* by *Hobbes's Point* to *Pembroke*, than from *Nayland* by the *Pembroke Ferry-house*. One question in the cause was, whether the plaintiff's ferry extended from *Nayland* to *Pater Dock*, on the *Pembroke* side; but this the jury negatived. The plaintiff, however, contended that the defendant, by carrying a passenger from *Nayland* to *Hobbes's Point* to go to *Pembroke*, had, in point of law, infringed his ferry, and that he was entitled to a verdict. For the

(*a*) This was before the New Rules.

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defendant, it was contended, that there was nothing to shew either that this was intended as an infringement of the plaintiff's ferry, or that it was done in fraud of it; and even if it were, yet that it was an act done by the defendant's servant without authority, for which the defendant could not be made responsible. The learned Judge left it to the jury to say, whether the act had been done fraudulently, which they negatived. He then directed them to find for the defendant, but gave the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that these facts amounted, in point of law, to an infringement of the plaintiff's right. The Attorney-General having obtained a rule accordingly, cause was shewn in *Hilary* Term last by

John Evans, for the defendant.—There are two points for the opinion of the Court in the present case. 1st, Whether the defendant was liable for the act of his servant in carrying a passenger from *Nayland* to *Hobbes's Point*. 2ndly, Whether that was, in point of law, an infringement of the plaintiff's ferry from *Nayland* to the *Pembroke Ferry-house*. First, the defendant was not liable for the act of his boy. The boy was not authorized by his master to carry persons to *Pembroke* town by way of *Hobbes's Point*, but his employment was only to carry passengers to *Pater Dock*. He was, therefore, not acting within the scope of his general authority, and his master cannot be responsible for his act. Secondly, the act itself was not an infringement of the plaintiff's ferry, it not having been done fraudulently, or with an intention to infringe it. The question cannot depend upon the circumstance of this being a nearer route to *Pembroke* than by the plaintiff's ferry; for, suppose a new road were made, and *Pembroke* was so situated that it should become nearer to go by *Pater Dock* to *Pembroke*, is it to be said that it would be an infringement of the plaintiff's ferry to convey passengers from *Nayland* to *Pater Dock*? That

certainly is not the law; and it would be very inconvenient to the public if it were so. The case of *Tripp* v. *Frank* (*a*) is decisive of the present case. There Lord *Kenyon* said, "If certain persons, wishing to go to *Barton*, had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here, these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say, that no person shall be permitted to go to any other place on the *Humber* than that to which the plaintiff chooses to carry them." In the present case the jury have negatived any fraudulent intention. According to that decision, also, it appears that the plaintiff cannot be compelled to carry passengers to *Hobbes's Point*, for Lord *Kenyon* adds—"It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than *Barton:* then his right must be commensurate with his duty." That, as was said by *Ashhurst, J.*, in the same case, is decisive against the plaintiff.

Sir *J. Campbell*, Sir *W. Owen*, *Chilton*, and *E. V. Williams*, *contrà*.—First, the master was liable for the act of his servant, as it was clearly within the scope of his authority. The master kept a boat, which he used by his servant, and received the money which he earned; and when the boy received a passenger on board, and rowed him to *Hobbes's Point* to go to *Pembroke*, he committed an act for which his master was liable. It was not a wilful act done by him contrary to his master's directions, but it was an act done by him in the course of his ordinary employment. The master was therefore responsible. *Turberville* v. *Stampe* (*b*), *Bush* v. *Steinman* (*c*). It is not necessary to shew express orders given to the servant to do the particular act, to render the master liable. *Rex* v. *Almon* (*d*).

(*a*) 4 T. R. 666.
(*b*) 1 Lord Raym. 264.
(*c*) 1 Bos. & Pull. 404.
(*d*) 5 Burr. 2686.

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Secondly, this amounted to an infringement of the plaintiff's ferry. The plaintiff was bound to keep a boat to convey all passengers going from *Nayland* to *Pembroke*; and the right of ferry is co-extensive with such obligation. This passenger was going from *Nayland* to *Pembroke*, and the defendant, by carrying him to *Hobbes's Point*, to enable him to get to *Pembroke*, committed an injury to the plaintiff's right of ferry. The case of *Tripp* v. *Frank* is in reality an authority for the plaintiff, as it shews that a person who carries passengers near to an ancient ferry, either at a short distance above or below it, subjects himself to an action. This was not only near the line of the plaintiff's ferry, but may be said to have been on it, for a ferry is not a mathematical line from point *A.* to point *B.*, but must have some considerable extent on each side, otherwise it would be of no avail. The line therefore from *Nayland* to *Hobbes's Point* may be considered as the *Pembroke Ferry*. [Lord *Abinger*, C. B.—That might be true, if going to *Pembroke Ferry* meant *Pembroke* town. *Parke*, B.—This might have been an infringement, if the plaintiff was obliged to carry all persons going to *Pembroke* town]. If there had been a town on the south side of the haven, it would have been an infringement to have carried and landed persons a little lower down on the shore for the purpose of going there, according to the case of *Tripp* v. *Frank*; and this, it is submitted, was substantially the same. In *Tripp* v. *Frank*, the passengers were not going to *Barton*; but here this passenger was going to *Pembroke*, the place to which the plaintiff's ferry leads. The authorities on this subject are very few. In *2 Rolle's Abr.* 140, tit. *Nusans* (*G*) *pl.* 4, there is the following passage, for which the Year-Book *22 Hen.* 6, c. 14, is cited as an authority: "If I have a ferry by prescription, and another erects another ferry on the same river near to it, by which my ferry is injured (*empaire*), that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I

shall be grievously amerced;" and that passage is also referred to in *Com. Dig., Action on the Case for a Nuisance.* The next case is that of *Churchman* v. *Tunstall* (*a*), which appears, according to the report, to be against the proposition here contended for, because there a bill had been filed for an injunction by the farmer of a ferry against a person who had carried passengers over the river three quarters of a mile below the ferry, and it was held no infringement: but the reporter adds a query. [*Parke*, B.—That case is no authority, as there was afterwards a decree in that case by Lord *Hale* that the new ferry should be put down.] The case of *Blissett* v. *Hart* (*b*) is an authority to shew that where another person sets up a new ferry near an ancient ferry, the owner of the ancient ferry has his remedy by action. [*Parke*, B.—The case of *Tripp* v. *Frank* certainly does appear somewhat contradictory to *Blissett* v. *Hart* and the older authorities.] *Tripp* v. *Frank* seems to have been somewhat of a hasty decision; and it is to be observed that no authorities appear to have been cited. The proposition laid down in *Com. Dig.* as to ferries, immediately precedes the propositions as to markets, to which they are analogous. It is laid down, that, if a new market be set up within seven miles of an ancient market, on the same day, the law will intend it to be a nuisance, but if it be on a different day, it is a question for the jury whether it is a nuisance or not. It is held reasonable that every man should have a market within seven miles; that is, about one-third of a day's journey, computed at twenty miles. If it be true with respect to markets, that a person shall not be allowed to set up a new market within seven miles of an ancient market, the same principle is applicable to the case of ferries; and the principle as to the former is, that a new one shall not be set up where

(*a*) Hardres, 162. (*b*) Willes, 508.

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there is an ancient one, which is available within a reasonable distance. In this case, the plaintiff's ferry was equally available for the purpose for which the other was used, and if this were allowed, it would be a manifest injury to the plaintiff's ferry. It is laid down in *Blackstone's Commentaries* (*a*) that, "If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For, where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the King's subjects; otherwise he may be grievously amerced. It would therefore be extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen." In this case the plaintiff is bound to keep boats at *Nayland Ferry*, and he is therefore entitled to the corresponding advantages resulting from the exclusive right of ferry.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

Lord ABINGER, C. B.—This was an action on the case for the disturbance of the plaintiff's ferry over *Milford Haven*, tried before my Brother *Parke*, at *Haverfordwest*. It was claimed in the declaration in different ways; but the question reserved for the consideration of the Court arises on the count which complains of a disturbance of *Nayland Ferry*.

The plaintiff was the lessee, under Sir *John Owen*, of a ferry, called the *Pembroke* or *Burton Ferry*, across *Milford Haven*, which was the ordinary communication between *Pembroke* and *Haverfordwest*. He was also lessee, under the same gentleman, of another ferry from the same point, on the *Pembroke* side, to *Nayland* and back; there was no question as to the right of the plaintiff to

(*a*) Vol. 3, p. 219.

both these ferries. He claimed also a much more extensive right, that of ferrying all persons backwards and forwards over *Milford Haven*, within no very narrow limits; but this right was negatived by the jury on the trial.

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It appeared, however, that the defendant had, before the commencement of this suit, set up a boat to carry passengers from *Nayland* to the opposite side, and, amongst other places, to *Hobbes's Point*, more than half a mile from the *Pembroke Ferry-house*. At this place a hard or pier had been built, to improve the communication between *England* and *Ireland*, and a road made from thence to *Pembroke*, which communicated with the turnpike road from *Pembroke Ferry* to *Pembroke*, at a distance of more than half a mile from the ferry; and the way from *Nayland* to *Pembroke*, by *Hobbes's Point*, was shorter than by *Pembroke Ferry*. There was no town or vill between *Hobbes's Point* or *Pembroke Ferry*, and the junction of the new with the old road; and, I rather believe, none between that point and *Pembroke*, although that circumstance was not inquired into on the trial.

On one occasion, a boy in the service of the defendant, and in his boat, received a passenger on board at *Nayland*, who, after the boat had been shoved off the shore, informed him he was going to *Pembroke*, and desired to be put on shore at *Hobbes's Point*; and this was done.

The jury having found for the defendant on the other questions in the cause, these points were reserved for the consideration of the Court—1st, whether the defendant was responsible for this act of his servant; and, 2ndly, whether, if he was, the facts proved amounted to a disturbance of the plaintiff's right of ferry, the jury having negatived any fraud in fact on the part of the defendant or his servant.

A rule *nisi* having been granted for a new trial, the case was argued before my Brothers *Parke*, *Bolland*, *Gurney*, and myself.

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Upon the first point there is no difficulty. The servant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved. *Turberville* v. *Stampe* (*a*).

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The second point is one of a more doubtful nature, and has called for much consideration. It is quite clear, that a ferry is a franchise which none can set up without a licence from the Crown; and in the case of a ferry by prescription, a grant or licence is presumed. As early as in the Year-Book, *22 Hen.* 6, 146, it is thus laid down by *Paston*, "If I have of ancient time a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;" and *Newton* says, "the case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in ease of the common people, and it is inquirable before the sheriff in his tourn, and justices in *Eyre*." This proposition is quoted in *2 Roll.* 140 (G), *pl.* 4, *Com. Dig. Piscarry*, B., and *Action on the Case for a Nuisance*, and in most of the cases in which the rights of ferry have come in question.

In the case of *Churchman* v. *Tunstall* (*b*), in the *Exchequer*, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at *Brentford*, as it would seem, under the Crown, filed a bill for an injunction to restrain the defendant, who had lands on both sides of the *Thames*, three quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so. The bill was dismissed without costs; but the reporter adds a query as to the propriety of the decision; and even if it was right, it is no authority against the maintenance of an action on the case. The decision, however, appears to have been wrong; for, upon another

(*a*) 1 Ld. Raym. 265. (*b*) Hardres, 162.

bill filed in 1663, after the Restoration, a decree was made by Lord *Hale*, on the 18th of *June*, 14 *Car.* 2, in favour of the same plaintiff, that the new ferry should be put down.

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In *Blissett* v. *Hart* (*a*), the plaintiff recovered in an action on the case, against the defendant, for setting up another ferry over the same river, near the plaintiff's ferry, and ferrying over persons and horses over the same river, near the plaintiff's ferry, by which she was obliged to let it for less rent than before, and had been deprived of great part of the profit of it. On motion in arrest of judgment, the Court held the declaration to be good, and they said, that "a ferry is a franchise that no one can erect without a licence from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a licence, the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action. The franchise is the ground of the action (*b*)."

So far the authorities appear to be clear, that, if a new ferry be set up without the King's licence, to the prejudice of an old one, an action will lie; and there is no case which has the appearance of being to the contrary, except that of *Tripp* v. *Frank*, hereafter mentioned. These old authorities proceed upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he receives a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him in return for the benefit received; and secondly, that, if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profit of passengers, which he would otherwise have had, and which he has, in a manner, purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury; and the case is, in this respect, analogous

(*a*) Willes, 508. (*b*) Willes, 512, n.

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to the grant of a fair or market, which is also a privilege of the nature of a monopoly.

A public ferry, then, is a public highway, of a special description, and its *termini* must be in places where the public have rights, as, towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious.

For instance, if any one should construct a new landing place at a short distance from one *terminus* of the ferry, and make a practice of carrying passengers over from the other *terminus*, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first, and all the vills and towns to which that highway leads; there could not be any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not.

If such new ferry be nearer, or the boats used more commodious, or the fare less, it is obvious that all the custom must inevitably be withdrawn from the old ferry; and thus the grantee would be deprived of all benefit of the franchise, whilst he continued liable to all the burthen imposed upon him.

It does not follow from this doctrine, that, if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, as a public highway from or to all the towns or places on its banks, and obliges them,

upon all occasions, to their own inconvenience, to pass from one *terminus* of the ferry to the other. The case of *Tripp* v. *Frank* (*a*) decided otherwise; and it is not intended to question that decision. It was there held that the plaintiff, who had a right of ferry from *Hull* to the town of *Barton*, had no right of action against a person who carried passengers from *Hull* to *Barrow*, a place on the banks of the river, at some distance from *Barton*. But, suppose he had known that the passengers were going by that route to *Barton*, and that their sole object was to go there; or suppose that *Barton*, instead of being within a few hundred yards from the *Humber*, was a mile distant, and was the first town with which either ferry communicated, it would not follow, from that decision, that in such a case passengers might be landed at *Barrow*, for the sole purpose of going to *Barton*.

We have thought it right, in consequence of the course taken by the counsel in argument, to enter thus far into the general question, and to lay down these principles, that it may not be supposed that the decision to which we find ourselves obliged to come, can in any manner affect the plaintiff's right to the exclusive privilege of ferrying passengers who leave *Nayland*, with no other object than that of going to *Pembroke*.

But, fully admitting his right, we are of opinion, after much deliberation, and I may add, not without some hesitation, that there is no sufficient ground for making the rule absolute.

It is to be observed, that, between *Hobbes's Point* and the junction of the two roads that lead from that place and from *Pembroke Ferry* respectively to the town of *Pembroke*, there are intermediate points, to which the passenger *Llewelyn* might be going; though *Pembroke* was his ultimate object, it might not be his only object; and, if he

(*a*) 4 T. R. 666.

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had any particular view of convenience in making *Hobbes's Point* the place of his landing, which could not have been accomplished as well by landing at *Pembroke Ferry*, then, according to the principles laid down in the case of *Tripp* v. *Frank*, there would have been no evasion of the plaintiff's ferry. It is true, that the intentions of *Llewelyn* are left very uncertain upon the evidence; and it does not appear from the report, that the counsel on either side thought proper to elicit them by any inquiry. And if this had been the real question which the parties intended to try, the Court might have been disposed to direct a new trial. But one cannot fail to observe that the main questions of fact in difference were fully tried and disposed of by the jury, and that the point stated upon *Llewelyn's* evidence was laid hold of for no other purpose than that of recovering a verdict for the plaintiff at all events, after all the matters really in difference had been decided against him. The Court, therefore, is bound to look with strictness to the evidence, and not to allow the plaintiff any advantage from an uncertainty that he ought to have removed. It was incumbent on him to offer satisfactory proof that *Llewelyn* had no other object than to evade his ferry, and that the defendants were aware, and must have understood, that he had no other object. Now, the communication made by *Llewelyn* to the defendant's servant, after the boat had commenced her passage, is not inconsistent with his having some legitimate object in going to *Hobbes's Point*, besides that of going to *Pembroke*. The uncertainty, therefore, in which this point has been left by the evidence, makes it impossible to say that the facts proved amounted to a disturbance of the plaintiff's ferry; therefore the rule cannot be made absolute, to enter a verdict for the plaintiff. And we think that the plaintiff, in a case of this sort, is not entitled to a new trial, that he may amend his evidence upon an incidental point, upon which he left it too doubtful to be

properly submitted to the jury. The rule, therefore, must be discharged.

Rule discharged.

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STARLING *v.* COZENS and Others.

TRESPASS against four defendants.—The *first* count was for an assault and battery; the *second*, for taking a fishing-net. Plea—Not Guilty. The defendants justified taking the net, under the 7 & 8 *Geo.* 4, c. 29, s. 35, because the plaintiff was found fishing with it in a private river running through the ground of one of the defendants. At the trial, before *Parke*, B., the jury found the defendant *Cozens* guilty upon the first count, but acquitted him on the second count, and found a verdict for the other three defendants upon both counts. On the taxation of costs, the Master refused to allow the three defendants who were acquitted their costs, or to allow the costs of the defendant *Cozens*, on the second count, to be deducted from those to which he was liable on the first count. On a former day in this term, *Thesiger* obtained a rule to shew cause why the Master should not review his taxation, citing *George* v. *Elston* (*a*), and *Griffiths* v. *Kynaston* (*b*).

Wordsworth shewed cause.—The defendant *Cozens* is not entitled to have the costs of his witnesses on the second issue to be deducted from the costs to which the plaintiff was entitled on the first issue, because the witnesses were as necessary for him on the first issue, and the whole evidence went to shew that none of the defendants were guilty. *Richards* v. *Cohen* (*c*). [*Parke*, B. (having referred to his notes of the trial)—The evi-

In trespass against four defendants, the declaration contained two counts. One defendant was found guilty on the first count, but acquitted on the second, and the other three defendants were acquitted on both counts:—*Held*, that the defendant, who was found guilty on the first count, was entitled to have the costs of such of his witnesses as related to his defence to the second count, to be deducted from the plaintiff's costs; and that the other three defendants were entitled to a fourth share of the costs of the defence, unless it appeared that they had not employed the attorney, and that it must be taken *primâ facie* that they had done so.

(*a*) 1 Bingh. N. C. 513; 1 Scott, 518. (*b*) 2 Tyrw. 757.
(*c*) 3 Dow. Pr. Cas. 533.

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dence of one of the defendants' witnesses related only to the taking of the net. The master ought to have allowed the defendant *Cozens* the costs of his evidence, to be deducted from the plaintiff's costs.] Then, as to the other defendants, it does not appear that they employed the attorney, or had incurred any costs, and consequently were not entitled to be allowed extra costs.

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PARKE, B.—It must be taken *primâ facie*, that all the defendants employed the attorney to defend the action, and they would consequently all incur a portion of the expenses; and they would, therefore, each be entitled to a fourth of the costs of the defence. If it turns out that they did not employ the attorney, then they would not be so entitled. It was laid down by *Bayley*, B., in *Griffiths* v. *Kynaston* (*a*), that the old practice of allowing only 40*s.* costs to defendants who have been acquitted, was not correct; but that they were entitled to an aliquot proportion of the costs, according to the number of defendants on the record. *George* v. *Elston* is an authority to shew that the costs of the defendants who are acquitted may be set off against the plaintiff's costs, and damages against the one found guilty. The defendant *Cozens* will be entitled to costs on the second count as between attorney and client, it being provided by the 7 & 8 *Geo.* 3, c. 29, s. 75, that, in any action brought for any thing done in pursuance of that act, if a verdict shall pass for the defendant, &c., he shall recover his full costs as between attorney and client. The Master must inquire whether the attorney was employed by the defendants who were acquitted.

Rule absolute (*b*).

(*a*) 2 Tyrw. 757. (*b*) See *Griffiths* v. *Jones*, *ante*, p. 333.

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WHITEHEAD *v.* PRICE and Others.

In a policy of insurance against fire on certain cotton mills, millwrights' work, including standing and going gear therein, engine-house adjoining and the steam-engine therein, &c., it was recited that, the "buildings were brick-built and slated; warmed exclusively by steam, lighted by gas, &c., worked by the steam-engine above mentioned; in the tenure of one firm only, standing apart from all other mills, and '*worked by day only:*'"—*Held*, that the words "worked by day only," referred to the mill only, and not to the steam-engine or any part of the gear; and that it was no breach of the

COVENANT.—The declaration stated, that heretofore, to wit, on the 23rd *March*, 1833, by a certain deed-poll, being a policy of insurance, then made and sealed with the respective seals of the defendants, being directors of a certain company called the *Protector Fire Insurance Company*, (*profert in curiam*), after reciting that the plaintiff and *John Mayall* (who died before the commencement of the suit) had paid the sum of *32l.* to the directors of the *Protector Fire Insurance Company* in *London*, and had also agreed to pay the sum of *32l.* yearly, on the 25th day of *March*, during the continuance of the said policy, for insurances from loss or damage by fire, the property thereby described not exceeding the sum specified under each head of insurance; namely, on the larger end of a cotton mill, called *Union Mill* (*A*), 1800*l.*; on millwrights' work, including the standing and going gear therein, 200*l.*; on the smaller end of the said cotton mill (*B*), 900*l.*; on millwrights' work, including the standing and going gear therein, 100*l.*; on the engine-house, adjoining the larger end of the said mill, and being under the same roof therewith (*C*), 400*l.*: on the steam-engine therein, 350*l.*; on the warehouse, communicating with the said mill by a staircase, the upper room of which was used for blowing and scutching cotton in, 250*l.*: and reciting that the aforesaid buildings were brick-built and

policy that the steam-engine was kept going by night, and that some parts of the machinery were turned by it, the cotton mill not being worked except by day only.

One of the conditions indorsed on the policy provided, "That every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially indorsed on the policy, so that the risk might be fairly understood; if not so expressed, or if any misrepresentation should be given, &c., or if, after the insurance should be effected, the risk should be increased by the erection of any stove, the carrying on any hazardous trade, operation, or process, or hazardous communication, the insured would not be entitled to any benefit under the policy." In an action of covenant on this policy by the assured, the defendants pleaded "That, after the making the policy, the steam-engine, in the said policy of assurance mentioned, was worked by night and not by day only, whereby the risk in the said policy of assurance was increased:"—*Held*, that the plea was bad, and that the plaintiff would be entitled to judgment, notwithstanding a verdict were entered up on this plea.

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slated, situate near *Oldham*, in the county aforesaid; warmed exclusively by steam; lighted by gas from the *Oldham Gas Light Company's* works, which gas, in the blowing and scutching room, was inclosed in glass; worked by the steam-engine above mentioned, in tenure of one firm (Messrs. *Bowden Gartside & Co.*) only, standing apart from all other mills, and worked by day only; and that the marks had reference to a plan of the building on the order for the said insurance; the said defendants did covenant and agree with the said *James Whitehead* and *John Mayall*, that, from the 25th *March*, 1833, to and inclusive of the whole 25th *March*, 1834, and so long as the said insured should pay, or cause to be paid, the sum of 32*l.* at the time therein above mentioned, and the directors for the time being should accept the same, the stock and funds of the said company should be subject and liable to pay or make good to the said insured, their executors, administrators, or assigns, all such loss or damage as should happen by fire (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion, or riot, or any military or usurped power whatever) to the property therein above mentioned, amounting in the whole to no more than the sum of 4000*l.*, according to the conditions indorsed on the said policy, as by the said policy, reference being thereunto had, will more fully appear; and the said plaintiff further says, that the said conditions, in and by the said deed or policy mentioned and alluded to, are as follows, (that is to say) *First*—that every person desirous of effecting an insurance must state his name, place of abode, and occupation; he must describe the construction of the buildings to be insured, where situate, and in whose occupation, of what materials the same were respectively composed, and whether occupied as a dwelling-house or otherwise; also the nature of the goods or other property on which such insurance might be proposed, and the construction of the buildings containing such pro-

perty. *Secondly*—that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, was to be specially mentioned in the order given for the policy, so that the work might be fairly understood; if not so expressed, or if any misrepresentation be given, so that the insurance be effected upon a lower premium than ought to be paid; or if buildings or goods be described in the policy otherwise than they really were; or if, after an insurance should have been effected, the risk should be increased by the erection or alteration of any stove, the carrying on any hazardous trade, operation, or process, the deposit of any hazardous goods or hazardous communication; the insured would not, except under the consent of the directors and on the terms they might impose, be entitled to any benefit under his policy.

The declaration (after setting forth eight other conditions upon which no question arose) then averred, that, after the making of the policy, to wit, on the 2nd of *April*, 1834, by a certain memorandum in writing, indorsed upon the said deed or policy by the direction and with the privity and consent of the said defendants, it was declared that the boilers belonging to the steam-engine which worked the mills described in the said policy, being completely outside the buildings insured by the said policy, and the two portions *A* and *B* of such mill being completely detached from all other mills, the premium from *Lady-day* in the year 1834, aforesaid, and thenceforward annually, should be reduced to 14*s.* *per centum*, say in the whole 28*l.*, subject to all the previous conditions and warranties, as by the said policy, with the said memorandum indorsed thereupon, reference being thereto had, will more fully appear. It then averred that the plaintiff, and *Mayall*, in his lifetime, at the time of the making of the policy, and from thence until the loss thereinafter mentioned, were jointly interested in the insured premises

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to the amount of all the money insured; and that the said premises in the said policy mentioned and so insured as aforesaid, afterwards, to wit, on &c., were burnt down, consumed, and destroyed by fire, which did not happen by invasion, &c. The declaration then alleged, "that the premises in the said policy and memorandum mentioned were duly described, and not otherwise than they really were, or so as to cause the said insurance to be effected on a lower premium than ought to have been," and then alleged performance of all the other conditions as mentioned in the policy.

The defendants pleaded eight special pleas, but the question turned only on the validity of the fourth and sixth pleas. The *fourth* plea was, "that the steam-engine and certain parts of the gear in the said policy of assurance mentioned, after the making of the said policy of assurance and memorandum, to wit, on the 1st of *May*, 1834, and on divers other times between that time and the destruction of the said premises by fire, as in the said declaration mentioned, were, without the leave or consent of the said defendants, or of the directors of the said company, *worked by night, and not by day only*, contrary to the tenor and effect, true intent, and meaning of the said deed and policy of assurance and memorandum. The defendants pleaded, *sixthly*, that, after the making of the said writing or policy of assurance and memorandum, to wit, on the 1st *May*, 1834, and on divers other days and times between that day and the destruction of the said premises in the declaration mentioned, the said steam-engine, in the said deed or policy of assurance mentioned, was worked by night, and not by day only, without the leave, licence, or consent of the defendants, or of the directors of the said company in the said policy of assurance mentioned, whereby the risk in the said policy of assurance was increased; and so the said defendants say, that the plaintiff and *John Mayall* thereby,

and by reason of not having the consent of the said defendants, or the directors of the said company, ceased to be entitled to any benefit under the said policy of assurance and memorandum.

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Replication to the fourth plea—That the said steam-engine was not, nor was any part of the gear in the said policy of assurance mentioned, after the making of the said policy, worked by night, and not by day only, in manner and form &c.

To the sixth plea—That the steam-engine, in the said policy of assurance mentioned, was not, after the making the said policy, worked by night, and not by day only, in manner and form, &c.

The cause was tried before *Alderson*, B., at the last *Spring* Assizes for the county of *Lancaster*, when it appeared in evidence, that, previous to the making of the policy, certain interrogatories were put to the assured; one of which was, whether the mill was worked by night as well as by day? The answer to which was, that it was worked by day only, and not by night. The steam-engine was in a detached building, the moving power being communicated, by means of shafts, to the plaintiff's mill. It appeared also by the evidence, that shafts were carried through the plaintiff's mill, by which the moving power of the steam engine was conveyed to other mills. The plaintiff's mills were worked by day only, but the steam-engine was kept going all night, and the shafts which communicated the moving power to the plaintiff's mills and the other mills, were also in motion during the night. This, it was objected by the defendants, was a working by night, contrary to the policy. The learned Judge, however, overruled the objection, and the plaintiff obtained a verdict; but he gave the defendants leave to move to enter a verdict.

Cresswell having obtained a rule accordingly—

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Blackburne, *Alexander*, and *Wightman* were to have shewn cause; but they having suggested that the fourth and sixth pleas (which were the only pleas which there was any evidence to sustain) were bad, and that the plaintiff would therefore be entitled to judgment *non obstante*, if a verdict were entered up for the defendants on the issue raised by those pleas, the Court called upon—

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Creswell, *Tomlinson*, and *W. H. Watson*, to argue that question.—The fourth and sixth pleas are good, and are a sufficient answer to the action, if found for the defendants, which they must be taken to have been. *First*, as to the fourth plea.—The policy recites, that the buildings were brick-built, warmed by steam, lighted by gas, &c., worked by the steam-engine before mentioned, in the tenure of one firm only, standing apart from all other mills, and *worked by day only*. Now, what is the meaning of worked by day only? It must have a reasonable intendment given to it; it must mean all that is before mentioned in the policy capable of being worked. Now there is mentioned before, the standing and going gear, which was kept going by night, and that was in contravention of the policy. This must be construed as a prohibition to working by night with any part of the manufactory insured. There are three things to constitute a mill: there is, first, the moving power; secondly, the medium of its application, of which the gear is a part; and, thirdly, the machinery to be moved; and any working by night of any part of this is forbidden by the policy. In this case, the shafts, which are part of the gear, were kept moving and turning by night, and that was in breach of the policy. Turning is a working, although applied to no ultimate purpose. But the words, "worked by day only," apply to every thing mentioned in the policy; and, therefore, the working the steam-engine by night alone would be a breach of the warranty. It is said, that the

words must be taken most strongly against the covenantors: but this is a warranty, and it has been held, that, in a policy, a warranty must be construed strictly. Then, as to the sixth plea. It is found that the steam-engine was worked by night; and the other allegation in this plea, "whereby the risk in the policy of assurance was increased," is not put in issue, and therefore must be taken to be admitted. [*Alderson*, B.—But the jury found the question as to the increase of risk in the negative.] It is submitted, that the increase of risk was not in issue on the sixth plea. [*Parke*, B.—Then the result would be, that the issue would be an immaterial issue, as the fact of its being worked by night is immaterial, if the risk is not increased.] If it is found that the steam-engine is worked by night, then the rest of that which is stated in the plea necessarily follows; not being put in issue, it stands admitted. In *Beal* v. *Simpson* (*a*), it was held, that a *virtute cujus*, when it contains an inference of law only, is not traversable;] but where it states a matter of fact, that it is traversable. And all the cases shew, that where there is a matter of fact alleged which is traversable, if it is not traversed, it is admitted. *Lucas* v. *Nockells* (*b*). In that case, it was said by *Best*, C. J., in delivering the judgment of the Court of *Exchequer Chamber*—"But the *virtute cujus* sometimes raises a mixed question of law and fact; and when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends." The plea states two facts, and the defendants might have traversed either the one or the other, or both; but one not being traversed, must be taken to be admitted.

Blackburn and *Wightman*, *contrà*, were stopped by the Court.

Lord ABINGER, C. B.—This case has been involved

(*a*) 1 Ld. Raym. 408. (*b*) 4 Bingh. 729; 1 M. & Payne, 783.

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in a good deal of perplexity in the course of the argument, and we are called upon to put a grammatical construction upon a passage in this policy, and to say whether the steam-engine is the nominative case to the second word "worked," in the sentence in question; and I think it clearly is not. Another question is, whether by working is meant turning? It has been pressed upon us in the argument, that the upright shafts must be considered as part of the steam-engine, and the millwright work as part of the mill, and that as the shafts were kept turning during the night, it was in contravention of the policy; but that is confounding the word working with the word turning. The shafts, during the night, were moving, but the mill was not working: the word "work," is not to be used in its popular sense. The interrogatory on the paper is, "Do you work it by night or by day?" The answer is, "We work it by day;" that is, we work by day only; our hands are on during the day only, and not during the night. I do not think the mere moving or turning of the upright shafts is a working in the sense that has been ascribed to it; and I think that judgment ought to be entered for the plaintiff. It requires that something more be shewn to have been done to discharge this policy. If the turning, by night, that which forms part of the machinery, were attended with increased risk, it might be sufficient to discharge the policy; but unless that is so, I think it is not sufficient.

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PARKE, B.—I am of the same opinion. The question arises on a motion for judgment *non obstante veredicto*, and turns on the validity of the fourth and sixth pleas. Now admitting, for the sake of argument, that both these pleas are to be taken to be proved to the full extent, it appears to me that they neither of them afford any answer to the action. The fourth plea is, "That the said steam-engine, and certain parts of the gear in the said policy of assurance mentioned, were, after the making of

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the said policy, and before the destruction of the said premises by fire, without the leave or consent of the defendants, or of the directors of the company, worked by night, and not by day only, contrary to the tenor and effect, true intent, and meaning of the said policy." Now, first, we may assume that the steam-engine and part of the gear have been worked without the leave and consent of the defendants, or of the directors of the company, by night and not by day only; and the question is, does that avoid the policy; and that depends entirely upon the construction to be given to the words "work by day only." In the policy itself the language is somewhat obscure; but I think the words "worked by day only," cannot be applied to the steam-engine, or any part of the gear, but apply to something else. I think that is a fair construction of all the terms that are used in this part of the policy. The insurance is on the larger end, and another end of a mill called the *Union Mill*, upon the building of the engine-house and steam-engine, and the building of the warehouse used for the blowing and scutching of cotton. The policy recites, "that the aforesaid buildings were brick buildings, and slated, lighted by gas," that applies to all the buildings; "and worked by the steam-engine above mentioned." Now, all the buildings cannot be worked by the steam-engine above mentioned. We must put a limited construction upon these expressions. I take it to mean, "all the buildings above mentioned which are capable of being worked by the steam-engine;" and therefore I read this part of the insurance, that the cotton mill should be worked by the steam-engine, and worked by day only; and it appears to me that the meaning of this insurance is, that it insures the cotton mill, which is worked by a steam-engine, and by day only. If this is the meaning, no part of the cotton-mill having been worked except by day, the plea is no answer to the declaration. Then, as to the sixth plea, it appears to me that the an-

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swer to be given to that is the same as the answer to the fourth, unless you can bring it within the second condition indorsed on the back of the policy. Now, that provides, that when any insurance is attended with particular circumstances of risk arising from the situation or construction of the premises, or from the nature of the trade carried on, &c., such circumstances must be specially mentioned; or if any misrepresentation be given, so that the insurance is effected on a lower premium than it otherwise would be, the policy is avoided. So, also, if there had been any alteration made, increasing the risk, after the insurance had been completed, or if any hazardous trade, operation, or process, was carried on which was not carried on at the time of the policy being granted, the policy is avoided; but there is no averment that there was any such operation carried on which was not carried on at the time the insurance was effected, as there ought to be to bring the case within this condition. It appears to me that the sixth plea is therefore wholly bad.

BOLLAND, B.—I am of the same opinion. The only question here is, what is the interpretation to be put upon the words "worked by day only," as contained in this policy. Now, on looking at the policy itself, and the subject-matter of it, I have no doubt that the mill, and the mill only, is the nominative case to the words "worked by day only." There is, no doubt, great ambiguity on the face of the policy; and the only safe construction I can put upon it is that which has been adopted by the Court.

ALDERSON, B.—I quite agree with the rest of the Court in the construction which they have put upon this policy. It seems to me that the ambiguity of the policy arises from the position of the words having been changed. If, after

the words "worked by the steam-engine above mentioned," you read on, "and worked by day only," there is no doubt that the latter words refer to the mill. That view is corroborated by the words which immediately follow, "standing apart from all other mills."

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Rule absolute to enter judgment for the plaintiff.

FALLOWS *v.* BIRD.

To a declaration on a bill of exchange for 65*l.*, with a count in *indebitatus assumpsit*, concluding to the plaintiff's damage of 200*l.*; the defendant pleaded as to the sum of 35*l.*, parcel of the money in the bill of exchange mentioned, that he accepted the bill so far as respected that sum, for the accommodation of the plaintiff, concluding with a verification; as to the sum of 40*l.*, other parcel of the sums in the declaration mentioned, payment of that sum into Court, and no damages *ultra* that sum; and as to the residue of the sums mentioned in the last count, *non assumpsit*. The plaintiff replied, denying that the bill was an accommodation bill, and joined issue on the plea of *non assumpsit*, but took no notice of the payment of money into court:—*Held*, on motion in arrest of judgment after verdict for the plaintiff, that there was no discontinuance on the record, and that the plaintiff might enter a *nolle prosequi* on the record.

ASSUMPSIT.—The *first* count was by the drawer against the acceptor of a bill of exchange for 65*l.* The other counts were in *indebitatus assumpsit* for 100*l.*, for work and labour as an agent generally; for 100*l.* for work and labour as a surveyor; 100*l.* for interest; and 100*l.* on an account stated, to the plaintiff's damage of 200*l.*

The defendant pleaded as to the sum of 35*l.*, parcel of the sum of money in the bill of exchange in the first count mentioned, that he accepted the bill of exchange so far as respected the sum of 35*l.*, for the accommodation of the plaintiff, upon the terms, that, if the defendant should pay the said sum of 35*l.*, the same should be returned to him, and that he should not be liable or called upon to pay the said sum to the plaintiff; and the defendant further said that the plaintiff always held, and still holds, the said bill upon the aforesaid terms; concluding with a verification. As to the sum of 40*l.*, other parcel of the said sums of money in the declaration mentioned, that the plaintiff ought not further to maintain his action against the defendant, because he now brings into Court here the said sum of 40*l.*, other parcel, &c., ready to be paid to the plaintiff;

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and the defendant says, that the plaintiff hath not sustained damages to a greater extent than the said sum of 40*l.*, in respect of the cause of action in the said declaration mentioned, as to that sum; verification. And, as to the residue of the said sums and promises in the last count of the said declaration mentioned, and not before pleaded to, the defendant says that he did not promise, &c.

Replication—As to the first plea, *precludi non*, because he says that the said defendant did not accept the said bill of exchange so far as respects the said sum of 35*l.*, for the accommodation of the said plaintiff, and upon the terms that if the defendant should pay the sum of 35*l.*, the same should be returned to him, and that he should not be liable or called upon to pay it; concluding to the country. As to the plea of the said defendant, by him lastly above pleaded, and whereof he puts himself upon the country, the said plaintiff doth the like. The plaintiff having recovered a verdict at the last *Warwick* Assizes for the sum of 30*l.*; *Gale*, in *Easter* Term last, obtained a rule *nisi* why the judgment should not be arrested on the ground that there was a discontinuance on the record, the replication having taken no notice of the plea of payment of money into Court.

Goulburn, Serjt., and *Humfrey*, shewed cause.—There is no discontinuance on the record, as the latter part of the first plea, as to the payment of money into Court, is not denied, and must therefore be taken to be admitted. The plea of payment of money into Court requires no replication, unless the plaintiff means to insist that he has sustained greater damages. The course, in such a case, is for him to take the money out of Court: but, even if that be not so, and it was any ground of objection on the pleadings, it is now cured by verdict. At all events, the Court will allow the plaintiff to enter a *nolle prosequi* as to that part of his demand, and then the record will be

correct. In *Fleming* v. *Langton* (*a*), the Court said that as to the want of a *nolle prosequi* on the roll, the plaintiff might supply that when he came to enter the final judgment. That case was cited and recognised in *Duperoy* v. *Johnson* (*b*). The matter in dispute at the trial was as to the residue.

Gale, contrà.—It is not true that there are only two pleas on the record. There are in fact three pleas, each affecting to answer a part of the declaration. There is to each of the pleas a formal commencement and conclusion, which makes them distinct and separate pleas, and it is of no consequence whether the pleas are good or bad in themselves—they are still distinct pleas if they have a commencement and conclusion. There ought, therefore, to have been an answer to each, but here one of them is left unanswered. The plea of tender, which is pleaded after a plea of the general issue as to part, is still always considered as a distinct plea. Before the new rules, the effect of payment of money into Court was to strike so much out of the declaration; and, where there were two counts, and money was paid into Court upon one, that might be considered as removed from the record, but still the other required an answer. [Lord *Abinger*, C. B.—Suppose the plaintiff had here entered a *nolle prosequi* as to the sum of 40*l.*?]—The effect of that would have been to abstract all question as to so much from the record, and from the consideration of the jury. In this case the verdict may have included the money paid into Court.

Lord ABINGER, C. B.—I was at first struck by the observation that the verdict might possibly contain the sum paid into Court; but I think that that could not be so,

(*a*) 1 Stra. 532. (*b*) 7 T. R. 473.

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because the jury must have looked to the whole record, by which they would have found out that the issue was as to the residue. It would be the same in that respect as if a *nolle prosequi* had been entered. It would undoubtedly have been more regular in the plaintiff to have entered a *nolle prosequi*, or stated on the record that he had taken the money out of Court. The issue was, in fact, tendered as to the residue; the plaintiff was at liberty to join in it as he has done, and go to the country. The only issue is, whether the defendant owes the residue, and that has been tried. The entry of a *nolle prosequi* is a mere matter of form, which may be done at any time after the trial. If the plaintiff chooses to enter it now he may, and his record will be right. Still the only issue raised on the pleadings will remain. The real issues were, whether the bill was, as to the sum of 35*l.*, an accommodation bill; and, as to the residue, whether there was anything due. If the defendant had adhered to the form given in the new rules, pleading first to the bill, and then payment of money into Court to the residue, the plaintiff might have replied damages *ultra*, and have gone to the country upon it.

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The rest of the Court concurred.

Rule discharged.

DAVIES (Assignee of Watts, an Insolvent Debtor) *v.* ACOCKS.

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ASSUMPSIT for money had and received to the use of the plaintiff as assignee, and on an account stated. *Plea, Non assumpsit.*—The cause was tried before *Gurney*, B., at the *Middlesex* Sittings, in *Easter* Term last, when it appeared that *Watts*, the insolvent, who resided at *Petworth*, in *Sussex*, being indebted to the plaintiff in the sum of 40*l.* 1*s.* 6*d.*, the amount of a bill of exchange which he had accepted, a writ was issued on the 13th of *May*, 1833, on which *Watts* was arrested on the 14th of *May*, and taken to prison, where he remained until the 14th *July*, 1834, when he was discharged under the Insolvent Act. *Watts* being indebted to several other creditors, they proposed to him, soon after his arrest, to assign all his effects to the defendant, in trust for the benefit of the creditors; and by a deed of assignment, dated the 7th *June*, 1833, three weeks after the imprisonment began, *Watts* assigned all his estate and effects to the defendant, upon trust to collect the effects, to pay the expenses, and to divide the balance amongst the creditors who should execute the deed. The assignment was tendered to the plaintiff for execution, but he declined to execute it unless the costs incurred in the action against the insolvent were paid; and, such costs not being paid, the plaintiff proceeded with the action, and ultimately charged the insolvent in execution for the sum of 58*l.* 18*s.* 6*d.* The defendant advertised the assignment in the *London Gazette* on the 8th *October*, 1833, and proceeded under the trusts of the assignment to take possession of the insolvent's effects; and, having disposed of them, realized about 250*l.*, after paying all expenses. On

An assignment by a debtor, he being at the time in a state of insolvency, of all his property, for the benefit of *all* his creditors, is not void within the meaning of the 7 *Geo.* 4, c. 57, s. 32; *dubitante*, *Alderson*, B.

An insolvent person being in prison, endeavoured to make terms with his creditors, they proposing that he should execute a composition-deed for their benefit, which he at first refused; subsequently, a letter was written by an agent of the creditors, stating that they would not consent to his discharge, and that he must either execute an assignment or be made a bankrupt. The insolvent, after taking three days to deliberate upon it, with great reluctance executed the assignment:—*Held*, that this was not a voluntary conveyance, within the above section of the Insolvent Act.

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the 5th *June*, 1834, the insolvent petitioned for his discharge, and on the 14th *July* following he was discharged accordingly, and the plaintiff was appointed his assignee by the Insolvent Court. The plaintiff brought the present action to recover the amount obtained by the sale of the insolvent's effects, which the defendant had in his hands, contending that the deed was void under the 7 *Geo.* 4, c. 57, s. 32. A case containing a statement of the above facts was, by the consent of both parties, laid before counsel, who decided against the validity of the deed of trust. The defendant, however, refused to acquiesce in it, and on the trial of the cause adduced evidence to shew the mode by which the insolvent was induced to execute the deed; from which it appeared, that, after he had gone to prison, he endeavoured to make terms with his creditors, they requiring him to execute a composition deed, and he stipulating for some conditions, which they refused. An agent of the creditors afterwards wrote to a person named *Gulston*, saying that they could not consent to his discharge, and that he must either execute the assignment or be made a bankrupt. This letter, it appeared, was shewn to *Watts* in *Horsham* Gaol, and, after taking three days to deliberate upon it, he, with great reluctance, executed the assignment. On the part of the defendant, it was contended that this was not a voluntary deed, within the meaning of the 7 *Geo.* 4, c. 57, s. 32.

The learned Judge directed the jury to find for the plaintiff, subject to a motion to enter a nonsuit, if the Court should be of opinion that the assignment was not void under the circumstances above stated, as being in contravention of the Insolvent Act.

Platt having in last Term obtained a rule accordingly,

Sir *W. W. Follett*, and *Channell*, shewed cause.—The assignment in question was fraudulent and void, it having

been made contrary to the provisions of the 7 *Geo.* 4, c. 57, s. 32. By that section it is enacted, "That if any prisoner who shall file his or her petition, for his or her discharge, under this act, shall, before his or her imprisonment, being in insolvent circumstances, *voluntarily* convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or *creditors*, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or *creditors;* every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared, to be *fraudulent* and void, as against the provisional or other assignee or assignees of such prisoner, appointed under this act: provided always, that no such conveyance, assignment, &c., shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, &c., of petitioning the said Court for his or her discharge from custody under this act." This assignment was a voluntary conveyance made by *Watts*, he being at the time in insolvent circumstances, to a creditor, in trust for the use, benefit, and advantage of his creditors, and was therefore void as against the plaintiff, the provisional assignee. Undoubtedly, it is for the benefit of all his creditors who choose to come in and execute it; but the words of the statute are general, that such a deed shall be void, if it is made for the benefit of any creditor or *creditors*, and would therefore apply to a conveyance to, or for the benefit of, all creditors. By it he has appointed the defendant to distribute his assets amongst his creditors; but that is not the way in which the statute has intended that his estate should be distributed; the statute intends that that should be done

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by a person whom the Insolvent Court appoint for that purpose, and over whom they hold a control, which is greatly beneficial to the estate. It was meant to prevent that which, in the same situation under the bankrupt laws, would be deemed a fraudulent preference. Now, with reference to the Bankrupt Act, it has been held, that to constitute a fraudulent preference, it is necessary that the deed should be made in contemplation of bankruptcy; that it should be made voluntarily, and in order to favour a creditor; and this statute intended to introduce a like provision into the Insolvent Act. [Lord *Abinger*, C. B.—But how can a conveyance, whereby a debtor conveys the whole of his property for the benefit of *all* his creditors, be construed to be a fraudulent preference of any of them? The Bankrupt Act, 6 *Geo.* 4, c. 16, s. 3, expressly prohibits such a general conveyance. *Alderson*, B.—That statute makes such a conveyance an act of bankruptcy, because the effect of it was necessarily to compel a trader to put an end to his trading. But that is no reason why a conveyance, for the benefit of all a man's creditors, should be held void under this section of the Insolvent Act.] It is submitted, that, if the deed be made voluntarily, and with the view of petitioning for his discharge, it is void, and that the fact of its being made for the benefit of all his creditors makes no difference.

But, *secondly*, it is said that the insolvent did not, in fact, execute this deed voluntarily, and the defendant adduced evidence at the trial, to shew that, in fact, he executed it under a threat. But it is submitted, that, after having agreed that a case should be laid before counsel, and that the facts should be taken to be as stated in that case, the defendant is bound by the facts as so stated, and has no right to alter the state of those facts. Besides, there was no evidence to show that the insol-

vent executed the deed against his will. The only evidence was, that upon an endeavour to make some terms with his creditors for his discharge, a letter was written to the insolvent, whilst he was in *Horsham Gaol*, stating that he must either execute the assignment, or be made a bankrupt; that the letter was shewn to him, and that, after three days' deliberation, he with *reluctance* executed the assignment. But mere reluctance is not enough; that does not shew that he was compelled to execute it. There was no evidence of any threat to proceed against him, as is usually given in cases of bankruptcy. He appears to have executed it upon a representation, that if he did so, he should obtain his discharge out of custody. Is it less a voluntary act, that it is obtained on the apprehension that he will derive a benefit by so doing? [*Alderson*, B.—In *Arnell* v. *Bean* (*a*), the Court of *Common Pleas* held, that the word "voluntarily" is used in the statute to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it.]

Platt, and *G. T. White*, *contrà*, were stopped by the Court.

Lord ABINGER, C. B.—This is in some respects an important case. It involves two points. The first is, whether a deed *bonâ fide* executed by an insolvent for the benefit of *all* his creditors is void; and the second is, whether, under the circumstances of this case, the insolvent executed this deed voluntarily. On the first point, I am of opinion that the deed was not void. It appears to me that the object of this provision was merely to bring

(*a*) 8 Bingh. 91; 1 M. & Scott, 151, S. C.

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within the reach of the Insolvent Debtors' Court that class of cases which, if they occurred in bankruptcy, might be overreached by the assignees of a bankrupt; cases where the debtor seeks voluntarily to give a preference to one over the general body of his creditors. (His Lordship here read the words of the thirty-second section). The words there used apply to the different modes by which the property may be conveyed, but do not necessarily include a conveyance of the whole of the debtor's effects. Again, when it speaks of the conveyance to any creditor or *creditors*, it is intended to meet the case of a conveyance for the benefit of several creditors, as for half-a-dozen, while the others are excluded. Such conveyances as these are declared to be fraudulent and void as against all the creditors, for their interest is vested in the assignees. This is the case whether the deed be executed before or after the commencement of the imprisonment; so that if a man at any time, being in insolvent circumstances, makes a conveyance of his property to a creditor, and afterwards goes to prison, it would render it void. A limitation, however, was put on this by the proviso which occurs at the end of the section. Looking at the whole of the section, how can any one with reason suppose that it was intended to overreach a conveyance of all a man's property made for the benefit of all his creditors? It cannot be said that it is executed with a view of preferring any one creditor over the rest. The act has declared, that a deed which is executed with such a view shall be deemed fraudulent as against the assignees. That seems to arise from the use of the word "voluntarily;" because, if there were any other fraud in the transaction, the deed would have been void independently of this provision. Secondly, it is said that this deed was void on the ground that it was executed voluntarily by the insolvent in expectation of being discharged from prison. But if it be by pressure of any creditor, it would not have been

a voluntary conveyance within the act. It cannot make any difference that the debtor did contemplate the discharge, though here, indeed, it may be observed, that the deed did not procure his discharge. If it be made at the urgency of a creditor, or upon threats, it is not executed voluntarily.

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BOLLAND, B.—I am of the same opinion on both points. It may be observed, that the proceedings in bankruptcy are *in invitum*, but those under the Insolvent Debtors' Act are not. According to the provisions of the latter, if a person chooses to give up all his property for the benefit of his creditors, he shall be discharged from all their claims. What difference can it make if he does this same thing by a deed, without the interference of that Court? Can it be necessary for him to go to prison and incur all the expense attending that course?

ALDERSON, B.—This rule must be made absolute. It is moved for on two grounds. On the first I do not give any decided opinion. If it had been necessary to do so, I should have required some time for consideration. It is possible that a difference may arise from the circumstance that the trustee is selected by the party, whereas the assignee is appointed by the Court, and is under its guidance and control. At the same time, the inclination of my mind is that the deed is good. On the other point I have no doubt. This is a conveyance to the defendant previous to the assignment to the provisional assignee. *Primâ facie*, that carries the property to him. Is it avoided by the thirty-second section of the Insolvent Act? Whether it is for the benefit of one or more creditors, it must be a voluntary conveyance, or the statute does not declare that it shall be void. I cannot say that it was so in this case. It is made by a person pressed and threatened to have a commission sued out against him if he does

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not execute it. He is reluctant to execute it, and only does so after three days' deliberation.

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GURNEY, B., concurred.

Rule for entering a nonsuit absolute (*a*).

(*a*) Vide *Reynard* v. *Robinson*, 9 Bingh. 717; S. C. 3 M. & Scott, 127; and *Stuckey* v. *Drewe*, 2 Mylne & Keen, 194.

AMNER *v.* CLARK.

A bill of exchange drawn in *London*, payable to the order of the drawer in *London*, upon a merchant residing at *Brussels*, and accepted by him, payable in *London*, is an inland bill of exchange, and must be stamped as such.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, drawn by one *Wm. Walker* upon the defendant, payable in *London*, and accepted by him payable in *London*, and indorsed by *Walker* to the plaintiff. The declaration averred that the bill was presented for payment, and dishonoured.—The defendant pleaded that he did not accept the bill of exchange mentioned in the declaration.

At the trial before *Gurney*, B., at the Sittings in *London*, the bill of exchange, on being produced, was as follows:—

"*London*, 11th *Oct.*, 1833.

"For 312*l.* 11*s.* 9*d.*

"At three months' date, pay this *first* of exchange to the order of self, *in London*, three hundred and twelve pounds eleven shillings and ninepence sterling, value received, which place to account as advised.

"*William Walker.*

"To Mr. *Delianson Clark*,
"No. 51, *Rue Ducall*, in *Brussels*.
"1st."

"Accepted, payable at Mr. *Jebson's*,
"No. 16, *Old Broad-street*, *London*.
"*Delianson Clark.*"

The bill was stamped with a 4*s.* stamp only. The defendant, it was proved, was a merchant, residing at *Brussels*, but there was no proof that the bill was accepted there. It was objected that the stamp was insufficient, and ought to have been 8*s.* 6*d.* The learned Judge received the bill in evidence, but gave the defendant leave to move to enter a nonsuit. *Platt* having, in last Term, obtained a rule accordingly—

Sir *F. Pollock*, and *Channell*, now shewed cause.—The question is, whether this, being a bill drawn in *England*, upon a person residing abroad, payable in *London*, and accepted by him payable in *London*, is an inland bill, and requires to be stamped as such. The statute 55 *Geo.* 3, c. 184, sch. part 1, after stating the duties which shall be chargeable on inland bills of exchange, proceeds thus—"Foreign bill of exchange, or bill of exchange drawn in, but payable out of *Great Britain*), if drawn singly, and not in a set, the same duty as on an inland bill of the same amount and tenor;" and that "foreign bills of exchange, drawn in sets according to the custom of merchants, for every bill of each set" shall be charged with duty according to the amount thereof. This bill of exchange, as set out in the declaration, "pay this my first of exchange," &c., is not a bill coming within the former description, "if drawn singly and not in a set;" but must be taken to be a "foreign bill drawn in sets," within the latter description. It appears on the face of it to be one of several bills, and there is no proof that there were not more; and without any such evidence, it is not to be presumed that there was any fraud. At all events, the defendant, having accepted it as one of a set, is estopped from disputing it. *Holdsworth* v. *Hunter* (*a*). The bill, being drawn on a person abroad, required to be accepted abroad before it became a com-

(*a*) 10 B. & C. 456; 5 Man. & R. 393, S. C.

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plete bill. If it comes within neither of the descriptions in the schedule, then it is a *casus omissus* in the act. It may be that there is another species of foreign bill, namely, when it is drawn in *England* upon a person residing abroad, and accepted by him payable in *England*. [Lord *Abinger*, C. B.—This bill is by the drawer himself made payable in *England*.]—If not a foreign bill, is this an inland bill? It is submitted that it clearly is not. [Lord *Abinger*, C. B.—The statute seems to have considered all bills as inland bills where they are drawn in *Great Britain*, unless where they are payable out of it.]—That is not clear, and the defendant is bound to make out that it is within the act. The statute is silent as to the meaning of the term "inland bill." [Lord *Abinger*, C. B.—It defines it by saying what a foreign bill is, and all others are to be taken to be inland bills.]—In *Mahoney* v. *Ashlin* (*a*), Lord *Tenterden* states what an inland bill is. He says—"The statute 9 & 10 *Will.* 3, c. 17, distinctly explains what was understood to be an inland bill at that time, and shews that by that term was meant a bill drawn in *England*, *Wales*, or *Berwick-upon-Tweed*, *upon London*, or some other place *within* those parts of the realm; and the term is used in subsequent statutes apparently in the same sense." If that definition be correct, this bill does not fall within it, for it was not drawn upon *London*, or any other place within the realm. If it be neither an inland nor a foreign bill, then it requires no stamp at all; and if it be a foreign bill, it is stamped as such. It may be said that there is no proof that the bill was accepted abroad; but it purports to be so, and if the defendant intended to insist that there was any fraud on the Stamp Act, it was incumbent upon him to prove it. *Abraham* v. *Dubois* (*b*).

Humfrey, *contrà*, was stopped by the Court.

(*a*) 2 B. & Adol. 482. (*b*) 4 Camp. 269.

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Lord ABINGER, C. B.—This case has been very ingeniously argued; but I do not think that this can be considered as a foreign bill of exchange. The legislature might have defined what was to be considered an inland bill, but they have not done so; and I cannot think that it was necessary to do so, as there is a definition of what a foreign bill is, and I think the act shews that by foreign bills the legislature intended bills drawn in, but payable out of, *Great Britain*. The legislature never intended to impose a stamp on bills drawn abroad; it was not in their power to do so; but they did mean to impose a stamp on bills drawn in *England*, payable abroad, because it was in their power to tax them. The statute, *primâ facie*, intends that inland bills are such as are not drawn payable abroad.

BOLLAND, B.—I am of opinion that this is an inland bill within the meaning of the statute. An inland bill is a bill drawn in and payable in *Great Britain*, which this bill is.

GURNEY, B.—The act provides, that a bill drawn in *England* for such an amount is to be stamped with the stamp of 8*s.* 6*d.*, unless it is drawn payable abroad. There is no pretence for saying that this was a bill drawn payable out of *England*.

Rule absolute for entering a nonsuit.

REX *v.* RAWLINGS, *ex parte* HAND.

Lands having been purchased at a sale by auction under an extent, and the purchaser having re-sold

THREE different writs of extent issued against the defendant *Rawlings*.—And by the inquisitions thereon it was found that the defendant *Rawlings* was seised of cer-

them for a less sum than that which he had contracted to give, the Court, with the consent of the Attorney-General, made an order that the name of the second purchaser should be substituted in the contract, and that the conveyances should be made to him, the original consideration being expressed in the deed.

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tain hereditaments in the parish of *White Waltham*, in the county of *Berks*, which the sheriff had seized and taken into his Majesty's hands.

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By an order dated the 25th of *November*, 1823, the usual order for sale was made under 25 *Geo.* 3, c. 35.

In pursuance of this order, the estates were sold by auction on the 14th of *November*, 1828, before the remembrancer of the Court of *Exchequer*, in different lots, when Mr. *Wm. Hand* purchased lots 1 and 4. This purchase was reported to the Court on the 15th of *November*, 1828; and by an order dated the 28th of *November*, 1828, the report was confirmed absolutely, and Mr. *Hand* was established the purchaser of the lots 1 and 4 at the prices therein mentioned. On the 24th of *July*, 1829, the usual consequential order was made for Mr. *Hand* to pay his purchase-money into the Bank, and that thereupon he should be let into possession; "and that all proper parties do join in and execute proper conveyances and assurances to the said *Wm. Hand*, of the said estates and premises, or as he shall direct; such conveyances to be settled by the said Remembrancer in case the parties shall differ in settling the same."

On the 20th of *November*, 1834, Mr. *Hand* contracted to sell the lots bought by him to the Rev. *Henry Pole*, for a less sum than he had purchased them for. No conveyance to Mr. *Hand* having been executed, he was desirous of saving the *ad valorem* stamp duty on the conveyance to himself; and Mr. *Henry Pole*, not being willing to take a conveyance direct from the Remembrancer without the sanction of the Court,

Boteler moved, on behalf of Mr. *Hand*, that Mr. *Pole* might be substituted and declared the purchaser of the mansion-house and premises, &c., in the stead of Mr. *Hand*; and that the Remembrancer of the Court of *Exchequer*, and all proper parties, should join in and

execute proper conveyances and assurances of the estate to the said *Henry Pole*, his heirs and assigns, in lieu of the said *William Hand*. He cited as a precedent an order made in the matter of the same extents *ex parte Macdougall*, who, having purchased lot 2 at the above mentioned sale before the Master for 2500*l.*, and after paying his purchase-money into Court under an order dated the 9th of *July*, 1830, had undersold the same for 2100*l.*; and the Court, with the Attorney-General's consent, made an order, whereby the new purchaser was substituted; and the conveyances were ordered to be made to him.

Pole, on behalf of the purchaser.—The Court has no power to make any such order as is sought, under the 25 *Geo.* 3, c. 35, if it is intended that the sale to Mr. *Hand* is to stand. The only course open to the Court is to discharge that purchase altogether, and direct a re-sale, at which Mr. *Henry Pole* might attend, and purchase the property. That course Mr. *Pole* could never consent to, if it were practicable, which, in fact, it is not, as Mr. *Hand's* purchase-money has long since been applied under the orders of the Court. The 25 *Geo.* 3 is so worded, as not to authorize the conveyance being made, otherwise than to Mr. *Hand*. The expressions used are, "that when a purchaser or purchasers shall be found, the conveyance of the lands, tenements, or hereditaments, so decreed to be sold, shall be made to the purchaser or purchasers, by his Majesty's Remembrancer in the said Court of *Exchequer*, or his deputy, under the direction of the said Court, by a deed of bargain and sale, to be enrolled in the same Court; and that from and after the making of such conveyance, and the enrolment thereof, as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and assigns, shall have, hold, and

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enjoy the lands, tenements, and hereditaments therein comprised, for his and their own respective use and benefit." From the omission of the word "assigns" in the part directing the conveyance, and its insertion in the habendum, it shews it was not intended that the Court should have the power which it is called upon to exercise in the present case. Difficulties have long been felt by conveyancers on powers of sale and exchange contained in deeds worded as this act is, when the object was to have the land proposed to be purchased conveyed to the uses of the settlement. The method adopted to obviate any objection to the title on this ground is, to recite in the deed of conveyance that the trustees are the persons who purchase, and, therefore, the conveyance is made to them; and afterwards, by a separate deed, the trustees declare the uses or trusts of the property. This course was brought before the Court, and approved of, in the case of *Howard* v. *Duncane* (*a*). The same objection must occur here, but without the same means of overcoming it, as long as Mr. *Hand's* purchase is permitted to stand; Mr. *Hand's* object being to avoid one set of stamps, which could not be done if any conveyance was made to him.

Boteler, in reply, insisted that the act ought to receive a liberal construction, and not to be fettered with such strict rules as had been applied to cases under powers. The precedent cited shewed that the Court considered itself to have jurisdiction in the matter; and he was informed that such orders as that now sought had been frequently made.

The Court were disinclined to interfere, and rather suggested an application to the Attorney-General.

(*a*) Turn. & Russ. 81.

The following order was afterwards made, with the consent of the Attorney-General:—

"It is ordered, that the said *H. Pole* be substituted and declared the purchaser of the mansion-house, estate, and premises, comprised in lots Nos. 1 and 4 of the estates in question in this matter, in the place and stead of the said *William Hand*; and that upon payment by the said *Henry Pole* to the said *William Hand* of the sum of 8500*l.*, the said *Henry Pole* do retain possession of the said mansion-house, estate, and premises, and be entitled to the rents and profits thereof, from the 25th day of *December* last: and it is further ordered, that, upon such payment being made, the tenant or tenants of the said estate and premises do respectively attorn and pay their future rent or rents to the said *Henry Pole*, or his assigns, to and for his sole use; and that the Remembrancer of this Court, and all other proper and necessary parties, do join in and execute proper conveyances and assurances of the said estate and premises to the said *Henry Pole*, his heirs and assigns, as the purchaser thereof, or to such other person or persons as he, the said *Henry Pole*, may direct, in the stead and in lieu of the said *William Hand*, such conveyances and assurances to be settled by the said Remembrancer; and that in the said conveyances, or one of them, the sum of 9853*l.* 15*s.* paid into the Bank to the credit of this matter for the said lots, be expressed to be the consideration for the said estate and premises. And it is further ordered, that all title-deeds, evidences, and writings relating to the said premises, in the custody or power of the said *William Hand*, be delivered to the said *Henry Pole*, or to whom he shall direct, and that the said *Henry Pole*, his heirs, and assigns, have the benefit and advantage of the purchase by the said *William Hand*, of the said mansion-house, estate, and premises, and of all orders, reports, and other proceedings made and taken in the said matter, relating to the same; and further, that

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the said *Henry Pole* be at liberty, either in his own name, or in the name of the said *William Hand*, to have, use, and take all such further and other acts and proceedings in this Court, and otherwise, as may be requisite and necessary for completing the said purchase on his behalf, in the place and stead of the said *William Hand*, and for fully and effectually vesting the fee-simple and inheritance of the said mansion-house, estate, and premises, in the said *Henry Pole*, his heirs, and assigns, or such person or persons as he may direct or appoint."

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DEROSNE *v.* FAIRIE and Others (*a*).

In the recital of a patent it was stated, 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 alleged, that the invention consisted in a means of discolouring syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, or even of animal charcoal alone. It then alleged that the discolouration was to be effected by means of a filter made of charcoal, and that there was nothing particular in the carbonization of the bituminous schistus, only that it was "convenient, before the carbonization, to separate the sulphurets of iron which are mixed with it." To an action for infringing this patent, the defendant pleaded, that the patentee did not, by any instrument, particularly describe and ascertain the nature of his invention, and in what manner the same was to be and might be performed:—*Held*, *first*, that the specification sufficiently described the invention stated in the title of the patent, it being shewn that it was applicable with advantage to the extracting of syrup from cane-juice, before it is baked to such a consistency as to granulate and become sugar. *Secondly*, it was proved, that sulphuret of iron was combined with the bituminous schistus found in this country; and there was no evidence to shew that the presence of iron in the charcoal produced by the schistus was not injurious to the matter going through the process of discolouration:—*Held*, that it was incumbent on the patentee to prove that the presence of iron in the bituminous schistus used in the process of filtering would not be injurious; or else, that the method of extracting the iron from it was so simple and well known, that a person ordinarily acquainted with the subject could remove it with ease; or that the bituminous schistus, as known in *England*, could be used in the process with advantage.

CASE for the infringing of 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 in the reign of King *James* 1, being, &c., (reciting the statute of 21 *Jac.* 1, c. 3), the first and true inventor, of certain im-

(*a*) This case was argued and determined in *Easter* Term.

provements 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 the 29th *September*, 1830, by his letters patent, bearing date, &c., (*profert in curiam*), after reciting, amongst other things, that the said plaintiff had, by his petition, humbly represented that the said plaintiff, in consequence of a communication made to him by a certain foreigner residing abroad, was in possession of an invention for certain improvements in extracting sugar or syrups from cane-juice and other substances, containing sugar and syrups; that the same was new in *England*, *Wales*, and the town of *Berwick-upon-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 said lord the King, of his especial grace, &c., did give and grant to the plaintiff, his executors, administrators and assigns, his especial licence, &c., that he, the said plaintiff, his executors, &c., and no others, should and might make, use, exercise, and vend his said invention, within *England*, &c. The declaration then set forth the patent, which was subject to a proviso "that if the said plaintiff should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled, &c., that the said letters patent, and all liberties, &c., should cease, determine, and become void." It then stated the enrolment thereof of record in *Chancery*; and assigned as a breach, that the defendant had made use of the invention without the licence of the plaintiff.

Pleas—*First*, not guilty. *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

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extracting sugar or syrups from cane-juice and other substances containing 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 in what manner the same was to be performed, to be enrolled in his Majesty's High Court of *Chancery*, in manner and form, &c.

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The plaintiff took issue on all the pleas.—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 syrups, partly communicated to the plaintiff by a certain foreigner residing abroad. The specification described the manner in which the invention was to be used as follows:—

"The invention consists in a means of discolouring 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 on beds very thick, on a filter of any suitable form. The filter of itself has nothing particular, and does not form the object of the patent, because it is already known and used for other purposes; but till now it has not been employed for discolouring syrups. To obtain this discolouration, I put the charcoal in a case, in which I place, at the distance of about an inch from the bottom, a metallic diaphragm, pierced with a great number of holes. I then place upon this diaphragm a clear or coarse linen or

woollen cloth, which exactly covers it. I then place upon this cloth a bed of charcoal of bituminous schistus alone, or mixed with animal charcoal, or animal charcoal alone; whatever it may be, this charcoal ought to be in a state of division, in order that it may be well penetrated with the syrup which is intended to be filtered. Charcoal in fine powder would not be penetrated by the syrup. It has been found that the charcoal reduced to the size of fine gunpowder is very fit for this operation; if the grain is too large, the filtration would be operated too rapidly. I lightly press the charcoal, and then again place new beds of the same charcoal, which should likewise be pressed till it has come up to the height of fifteen or sixteen inches. It may be made higher if found necessary, or it may be less, but the discolouring effect will be always in proportion to the thickness of the bed of charcoal. When the charcoal is disposed to the proper thickness, it is to be covered with another metallic diaphragm, pierced likewise with holes, upon which is spread another clear linen cloth: it is upon this cloth on which is poured the syrup which is destined to be discoloured. The syrup ought then to form a bed of several inches thick, from four to eight, although there is no precise rule. For operating well in the filtration of syrups, the syrup ought to be clear before pouring it upon the filter, and ought to have undergone a first filtration by the known means. The point to be obtained by the filtration through the thick beds of charcoal, is only the discolouration of syrups. The syrup to be filtered out ought not to pass over the consistence which is produced by two-thirds of syrup and one-third of water; but it may be filtered at any less degree of consistency, according to the result required. When the syrup is hot, the filtration operates a great deal more rapidly. In operating on a great scale, a reservoir filled with syrup can furnish several filters at a time, by means of cock-balls placed in each filter. The first por-

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tion of syrup which passes through the filter is always the most discoloured, and by the time the colouring part combines itself with the charcoal, the effects of the last portion become less sensible. The portion of syrup which preserves a part of its colour after its filtration, can be passed again upon another bed of charcoal in another filter, and by this means it may be obtained in a greater degree of purification. Whatever the charcoal used, it is desirable to mix the charcoal with about one-sixth part of its weight of water before putting it into the filter: the place of that water is occupied by the syrup, which penetrates the beds of charcoal, and then the water comes first; it has a disagreeable and salt taste when the animal charcoal is used; the water after that comes with a mixed portion of syrup, and soon after it is displaced by the pure syrup. When the charcoal has been deprived of its colouring effect, pour water on the filter for dissolving or displacing the syrup which is mixed with the charcoal; the syrup then comes pure first, and after that mixed with more or less water; using as little as possible of water. It is convenient to suspend occasionally the effusion of water on the upper part of the filter, and to shut its cocks. The syrup, being heavier than the water, gains the bottom of the filter and runs first. The syrups made with raw sugar by this process can be made as clear as water; the molasses are deprived of their bad taste, and are converted into a good kind of syrups, of a clear and yellow colour. 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 the said juices or liquids have been baked for 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 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, the discolouration of syrups is always proportioned to their primitive colouration, and to the quality of charcoal which is used. The carbonization of bituminous schistus has nothing particular; it is produced in close 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. Instead of using the schistus or animal charcoal of the size of gunpowder, it can be reduced to a powder still more fine; mixed with sand in this state, a given quantity of charcoal discolours better than when powdered less fine; but the filtration is slower, and more difficult to be regulated. After having tried this first method, I have given the preference to the other mode; but both of them are the object of the patent."

At the trial before Lord *Abinger*, C. B., at the sittings after last *Hilary* Term, an examined copy of the specification was produced and proved; and evidence was given to shew that the specification was correct in law and in fact, which it is not necessary to detail, 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, and 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

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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.

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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 cane-juice; and, therefore, did not contain a full description of the proper 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.—*First*, they contended, that there was on this record 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 attack the title. *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 pro-

cess could be applied, and had been applied, whilst the cane-juice was in the state of syrup; and also because, in extracting sugar from beet-root, this invention was proved to have been always applied before the sugar was formed. Upon these points they cited *Bloxam* v. *Elsee* (*a*), *King* v. *Wheeler* (*b*), *The King* v. *Metcalf* (*c*), *Hill* v. *Thompson* (*d*), *Cochrane* v. *Smethurst* (*e*), and *The King* v. *Cutler* (*f*). *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 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, only *it is convenient* before the carbonization to separate from the bituminous schistus the sulphurets of iron which are mixed with it" (*g*). 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, the iron could be removed by the simple mechanical operation of breaking the schistus, and taking out the nodules of iron which were generally found in it. It would therefore have been improper to have given a description of so easy an operation. *Savory* v. *Price* (*h*). And that, at all events, supposing the schistus did not completely answer the specified purpose, it was new; and it was decided in *Lewis* v. *Marling* (*i*),

(*a*) 6 Barn. & Cress. 169; 9 D. & R. 215.

(*b*) 2 Barn. & Ald. 350.

(*c*) 2 Stark. N. P. C. 249.

(*d*) 2 B. Moore, 454; 8 Taunt. 375; Holt, 636, S. C.

(*e*) 1 Stark. N. P. C. 205.

(*f*) 1 Stark. N. P. C. 354.

(*g*) 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 naturally fly off, and retaining the residuum (a charcoal).

(*h*) 1 Ryan & Moody, 1.

(*i*) 10 B. & C. 22; 5 Man. & R. 66.

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and *Haworth* v. *Hardcastle* (*a*), that although every part of an invention must be new, yet every part need not be useful. Besides, there was no evidence to shew that the schistus could not be used to some extent.

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Sir *F. Pollock*, Sir *W. Follett*, and *Crowder*, in support of the rule, were stopped by the Court.

Lord ABINGER, C. B.—The doubt which the Court has had is, as to what rule they should pronounce in this case as to the costs. Certainly, my impression at the trial was, that I ought to have nonsuited the plaintiff; but I was very anxious to avoid the possibility of withdrawing any thing from the jury, even a scintilla of evidence, in order to avert the necessity of another trial, which, in a case like the present, must be attended with great expense to the parties. But I am free to own, that, although I refused to nonsuit the plaintiff after the close of his case, I felt very strongly that there really was no evidence to go to the jury. I felt that it was incumbent on the plaintiff, after the evidence given by his own witnesses, to have proved that bituminous schistus, as found in this country, might be used without detriment, after having been exposed to the process of distillation which he describes, but without removing the iron. I well remember that Sir *F. Pollock* had taken the objection very strongly, that it had been proved in the cause that the presence of iron was disadvantageous, and admitted to be disadvantageous, not in the qualified sense in which it has been urged on this occasion, viz. that although it rendered the process less efficacious, it did not deprive it of all efficacy; but that the presence of it was positively injurious. I so understood it, and I must do the defendants' counsel the justice of saying, that such was my understanding of it on the representation of both sides.

(*a*) 4 M. & Scott, 720; 1 Bing. New Cases, 182.

With that understanding, I felt that the plaintiff was bound either to have shewn that there was some known process of extracting it, which he did not, or to have shewn that there was some bituminous schistus which might be found in *England*, with the iron not entirely extracted, that yet might be used with effect; and on looking to my notes I could not find any such evidence. Mr. *Derosne's* agent had been examined at great length, and gave his evidence in rather an irregular manner, so as to make it very difficult to take it down on my notes; and, from the short note I took of that witness's evidence, I felt some doubt in my own mind whether he had not stated some fact which had escaped me at the time, which, on further investigation, might supply that defect in some minute degree; and I must own it was more with that impression that I left the case to the jury than on any conviction of my own mind that the plaintiff had made out a case; and then I wrote the note which I have read, that if I was wrong in leaving it to the jury, the defendants' counsel should have the benefit of it on moving for a nonsuit. Now, that being the case, I cannot but feel that the defendants are placed in the situation, by my having so acted, of being compelled to make this motion. If I had nonsuited the plaintiff, he then must have applied to the Court, and suggested any misunderstanding that had arisen at the trial, for the purpose of obtaining a new trial; or he might have stated that he himself was surprised by the objection, and could have answered it by evidence, if he had been fully aware of it; that is, that had the plaintiff's counsel been aware that the defendants meant to make this sort of objection, that bituminous schistus, such as is found in *England*, could not be used with advantage in this process, he would have had abundant evidence to rebut it. If I remember rightly, that was suggested at the close of my summing up. Now,

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the question is, on what terms we ought to allow this inquiry; and it appears to me that, as the defendants were entitled to a nonsuit, and would be entitled to a nonsuit if it were not for that suggestion, they ought not to pay the costs of the new trial. Then a question has arisen, whether, if there was any real misunderstanding, the *plaintiff* ought to pay the costs of the new trial? It is plain that if I had nonsuited the plaintiff, and he had applied to set aside the nonsuit, and there had been nothing irregular or improper in the conduct of the defendants, he would have had to pay the costs of the new trial. The reason the Court is induced to grant a new trial is, to have the matter more fully explained as to what is the use of the bituminous schistus, and what was the the real effect of it in its operation; and that being the case, the Court is disposed to pronounce this rule. I will first state the rule which the Court is disposed to pronounce, and will then state some reasons why we have come to that judgment. The rule will be—that the verdict should be set aside, that a new trial should be had, and that the costs of the new trial shall be costs in the cause if the defendants obtain a verdict finally, but shall not be costs in the cause if the plaintiff obtains a verdict. 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. 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 was to be expected 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 it 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; and 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 the question necessarily arises at present, or that it calls for an ultimate decision; because we think, on consideration, that the double process, or both the branches of the invention mentioned in the patent, are sufficiently described in the specification. I have come to that conclusion in consequence of the discussion on this motion. The patent purports to be a patent for an improvement in extracting sugar from the cane-juice, as well as 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 he 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 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 in opposition the case of extracting the sugar from the cane-juice, and 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 he 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

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sugar or syrup from the juice before it is baked and made sugar; but it is in evidence that it is made into syrup before it comes into that degree of baking, by the action of fire, as to make it granulate; it is made into syrup after it has derived a certain consistency by passing one, two, or three coppers, but it must pass through two others before it is in a state to granulate and to be 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 at which granulation takes place, 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 in other respects, as compared with the evidence on the face of it, it must be understood 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 he may mean that every part of his process is to be treated as an improvement. 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, if 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 combined with any iron whatsoever, would answer at all. The plaintiff himself has declared, that in that bituminous schistus which he himself furnished, the whole of the iron was extracted; and it appears that it was admitted by the counsel that the presence of iron would not

only be disadvantageous, but injurious. Thus, then, it appearing 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, it appears to me that the plaintiff ought to prove 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 well known that a man may be able to accomplish it with ease. As the bituminous schistus which was procured and used was exclusively that which was furnished by the plaintiff, not in its original state, but after it had undergone distillation and been made into charcoal in a foreign country, and as in that stage of its preparation it could not be discovered by examining it 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, 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 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 also underwent another process. I am therefore of opinion, that, without considering whether or not the patent would be avoided by the process requiring the use of means to extract the iron from the bituminous schistus, which were kept secret by the patentee, 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, I think that the plaintiff ought to have given some evidence to shew that bituminous schistus, in the state in which it is found and known in *England*, could

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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 supply the defect of proof as to the schistus on a new trial 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 have been stated.

PARKE, B.—I entirely agree with my Lord *Abinger* in respect to the construction of the patent. We cannot, on the face of this patent, say that, 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 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 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.

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 it appears to me, for the reasons that have been already given by Lord *Abinger*, that 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 Judge'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 which the plaintiff gave that bituminous schistus, when used in the process described, produced the desired effect, applied to a pulverised substance, which the witness had purchased 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 produced the effect in its natural state, a great portion of the difficulty would have been removed; but that not being proved, 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 *Buller*, J., in the very early case of *Turner* v. *Winter* (*a*); and that very learned Judge added a most extensive acquaintance with the subject of patent right 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

(*a*) 1 T. R. 607.

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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 the 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 show what the invention was, and that the proof that the specification was improper lay on the defendants; 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 wherever 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 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, I think a new trial ought to be had.

ALDERSON, B.—I quite agree with the view the rest of

the Court have taken in 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 by the Court; and I certainly entertain considerable doubts whether it is open to be taken on 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 the 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 it is much more competent for my Lord to decide 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 otherwise would be the case, that undoubtedly would be a ground for a nonsuit. But had 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 unnecessary to have shewn the operation of separating the iron from it: if its presence in the bituminous schistus was a positive detriment to the process of depriving the sugar of colour, then indeed

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the patent would fail. Under all the circumstances, I quite concur, in the view the rest of the Court have taken, as well as in the terms on which this case ought to go down to another jury.

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Rule for a new trial accordingly.

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Where the sheriff has levied 40*s.* under a *distringas*, and made a return that he has so levied, the plaintiff is entitled to enter an appearance, without an affidavit from the sheriff's bailiff of the due execution of the writ.

IN this case *Sewell* applied for leave to enter an appearance, on an affidavit stating that a writ of *distringas* had been issued against the defendant, and that the sheriff had returned that he had levied 40*s.* The plaintiff had applied to enter an appearance for the defendant, but the officer of the Court refused to allow him to do so, there being no affidavit from the sheriff's bailiff of the due execution of the writ. *Sewell* urged that there was nothing either in the act of the *2 Will.* 4, c. 39, or any of the new rules, which required such an affidavit to be made.

PARKE, B.—The uniformity of process act, *2 Will.* 4, c. 39, s. 3, directs that the *distringas*, and the notice thereto subscribed, shall be in the form mentioned in the schedule No. 3; and the notice is, that in default of the defendant's appearance within eight days inclusive after the return of the *distringas*, the plaintiff will cause an appearance to be entered for him. The objection is, that it does not appear that this notice was shewn to the defendant; but the sheriff's return is sufficient proof of the execution of the writ. You are therefore entitled to enter an appearance.

Motion granted.

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TROVER for a chaise. Pleas—*First*, not guilty; *secondly*, that the said chaise in the declaration mentioned was not, at the time of the supposed conversion thereof by the defendant to his own use, the property of the plaintiff, in manner and form, &c., and issue thereon.

In an action of trover for a chaise, it appeared that one *B.* had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that whilst it was in the defendant's possession, in the city of *London*, it was attached by process out of the Sheriff's Court. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it:—*Held*, that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not of the defendant.

At the trial before *Parke*, B., at the *Middlesex* Sittings in this term, the jury found a verdict for the plaintiff on the second issue; but the learned Judge being of opinion that there was no evidence of a conversion, directed them to find for the defendant on the first issue. It appeared that the plaintiff was a coach manufacturer, and the defendant a livery-stable keeper, residing in *Little Britain*, in the city of *London;* that one *Banks* had hired the chaise in question of the plaintiff, and had taken it to the defendant's, where he left it upon sale, together with a horse of his own, and that whilst it remained in the defendant's possession, it was attached by process out of the Sheriff's Court, in an action against *Banks*. The plaintiff demanded the chaise from the defendant, but the defendant said it had been seized under an attachment out of the Sheriff's Court, and refused to deliver it up. The plaintiff made a second application when *Banks* was present, who admitted that the chaise was the property of the plaintiff. The defendant requested time to consider whether he ought to give up possession of it, but afterwards refused to do so. The learned Judge was of opinion that this did not amount to evidence of a conversion, and directed the jury to find their verdict for the defendant on the general issue; which they accordingly did.

Humfrey now moved to enter a verdict for the plaintiff on the first issue. He submitted that there was in this

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case sufficient evidence of a conversion, as there was a clear demand and refusal. [Lord *Abinger*, C. B.—The objection is, that there was an attachment lodged against the property out of the Sheriff's Court.]—The attachment only bound the defendant not to deliver the chaise to *Banks*, who was the defendant in the action in the inferior court; but when the real owner of the chaise demanded it, it was at the defendant's peril to refuse to deliver it up.

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Lord ABINGER, C. B.—I am of opinion that there was in this case no evidence of a conversion. There is nothing to shew that the defendant ever intended to convert the chaise to his own use. It was attached as the property of *Banks*, after which it was in the custody of the law, and the defendant had it not in his custody or power to deliver; and he says, on its being demanded, that it is in the custody of the law, and that he cannot deliver it.

ALDERSON, B.—Although the chaise was in the defendant's hands, and upon his premises, it was in the custody of the law, and he could not deliver it without a breach of the law. The defendant had no notice of its being the plaintiff's property until after it was in the custody of the law.

Rule refused.

THOMAS *v.* MORGAN.

In an action on the case for keeping dogs, well knowing them to be used and accustomed to bite cattle, &c., and which bit and worried the plaintiff's cattle:—*Held*, that the plea of not guilty puts in issue the *scienter*, it being of the substance of the issue.

Where the defendant, on being informed that his dogs had bitten the plaintiff's cattle, offered to settle for them, if it could be proved that his dogs had done it:—*Held*, that this was some evidence to go to the jury of the *scienter*, though entitled to but little weight; but that proof that the dogs were of a savage disposition, and had bitten the cattle of other persons, was not evidence that the defendant knew they were accustomed to bite cattle.

CASE.—The declaration stated, that the defendant, theretofore, to wit, on the 1st day of *September*, 1833, and from thence for a long space of time, to wit, until and at

the time of the damage and injury to the said plaintiff as thereinafter mentioned, wrongfully and injuriously did keep divers, to wit, ten dogs, he, the said defendant, during all that time well knowing that the said dogs then were of a ferocious and mischievous disposition, and used and accustomed to attack, chase, bite, worry, and kill cattle; which said dogs afterwards, to wit, on &c., and on divers other days, &c., did attack, chase, bite, worry, and kill divers, to wit, ten bulls, ten cows, ten oxen, ten heifers, and ten steers, of the said plaintiff, of great value, to wit, of the value of one hundred pounds, by means whereof, &c.

Pleas.—*First*, not guilty.—*Secondly*, that no dogs or dog of him, the defendant, did attack, chase, bite, worry, or kill any bull, cow, ox, heifer, or steer, of the said plaintiff, in manner and form, &c.

The cause was tried before *Williams*, J., at the last *Spring* Assizes for the county of *Carmarthen*, when it was proved that the defendant's dogs had killed some of the plaintiff's sheep. It was also proved, that these dogs had worried the cattle of other persons, and were of a ferocious disposition; and that when the defendant was told that his dogs had killed the plaintiff's sheep, he promised to settle for the damage, provided it were clearly proved that they had done it. A witness of the name of *Protheroe* also proved that the defendant's dogs had worried his cattle, and that when he complained of it to the defendant, he said he could not help it, and that he had ordered his dogs to be kept up. This, it appeared, was on the 15th of *September*, the plaintiff's sheep having been bitten two or three days before. It was objected, that there was not sufficient evidence of the *scienter* to render the defendant liable; and the learned Judge being of that opinion, nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of 11*l.* 10*s.*, the value of the cattle, if the Court should

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be of opinion that there was sufficient evidence of the *scienter*.

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Chilton, in *Easter* Term last, moved accordingly, on two grounds:—*First*, that it was not necessary to prove the *scienter*, it being admitted on the record; and, *secondly*, that there was evidence of it to go to the jury.

The second plea is, that the dogs did not bite the plaintiff's cattle, but that was clearly proved; the learned Judge, however, thought that the *scienter* was not proved; but that, it is submitted, was admitted on the record. Since the new rules, all that is put in issue by the plea of not guilty is, whether or not the act complained of was done. The rule of *Hilary* Term, 4 *W.* 4, is, that "in actions on the case, the plea of not guilty shall operate only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." [Lord *Abinger*, C. B.—The *scienter* is no inducement; it is the substance of the issue.] It was held in *Frankum* v. *The Earl of Falmouth* (*a*), that, under the rules of *H.* T. 4 *W.* 4, the plea of not guilty, to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere *fact* of the diversion, and not its wrongful character. That shews that all that the general issue denies is, the act done; and therefore, under the general issue in this case, the only matter in dispute is, did the defendant's dogs worry the plaintiff's cattle?

Lord ABINGER, C. B.—In *Frankum* v. *The Earl of Falmouth*, the diversion was the injury complained of, and the Court held very properly that the plea of not guilty put in issue the mere fact of the diversion, and not the right to divert. Here, the *scienter* is no inducement; it is a part of the cause of action. If it was proved that

(*a*) 4 Nev. & Man. 330.

the defendant's dogs did bite the plaintiff's cattle without the defendant's knowledge of their propensity, he would not be liable to an action.

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The Court refused the rule on this point, but granted a rule on the ground that there was evidence of the *scienter*, which ought to have been left to the jury.

John Evans and *E. V. Williams* shewed cause.—There was in this case no evidence of any previous knowledge in the defendant that his dogs were accustomed to bite cattle, and therefore the nonsuit was right. The rule of law is, that the *scienter* must be clearly proved. The payment to *Protheroe* was after the plaintiff's sheep were bitten, and therefore does not shew any previous knowledge; and it cannot be inferred from the circumstance that the defendant promised to settle with the plaintiff for his sheep, if it could be proved that his dogs had killed them, that he had a prior knowledge of their being accustomed to bite cattle. The defendant may have made that promise from motives of charity, and without intending to admit his liability. In *Beck* v. *Dyson* (*a*), which was an action on the case for keeping a dog which bit the plaintiff, Lord *Ellenborough* held that it was not sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up; and that the defendant promised to make pecuniary satisfaction to the plaintiff, after the latter had been bitten by the dog. The *scienter* is the gist of the action, and must be clearly proved, and cannot be presumed from the disposition or the act of the dogs themselves. In *Hartley* v. *Harriman* (*b*), it was held that an averment in the declaration, that the defendant's dogs were accustomed to bite cattle, was not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. That case

(*a*) 4 Camp. 198. (*b*) 1 B. & Ald. 620.

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shews that there must be direct evidence of previous knowledge.

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Chilton, and *W. M. James*, in support of the rule.—There was evidence in this case which ought to have been submitted to the jury. From the fact that the defendant, on being informed of the injury, said, "he could not help it, he had ordered the dogs to be tied up;" and his offering to settle the matter if it could be proved that his dogs had done it, the jury might have inferred that the defendant knew of the disposition of the dogs. In *Jones* v. *Perry* (*a*), where the action was held maintainable, though it was not proved that the defendant knew his dogs had been used to bite, Lord *Kenyon* laid great stress on the circumstance that the defendant had had his dog tied up, and said that it shewed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad. In *Hartley* v. *Harriman*, it is said by *Abbott*, J. (*b*), that in *Judge* v. *Cox* (*c*) he left it to the jury to say, whether the expression used by the defendant, cautioning a person not to go near the dog least he should be bitten, was not evidence from whence they might infer that to her knowledge the dog had previously bitten some person. [*Parke*, B.—There is no doubt some evidence of the *scienter*; but we must consult the learned Judge to know how he intended to leave the question to us; whether he intended that a verdict should be entered for the plaintiff, if we were of opinion that there was some evidence of the *scienter*, or only in case there was substantial evidence of it.]

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—This was an action against the defendant for keeping dogs

(*a*) 2 Esp. 482. (*b*) 1 B. & Ald. 623. (*c*) 1 Stark. 285.

accustomed to bite cattle, and which had worried and bit the plaintiff's cattle. After the cause was gone through, and when the case was about to be submitted to the jury, it was objected, on the part of the defendant, that there was no sufficient evidence to go to the jury of the *scienter*. My Brother *Williams* being of that opinion, nonsuited the plaintiff; but gave him leave to move to enter a verdict for the sum of 11*l.* 10*s.*, if the Court should be of opinion that the learned Judge should have left the question of knowledge to the jury on the facts that were proved. Now, upon the facts proved, it was urged on the part of the plaintiff, that the case should have been submitted to the jury, on the question as to whether there was evidence of the *scienter*. One point made on the argument was, that a person of the name of *Protheroe* had had his cattle bitten by the defendant's dogs; that the defendant was acquainted with their savage nature, and had offered *Protheroe* satisfaction for the injury done by them; but it was stated that the transaction in question, in which the plaintiff's cattle were bitten, occurred before the transaction with *Protheroe;* and, on a careful examination of the report, such appeared to be the fact. It appeared that the learned Judge called back *John Jones*, who proved the transaction in which *Protheroe's* cattle were bitten; and upon his examination, it appears upon the report, that this transaction did not take place before the plaintiff's cattle were bitten. We have consulted the learned Judge, and find that he is satisfied of that fact, and therefore there is an end to that part of the case. It was also submitted, that the very disposition of the dogs themselves, their practice and habits, they having bitten other persons' cattle, ought to have been left to the jury, without further evidence, to shew that the defendant must have been aware of it. We are clearly of opinion, that in this respect there was no case to go to the jury; so the learned Judge thought, and we concur in that opinion.

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It was again submitted that there was an offer on the part of the defendant (and which was proved on the trial) of a compromise, after the plaintiff's cattle had been bitten, in which the defendant said he would settle with the plaintiff for the cattle which had been killed. The witness said, "I told him his dogs had killed three of the plaintiff's cattle, when he said, if they had done it he would settle for it." It was argued that this ought to have been allowed to go to the consideration of the jury; that the ready admission, that, if the dogs had been guilty of inflicting this injury, he would settle for it, was an acknowledgment that he knew he was liable in point of law for any damage done on account of their savage disposition; and that appears to the Court to be a position which ought, strictly speaking, to have been submitted to the jury. But upon looking at the terms in which the learned Judge has referred the question to the consideration of the Court, a doubt occurred to us whether the point was ever sufficiently brought to the attention of the Judge, or whether he was called upon to leave that as a question for the jury. The words in which the learned Judge makes his report are these:—"I thought there should be some proof of the defendant's knowledge of the mischievous nature of the dogs at the time of the mischief, and the question is, whether there was any such knowledge. Here Mr. *Chilton* contended, that knowledge might be inferred from the acts of the dogs. I thought otherwise, directed a nonsuit, and gave him leave to move." It is clear from the Judge's notes that the question has not been left to the jury, whether the offer of compromise was not an admission of his liability; and the learned Judge who tried the cause informs us, that he has no recollection of being called on to leave it to the jury. Now, certainly, the Court think, strictly speaking, and we all concur in that opinion, that the evidence ought to have been submitted to the jury; but that it ought to have been submitted to them with a

strong observation in favour of the defendant. Lord *Ellenborough* thought it entitled to so little weight, that he refused to leave it to a jury. But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity, without any admission of liability at all. We think, therefore, that we cannot in this case direct a verdict for the plaintiff; and it seems to us that we ought not to send the case down to a new trial, when the fact, if it had been submitted to the jury, ought to have been submitted with such strong observations as to make it very improbable that they would find for the plaintiff. We therefore think that the nonsuit ought not to be disturbed.

Rule discharged.

DOE *d.* EDMUNDS and Another *v.* LLEWELLIN and Another.

Where lands are held by copy of court-roll, according to the custom of the manor, they are copyhold within the 55 *Geo.* 3, c. 192, although they are not held *at the will of the lord.*

THIS was an action of ejectment, tried before *Patteson*, J., at the last *Summer* Assizes for the county of *Monmouth;* when the jury found a special verdict, as follows:—That *William Edmunds* and *John Edmunds,* on the 1st of *March,* 1825, demised the premises in question to *John Doe,* &c.; that the several before-mentioned premises, from time whereof the memory of man runneth not to the con-

By the special verdict it was found, that, previous to the passing of the 55 *Geo.* 3, c. 192, there did not appear upon the court-rolls of the manor any entry of a surrender of lands, parcel of the manor, and held by copy of court-roll thereof, to such uses as should be declared, by the last will of the person making such surrender, had ever been made:—*Held,* notwithstanding, that they were within the above statute.

Quære, whether a negative custom that copyhold lands, surrendered to the use of a will, should not pass thereby, is good?

A testator devised all the rest, residue, and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same might be:—*Held,* that the words of this devise were sufficient to pass the copyhold estate; and that a copyhold estate would pass by a general devise of real estate, although the devisor had made no surrender to the use of his will.

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trary, have been and still are within and part and parcel of the manor of *Abercarne*, in the county of *Monmouth*, and customary tenements thereof; and during all that time have been held and been demised and demisable by copy of court-roll, according to the custom of the said manor, but not at the will of the said lord of the said manor; and they further say, that one *Viah Edmunds*, being seised in fee of and in the premises aforesaid, on the 10th of *December*, in the year of our Lord 1771, at a court then held in and for the said manor, surrendered according to the custom of the said manor, into the hands of the lady of the said manor, by the acceptance of her deputy-steward, the premises aforesaid, being the premises hereinafter mentioned, and being the premises for the recovery of the term whereof the said ejectment, as to the first count thereof, is brought, to the use and behoof hereinafter mentioned; and at the same court the said lady granted the aforesaid premises, with the appurtenances, by copy of court-roll, to *Henry Edmunds*, his heirs and assigns for ever, according to the custom of the said manor, by and under the yearly rent of 1*s.* 5*d.*, and other rents and services therefore anciently due, and of right accustomed to be paid and performed. And the said *Henry Edmunds* then and there gave to the said lady, as a fine for such his estate in the premises, 1*s.* 5*d.*, and did his fealty, and was admitted tenant thereof. And the jurors aforesaid further say, that the entry on the court-rolls of the said manor of such surrender and admittance is as follows; that is to say,

"Manor of *Abercarne*." The court baron of *Mary Burgh*, widow, mother and guardian to *Charles Henry Burgh*, esquire, an infant, lady of the said manor, held at the dwelling-house of *Mary Williams*, spinster, situate at *New Bridge*, in and for the said manor, on *Tuesday* the 10th day of *December*, 1771, before *Robert Blandford*,

gentleman, deputy to *Charles Halfpenny*, gentleman, chief steward of the said manor, and *William John*, *Edward John*, and *Richard William*, homagers there.

To this court came *Viah Edmunds*, of the parish of *Mynyddysloyne*, in the county of *Monmouth*, widow, a customary tenant of the said manor, in her own proper person, and surrendered into the hands of the lady of the said manor, by the acceptance of her said deputy-steward, two customary messuages or tenements, three barns, one cow-house, and several pieces or parcels of customary land, commonly called or known, &c.; [here followed a description of the premises]; and all her estate, right, title, interest, property, claim, and demand whatsoever, of, in, or to the said premises, and every or any part thereof; and the reversion and reversions, remainder and remainders thereof, to the use and behoof of *Henry Edmunds*, of the parish of *Mynyddysloyne* aforesaid, gentleman, his heirs and assigns for ever, according to the custom of the said manor; to which said *Henry Edmunds*, the lady, by her said deputy-steward, granted seisin thereof; to have and to hold the said premises, with the appurtenances, unto the said *Henry Edmunds*, his heirs and assigns for ever, according to the custom of the said manor, by and under the yearly rent of 1*s.* 5*d.*, and other rents and services therefore anciently due, and of right accustomed to be paid and performed. And the said *Henry Edmunds* hath given to the lady, as of fine for such his estate and entry in the premises, 1*s.* 5*d.*, and hath done his fealty to the lady, and is admitted tenant thereof."

And the jurors aforesaid, upon their oath aforesaid, further say, that the said *Henry Edmunds*, having been so admitted as aforesaid, and being seised of an estate in fee simple in possession, of certain freehold premises within the manor, did afterwards, on the 2nd day of *November*, 1815, make and publish, in the presence of two

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witnesses, his last will and testament in writing, as follows:—

"In the name of God, amen. I, *Henry Edmunds*, of the parish of *Mynyddysloyne*, in the county of *Monmouth*, gentleman, being of sound and disposing mind, memory, and understanding, but mindful of my mortality, do make this my last will and testament in manner and form following, that is to say:—I give and bequeath unto my daughter *Maria Edmunds*, 100*l.*; I also give and bequeath unto my daughter *Catherine Edmunds*, the like sum of 100*l.*; and unto my daughter *Sarah Edmunds*, the like sum of 100*l.*; which said several sums or legacies I do hereby direct to be paid unto my said daughters respectively, by my eldest son *Henry Edmunds*, out of my freehold estate, when and as they shall severally and respectively attain their ages of twenty-one years, or be married, which shall first happen; and in case any or either of my said daughters, *Maria*, *Catherine*, and *Sarah*, shall happen to die before her or their attaining their respective ages of twenty-one years and unmarried, then I give and bequeath the share and respective shares of her or them so dying, unto the survivors or survivor of them. I also give and bequeath unto my said daughters, *Maria*, *Catherine*, and *Sarah*, and unto my youngest daughter, *Viah Edmunds*, four feather-beds and bed-linen, four chaff-beds, four tea-trays, four silver sugar-tongs, twenty-four silver tea-spoons, twelve brass candlesticks, four silver punch-ladles, four sets of fire-irons, twenty-four knives and forks, seven mahogany chairs, two square tables, and two round tables, equally to be divided between them as they shall severally and respectively attain their ages of twenty-one years, or day or days of marriage, or immediately after the death of my beloved wife, *Joan Edmunds*, which shall first happen. I also give and bequeath unto my said daughter *Maria*, one large looking-glass, and one

silver cream-jug; and I also give and bequeath unto my said daughter *Viah*, one dresser, with all the articles thereon and thereunto belonging. I also give and bequeath unto my son *Edmund Edmunds*, my new clock, desk, and book-case. I also give and bequeath unto my son *John Edmunds*, my best silver watch and one silver tankard. I also give and bequeath unto my son *William Edmunds*, my other silver watch and one silver tankard.

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"All the rest, residue, and remainder of my estate whatsoever and wheresoever, and of what nature, kind, and quality soever the same may be, and not hereinbefore given and disposed of, after the payment of my debts and funeral expenses, and the expense of proving this my will, I hereby give and bequeath unto my dear wife, the said *Joan Edmunds*, whom I hereby make, ordain, constitute and appoint, together with my friends, *John Evans*, of *Penygarn*, and *William Jones*, of *Mynyddysloyne*, executrix and executors and trustees of this my will, for the benefit of my children; and hereby revoking all former will and wills by me at any time heretofore made, I do declare this to be my last will. In witness whereof I have hereunto set my my hand and seal, this second day of *November*, in the year of our Lord one thousand eight hundred and fifteen.—*Henry Edmunds, L. S.*" "Signed, sealed, published, and declared by the said testator, *Henry Edmunds*, as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.—*Lewis Isaac, Daniel Edwards.*"

And the jurors aforesaid, upon their oath aforesaid, do further say, that the said premises in the first count of the within declaration mentioned, and all other lands and tenements being within and part and parcel of the said manor, and held by copy of court-roll thereof, have,

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from time whereof the memory of man runneth not to the contrary, passed by surrender and admittance.

And the jurors aforesaid, upon their oath aforesaid, do further say, that, from time whereof the memory of man runneth not to the contrary, customary courts have been holden in and for the said manor, at which the tenants of the said manor, holding their lands by copy of court-roll thereof, do suit; and that, by the custom of the said manor, the said tenants are sworn of the homage, and that fines are paid, and fealty performed, by all persons who are admitted to any lands, being part or parcel of the said manor; and that a heriot of the best beast is payable on the death of every tenant of the said manor, holding his lands by copy of court-roll thereof. And also that the widow of every such tenant is entitled, as her free-bench for the term of her life, to the whole of the lands, being part and parcel of the same manor, and held by copy of court-roll thereof, of which her husband died seised. And further, that by the custom of the same manor, the mines and minerals under the lands of the tenants of the same manor, being part and parcel of the same manor, and held by copy of court-roll thereof, cannot be worked without the licence of the lord of the manor, by whose lessees, being tenants of the said lands, the said mines and minerals are worked. And the jurors aforesaid further say, that previous to the passing of an act of Parliament, in the 55th year of the reign of his late Majesty King *George* the Third, to remove certain difficulties in the disposition of copyhold estates by will, there does not appear upon the court-rolls of the said manor any entry of a surrender of lands, being part and parcel of the said manor, and held by copy of court-roll thereof, to such uses as should be declared by the last will and testament of the person making such surrender, had ever been made; but that since the passing of the said

act, lands, being part and parcel of the said manor, and held by copy of court-roll thereof, have been surrendered to such uses as should be declared by the will and testament of the person making such surrender.

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And the jurors aforesaid, upon their oath aforesaid, do further say, that the said *Henry Edmunds* did not, at any time, surrender the said tenements in the first count of the within declaration mentioned. And they further say, that the said *Henry Edmunds* died on the 24th day of *December*, 1815, and after the passing of the said act of Parliament, without having altered or revoked his said will, entitled to the premises in the first count of the within declaration mentioned, for the estate hereinbefore mentioned, leaving a widow, the said *Joan Edmunds*, and three sons, him surviving: and that the said *William Edmunds* and *John Edmunds* are the two younger sons of the said *Henry Edmunds*.

And the jurors further say, that the lands, being part and parcel of the said manor, and held by copy of court-roll thereof, descend, according to the custom of gavelkind, to all the sons of a tenant dying seised thereof. And the jurors aforesaid, upon their oaths aforesaid, further say, that, at a court baron and customary court, held in and for the said manor, on the 28th day of *February*, 1821, the said *Joan Edmunds* was, according to the custom of the said manor, admitted tenant, as well to the premises in the first count of the within declaration mentioned, as to all other lands and tenements, being part and parcel of the said manor, and held by copy of court-roll thereof, of which the said *Henry Edmunds* died seised, or to which he was entitled, to hold all the said premises unto her, the said *Joan Edmunds*, her heirs and assigns for ever: and that the entry of such admittance appearing upon the court-rolls of the said manor is as follows, that is to say:—

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"Manor of *Abercarne.*" The court baron and customary court of *George Maule, Joseph Kay*, and *John Llewellin*, esquires, lords of the said manor, held in and for the said manor, on *Wednesday*, the 28th day of *February*, 1821, by and before me, *David Williams*, gentleman, steward of the said manor, and *William Edmunds* and *Philip David*, homagers, then and there present.

"To the court came *Joan Edmunds*, of the parish of *Mynyddysloyne*, in the county of *Monmouth*, widow, and prayed to be admitted tenant of and to all that one close and parcel of land, called &c.; [here followed a description of the premises]; and the reversion and reversions, remainder and remainders thereof. And the said lords, by their said steward, to the said *Joan Edmunds*, hath granted seisin thereof, to have and to hold the said premises, with their appurtenances, unto the said *Joan Edmunds*, her customary heirs and assigns for ever, according to the custom of the said manor, by and under the yearly rent of , and other rents and services, therefore anciently due, and of right accustomed to be paid and performed; and the said *Joan Edmunds* hath given to the lords, as a fine for such her estate and entry in the said premises, and hath done her fealty to the lords, and is admitted tenant thereof."

And the jurors aforesaid further say, that, at the said last-mentioned court baron and customary court, the said *Joan Edmunds*, so admitted tenant of the said premises in the within-written declaration mentioned, did surrender the same into the hands of the lord of the said manor, according to the custom thereof, to the use of one *Henry Mostyn*, his customary heirs and assigns for ever; to whom the said lords did, at the same court, grant admittance thereof; but whether or not upon the whole matters aforesaid, by the jurors aforesaid in form aforesaid found, the said defendants are guilty of the trespass and eject-

ment in the within-mentioned first count, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the Court of our lord the King, before the Barons of his *Exchequer;* and if, upon the whole matter aforesaid, it shall seem to the said Court, that the said defendants are guilty of the trespass and ejectment last mentioned, then the jurors aforesaid, upon their oath aforesaid, say that the said defendants are guilty thereof, in manner and form as the said *John Doe* hath within thereof complained against them; and in that case they assess the damages of the said *John Doe*, on occasion of the said trespass and ejectment, besides his costs and charges, by him about his suit in his behalf expended, to one shilling; and for these costs and charges, to forty shillings. But if, upon the whole matters aforesaid, it shall seem to the said Court, that the said defendants are not guilty of the trespass and ejectment in the said first count mentioned, then the jurors aforesaid, upon their oath aforesaid, say, that the said defendants are not guilty thereof, &c., &c.

R. V. Richards, for the lessors of the plaintiff.—There are, in this case, three questions for the consideration of the Court. The *first* is, whether these lands are copyhold lands; *secondly*, if they are so, is there in this manor any custom to devise lands by will. If either of these questions are determined in the negative, then the statute 55 *Geo.* 3, c. 192, s. 1, which provides for the case where there is no surrender to the use of a will, will not affect the question. The *third* question, in the event of this Court deciding these two points against the plaintiff, will be, whether the will in question is sufficient to pass the copyhold estate.

First.—The lands in question are not copyhold lands, not being held at the will of the lord. All the authorities on this subject shew, that if the lands are not held at the will

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of the lord, they are not copyholds, however in other respects the tenure may be of a copyhold nature. Thus, in *Smith* v. *Page* (*a*), it is said, that "whatever may pass by surrender in the lord's court, *secundum consuetudinem manerii*, but not *secundum voluntatem domini*, is not copyhold." So, in *Littleton*, s. 73, the definition of a copyhold is thus given—"Tenant by copy of court-roll is, as if a man be seised of a manor, within which manor there is a custom, which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, fee tail, or for term of life, &c., *at the will of the lord*, according to the custom of the same manor." And, in the notes to the words "at the will of the lord," *Co. Lit.*, note 385 to page 58. a., it is said, "*Nota*, these words, *ad voluntatem domini*, are material to express copyhold; for if these words be omitted in pleading, it shall be intended that the estate is a customary freehold. *M.* 7 *Car. B. R. Crook*, *n.* 7, *Hughes's case. Hale, MSS.*" And in *Rowden* v. *Malster* (*b*), it was held, that copyholds could not be entailed, because copyholders, at the time of making the statute of *Westminster* the second, *de donis conditionalibus*, and for divers years after, were only tenants at the will of the lord, and the lord might have ousted them, and they had no remedy, unless in *Chancery*. In *Rogers* v. *Bradley* (*c*), which was an action of replevin, the defendant made conusance, that *Joseph Mark*, *diu ante*, &c., was seised in fee of a close called *Underway*, part of the manor of *Liscard*, of which the place where was and is parcel, according to the custom of the manor, and stated a surrender in Court according to the custom of the manor. The plaintiff replied

(*a*) Comb. 387. (*b*) Cro. Car. 45

(*c*) 2 Ventr. 143.

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matter which was frivolous; to which there was a demurrer, but the Court gave judgment for the plaintiff, "because the conusans was insufficient; for the lands whereupon the distress was taken, being freehold, (for so they must be taken to be, though it is shewn that *Mark* was seised according to the custom of the manor, *because it is not said at the will of the lord*), could not be conveyed by surrender in Court and an admittance, without an especial custom to pass them in that form; and it is not enough to say, that he surrendered them *secundum consuetudinem manerii*, but the custom should have been fully set forth." So, in *Brown's case* (*a*), it is said, "but the heir cannot plead, that his father was seised in fee at the will of the lord, by copy of court-roll of such a manor, according to the custom of the manor, and that he died seised, and that the same descended to him; for in truth such interest is but a particular interest at will, in judgment of law, although it is descendible, as hath been said, by custom; for he is tenant at the will of the lord, according to the custom of the manor." In *Crowther* v. *Oldfield* (*b*), which was an action on the case, for inclosing a common, the declaration stated, that the plaintiff was seised in fee of and in one messuage and ten acres of land, with the appurtenances, in *N.*, parcel of the manor of *W.*, and holden by copy of court-roll of that manor, as a customary tenant in fee simple, according to the custom of the same manor. Upon not guilty pleaded, the plaintiff obtained a verdict; but upon motion in arrest of judgment, the Court of *Common Pleas* gave judgment for the defendant; and although the judgment was reversed on a writ of error, the ground is stated by *Holt*, C. J., to have been, that the fault in the declaration was helped by the verdict; but he adds, "It should have been said, indeed, that the tene-

(*a*) 4 Rep. 226. (*b*) 2 Ld. Raym. 1225.

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ments were held at the will of the lord, according to the custom of the manor, to have them appear fully to have been copyhold; but unless they be copyhold, it is impossible this finding can be true." In *Gale* v. *Noble* (*a*), it is said, that, "upon a trial at bar, in ejectment for lands, parcel of the manor of *Corsham* in *Wilts*, which by very ancient books of that manor appeared to be parcel of the Duchy of *Cornwall*, and still passed by surrender and copy of court-roll, but yet are not copyhold, because it did not appear that on any of the rolls or copies produced, they were granted *ad voluntatem domini manerii*, but only *secundum consuetudinem manerii*; therefore, it was resolved by the Court, that these lands are not copyhold, but a customary freehold." [*Alderson* B., here referred to *Brooke's Abridgment*, *tit. Tenant per copie de Court-rol*, *&c.*, *pl. 22*, and *Blackstone's Law Tracts*, Vol. 1, p. 127.] The case of *Doe* d. *Reay* v. *Huntington* (*b*), shews, that estates of this kind in the North of *England*, are not customary estates, nor freehold, but fall under the same general consideration as copyholds, though alienable by bargain and sale and admittance thereon, and not holden at the will of the lord. So, in *Burrell* v. *Dodd* (*c*), it was held, that the customary tenements in the North of *England*, which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called "tenant right," and held of the lord according to the custom, were not within the statutes of partition, 31 *Hen.* 8, c. 1, and 32 *Hen.* 8, c. 32. That decision proceeded on the ground, that the lands were neither customary freeholds nor copyholds, but of a peculiar description. Lord C. B. *Gilbert* lays it down in his *Treatise on Tenures* (*d*), that "a copyholder can-

(*a*) Carthew, 432.
(*b*) 4 East, 270.
(*c*) 3 Bos. & Pull. 378.
(*d*) Gilb. on Tenures, p. 157.

not transfer his estate but by surrender; the reason is, he has only an estate at will." And Mr. Serjeant *Williams*, in a note to the words "at the will of the lord," says (*a*); "These words are essential, for it is held to be fatal to say, that the lands were demisable by copy of the rolls of the Court, without adding, *at the will of the lord*." And *Hill* v. *Bolton* (*b*) is cited; and he adds, "If these words be omitted, it will be intended an estate in fee at common law." If this estate be not copyhold, it is of no consequence what the nature of it is, as the statute applies to copyholds only.

Secondly.—Even supposing that they are copyhold, they are not affected by the statute 55 *Geo.* 3, c. 192, it not having been found by the special verdict, that there was any custom in this manor to surrender to such uses as should be declared by will. The statute recites, that "whereas, by the customs of certain manors, copyhold estates of such manors pass by the last will and testament of the copyhold tenants thereof, declaring the uses of surrenders made for that purpose; and whereas much inconvenience has arisen from the necessity of making such surrenders;" and it enacts, "that in all cases, where by the custom of any manor in *England* or *Ireland*, any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have

(*a*) 1 Saund. 348. (*b*) 2 Lutw. 1166, 1171.

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been if a surrender had been made to the use of such will." But by the third section of the act it is provided, that nothing in the act shall be construed "to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest, in or to any copyhold lands, &c., which would be invalid or ineffectual, if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will." Therefore, if there was no custom in this manor to surrender lands to the use of a will, this statute would not in any way affect the right, or render that devise valid which was not so before the statute, in case a surrender had been made. The case of *Pike* v. *White* (*a*), where Lord *Thurlow* is reported to have said, that "it was totally impossible to say that a copyhold surrendered to the use of a will should not pass thereby; and therefore he must declare the custom (if there were such a one) bad," has been very much questioned (*b*). Mr. *Evans*, in his collection of the statutes (*c*), states, that he thinks this position untenable in point of law; and Mr. *Belt* states, in a note to this case, that "Lord *Redesale's* notes intimate that Lord *Thurlow* laid down no such general proposition, and said no more than that, in that case, the surrender should be supplied." The effect of the special verdict in this case is, that there is within this manor no custom to surrender to the use of the will. [*Parke*, B.—I think you may take it as finding no such custom affirmatively.] The Real Property Commissioners, in their Third Report (*d*), in speaking of customary freeholds, observe—"that, in many of the manors, to which allusion has been made, and with respect to some property denominated

(*a*) 3 Brown, Cha. Ca. 286.
(*b*) See Mr. Belt's note to that case, page 288.
(*c*) Vol. 1, 475.
(*d*) Page 20.

customary freehold, there was no common law right of devising, and no advantage has been derived from the statute. There is a want of the custom for surrendering to the use of the will; and the testamentary power, in the absence of a special custom, can only be exercised (as it was in regard to freehold lands before the statute of wills) indirectly, by transactions *inter vivos*;" so that they speak of it as being without doubt. [*Parke*, B.—Those reports are no authority. *Alderson*, B.—The statute itself appears to contemplate some cases to which it would not be applicable.]

The *third* question is, whether the words of this will are sufficient to pass the copyhold estate. It was certainly held, in *Doe* d. *Clarke* v. *Ladlam* (*a*), that, since the stat. 55 *Geo.* 3, c. 192, a copyhold will pass under a general devise of real estate, although there be no surrender to the use of the will; but the decision in that case is considered as being impugned by the later case of *Doe* d. *Smith* v. *Bird* (*b*). [*Parke*, B.—The case of *Doe* v. *Bird* is distinguishable; for there the will was made before the statute. The Judges had no intention to interfere with the decision in the former case, and the point was much considered.]

Maule, contrà.—First, these lands are copyhold, within the meaning of the statute, and will pass by the will, unless there be something in this particular manor to prevent them. They are not, indeed, described in the court-rolls as being held at the will of the lord; but the meaning of those words in copyhold cases is the same as that of the words "according to the custom of the manor," and these lands are held according to the custom of the manor. The question, whether copy-

(*a*) 7 Bingh. 275; 5 M. & Scott, 48.

(*b*) 5 B. & Adol. 695; 2 Nev. & Man. 679.

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hold or not, depends on the nature of the tenure, not on the words by which it is described. If these lands are, in part, held in the same manner as copyholds, they are of that tenure in whatsoever language the holding may be described. Sir *W. Blackstone*, in his Tracts, *Considerations on Copyholders* (*a*), considers the terms, "customary freehold or freeholders," as put in opposition to "*common* copyhold or copyholders," or a "*mere* copyholder," but that they are still copyholds of a free and privileged nature. [*Alderson*, B.—He says, "It would be absurd to say that lands holden by copy are not copyholds in *any* sense."] Sir *W. Blackstone* says (*b*), "That however the lawyers may at times have denominated these tenures a sort of base species of freehold, in contradistinction to mere copyholds, yet the law in the main regards them as being properly *copyhold*, and not freehold tenures, else they could not have subsisted to this day. For they must otherwise have been involved in the general fate of the rest of our ancient tenures, when by the statute of 12 *Car.* 2, c. 24, they all were abolished, and reduced to free and common socage, except only tenures in frankalmoign, and tenures by copy of court-roll." Mr. Serjt. *Scriven* (*c*) quotes the above passage, and adds (*d*)—"I wish also to remind the reader that there is a difference in the mode of pleading, between pure copyholds and those of a privileged nature, (denominated customary freeholds), arising principally out of the circumstance of the former being held, not only *secundum consuetudinem manerii*, but also *ad voluntatem domini*; whereas the latter are held according to the custom of the manor, but not at the lord's will. With this exception, however, there would appear to be no grounds of distinc-

(*a*) Pages 145, 147.
(*b*) Page 159.
(*c*) Vol. 2, 672.
(*d*) Id. 674.

tion between ordinary and privileged copyholds, when the latter are held by *copy of court-roll*, and pass by *surrender* and admittance, although not held at the will of the lord." But even if the lands in question be for some purposes not copyholds, they are so within the stat. of *55 Geo. 3*, c. 192, which is a beneficial act, and ought to be liberally construed. Its object was to supply a surrender in all cases where the tenure was such, that land might pass by will and surrender, and could not pass by will without surrender. This case is, therefore, clearly within the mischief intended to be remedied by the act.

Secondly.—There is nothing in this manor to prevent lands passing by will. The special verdict does not find any custom as to devising either affirmatively or negatively. It certainly does not find any custom that lands shall not be surrendered to the use of a will; but, if such a negative custom had been found, the case of *Pike* v. *White* is a decisive authority to shew that such a custom would be bad. It has been said that some writers have objected to the correctness of that judgment; but they are of no authority against that decision which has been carried into effect; and the property involved in the suit has been enjoyed under that decree. It cannot be said that it has been generally disapproved of, for Mr. *Watkins*, in his *Treatise on Copyholds* (*a*), lays it down, that "a copyholder may surrender to such uses as he shall by will appoint, without a special custom for that purpose; and, indeed, if a special custom were alleged to restrain him from doing so, it could not be supported;" and he refers to *Pike* v. *White*. So, in *Church* v. *Mundy* (*b*), Lord *Eldon* quoted Lord *Thurlow's* opinion with approbation, and said, that "the Court would hold that there might be a surrender to the use of a will, though no instance could be found on the records of the manor; or if there could

(*a*) Vol. 1, 122. (*b*) 15 Ves. 404.

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be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which this Court would supply." Such a custom would therefore be bad; but it is clear that in this case no negative custom is found, even assuming it to have been good if it had been. It is here merely found, that, before the passing of the 55 *Geo.* 3, there does not appear upon the court-rolls of the manor any entry of a surrender of lands, being parcel of the manor and held by copy of court-roll thereof, to such uses as should be declared by the will of the person making such surrender; but that, since the passing of the act, such lands have been surrendered to such uses as should be declared by will. But the mere absence of any instance of such a surrender appearing on the court-roll does not shew a negative custom. It would therefore pass by devise by the general law of copyhold. [Lord *Abinger*, C. B.—You say that the general rule prevails, and that they will pass by devise, unless there is a custom to the contrary.] The special verdict finds the custom to be, that the lands pass by surrender and admittance, which is, indeed, the general custom with regard to copyholds; the meaning of that is, that a copyholder has a right to surrender, and to direct who shall be admitted; he is not restrained to any particular mode of pointing out the person to be admitted, and it is no objection to any mode of doing this, that it does not appear to have been used before in the manor, provided it is not unreasonable or absurd. Suppose there had been a surrender to the use of such person as the surrenderor should appoint by deed, attested by two witnesses, would it be any objection to a title, founded on such a surrender, that no surrender to the use of a deed so attested appeared to have been previously made? It does not, therefore, require a special custom to surrender to the use of a will; but it is

part of the general custom that the lands pass by surrender and admittance, that the person to be admitted may be pointed out by a will. Indeed the term will is not accurately used as applied to such a case. It is not analogous to a direct devise by will, but to an appointment to uses, in the same way that a feoffment to uses enabled a freeholder to devise before the statute of wills. Mr. Serjt. *Scriven* (*a*) begins the chapter on Devise as follows—"A will of copyholds is only in the nature of an appointment, or declaration of the uses pursuant to the power created by the surrender; and is as inoperative, as a substantive conveyance of copyhold property, as a will defectively executed is for the conveyance of freehold property;" that is, because it is parcel of the custom that lands shall pass by surrender and admittance to the use of the will. Again he says (*b*), "an instrument in any form, whether deed-poll or indenture, if the obvious purpose be not to take place till after the death of the person making it, operates as a sufficient declaration of the uses of a surrender to will, even if it be wholly confined to copyhold, and not therefore within the cognizance of the ecclesiastical courts." The Real Property Commissioners, in their Fourth Report, thus express themselves—"an indirect power of making a legal devise existed through the medium of a surrender." They also say, that, "by a custom, which since became general, copyholds were surrendered to the use of such persons as the surrenderor should name by will, (or, what is the same thing, to the use of his will), and the devisee was considered to be entitled to admittance in the same manner as if his name had been inserted in the surrender." Since, therefore, the lands in question pass by surrender and admittance, and there is no custom restraining the general power of pointing out the party to be admitted, he may be point-

(*a*) Treatise on Copyholds, 299. (*b*) Page 293.

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ed out in any reasonable way the surrenderor thinks best, and, therefore, might be pointed out by will. It follows, that as the lands are copyhold within the statute, and capable of passing by will and surrender, the statute supplies the surrender, and they pass by the will also.

R. V. Richards replied.

Cur. adv. vult.

Lord ABINGER, C. B., delivered the judgment of the Court.—This case was argued before us last term on a special verdict. The question was upon the statute of *55 Geo. 3*, c. 103, whether or not, by virtue of that statute, the estate in question, which had been devised by the testator, passed the copyhold estate, it not having been surrendered to the use of the testator's will. On the special verdict two points were made—*First*, that this was not a copyhold estate at all, because it did not appear on the special verdict to be held at the will of the lord, and consequently could not be within the operation of the statute, which applied only to copyhold estates. That point has been very much considered, and although it may be true that this copyhold estate, not held at the will of the lord, may not, in strict legal language, be a copyhold; yet all the text-writers, and especially Sir *William Blackstone*, and my Lord *Coke*, treat these estates as copyholds of a like species, though distinguished in some of their characters; and therefore it is sufficient to say, that the general word "copyhold," which is in the stat. *55 Geo. 3*, must be considered to embrace estates of that description. The next point was, that it did not appear, that, by the custom of this manor, copyhold estates within it, though passed by surrender and admittance, were devisable by will, and it was argued that the statute had no application to any species of copyhold estates which was not devisable by will. The special verdict finds that the estates in question, with

all other copyholds of a like nature, passed by surrender and admittance, and it does not state any negative of a custom to pass by will; therefore the question arises, which has been very ingeniously and fully discussed, whether or not we must take the special verdict to be that this copyhold estate, within a manor of this description, did not pass by will. Now, if it had been necessary to find affirmatively or negatively, in distinct terms, whether a custom existed to pass copyholds by will in this manor, the special verdict would be imperfect, for not having found distinctly the negative or affirmative of that proposition, and the result would have been that the Court must have awarded a writ of *venire de novo;* but, on a full consideration, we are of opinion that there is sufficient on this special verdict to warrant our judgment, although it does not contain any negative finding against the right claimed by the devisee. It may be observed, that the authority of Lord *Thurlow*, in the case of *Pike* v. *White* (*a*), if taken to the full extent, would be a warrant to say, that in all cases a negative custom of that sort would be bad; but the Court is not prepared to go that length; at the same time it must be observed, that the authority of Lord *Thurlow* in that case, though referred to by other Judges, has never been questioned, nor has his *dictum* been overruled; but Lord *Thurlow's* proposition contains two points in respect of the case then before him:—the case neither found that there was or was not a custom; and Lord *Thurlow* laid it down that it was impossible to say that a copyhold surrendered to the use of a will should not pass thereby, though there were no special custom prevailing in the manor to devise lands: but then he added, if a negative custom had been found that lands should not be surrendered to the use of a will, it would have been bad. Now, the question which has been made

(*a*) Brown's Ch. Cases, 286.

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on Lord *Thurlow's* judgment by two or three gentlemen, who have devoted much time to the nature of copyhold tenures, has never gone beyond this proposition—namely, whether, where the custom has been found in the negative to exist in a manor, that copyholds should not pass by will, Lord *Thurlow* would have been right in saying that that custom would be unlawful; but nobody has ever questioned the first part of the proposition, that, where it did not appear in the negative form, the estate did pass by surrender and admittance to the use of a will. It appears to us on principle, and upon the authority of this case, and so far nobody has questioned Lord *Thurlow's dictum*, that, if the fact is affirmatively found, as it is here, that copyhold estates do pass by surrender and admittance, there is enough found to justify us in inferring that they must pass by will, the contrary custom not being found. There seems to be nothing unreasonable for a man to surrender to the use of his will, or that he should surrender a copyhold estate, and should declare the person whom he wished to be admitted by his will. There is nothing in this special verdict to shew what particular form of declaring his intention, or the use of his surrender, is required by the custom of the manor; there is nothing to shew that he should not declare by deed or note in writing, or by will or by parol, the person who was to be admitted on surrender; and therefore, as the verdict distinctly finds, that, by the custom of the manor, copyhold estates pass by surrender and admittance, and does not negative the custom that surrenders may be to the use of the will, we are of opinion that there is sufficient to justify the Court in finding, in this case, that the statute has application to the case in question; and that, although no surrender was actually made, yet if a surrender had been made, the copyhold estate would have passed by will independently of the statute: and the statute applies to make the fact of a surrender unnecessary

to support a devise by will of a copyhold estate, where by the custom of the manor a copyhold estate was devisable by will on a surrender being made. We think on this special verdict we are warranted in saying, that the custom is sufficiently established in law, as well as in fact, to apply the statute to it; and we are of opinion, therefore, that the judgment ought to be for the defendant.

Judgment for the defendant.

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The KING *v.* FAULKNER.

A commissioner of bankruptcy appointed under the 1 & 2 *Will.* 4, c. 56, has no power, when sitting alone, under the authority of the 7th section, to fine or commit for a contempt.

A *FIAT* in bankruptcy had issued against one *J. L. Kensington*, under which Messrs. *Adlington*, *Gregory*, and *Faulkner*, were the *London* agents for the petitioning creditor, who resided at *Holyhead*. In the course of the proceedings, an offer was made by the petitioning creditor to take the effects of the bankrupt for a certain sum, which offer was accepted by the official assignee. Messrs. *Adlington*, *Gregory*, and *Faulkner*, as the solicitors for the petitioning creditor, prepared the assignment by which the effects of *Kensington* were to be assigned to him. A question arose upon whom the costs of the assignment were to fall, whether upon the petitioning creditor or upon the estate. Mr. *Faulkner*, who conducted this business, made out a bill, charging the costs to the estate. This *fiat* came before Mr. Commissioner *Fane*, who thought that the costs of the assignment, according to the usual form, ought to be thrown upon the purchaser; and that it was not right that they should be a burthen on the estate; and he expressed that opinion sitting in the discharge of his official duties, and made certain observations, at which Mr. *Faulkner* felt offended, and wrote a letter to Mr. *Fane* in answer to his ob-

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servations, reflecting upon Mr. *Fane's* conduct. This letter was delivered to Mr. *Fane* sitting in his court, in the exercise of his judicial duty. Mr. *Fane* subsequently summoned Mr. *Faulkner* before him as a witness; and the latter having been sworn, was examined, and on being asked, acknowledged that he had written and sent the letter. The learned commissioner then said, that, in so doing, he had been guilty of a contempt towards him in his character of a commissioner of the Court of Bankruptcy, for which he was liable to be fined or imprisoned; and he thereupon imposed a fine of 10*l.* upon Mr. *Faulkner* for his contempt. An estreat of this fine having been made up, and removed into the Court of *Exchequer*, a rule was obtained in *Easter* Term by Sir *W. W. Follett*, calling upon the Attorney-General to shew cause why the fine should not be set aside, and the money be restored.

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The *Attorney-General* (Sir *J. Campbell*), and *R. V. Richards*, now shewed cause. The question in this case is, whether a commissioner, under the circumstances in which this commissioner was sitting in the exercise of his functions as a commissioner of bankruptcy, has a power to fine for contempt. It is admitted that the commissioners acting under the 6 *Geo.* 4, c. 16, and the acts which preceded it, had no such power; but it is submitted that the present commissioners have that power; and if so, this Court will not inquire into the nature of the contempt (*a*). The question is not, whether they have a power to imprison until satisfactory answers are given by a witness who prevaricates, or who refuses to answer questions put to him, which they clearly have not, but whether they have a power to fine for a contempt. It is submitted that they have such a power. The object of the 1 & 2 *Will.* 4, c. 56, was to create a Court of Bankruptcy, consisting of several limbs or

(*a*) Viner's Abr. tit. Contempt.

branches, (but the Judges of that Court never meet), all forming one tribunal; but there are three divisions, viz. the Court of Review, the Subdivision Courts, and the Commissioners acting singly; and whatever power the Court of Review has, whatever power the Courts of Subdivision have, the Commissioners sitting singly have also, at least so far as the power of committing or fining for a contempt may go; and if the Court were to hold that a single commissioner sitting alone has no such power, it seems to follow inevitably that the Court of Review would have no such power. The first section establishes and describes the Court of Bankruptcy, and the Judges and commissioners who are to compose it, and concludes as follows—"and the same Court shall be and constitute a Court of law and equity, and shall, together with every Judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of record, or Judge of a Court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's Courts of law or Judges at *Westminster*." The effect of this enactment is to make each Court a Court of record, and to place each Judge and each commissioner in the situation of a Judge of a Court of record; and every commissioner acting as such has the same power as a Judge of a Court of record. The commissioner has therefore the same power as the Judge of the Court of *King's Bench* sitting in the Bail Court, or any of the Judges of *Westminster Hall* sitting at *Nisi Prius*; and there is no doubt that a Judge at *Nisi Prius* has power to fine and commit for a contempt. That was held in *Rex* v. *Davison*(*a*), and in *Rex* v. *Clement*(*b*), in which latter case the authorities on this subject were fully discussed. Whatever doubt there may be as to the authority of a Judge sitting at chambers to fine and imprison, that doubt could

(*a*) 4 B. & Ald. 329. (*b*) Ibid. 218; S. C. 11 Price, 68.

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only have arisen from the circumstance of its being doubtful whether he then constitutes a Court of record; for if he does, there can be no question as to his right to fine and imprison for a contempt. All the authorities agree that this was a power universally incident to a Court of record. There can be no doubt that a commissioner sitting alone constitutes a Court, and that Court is a Court of record, as appears by the first section. That will appear clear by referring to the second section, which constitutes the Court of Review. By that section it is enacted "that the said Judges, or any three of them, shall and may form a Court of Review." There can be no doubt that the Court of Review is a Court of record. Then why is it a Court of record? It is by virtue of the first section, which says that the *same* Court, that is, the Court of Bankruptcy, shall be and constitute a Court of law and equity, and shall, together with every Judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of record. If so, its authority is derived from the same language, and applies to the commissioners as well. [Lord *Abinger*, C. B.—It gives each Judge, commissioner and all, all the rights and incidents of a Court of record. It does not make each Judge a Court, but gives each Judge the same power that a Judge of a Court of record would have.]—It is submitted that it makes the Court of each commissioner sitting alone a Court of record. [*Alderson*, B.—If you look to the fourth section you will see that it gives to the Court of Review particular powers, which it would have already possessed if the first section had constituted it a Court of record.]—That section gives the Court of Review power to direct any issue of fact to be tried by a jury, and to issue process to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the Court of Review; that gives them the power to issue attachments for disobedience of process, which they would not otherwise have had. But it is said that the limitation in the seventh

section, (which gives the commissioners power to act in commissions of bankruptcy, as if they or any one or more of them were specially authorized for the purpose by a separate commission,) that they shall not have the power of committal for not duly answering, negatives their power to commit for contempt, and shews that the Legislature never intended that they should have such a power. But it must be observed, that the power of committing for contempt, and for not duly answering, are very different powers, and quite independent of each other; and the limitation of the one does not affect the other. It is highly necessary that the Court of each commissioner should constitute a Court of record, in order that they may be protected from actions to which they would be liable if they were not Courts of record. If the Subdivision Court has a power to fine and commit for contempt, why should not the single commissioner have the same power, because the same functions are exercised by the single commissioner as by the three assembled in a Subdivision Court? It is the more necessary that he should have this power, because, sitting alone, he may be in more danger of being treated with disrespect (*a*).

Sir *W. W. Follett*, *Wightman*, and *Cowling*, in support of the rule.—The sending of this letter, or the receipt of it, was not a contempt of the Court of the commissioner. [*Parke*, B.—We cannot enter into that. The only thing for us to consider is, whether this individual commissioner, sitting alone, is entitled to fine for a contempt. We are now only examining the record.] But even if the commissioner had power to commit for a contempt before him, for any thing that obstructed the course of justice, this is not a contempt before him, nor can it be said to have

(*a*) They then argued on the other sections of the act, but as they are not material to the judgment, the arguments are omitted.

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been an obstruction of the due course of justice. [*Parke*, B.—In *Rex* v. *Almon* (*a*), Mr. Justice *Wilmot* was of opinion, that a libel upon a Judge, for acts done by him in his judicial character, was a contempt of the Court, though there might be no actual obstruction of justice. In *Rex* v. *Clement* (*b*), there was no obstruction in the face of the Court.] It was put on the ground that it was an obstruction to the proceedings of the Court. [*Parke*, B.—Is it not an obstruction to the proceedings of the Court to send an intemperate or abusive letter to a Judge, in respect of a judgment which he has pronounced in the Court?] It is submitted, that a Judge at *Nisi Prius* would have had no such power to impose a fine, or to commit, under circumstances similar to the present, and yet the Judge at *Nisi Prius* is a Court of record, and he constitutes the Court.

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But to come to the construction of this act of Parliament. The commissioner has, in no case, this power to commit for a contempt. It is conceded on all hands, that the commissioners of bankrupt, under the old bankrupt act, had no such power. The legislature has not given to the commissioner, sitting alone, even so large a power as the commissioners under the old bankrupt law had; but has expressly narrowed their authority, instead of extending it, as far as regards the power of committal. The utmost power that the first section of this act could be said to give to the commissioners, even without referring to the other sections, would be, that they should stand in the same situation, and have the same powers, as any single Judge of a Court of record at *Westminster*. Now, a Judge of those Courts has not, of himself, any power to fine for a contempt, though the Court itself has. A Judge at chambers has not the power, which may be deduced from

(*a*) Wilmot's Notes and Opinions, 243. (*b*) 4 B. & Ald. 218.

the practice respecting attachments; which do not issue upon a disobedience of a Judge's order, but only upon its being made a rule of the Court. That shews that disobedience to a Judge's order is not a contempt of the Court. The only case as to the authority of a Judge at chambers, was discussed in the case of Mr. *Wilkes*. [*Parke*, B.—The whole history of that case appears in *Rex* v. *Almon*, in Mr. Justice *Wilmot's* notes. My impression is, that the legislature intended to give to these commissioners the same protection from liability for their acts as the Judges have, who are not liable to be sued, even for acts done by them at chambers. But if that be the effect of this provision, even the Court of Review does not possess the power to fine and imprison for a contempt.] It may be doubtful whether that Court has that power, but it is here sufficient to contend that the commissioners have not. They have not the powers of the Subdivision Courts, for one commissioner cannot convict for refusal to answer, but must refer the matter to the Subdivision Court. [*Alderson*, B.—That corresponds with the provisions under the former act, which required the committal to be under the hands of three of the commissioners.] It shews that the legislature did not intend that these commissioners should have the power to commit for a contempt, because these very cases which are referred to the Courts of Subdivision, are cases of contempt. With respect to cases of contempt in the face of the Court, it appears that, by the 1 & 2 *Geo.* 4, c. 115, s. 21, a power was given to the commissioners under the former acts, of committing a person for behaving riotously before them, and making a disturbance in the Court, to the custody of a messenger, to be taken before a magistrate, to be by him punished; and the only power which the present commissioners have is not more extensive. They therefore have no authority to fine for a contempt.

Lord ABINGER, C. B.—If I felt any doubt on this case,

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I should have been very much disposed to take some time to consider it, both from the importance of the question, and the respect I entertain for the gentleman who imposed this fine. He has acted upon a construction of the act of Parliament, which is very pardonable, if it be wrong; for it must be owned that there are some obscurities in it. For some time during this discussion, I hesitated very much as to the proper conclusion to come to upon it; but I now entertain a clear opinion, and feel no doubt that Mr. *Fane* in this case has exercised a power which that act does not authorize him in exercising. Now the argument is, that the first clause of the act, which constitutes the Court of Bankruptcy, makes that Court, together with every Judge and commissioner thereof, a Court of record, possessing all the incidents, rights, and privileges of a Court of record, or of a Judge of a Court of record; and it is contended, that the commissioner, every time he exercises any function with which the act invests him, is sitting as a Judge in a Court of record. But that is a construction by inference only, of an act of Parliament that pretty clearly defines what the powers of the Subdivision Courts, the Court of Review, and the commissioners are; and goes so far in some cases, where this very subject of contempt is mentioned, as to define what shall be done in that particular case. I think so important a power, which requires the greatest nicety in its exercise, should not be vested merely by an inferential construction of an act of Parliament, because in a general clause it invests him with the character of a Judge of record. It is sufficient to say, if we are bound to find a meaning for every word in that clause, that the incidents and rights given to the Judges of record were meant to protect him from being liable to the consequences of an action for any act he might do in exercising his functions; but it would not follow from that, that the legislature intended to give him all the powers

of a Judge of a Court of record to the full extent; and that the act did not mean to do so, is plain, because it has not contented itself with leaving his supposed powers in doubt, but goes on in many of the clauses to define what those powers shall be. It is sufficient, I think, therefore, to say, that the clause in the act of Parliament, which creates a Court which, in no part of the subsequent clauses, seems to have any functions or existence whatever—namely, the Court of Bankruptcy—if it has any meaning at all, means only to give to any act done by the Court, or any Subdivision Court, or by any Judge or commissioner of any Court, the same privileges and protection that a Judge of a Court of record would have. A Judge of a Court of record very often is engaged in the performance of functions which are wholly unconnected with his power of committing; a Judge of the Court of *King's Bench*, who grants a warrant at chambers, is protected, although he should mistake his jurisdiction; but no one would think that, because he might grant a warrant on an information laid before him, he could, in his private capacity, as a Judge of a Court of record, punish any man for a contempt, by fining him. I believe there is no case whatever to be found, where such a Judge has ventured to fine or imprison a person without the authority of the Court. Again, the Judges of the different Courts, whilst discharging their judicial functions, which they have discharged from very ancient times, separately, and in chambers, as ancillary to the general business of the Court, have never yet ventured to act as Courts of record, although they are Judges of Courts of record; they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the powers of a Court of record; which is illustrated by the instance referred to, that an order of the Judge at chambers cannot be enforced by attachment, but must first be made a rule of Court, before there is any

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contempt in violating it. That is a strong instance to shew that a man may be acting as a Judge of record, and discharging his judicial functions, without possessing the power of committing for a contempt. It is therefore by no means a necessary inference to draw from the privileges and exemptions and rights of a Judge of a Court of record, to say, when he is acting as a commissioner under the particular clause which defines his duties, that he is to possess the power of committing for a contempt.

But to go further, and looking at the general intention of the act, it appears to be the object of it to establish a Court of Review, consisting of four Judges; to make six Commissioners, of whom three will form a Court of Subdivision, and the other three another Court of Subdivision; and that the Court of Review shall have all the jurisdiction that the Court of *Chancery* before had in bankruptcy; and that the other Courts of subdivision shall have all the authority and power that commissioners of bankruptcy had before. Then comes a clause, for the purpose of giving more facility to the act in operation, to enable the commissioner to exercise the same functions that commissioners of bankruptcy did before. Three commissioners of bankruptcy were, by the old law, necessary to constitute a proper tribunal; three commissioners now make the Court of Subdivision. But it occurred to the framers of this act that it would be convenient, in many cases, as the business multiplied on them, to allow one commissioner to do many of the official or ministerial acts; and the act therefore provided that a commissioner should have the same power that the commissioners of bankruptcy possessed under the act then in existence—the same powers and authorities that were limited and defined by previous acts of Parliament; and undoubtedly they did not embrace the authority now in question, of committing for a contempt; but any obstruction or contempt of the commissioners was punishable by

an attachment from the Court of *Chancery*, on proper complaint made to the Lord Chancellor. By the second clause of this act, all the powers which the Court of *Chancery* had exercised before, in any complaint made from the commissioners, it appears to me the Court of Review may now exercise; and there is no difficulty, therefore, for the commissioner, if, whilst he is acting in his individual capacity, he meets with any obstruction, to make his complaint to the Court of Review, in like manner as a commissioner might have done before to the Lord Chancellor.

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The commissioner has, therefore, all the authorities and powers that the three commissioners of bankruptcy had before, but with one exception, which applies very strongly by analogy to the case now before the Court; he cannot commit in those cases where the three commissioners might before have done. For instance, if any obstruction arose in the nature of a contempt, either by the bankrupt refusing to answer, or not giving a direct answer; or any person refusing to be sworn, or not answering when he is sworn; the three commissioners, under the old law, had power to commit generally: but these commissioners, by the 7th section, have only authority to commit him to the custody of a messenger, in order that he may be brought before a Subdivision Court or the Court of Review. Finding, therefore, nothing in the direct words of the act to give this power—finding no occasion to employ it for the purpose of protecting the commissioner, and finding, on the contrary, something like a jealousy as to the act of a single commissioner exercising even the same power that the three commissioners did before under the old act, and that the power of the single commissioner when sitting is actually referred to, and founded upon the powers the former commissioners possessed, who were admitted not to possess this power, it appears to me that we should put a violent construction on this act if we allowed the commissioners, sitting separately, to entertain and exer-

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cise a power of committing for contempt. It is therefore unnecessary to consider whether the proceeding that is brought before the Court on these affidavits, was that sort of contempt or obstruction of the Court which would have justified the commissioner in calling the party before the Court of Review. I think that the commissioner, sitting separately, had no right to exercise the authority which he has done, and that the rule must be made absolute (*a*).

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BOLLAND, B.—I am of the same opinion; and after the observations that have been made by my Lord Chief Baron, in the full view he has taken of this case, I should have contented myself with only expressing my acquiescence in his judgment; but as it is a question of novelty and importance, I will point out the reasons why I agree with him in all that he has said upon the construction he has put upon this act of Parliament.

It appears that, in order to carry into operation the purposes of this act, it was thought right to select ten persons to carry such measure into execution; and in order to facilitate the operation and working of the act, these ten persons are afterwards subdivided, and to them are given separate and distinct offices to perform. It does not appear at all, although the ten are formed into a Court, that they have in practice ever sat as such Court as is constituted by the act; but to that Court, and every Judge, and every commissioner of that Court, is given distinctively the powers that belong to his Majesty's Courts of law, or Judges at *Westminster*, while sitting in matters of bankruptcy. By the second section, a Court of Review is formed. By the third section it is provided, that the Court of Review is to hear certain matters that are to be brought before it; and it is by the fourth section enabled to order issues to be tried. By the sixth section, the six

(*a*) *Parke*, B., had left the Court.

commissioners are divided into two Courts, which are to be called the Courts of Subdivision. Now, these are the *Courts* that are to exercise their functions under this bill; but in order to facilitate the working of the act of Parliament, and to carry it more fully into operation, the legislature has, by the 7th section of it, provided that any one *commissioner* may sit to perform the functions that were performed before by the commissioners of bankruptcy, under the old law. Every one who is familiar with the manner in which the business was done by the commissioners under the old act, must know that, from the very great press of business at times, it was absolutely necessary, after the commission was opened, to send one of their body to sit apart from them, (as a Judge of the other Court sits now apart from us), to examine the witnesses and take the proofs of debts, and to facilitate the business in operation.

In order, therefore, to throw a protection round such person sitting alone, the 7th clause gives to one commissioner all the powers that were possessed by the three commisioners under the old act of Parliament; but it goes on further—it goes on to take from them that power which the three commissioners, under the old acts of Parliament, had—namely, the power of committing in cases of contempt; and it says, that no single commissioner shall have power to commit any bankrupt, or other person, examined before him, otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review, within three days after such confinement; clearly shewing that the legislature meant to take from these gentlemen, when they were sitting in their individual character of commissioner, and sitting alone, every such power as had been possessed by the three commissioners under the old act. Then, by the 10th section, I think it is perfectly clear that,

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in matters of contempt, the legislature has shewn that it did not intend to invest a single commissioner with the power that is now contended for. The 10th section provides, that an attorney who practises in that Court, not being an attorney or solicitor duly admitted, shall be guilty of contempt; but it says that the attorney shall only be liable to punishment on complaint thereof made to the Court of Review. If it is a contempt, why is it not to be punished by a single commissioner sitting alone, if he was intended to have a power of committing for contempt? On these grounds I perfectly agree with what has been said by my Lord Chief Baron. I will go further, and say that I had no doubt from the first, when I heard this application made to the Court, that the fine could not be sustained; and I am the more confirmed in the opinion that I then formed by what I have heard to-day.

ALDERSON, B.—I am of the same opinion, that in this case the rule ought to be made absolute, and that Mr. *Fane* had no jurisdiction to commit for a contempt. I quite agree with the law as laid down by the Attorney-General, that, if there be a power on his part to commit for the contempt, the nature of the contempt is not examinable before this Court. It then becomes important to consider whether so large a power is given by the legislature in this case; and it appears to me that such a power is not given by the act in question to one commissioner sitting alone. The main stress of the argument in support of it rests on the first clause of the act of Parliament. It seems to me, that the first clause may have a very reasonable construction, without giving to the commissioner sitting alone the power contended for on the present occasion. After constituting the Court, the act of Parliament proceeds to state, that "the same Court shall be and constitute a Court of law and equity, and shall, together with every Judge and commissioner thereof, have, use, and exercise all the

rights, incidents, and privileges of a Court of record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed, by any of his Majesty's Courts of law, or Judges at *Westminster*." If you take the words to the letter, it would give to every commissioner the power and privilege of a Court of record, as fully as they are exercised by the Courts of record at *Westminster*. I think it would require very strong words to induce the Court to come to that conclusion. The words of the act may have a very sensible construction by being construed distributively, that is to say, by giving to Courts of bankruptcy the incidents and privileges of a Court of record, and by giving to Judges and commissioners of Courts of bankruptcy the rights, incidents, and privileges, that belong to a Judge of a Court of record. No one of the rights, privileges, and incidents of a Judge of a Court of record, necessarily carries with it the power of committing for contempt; and therefore it seems to me, that the first clause, by being construed distributively, may have a perfectly sensible construction, being intended to constitute the Court as a Court of record, with all its rights, incidents, and privileges; that is, having its records treated as all other records of another Court, and each of its Judges having the same protection and privileges which Judges of the Courts of record have, of not being answerable, in the shape of actions, for any acts which they have done in their judicial capacity and character. That will give a clear and sensible construction, without giving this irresponsible power; and it seems to me, that is much more consistent with the other clauses of the act to which the attention of the Court has been called. For instance, it appears much more consistent with the fourth section than the construction put on it by the Attorney-General would be. You are to suppose that each of the Judges and each of the commissioners has the full power of a Court of record; and yet we find

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the Court of Review itself, which consists of four of the superior officers of this Court, namely, the Judges, have only those powers to enforce its orders and decrees which are vested in his Majesty's Courts of record at *Westminster*, for the purpose of enforcing their orders and decrees. A special power is given to the Judges of the Court of Review unnecessarily, if the first section had given them all the powers, and all the privileges, and all the incidents; but not unnecessarily, if the construction which I put on the act of Parliament be the true one.

So it appears to me, that the seventh section is utterly inconsistent with the argument that the commissioners have all this power. It gives to the commissioners, when they sit alone, the same powers that were before vested in commissioners of bankrupts; and then it goes on to provide, that they shall not have, to the full extent, the same powers which those commissioners previously exercised; for it prohibits them from committing the bankrupt, or other person examined before them, otherwise than to the care and custody of a messenger, or other officer of the said Court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review. Now, if each of these commissioners had had all the powers incident to a Court of record, they would have larger powers than commissioners of bankrupts had before; and yet by the seventh section, this act of Parliament gives them less than the commissioners of bankrupts exercised before. I think, therefore, to adopt the general construction which is sought to be inferred from the words of the first section, would be to convict the framers of the act of Parliament of very strange carelessness in wording the act, so as to make it utterly inconsistent with itself; but the view I take of it seems to make the act quite consistent with itself, inasmuch as it is reasonable the commissioners should have the protection of a Judge of a Court of record, but with powers not quite

so extensive as those possessed by the former commissioners. There are other sections in the act, to which I will not refer, leading to the same conclusion. I am of opinion, therefore, that this rule must be made absolute.

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Rule absolute (*a*).

(*a*) In consequence of this decision, the act of 5 & 6 *Will.* 4, c. 29, was passed, to obviate all doubts: and by s. 25, it is enacted, that the said Court of Review, and the said several subdivision Courts, shall henceforth be, and shall be deemed and taken, from and after the passing of the 1 & 2 *Will.* 4, c. 54, to have been, Courts of record, and shall and may have and exercise all such powers of commitment as were vested in commissioners of bankrupts acting as such at the time of the passing of the before recited act, and shall and may have, use, and exercise, all the powers, rights, incidents, and privileges of a Court of record, as fully as the same are used, exercised, and enjoyed, by any of his Majesty's Courts of law at *Westminster*; and all orders heretofore pronounced, and all acts done by the said Court of Review and subdivision Courts respectively, shall be deemed and taken to have been pronounced and done by the said Courts respectively, as Courts of record; and every Judge or commissioner appointed or to be appointed by virtue of the said first recited act, sitting alone, and acting in the execution of the duties imposed upon him as such Judge or commissioner, shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a Court of record: Provided always, that nothing herein contained shall be deemed or taken to authorize or empower any such Judge or commissioner, sitting alone, to impose any fine, or commit for a contempt of Court; but every contempt of any such Judge or commissioner, sitting alone, and acting as aforesaid, shall be cognizable by the said Court of Review, and the same may be referred by any Judge or commissioner as aforesaid, to the said Court of Review.

IN THE EXCHEQUER CHAMBER.

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EASTON *v.* PRATCHETT.

Exch. Chamber, 1835.

(In Error from the Court of Exchequer) (*a*).

To a declaration on a bill of exchange, by an indorsee against an indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement; and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement:—*Held*, after verdict, that the plea was sufficient.

A WRIT of error having been brought, it was now argued by

Cowling for the plaintiff.—The plea admits that the defendant promised as stated in the declaration, and merely alleges that there was no consideration for the *indorsement*. It does not allege that there was no consideration for the *promise;* if it had, it would have been demurrable since the new rules, but cured by the verdict. If, therefore, there are circumstances which shew a consideration for the defendant's promise to pay, he is liable, though there is no consideration for the indorsement. *Sowerby* v. *Butcher* (*b*) shews that there is no necessity for such a consideration. To make the defence complete, the defendant should have gone on to allege, that there was no consideration for the acceptance also; for otherwise there is a sufficient consideration for the defendant's promise, viz. his remedy over against the acceptor [*Patteson*, J.—Your argument depends upon the averment of acceptance in the declaration, which is not a necessary averment, and may be rejected.] The plaintiff has a right to take advantage of that as a fact in the case. The test of the consideration is, whether, if the defendant had given the plaintiff money instead of the bill, he could have recovered it back on the insolvency of the acceptor; *per Parke*, J., *Stephens* v. *Wilkinson* (*c*).

(*a*) See 1 C. M. & R. 798. (*b*) 2 Cr. & M. 368. (*c*) 2 B. & Adol. 326.

If the plaintiff sued the acceptor and recovered, the latter might set off so much as against any demand the defendant might have against him; so that the defendant is liable, at all events, indirectly, and ought therefore to be capable of being sued without that circuity. If the defendant had indorsed it for the accommodation of the acceptor, or of the plaintiff, the case might have been different. If the defendant merely intended to assign to the plaintiff his rights of action against the acceptor, he should have indorsed it *sans recourse*, but here it is absolute. The cases in which it has been held that the plaintiff cannot recover where there has been a gift, have been cases between payee and acceptor, in which there has been no third person against whom the defendant might recover over; and therefore, admitting that a consideration is always requisite, and that a gift under such circumstances is not a sufficient consideration, these cases do not apply. It may be admitted, that the objection from the words "having and receiving" in the plea, is cured by the verdict.

Crompton, contrà.—The promise alleged in the declaration is only a conclusion of law, arising from the facts therein stated, which will *primâ facie* warrant that conclusion. But the plea rebuts it, because the want of consideration prevents the implication of a promise; and if there were an actual promise, it must have been void for want of a consideration to support it. In the cases referred to, the question has been whether the consideration actually existed or not. *Sowerby* v. *Butcher*, and *Stephens* v. *Wilkinson*. But it was not argued, that where there is a total want of consideration, an action is still maintainable. It is said that the promise arises on the indorsement; but there was no consideration for that indorsement; and as to the argument of the remedy over against the acceptor, that cannot prevail, because the liability of the indorser is

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not affected by the acceptance. *Tanner* v. *Bean* (*a*). It is absurd to say, that the liability of the acceptor, which existed before the indorsement, was a consideration for the promise. [*Patteson*, J.—How does that consideration move from the plaintiff?] All the authorities shew, that a negotiable instrument of this nature is not binding between the parties without consideration; and this objection is not confined to the acceptor and the drawer, but may be urged between any immediate parties.

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Cowling replied.

Lord DENMAN, C. J.—The jury having found that there was no consideration for the defendant's indorsement, there is an end of the case. Even if there had been an express promise to pay this bill, yet, there being no consideration for that promise, it could not be binding. It is a mere fallacy to say, that the liability of the acceptor can be any new consideration. After the finding of the jury, it must be taken that there is no consideration binding in law, and the judgment must be affirmed.

Judgment affirmed.

(*a*) 6 D. & R. 338; 4 B. & C. 312.

LOWE *v.* The ATTORNEY-GENERAL.

(In Error from the Court of Exchequer.)

The King's Warehouse is a warehouse within the meaning of the 3 & 4 *Will.* 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited.

INFORMATION for being concerned in the illegal removal of goods. The information, which was founded upon the 3 & 4 *Will.* 4, c. 53, s. 44, charged the defendant with

having assisted and been concerned in the illegal removal of certain goods from a certain warehouse in the United Kingdom wherein the same had been deposited, that is to say, in *London*, commonly called the King's Warehouse, at the Custom-house. The Court of *Exchequer* having given judgment for the Attorney-General, the defendant below brought a writ of error, contending that a king's warehouse was not a warehouse within the meaning of the clause on which the information was founded (*a*).

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J. Jervis, for the plaintiff in error.—The clause in question contemplates two places from which goods may be removed, viz. a warehouse, or a place of security. The latter may comprehend a king's warehouse, but the information does not so describe it; the words, however, are important for the plaintiff in error, as they shew that a removal from the king's warehouse is not unprovided for, though it be not a warehouse within the meaning of the act. There are in practice two kinds of warehouses—merchants' warehouses, and the king's warehouses; the latter being places of security for the duties under the management and control of the king's officers. The trade have hitherto treated the two as distinct places; and so the Legislature has defined them. By the interpretation clause, 3 & 4 *Will.* 4, c. 52, s. 119, a warehouse is described to mean "any place, whether house, shed, yard, timber-pond, or other place in which goods entered to be warehoused for importation may be lodged, kept, and

(*a*) Enacting (*inter alia*) that every person who shall knowingly harbour, &c., any goods which shall have been illegally removed without payment of the duties, from any warehouse or place of security in which they have been deposited; or who shall assist or be in any wise concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, shall forfeit either the treble value thereof, or 100*l.*

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LOWE v. ATT.-GEN.

secured without payment of duty, or although prohibited to be used in the United Kingdom;" whereas a king's warehouse is defined to mean "any place provided by the Crown for lodging goods therein for security of the customs."

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Kaye, contrà.—The point was decided in the *Attorney-General* v. *Vondiere* (*a*). In fact, it does not arise here; for the information merely states that the warehouse is *commonly called* the King's Warehouse.

J. Jervis, in reply.—This case is brought to review the decision in the *Attorney-General* v. *Vondiere*. With respect to the description, that is material; for if it could be rejected, there would be no allegation of a removal at all.

Lord DENMAN, C. J.—There is no ground for doubt in this case, either upon the principle or the letter of the clause.

Judgment affirmed.

(*a*) 1 C. M. & R. 570.

END OF TRINITY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

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IN

The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, MICHAELMAS TERM, 6 WILL. IV.

COUSINS *v.* PADDON.

1835.

DEBT for goods sold and delivered, work and labour, and on an account stated. Pleas—*First, nunquam indebitatus; secondly,* as to parcel of the sum demanded, to

Under the general issue to an action for goods sold and delivered, or for work and labour done, the defendant may prove (even since the new rules) that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price; and the plaintiff can then recover only on the *quantum meruit*.

Where, in debt on simple contract, the defendant pleads payment of a certain sum, he must prove payment of *that* sum, (even though it be laid under a *videlicet*), in order to entitle him to a verdict on the whole plea. But the plea may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue for the plaintiff.

The like as to a plea of set-off.

Therefore, where, in debt for goods sold and delivered, and work and labour done, the defendant pleaded, *first, nunquam indebitatus; secondly,* as to parcel of the sum demanded, to wit, 338*l.*, payment of 338*l.* in discharge of that parcel; *thirdly,* a set-off for money paid; the plaintiff proved a special contract for good, sound, saleable bricks, to be made for him by the defendant, at a certain price per thousand, and delivery of so many as amounted, at that rate, to 396*l.*; the defendant proved payment of 314*l.*, and a set-off for 21*l.*, and proved also that the bricks were badly made, and the jury found the value of those delivered to be not more than 335*l.*:—the Court directed the verdict to be entered, on the plea of payment, as to 314*l.* for the defendant, as to the residue for the plaintiff; on the plea of set-off, as to 21*l.*, for the defendant, as to the residue for the plaintiff; on the plea of *nunquam indebitatus*, as to the whole sum demanded, except 335*l.*, for the defendant; so as to give the defendant judgment on the whole record.

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wit, 338*l.*, that the defendant paid, and the plaintiff accepted, a certain sum, to wit, 338*l.*, in full satisfaction and discharge of the said certain parcel of the sum demanded, to wit, 338*l.*; *thirdly*, a set-off for money paid, &c. The replication denied the payment and acceptance, and the debt proposed to be set off. At the trial before *Patteson*, J., at the *Winchester Spring* Assizes, it appeared that the action was brought for bricks made by the plaintiff for the defendant, on a specific contract to furnish "good, sound, saleable bricks," at 24*s.* a thousand. The defence was, that the bricks were not of the quality and description which they ought, according to the contract, to have been, and that the full amount due to the plaintiff, according to their real value on a *quantum meruit*, had been paid in part; and that as to the residue, there was a set-off for money paid on the plaintiff's account. The value of the bricks, according to the contract price, was 396*l.* 12*s.*, supposing such had been delivered as were required by the contract. It appeared that the defendant had kept the bricks for some time on his premises without any offer to return them, and had sold different portions of them. It was contended for the plaintiff, that it was not competent to the defendant, at common law, to give such defence in evidence at all; or, at all events, since the late pleading rules, to give it in evidence under the general issue. The learned Judge, however, thought that the defendant had a right to avail himself of the defence. The defendant thereupon gave evidence of the inferior quality of the bricks, and proved payments on account to the amount of 314*l.* 3*s.*, and a set-off for money paid to the amount of 21*l.*, making together 335*l.* 3*s.* It was then objected, that the sum mentioned in the plea of payment, (338*l.*), was fixed and certain; and that, to support the plea, the whole amount of 338*l.* must be proved to have been paid. The learned Judge inclined to that opinion. An application was then made on behalf of the defendant, to amend

the plea by altering the amount from 338*l.* to 314*l.* 3*s.*, but the learned Judge doubted whether he had power to do so under the 3 & 4 *Will.* 4, c. 42, s. 23. He left it to the jury to say whether the sum which the defendant ought to have paid for the bricks delivered exceeded the sum of 335*l.* 3*s.* or not, and they found that it did not. The learned Judge thereupon directed a verdict to be entered for the plaintiff for 1*s.*, and also directed the facts to be found specially, pursuant to the power given by the 3 & 4 *Will.* 4, c. 42, s. 24, and reserved leave to the defendant to apply to the Court to enter a verdict for him on the second issue, if the Court should be of opinion that it was proved. In the following term, accordingly, *Dampier* obtained a rule *nisi* to enter a verdict for the defendant; and *Bompas*, Serjt., for the plaintiff, obtained a cross rule to increase the damages by the sum of 58*l.* 11*s.*, (the sum remaining unpaid, if the plaintiff were entitled to recover according to the contract price). In *Trinity* Term, both rules came on to be argued together.

Erle and *Crowder*, for the plaintiff.—The verdict found for the plaintiff ought to stand, and the damages ought to be increased to the amount of the contract price.

First, the defendant was not at liberty, at common law, to set up the defence of the badness of the work done. Here was a special contract for the bricks at so much a thousand; bricks were made by the plaintiff under that contract, amounting at that rate to the value of 396*l.* 12*s.*; they were delivered to the defendant, were kept on his premises, portions of them sold by him from time to time, and payments made on account of them down to the time of action brought, without complaint, and without any offer to return them. After such acquiescence, he is not at liberty to go beside the special contract, and to defend himself on the ground that they were improperly made. Such a defence is applicable only to a claim on a *quantum*

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meruit. [*Parke*, B.—All you can do is to use the acquiescence of the party as strong *evidence* that the work *was* properly done, but as evidence only. I understood the law on the subject to have been settled, ever since the case of *Basten* v. *Butter* (*a*). It is an implied part of the special contract that the work shall be done in a workmanlike manner; if it be not, the party can go only on a *quantum meruit.*] Where there is a specific warranty, the case is different. *Poulton* v. *Lattimore* (*b*). [*Parke*, B.—Where the plaintiff is himself the workman, there is an implied warranty that the work shall be done in a workmanlike manner; in the case you refer to, the plaintiff was no more than the seller of the goods.] Then, secondly, such a defence ought, since the new rules, to have been specially pleaded. As it stands, it amounts to this—that, under the plea that the *defendant* did not contract, he relies on non-performance by the *plaintiff*. The *indebitatus* count is now applicable to a double purpose; it is sufficient to authorize the plaintiff either to give evidence of a special contract, or to go upon a *quantum meruit*. [*Alderson*, B.—You are in this dilemma: if the defence is not good without being specially pleaded, it is because this is a demand upon a special contract; but if it is, you are out of court by the verdict of the jury, who have found in effect that the workmanship was inferior.] The object of the new rules is to compel every specific defence to be pleaded, in order that both parties may know precisely the issue to be tried. Though the count is general in form, the special contract was within the defendant's knowledge, and he knew also that there was but this one dealing between himself and the plaintiff. The rule applies to the *fact* of there being a special contract; not to the *form* in which it is alleged. Lord *Ellenborough* says, in *Basten* v. *Butter* (*c*), "Where a

(*a*) 7 East, 479.

(*b*) 9 B. & C. 259; 4 Man. & R. 208.

(*c*) 7 East, 483.

specific sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise, if evidence be admitted to shew that the work done and materials provided were not worth so much as was contracted to be paid, because he may only come prepared to prove the agreement for the specific sum and the work done, unless notice be given to prove that the payment is disputed on the ground of the inadequacy of the work done." *Broom* v. *Davis* (*a*), there cited, was a ruling of *Buller*, J., to the like effect. [*Parke*, B.—As to surprise, parties must be taken to know the law, and to expect, in every case, the defence which is admissible under the plea. Collateral notice can make no difference in the legal rights of parties under the pleadings.] The Court will take notice of the rule requiring particulars of the demand to be given to the defendant. The plaintiff claims by a special contract, and gives the defendant express notice of it. *Roffey* v. *Smith* (*b*) is a direct authority in favour of the plaintiff on this part of the case. [*Parke*, B. —There would be no difficulty, unless the rule of pleading had been relaxed, and the plaintiff allowed, under the general *indebitatus* count, stating the defendant to be indebted in a certain sum, to shew himself entitled on a *quantum meruit*. It would have been different, if the plaintiff had *set out* a special contract; then, clearly, the defendant could only have denied the contract in fact by the general issue. But here, may he not deny that which is implied by law as part of the *implied* contract stated in the declaration—viz. that those goods were delivered which were contracted for?]

The next question is, whether the direction to enter a verdict for the plaintiff on the pleas of payment and set-off, was right. The plea of payment is a plea of confession and avoidance, admitting a cause of action to the

(*a*) 7 East, 480, n. (*b*) 6 Carr. & P. 662.

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amount of 338*l.* The defendant establishes the payment of 314*l.* only. The consequence at law is, that the residue remains due to the plaintiff. If that plea alone had been on the record, there must have been a verdict for the plaintiff. Issue is joined on the precise point, as to the payment of that specific sum of 338*l.*; if *that* payment is not substantiated, the issue is determined in favour of the plaintiff. So also as to the set-off: the defendant undertakes to prove the plaintiff indebted to him in a greater amount than is claimed by the plaintiff; this he fails to do, and the issue is therefore determined against him. No doubt, payments in part may be taken into consideration by the jury in reduction of damages; but these are pleas pleaded in bar of the whole action.

Lastly, this was not a case in which the learned Judge could amend. The power of amendment applies only to cases of *variance* between the allegation and the proof of the contract; but there is no power to amend the formal statement of the pleader, by which, in the commencement of the plea, he states as to what part of the demand the plea is to be applicable. And its being made under a *videlicet* makes no difference; the party must set forth with certainty and precision the portion of the claim to which he pleads.

Dampier and *Smirke*, for the defendant.—First, the defendant was entitled, at common law, to shew the badness of the work under the general issue. [*Parke*, B.—We think you need not trouble yourself on that point: we are all of opinion that it was competent to a defendant, under the old plea of the general issue, to shew that the goods delivered were not of such a description as they ought to have been, to entitle the plaintiff to avail himself of the special contract, on the general *indebitatus* count; that therefore he must be driven to his *quantum meruit*. Looking at all the cases together, it appears clear that if the

work supplied turns out not to have been of a workmanlike character, which is impliedly stipulated for, the defendant may shew that he was not liable to pay the agreed price.]

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Then, have the new rules altered the case? If the plaintiff had declared specially, he would have been bound to aver that he made "good, sound, saleable bricks," which allegation the defendant might have traversed. But the *indebitatus* count involves an allegation of a delivery of such goods, pursuant to the contract, as raised the implied promise to pay for them *on request*: if the goods stipulated for were not delivered, the liability to pay on request never arose. The defence, therefore, is not one in confession and avoidance, but in absolute denial of the contract on which the plaintiff relies. The Court of *King's Bench* certainly decided, in *Edmunds* v. *Harris* (*a*), that a defendant could not set up, under the general issue, the defence that the goods were sold on a credit not yet expired; but that case was doubted by this Court in *Taylor* v. *Hilary* (*b*); and in *Alexander* v. *Gardner* (*c*), the *Common Pleas* held, that on a general declaration for goods bargained and sold, evidence of a special contract subject to conditions which had not been complied with, might be given in evidence under the general issue. The Court appear to have decided *Edmunds* v. *Harris* by looking at the example given in the rule, instead of the rule itself. [*Parke*, B.—The plaintiff is bound to prove such a sale and delivery as will raise a debt payable on request. You deny the delivery in fact of the goods which were by the contract to be delivered, and in respect of which the plaintiff was to have so much per thousand.] The only effect of the new rules is to bring back the old law of pleading as to matters *ex post facto*. Originally,

(*a*) 2 Ad. & El. 414; 4 Nev. & M. 182.

(*b*) Ante, Vol. 1, p. 743.

(*c*) 1 Bing. N. C. 671; 1 Scott, 281; 3 Dowl. P. C. 146.

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the defendant pleaded specially every matter of defence which admitted that the plaintiff had once a cause of action: *Paramore* v. *Johnson* (*a*). The cases collected in *Vin. Abr. Evidence, Z. a.*, shew what was the progress of the law. The general issue was let in, to put the plaintiff on proof of a subsisting debt at the time of action brought.

Next, as to the pleas of payment and set-off.—In debt on simple contract, the plaintiff is not bound (though the rule was formerly otherwise) to the proof of the precise sum demanded. *M'Quillin* v. *Cox* (*b*); *Lord* v. *Houstoun* (*c*). The plaintiff, then, being permitted to prove a different sum from that alleged, the defendant is necessarily let loose to meet him with proof of payment of a different sum from that stated on his part. Otherwise the plaintiff might demand 10,000*l.*, and prove 1*l.* only; the defendant might plead payment of 10,000*l.*, and prove it all except 1*l.*, and yet fail. So unjust a consequence appears, in the absence of authority to the contrary, to furnish a conclusive argument against the adoption of the doctrine contended for on the other side. Whenever the plaintiff is bound to state a precise sum, the defendant must meet it in pleading with a precise sum also; but where the plaintiff is not bound to *prove* the precise sum, neither is it incumbent on the defendant to meet it with proof of the precise sum. In *Brown's Vade-Mecum*, 92, there is a plea of payment and acceptance, in an action of *assumpsit* for use and occupation, of 28*l.* 12*s.* 4*d.* "for the third part of the aforesaid rent of 85*l.* 17*s.* 4*d.* in the said declaration mentioned, which the said plaintiff accepted for the third part of the said rent, in full discharge of the said promises of the said defendant;" and a replication denying the payment; and it is said there was verdict and judgment for the defendant. In 2 *Brown's Entries*, 6, there is a precedent of a plea, ad-

(*a*) 1 Ld. Raym. 566. (*b*) 1 H. Bl. 249. (*c*) 11 East, 62.

mitting the promise alleged, but excusing it by payment of "the said several sums of money, amounting in the whole to the said sum of 390*l.*, according to the said several promises and undertakings, &c." Such a plea could never have been pleaded, or printed as a precedent, if the principle contended for on the other side be correct, because it would expose the defendant to so great and manifest a disadvantage. The plea means only, that the defendant will prove payment of all that the plaintiff can prove against him, up to a certain amount. No doubt the plea must shew a sum certain; but the proof need not be equally precise. In *Robinson's Entries*, 56, there is a precedent of a plea of payment to the plaintiff of "all the sums of money due to him," and a replication denying the payment; perhaps, however, such a plea might be bad on special demurrer for want of the requisite certainty. *March*, 77; *Com. Dig. Pleader*, E 5, 2 G. 15. There is high authority for saying even that judgment by default in debt is not necessarily a confession of the sum demanded (*a*). [*Parke*, B.—*Holroyd*, J., and *Littledale*, J., certainly said so; but the practice is uniform the other way.]—The plea of tender was referred to at the trial as furnishing an analogy favourable to the plaintiff; but it is not altogether an analogous case, because that plea is never admitted without a very distinct admission of the debt; nor can it be pleaded doubly with another plea, but must be excepted out of the general issue: it determines the sum also in another remarkable way, because the amount must be paid into Court. There is an analogy in favour of the defendant, in the case of trespass. Suppose the plea in trespass professes to justify more than it properly can, it is enough if the defendant proves as much of his justification as covers the plaintiff's proof. *Redford* v. *Birley* (*b*).

(*a*) See *Arden* v. *Connell*, 5 B. & Ald. 885; 1 Dowl. & R. 529; *Brill* v. *Neele*, 1 Chit. Rep. 627.

(*b*) 3 Stark. N. P. C. 83.

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The same arguments apply to the plea of set-off. In a plea by an executor of retainer or payment to other creditors, he is not bound down to the precise sum stated. It is true that is a plea at common law; but there is nothing in the statutes of set-off to limit the operation of the plea in this respect. It is impossible to plead it alone, unless the plaintiff tells the defendant the precise sum he claims; it must, therefore, be pleaded to part, especially in debt, where the plaintiff claims the aggregate of all the sums laid in the action.

Lastly, the learned Judge had power to make the amendment prayed. The plaintiff could not have been misled, and it was in a matter not material to the merits; for he was put by the general issue to prove what was due upon the contract, and he knew what he had received in part payment. It may be said, the defendant knew also what he had paid; but the proof of the several payments may be very difficult, and the plaintiff did not give credit for them in his particulars.

PARKE, B.—The only point on which we desire to take time for consideration is on the effect of the two pleas of payment and set-off, especially the former; first, whether they can be taken distributively; or if not, whether, upon the facts found by the jury, we can say that the variance was immaterial, and might have been amended. It is a question of great importance, since the new rule compelling parties to plead specially, and, in one view of it, of very great difficulty on a defendant. On the other point, the Court all concur in the same view. The old law certainly permitted the defendant to avail himself, on the general issue pleaded to an *indebitatus* count, of the defence that the work was improperly done, or the goods delivered not such as were contracted for; and we think the late rules have not introduced any alteration in this respect. The defendant is entitled, under the plea of *non assumpsit*

or *nunquam indebitatus* to an action for the price of goods, to shew either that there was no sale or delivery, or none such as to make him liable on the contract: so also, in an action for work and labour and materials, to shew that the work done, or materials provided, were not such as to render him liable to pay for them under the contract: and then he opens his liability to pay on a contract of another description, namely, on a *quantum meruit*.

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Rule to increase the damages discharged: on the rule to enter a verdict for the defendant,

Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

PARKE, B.—After stating the pleadings and facts of the case, his Lordship proceeded:—The question remaining for consideration is, whether the defendant is entitled to a verdict upon the issue on the second plea altogether, or as to the 314*l.* 3*s.*, part of the sum therein mentioned, the verdict as to the residue being found for the plaintiff. It appears to us that the defendant is not entitled to a verdict on the whole plea. The plea contains an admission that a certain parcel of the debt was due; and in order to support the whole plea, that parcel must be proved to have been paid; and that parcel is by the introductory part of the plea stated to be 338*l.* It is true, it is so stated under a *videlicet;* but it is perfectly clear that the addition of a *videlicet* cannot render a material averment immaterial; *Greenwood* v. *Barnett* (*a*); and there is no doubt that the sum mentioned in the plea is material, for the plea must state how much of the demand it proposes to answer. On a demurrer to this plea for not stating that part with cer-

(*a*) 6 T. R. 460.

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tainty, the answer would have been that it was so stated, and that the *videlicet* made no difference. For this reason we are of opinion that the defendant cannot have a verdict on the whole plea: but we think that the plea may be taken distributively, and found as to part for the defendant, and part for the plaintiff. The general rule is, that a plea is an entire thing, and bad altogether if disproved in part; but to this rule there are exceptions which have been long established. For instance, in a plea of *plene administravit*, though assets unadministered are shewn to be in the defendant's hands, and so the plea is disproved, yet the judgment for the plaintiff is only for the part unadministered (*a*). So, on a plea of judgment recovered against the testator, in actions against an executor, and no assets *ultrà*, it is not enough to disprove a single judgment. So, where two executors join in a plea of *plene administravit*, and assets are proved to be in the hands of one only. All these are instances where, from the nature of the case, the plea is not entire; and the question is, whether the present case falls within the same principle. If this had been an action of *indebitatus assumpsit*, there could, we think, have been no doubt but that the plea would have been divisible. A plea of payment is not usual in *assumpsit;* but pleas of set-off and the statute of limitations, which are very common, are, we believe, almost invariably pleaded to the whole declaration; and yet, if the debts due to the defendant do not cover the whole demand, or the whole of the causes of action did not accrue beyond six years, and the residue in both cases is answered under the general issue, the defendant has always judgment on the whole record. So, if there be a plea of the general issue, and a plea of bankruptcy to the whole declaration, and part of the demand be answered on the general issue, part by the defendant's certificate,

(*a*) 1 Saund. 336.

the course is the same. This can only be on the ground that such pleas, to a declaration of this general nature, which may and often does comprise many distinct contracts in point of fact, are capable of being severed, and applied to each portion of the demand, in like manner as if there were several distinct pleas, one to each of such portions respectively. For if, in the cases above stated, the pleas of set-off, of the statute of limitations, and of bankruptcy, were entire, and, if disproved in part, were bad altogether, then, as they are each pleaded to the whole declaration, and are proved only as to part of it, the consequence would be, that the plaintiff would be entitled to a verdict upon the issues on each of those pleas. It seldom happened, before the late rules, that there was any occasion in these cases to make any other entry on the record than a general finding for the defendant, and judgment for the defendant on both issues; but since the costs of each issue now follow the event of the issue, there can be no doubt but that the proper entry would be in such cases, on the general issue, for the defendant as to all but ——*l.*, (the sum covered by the proof under the special plea), and on the special plea, so far as related to that sum, for the defendant; and as to the residue on both issues, for the plaintiff. If this be so, there is no reason why, upon a special plea of payment, the same course should not be pursued. Such a plea does not mean that the defendant paid one certain fixed sum at a certain time, but that he did, either in one sum, or in several sums at different times, pay the whole of the plaintiff's demand. When the plea is so understood, there is nothing contradictory in holding that the issue might be found as to part for the plaintiff, and part for the defendant. The remaining question then is, whether there is any difference between these cases, and similar pleas to an action of debt on simple contract. Whilst it was considered to be law, that an action of debt on simple contract was founded on

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one entire single contract, and that the plaintiff could not recover less than the whole, doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established by several cases that the demand in such actions is divisible, and the plaintiff may recover less, and since several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as *indebitatus assumpsit*, and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, we do not see any satisfactory reason why it may not be considered capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or, as in the present case, to part. The only difference between the two actions will therefore be, that in an action of *assumpsit* the plea to the whole declaration admits no certain sum to have been originally due from the defendant to the plaintiff, whilst the plea to the whole declaration in debt admits the sum nominally claimed to have been originally due. In either, we think the verdict may be found for the defendant for the whole, or for the part actually paid, according to the fact. This decision will be productive of great practical convenience, as under the new rules of pleading payment must be pleaded specially; and unless the plea be divisible, the defendant must either multiply his pleas by pleading to each of the demands separately, or he must be driven to the necessity of applying to amend on the trial under the 3 & 4 *Will.* 4, c. 42, in case any part of the plea should not be proved. The verdict must be entered, on the plea of payment, so far as relates to the sum of 314*l.* 3*s.*, for the defendant; on the plea of set-off, so far as relates to the sum of 21*l.*, for the defendant; and on the plea of *nunquam indebitatus*, as to the whole sum demanded, except

335*l.* 3*s.*, for the defendant. The consequence will be, that on the whole record the defendant will have judgment.

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Rule absolute accordingly.

ROBERTS *v.* WILLIAMS and Another.

A notice of action to justices, under the 24 *Geo.* 2, c. 44, s. 1, is sufficient, which is indorsed with the name and *place of business* of the attorney, although he actually resides elsewhere.

THIS was an action against two justices of the county of *Denbigh*, for imprisoning the defendant in the house of correction without reasonable or probable cause. At the trial before *Bolland*, B., at the *Chester Spring* Assizes, the notice of action to the defendants, required by the 24 *Geo.* 2, c. 44, s. 1, being put in, it appeared to be signed as follows:—"*Edward Jones, Record Street, Ruthin, Denbighshire*, attorney for the said *Robert Roberts*." It was proved that Mr. *Jones* resided at a place called *Brynhyfrid*, about a quarter of a mile out of the town, but within the borough of *Ruthin;* but that his office of business was in *Record Street*, in that town, and was known by the defendants. The defendant's counsel contended that this was not a sufficient notice within the statute, which required the name and place of abode of the attorney to be subjoined. The learned Judge reserved the point, and the plaintiff had a verdict for 15*l.* *John Jervis* having accordingly obtained a rule *nisi* to enter a nonsuit (*a*)—

R. V. Richards and *Dunn*, in *Trinity* Term, shewed cause.—The notice was sufficient. The only object of the statute was to enable the justices to find out the attorney, in order to tender amends. That object is best

(*a*) He objected also that *E. Jones* was not the attorney on the record; but the Court said the plaintiff might have changed his attorney after the notice was served, and before the declaration was delivered.

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attained by holding the words "place of abode," to be satisfied by the place of business of the attorney, where he is most readily to be found. Suppose an attorney lived at *Hampstead*, having an office in *London*, must the notice be dated from *Hampstead* rather than *London?* Or suppose five or six in a firm, resident in different places; are all their sleeping places to be given in the notice? [*Parke*, B.—That would be in ease of the defendant, since it would give him the means of tendering amends to any of them.] The object of the plaintiff is generally rather to avoid a tender; that purpose would be much aided by a notice framed as is contended for on the other side. In *Osborn* v. *Gough* (*a*), a notice, signed "*W. S.*, of *Birmingham*," was held sufficient; if, therefore, this notice had been merely "of *Ruthin*," it would clearly have been sufficient; then the words *Record Street* may be rejected as surplusage. In *James* v. *Swift* (*b*), it was held that the notice might be given in the name of the firm. [*Parke*, B.—The question there was, whether it did not satisfy the word *name*, the words not being *christian and surname*.] Similarly, the place of abode of an attorney means his place of business: the act has reference to him only in his character of attorney; his place of abode, therefore, is where he abides during the day for the purpose of doing business as such. The notice need not be such as to preclude the necessity of all inquiry. *Taylor* v. *Fenwick* (*c*) is different; there, the description, "*at Durham*," was manifestly insufficient, since the party might be merely passing through the town on a journey. The Uniformity of Process Act has the same words; must all writs, therefore, henceforth be indorsed with the place where the attorney sleeps? In that act, too, a distinction is expressly taken between the place of abode of the attorney, and the *resi-*

(*a*) 3 Bos. & P. 551.
(*b*) 4 B. & C. 681; 6 D. & R. 625.
(*c*) 3 Bos. & P. 553, n.

dence of the party, which distinction has been acted upon in several cases (*a*).

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J. Jervis, contrà.—The words of the statute being plain and unequivocal, the best course is to follow them without deviation. In *Taylor* v. *Fenwick*, Lord *Mansfield* says, "In favour of justices, the legislature has thought fit to prescribe a precise form; whether right or not, it does not matter; in words he must tell you his place of abode." Observations to the same effect fell from the Court in *Osborn* v. *Gough*. *Hill* v. *Humphreys* (*b*) is strongly in point for the defendants. That was a decision on the *2 Geo. 2*, c. *23*, s. *23*, requiring the delivery of an attorney's bill at the defendant's place of abode; and Lord *Kenyon* ruled, that leaving it at his counting-house was not enough; although, the defendant being a merchant, it might be urged that he was more likely to pay the bill there than at his dwelling-house.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—The Court have taken some time to consider the objection taken in this case, which is one of considerable importance in practice. We find no express decision upon the point; and we were struck with the reason of the thing, and the great inconvenience which would result in practice from holding the construction of the act to be as is contended for by the defendants. Under the Uniformity of Process Act, where the same expression is used, it appears that the practice has uniformly been to state the place of business, and that that

(*a*) See *Engleheart* v. *Eyre*, 2 Dowl. P. C. 145; *King* v. *Monkhouse*, Ib. 221; *Pickman* v. *Collis*, 3 D. P. C. 429; *Yardley* v. *Jones*, 4 D. P. C. 45.

(*b*) 2 Bos & P. 343.

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practice is supported by several decisions. We think, therefore, that reason and convenience compel us to hold, that the place where an attorney abides for the purposes of his business, is a correct description to satisfy this act of parliament, and that this notice was therefore sufficient. We are disposed to think, however, that either place will do; that the act will be sufficiently complied with, whether the attorney state the place of his actual residence, or his place of business. One case was suggested at the bar, of several persons in partnership, carrying on their business at some one specified place, but all residing in different places; very great inconvenience would ensue, if it were necessary that the notice must specify all those places of residence, and the defendant were thus obliged to go to several different places to tender amends. After some doubt, therefore, we have come to the conclusion, that the place of business is a sufficient place of the attorney's abode, within the meaning of the act. The rule for entering a nonsuit will therefore be discharged.

Rule discharged.

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The *common counts* are, notwithstanding the rule of *Trinity* Term, 1 *Will.* 4, separate counts for the purposes of *pleading*, as well as for the purposes of costs.

ASSUMPSIT.—The *first* count was on a bill of exchange for 31*l.* 14*s.* 3*d.*, by indorsee against drawer; then followed the general demand, according to the form given by the rules of *T.* T., 1 *Will.* 4, for 100*l.* for money paid, 100*l.* for money lent, 100*l.* for goods sold and delivered, 20*l.*

To a declaration for 31*l.* on a bill of exchange, and 100*l.* for money paid, lent, interest, goods sold, and on an account stated, the defendant pleads, as to the 31*l.*, and as to 12*l.*, parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into Court of 51*l.*; and alleges that the plaintiff has not sustained damage to a greater amount, in respect of so much of those causes of actions as in the plea mentioned. *Quære*, whether such plea is good in special demurrer?

Semble, the defendant ought to have shewn distinctly what portion of the money paid into Court was to be ascribed to the bill of exchange.

for interest, and 100*l.* on an account stated, concluding to the plaintiff's damage of 100*l.* *First* plea, as to the first count of the declaration, and as to the sum of 12*l.* 2*s.*, parcel of the sum of 100*l.* in the *second* count of the declaration alleged to be due from the defendant to the plaintiff for the price and value of goods sold and delivered to the defendant at his request; and as to the sum of 100*l.* in the *second* count of the declaration alleged to have been found to be due from the defendant to the plaintiff on an account stated between them, and the promises alleged to have been made by the defendant in respect thereof; that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of 51*l.* 9*s.* 7*d.*, ready to be paid to the plaintiff; and the defendant says, that the plaintiff hath not sustained damages to a greater amount than the said sum of 51*l.* 9*s.* 7*d.*, in respect of *so much* of the causes of action in the declaration mentioned as are above specified and set forth; concluding with a verification and prayer of judgment. *Second* plea, *non assumpsit.* Special demurrer to the first plea, assigning for causes, first, that the payment of the sum of 51*l.* 9*s.* 7*d.* was pleaded in satisfaction of a greater sum, viz. the sum of 143*l.* 16*s.* 3*d.*: secondly, that the defendant had not specified what portions of that sum were intended to be paid on each of the respective counts to which the payment of that sum was made applicable: thirdly, that the defendant had not pleaded separately to each of the second, third, fourth, fifth, and sixth counts: fourthly, that he he had stated and pleaded to the second, third, fourth, fifth, and sixth counts of the declaration, as if those counts were one count. Joinder in demurrer.

The case was argued in *Trinity* Term, by

W. H. Watson, in support of the demurrer.—It is clear this plea would have been bad before the recent rule, which

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allows the defendant to plead payment of money into Court (*a*); payment of a smaller sum being in law no discharge of a greater. *Fitch* v. *Sutton* (*b*). Since the new rules, such a plea is allowed; but in this case it is not in the proper form. The defendant ought to have pleaded, as to the sums of 31*l.* 14*s.* 3*d.*, &c., the payment into court; and as to the residue, *non assumpsit*. [Lord *Abinger*, C. B.—That would certainly be so in debt; the question is, whether it is so in *assumpsit*.] There is no difference. In *assumpsit* the party pleads, not to the damages, but to the demand; the damages are only for the non-payment. *Thomas* v. *Heathorn* (*c*). It is true, the action of *assumpsit sounds in damages;* but the *indebitatus assumpsit* is not for *unliquidated* damages. [Lord *Abinger*, C. B.—In *Thomas* v. *Heathorn*, the plea did not go on to add, that the plaintiff had sustained no damages *ultrà*. This is certainly not the usual form of plea; but have you any authority to shew that this unusual form is bad?] The usual mode of pleading under the new rules has been, as to 50*l.*, &c., payment into Court; as to the residue, *non assumpsit*. The *effect* of payment into Court is still the same as before the new rules, viz. that the amount is considered as being struck out of the declaration, and then the *non assumpsit* has reference to the rest of the demand. The rule means no more than this—"I pay 50*l.* into Court, and say that, *as to that* 50*l.*, you have not sustained further damage." [Lord *Abinger*, C. B.—Suppose, before the rules, a party pleaded that the plaintiff had not sustained damage by the breach of promise alleged, beyond 100*l.*, and that sum he tendered and brought into Court?] That might be substantially *non assumpsit*. [Lord *Abinger*, C. B.—And is not this? You may plead the general issue in a different form, and it will still be good. It does not follow,

(*a*) H. T. 4 W. 4, s. 17.
(*b*) 5 East, 230.
(*c*) 2 B. & C. 477; 3 D. & R. 647.

though the defendant may have *promised* to pay 100*l.*, that the *damages* exceed 50*l.*, because he may have paid the residue. There is a difference between *assumpsit* and debt.] It never has been the usage to plead to the damages in *assumpsit*. It is no issue to say the plaintiff was not damnified; the issue is, whether the defendant promised. [Lord *Abinger*, C. B.—How do you distinguish this plea from that given by the new rule, except that the order of the words is inverted?] That rule applies to cases where the damages are unliquidated, not to a case of *indebitatus assumpsit*.

At all events, the defendant has pleaded to *one* only of the common counts; the others remain unanswered.

Hoggins, contrà.—The answer to the last objection is, that the money counts form altogether but one count for the purpose of pleading: they are separate counts only for the purpose of the taxation of costs, for which purpose the rule of Court (*a*) expressly makes them so, shewing that in other respects they are not so. There is but one breach and one promise in respect of them all.

But, supposing they are separate, the plea applies itself by one payment of one sum of money, to each count in which 100*l.* is claimed. The defendant says, as to 51*l.* of the 100*l.* in the first of those counts, and so in the second of them, and so on,—I pay 51*l.* into Court, and say I made no promise as to the residue. The same, as to the sums of 31*l.* 14*s.* 3*d.*, and 12*l.* 2*s.* Thus, his several pleas of payment, and his plea of the general issue, together cover the whole demand. He admits, that in respect of these several sums, the plaintiff had a cause of action, and applies to them respectively the allegation, that no damage has been sustained beyond the amount paid into Court. If a plaintiff may enlarge the real contract to a greater sum, why may

(*a*) Trin. 1 Will. 4.

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not the defendant bring it back to its true footing? [Lord *Abinger*, C. B.—Suppose, on issue joined, the plaintiff proved that the real cause of action, on the count to which the 12*l.* 2*s.* applies, was 13*l.* or 14*l.*] The plaintiff would recover on that issue, because the defendant has taken upon him to define the amount. But that difficulty does not arise here, because the demurrer admits the three amounts to be correctly limited; the only question is, as to the defendant's *right* so to limit them.

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Watson, in reply.—All that the defendant denies is *damages* beyond 51*l.* Now, the plaintiff may have no damages beyond that amount, in various ways: by payment, or release, or any other defence which ought to be specially pleaded. If the *debt* be confessed, the plaintiff may recover *damages* beyond, for interest or otherwise. The allegation of the plea cannot be extended to mean that there is no *debt* beyond the 51*l.* [*Alderson*, B.—Does the 100*l.*, in an *indebitatus* count, mean anything more than some sum *not exceeding* that amount? If not, why may we not take it in the same way for the defendant? If we do so, there is no inconsistency.] It is to be inferred from the form of the rule as to the plea of payment into Court, that it was to be a plea to part of the declaration only; for the *actionem non*, which, by rule 9, is to be applied only to pleas pleaded to a part of the declaration, is made a part of it. [*Alderson*, B.—This is a plea to the *further* maintenance of the action.] Yes, but of the *whole* action.

But the plea is unquestionably bad for treating the common counts as a single count. The old forms were separate counts, with a separate promise to each; it is in the latter point only that they are altered by the new rules. And the rule itself calls them common *counts*, and speaks of the defendant's *promises*, in the plural.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by

Lord ABINGER, C. B.—After stating the pleadings, his Lordship proceeded:—The objections to the plea, on the argument, were two: *first*, that a less sum of money was paid into Court, in satisfaction of a greater certain pecuniary claim, admitted by the plea; and that the sum paid into Court as to each debt is not stated. *Secondly*, that the declaration consists of six counts, and not of two, the plea having been framed on the latter supposition; and this is pointed out as a cause of special demurrer. With respect to the first objection, if this had been a plea of payment into Court of the sum of 51*l.* 9*s.* 7*d.*, or a less sum, to the whole declaration, except to that part which relates to the bill, it would have been good; for the sums claimed in the declaration are all of them liquidated damages, so as to admit of a payment of money into Court, but the plaintiff is not bound to prove himself entitled to the precise sums alleged, in order to recover; and the defendant, by pleading the payment of money into Court, on such a declaration, though he thereby admits that he did enter into contracts with the plaintiff for money paid, money lent, goods sold, interest, and account stated, does not admit that any *precise* sum was ever due to the plaintiff upon such contract, still less the exact sums mentioned in the declaration; he only admits that some amount of liquidated damages had become due, but denies that the plaintiff was ever entitled to recover more by way of such damages than the sum paid into Court. The plea would be therefore good, so far as relates to the whole of the declaration, except the claim on the bill of exchange. Then, is it necessary to specify how much is paid in on the one part, and how much on the other? It would be extremely inconvenient to defendants to be more restricted in that respect, than they were under the old practice of paying money into Court on the common rule, in place of

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which this plea is framed; and as it was the constant practice to pay one sum of money into Court generally on all the counts, we see no sufficient reason why this may not be equally done under the new rule. If, then, a plea of payment of 51*l.* 9*s.* 7*d.* into Court on all the demands, except that on the bill of exchange, would be good, there is not the least ground for saying that it would not be good as to part of those demands. Upon the plea in this case, it must be intended that the defendant, knowing for what precise demands the plaintiff is proceeding under this general form, (which an order for particulars always enables him to do), means to dispute, under the plea of *non assumpsit*, all the demands for money paid, lent, and interest, and all for goods sold, except for a parcel in respect of which 12*l.* 2*s.* is claimed; and to admit liability as to that parcel of goods, and on an account stated, but to contest the amount of liquidated damages for such admitted liability. The count on the bill creates some difficulty. Supposing that, to an action on a bill of exchange, there was a plea of payment into Court of a less sum than the amount alleged to be due on the bill, it might be objected that the plea admitted the larger ascertained sum to be *primâ facie* due from the defendant, but that the part paid could not satisfy the whole of that sum, and that the plea contained no answer or ground of defence as to the remainder. For if the plea of payment of money into Court should be considered in the nature of a plea of *non assumpsit* as to the residue not paid into Court, it would be inapplicable to a bill of exchange, as to which a plea of *non assumpsit* is inadmissible; and the record would contain no proper answer as to the residue, unless there was an allegation of some special ground of defence in that respect, as part payment, or failure of consideration as to part. It is, therefore, very questionable whether such a plea would be good, and also questionable whether it is made good by the plea of payment into Court, on the

whole declaration, of a larger sum than the amount of the bill; for so much as would cover that amount is not necessarily to be ascribed to the bill. We do not, however, find it necessary to decide this point, as we are of opinion in favour of the plaintiff on the second ground; but shall permit the defendant to amend his plea; the objection, if it is wrong, may be removed by payment into Court of a certain sum to cover the amount of the bill and interest. The Court think that the last ground of special demurrer must prevail, and that the several demands on the bill of exchange and for money paid, lent and advanced, and interest, and account stated, in the declaration in this form, are to be considered as different counts. This declaration is framed in compliance with the rule of Court, *T.* T., 1 *Will.* 4, in which the demands in *indebitatus assumpsit*, in the form there prescribed, are not treated as one but as several counts. They are called money *counts;* and, in effect, not one sum as the amount of all the demands, but several sums, and not one consideration and promise, but several, are stated; for there is an averment of a promise to pay each sum respectively in consideration of the defendant's being indebted in *that* sum. And if the demands for money paid, &c., are to be treated as one count, the *whole* declaration must be so considered, as the demand on the bill of exchange stands on no different footing from those for money paid, lent, goods sold, interest, and account stated. If the concluding part contains but one promise, it certainly covers the whole declaration, and all is one count. We think, however, for the reason above given, that these demands constitute several counts; and there will be a greater convenience in practice in so treating them, as where the defendant means to plead severally to each part of the declaration, it will be much more concise and simple to designate such parts as counts, than as parts of counts; in which latter case nearly the whole of the matter

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intended to be answered must be recited in the preamble of the plea. The rule of Court, *H.* T., 4 *Will.* 4, orders, that where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts. This rule has been on some occasions considered as implying that they are so only for this purpose; and on the argument of this case we believe an intimation of opinion was given to that effect. On consideration, however, we think that it does not necessarily follow from this provision that they are not separate counts for other purposes also, when framed in the manner in which these are. This clause meets *every* case of several debts, and treats them as being within the rule forbidding the use of several counts; and if a count were now to be framed, as it used sometimes to be, on the plan recommended by the learned editor of *Saunders*, vol. 2, p. 121, note C., for money paid, &c., clearly stated to form part of one entire consideration, with one promise only, still these separate debts would, under this rule, be deemed to be several counts, though they might not be so deemed in pleading. For these reasons, we think that the demurrer must prevail; but it is a case in which, undoubtedly, the defendant must have liberty to amend.

Leave to amend.

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THIS was an action for a libel contained in a letter written by the defendant, one of the firm of Messrs. *Currie, Horne, & Woodgate,* solicitors, in *Lincoln's Inn,* to a Mr. *Byrom,* an attorney at *Liverpool,* under the circumstances hereafter stated. The defendant pleaded, *first,* not guilty; *secondly,* as to the parts of the alleged libel which, in the copy of the letter hereafter set forth, are included within brackets, a justification of their truth. At the trial before Lord *Abinger,* C. B., at the *London* Sittings after *Trinity* Term, the following appeared to be the circumstances of the case.

The plaintiff, in the year 1816, being then an infant, became entitled, under the will of his grandfather, to personal property to the amount of about 500*l.* In the same year a bill was filed in *Chancery,* in the name of the plaintiff, by one *Whitley,* his next friend, to establish the trusts of the will. *Whitley* died soon afterwards, and an order was made substituting *Byrom* as the plaintiff's next friend; and, on the death of the plaintiff's father, in 1827, another order was made, appointing a Mr. *Jackson* his guardian. Other proceedings took place in the suit down to the month of *November,* 1834, all of which were conducted, on the part of the plaintiff, by Messrs. *Currie, Horne, & Woodgate.* At that time the plaintiff, who was then within a few months of attaining his majority, became dissatisfied with their conduct in the management of the suit, and applied to his guardian to take the business out of their hands. He consented to do so, and the plaintiff accordingly intimated to Mr. *Woodgate,* the defendant,

The meaning, in law, of a *privileged communication,* is, a communication made on such an occasion as rebuts the *primâ facie* inference of malice, arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact: but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.

The defendant was the solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend, (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in his office:—*Held,* that this was a privileged communication.

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that the suit would thenceforth be conducted on his behalf by other solicitors. On the same day the defendant wrote and sent to Mr. *Byrom* the letter which was the subject of the present action, and which was as follows:—

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"*Wright* v. *Hamerton.*

"Dear Sir,

"At the time you were concerned for this infant, you were named in the pleadings as his next friend, and your name still continues thereon. Just before the last vacation the cause came on to be heard on further directions, when it was supposed the Court would decide what interest the infant took under the will; but the Master of the Rolls directed the hearing on this point to stand over until the infant should attain his majority, which will be some time in the course of next year. The infant has been with us this morning, endeavouring to persuade us to apply to the Master to open all the accounts of the receiver, on the ground that the maintenance money, stated to have been paid him, has not in fact been paid him. This we have refused to do, as the accounts have been long since passed, and all payments duly and properly vouched. Mr. *Wright* has taken himself off in great dudgeon, with a view to instruct some other solicitor to act for him, and has since sent word that he finds he must obtain some direction from you, since you have been named his next friend. Without looking more into the case than we have time at the present moment to do, we know not if any direction will be necessary from you, but we are inclined to think not, since he has a guardian, a Mr. *Jackson*, (lately become his father-in-law), regularly appointed by the Court. There is something due to us for costs. Should any application be made to you, probably you will oblige us by declining to interfere, at all events until our costs are paid. You are acquainted with the disposition of Mr. *Wright*, and therefore will not be surprised to hear he is seeking a quarrel

with us. When we are paid, he is at liberty, with his guardian, to take his business where he pleases.

"At present there is nothing doing in the suit but the passing of the receiver's accounts. [Some little time since, he was apprenticed to a most respectable surveyor and civil engineer, but we understand his master has made him a present of his indentures, because he was worse than useless in his office.] [He is under terms to make a settlement on his wife on his coming of age, and because we tell him we are bound to the Court to see a settlement made according to its order, he wishes us to be no longer employed, that he may, we think, avoid the order;] and, before the question as to the will can be determined, it must be ascertained whether or not his father made a will. This is an inquiry he cannot bear to have named to him; and the more particularly so, since he is told an attested copy of a will is in the possession of his aunt or sister. He considers his father as having died intestate, and treats himself as heir at law. For all that we have done for him since we were employed, we have taken the directions of his guardian, and we think you cannot do better than refer him to the same quarter, should any application be made to you. With many apologies for troubling you with this long statement, we are, dear sir, yours faithfully,

"*Currie, Horne, & Woodgate.*

"*Henry Byrom, Esq., Liverpool.*"

Mr. *Byrom* proved the receipt of the letter by the post, and that he transmitted a copy of it to Mr. *Jackson*.

Erle, for the defendant, (no evidence being offered in support of the pleas of justification), submitted that the plaintiff ought to be nonsuited, the letter being, under the circumstances, a confidential and privileged communication. The Lord Chief Baron expressed his opinion that

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the whole of it was privileged, except the sentence relating to the plaintiff's conduct as an apprentice, which he thought unnecessary for the purpose of the letter. *Erle* then addressed the jury, and contended that that portion of it also was protected, inasmuch as it was important to Mr. *Byrom* to know the plaintiff's character and disposition, in order that he might be put upon his guard, and protect himself from incurring costs on his account. His Lordship thereupon intimated his concurrence in that view of the case, and expressed his intention to nonsuit the plaintiff, unless the master, with whom the plaintiff had served as an apprentice, were called to disprove the imputation as to the plaintiff's conduct in his service. The master, a Mr. *Kennett*, was accordingly called, and his evidence went to shew that, although the plaintiff had been of but little use in his office, he had not been guilty of any positive disobedience or misconduct. The Lord Chief Baron left it to the jury to say whether the sentence relating to the plaintiff as an apprentice, was inserted with an intention to prejudice the plaintiff, and as an imputation on his moral character, or whether it was written without any malice; in the latter case he directed them to find for the defendant. A verdict having been found for the defendant—

Sir *F. Pollock* now moved for a rule *nisi* for a new trial, or, at all events, to enter a nonsuit instead of a verdict for the defendant. He contended that the plaintiff ought, under the circumstances, to be considered in the same situation as if he had submitted to a nonsuit; and that such nonsuit could not have been supported in law, inasmuch as he had a right to have the letter itself submitted to the consideration of the jury, that they might pronounce whether it bore evidence of malice on the face of it; since in that case it would not

be protected, whatever were the circumstances under which it was written. He urged that several passages of the letter conveyed wanton and unjustifiable imputations, and that its evident object was not to caution or protect Mr. *Byrom*, but merely to prejudice him against the plaintiff, and induce him not to do any act in concurrence with his wishes until the defendant had got a settlement of his costs: that this being a voluntary communition, and not in answer to any inquiry from *Byrom*, it must be shewn not only to have been made *bonâ fide*, but also to be true, in order to justify the imputations contained in it. At all events, he submitted that the plaintiff ought, in fairness, to be placed in the same situation as if he had consented to be nonsuited, and to have the option of laying the case before another jury: and also that the two last issues ought to be entered for the plaintiff, no evidence having been given in support of the justification pleaded.

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PARKE, B.—The application to alter the entry of the verdict may be made at chambers, when, if the statement now made be not opposed, the amendment will be a matter of course. But Sir *F. Pollock* has failed to satisfy me that there is any ground for granting a new trial. I entirely concur in the latter opinion expressed by my Lord *Abinger* at the trial. The term "privileged communication," as it was applied in this case, is not, perhaps, quite a correct expression. The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. In the present case

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it became, in my opinion, incumbent upon the plaintiff to shew malice in fact. This he might have made out, either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, shewing that he was actuated by a motive of personal ill-will. If Lord *Abinger* had meant to say that it was incumbent on the plaintiff to make it out by extrinsic evidence *only*, and that the jury could not look at the letter at all for the purpose of drawing such a conclusion, then I think that would certainly have been a wrong direction. But if he meant only that it was of no use to the plaintiff that the evidence, as it stood, should go to the jury, inasmuch as the verdict must be against him, in that opinion I entirely agree. The plaintiff's counsel did not ask for any explanation of the expression used by his lordship, or desire that he should leave the evidence, as it stood, to the jury: not having chosen to do so, they must abide the consequences. Had such an application been made, the learned Judge must have left the case to the jury; but it would probably have been—at least I should have so left it—with very strong observations in favour of this being a *bonâ fide* communication. I think, therefore, that there should be no new trial.

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ALDERSON, B.—I am of the same opinion. Ultimately the case comes to the same thing as if the learned Judge had decided in the first instance that this was a privileged communication, and that the *onus* of shewing malice was thrown upon the plaintiff. The term *nonsuiting* is not to be construed so strictly as to have been intended to exclude the letter altogether from the consideration of the jury, but only as intimating an opinion that the jury could not reasonably act upon it in favour of the plaintiff.

GURNEY, B.—I think, from the contents of this letter,

that it was absolutely incumbent on the plaintiff to shew malice in fact.

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Lord ABINGER, C.B.—If I entertained any doubt in this case, I should be most anxious, under the circumstances, to grant a new trial. The distinction certainly was not at the time present to my mind, between nonsuiting the plaintiff and directing the jury to find for the defendant. Undoubtedly I was induced by the remarks which fell from Mr. *Erle* to alter my opinion as to the effect of the letter, and to consider it privileged, not only as relating to the interest of the defendant, but also as relating to that of *Byrom*, in order that he might know something of the character and conduct of the young man who was about to make such an application to him. I still adhere to that opinion. But I find that, in fact, I did after all leave the question to the jury, whether, under all the circumstances of the case, there was malice on the part of the defendant or not.

Rule refused.

DOE *d.* BOYDELL and Another *v.* GILLETT and Another.

EJECTMENT for two copyhold houses situate in the parish of *Adderbury*, in the county of *Oxford*, claimed by the plaintiffs as assignees of *Richard Lamb*, an insolvent debtor. At the trial before *Williams*, J., at the last *Oxford* Assizes, the only question in dispute was, whether a surrender of the premises by the insolvent to the defendants, shortly before his imprisonment, was or was not void as being a voluntary conveyance within the 7 *Geo.* 4, c. 57, s. 32. The facts of the case were as follows:—

It is not necessary, in order to support a conveyance or transfer made by an insolvent trader to a creditor, to shew that it was made in consequence of pressure on the part of the creditor: in order to invalidate it, it must appear to have originated in the voluntary act of the trader, and not in a *bonâ fide* application by the creditor.

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DOE *d.* BOYDELL *v.* GILLETT.

Lamb, who carried on the business of a corn-dealer at *Oxford*, and occupied one of the houses at *Adderbury*, kept an account with the defendants, who were bankers at *Banbury*, and in *July*, 1833, was indebted to them in upwards of 1000*l*. In that month the defendants' attorney called upon him to require some security for the debt, and *Lamb* gave up to him the lease of a house in *Newington Causeway*, but objected to charge the property at *Adderbury* on account of the publicity which would be necessary to the surrender. On the 22nd of *September*, the defendant *Gillett* wrote to *Lamb*, stating that the lease was an inadequate security, and wishing him to make over by deed the houses at *Adderbury*, and also his reversionary interest in another estate. The letter concluded—"I mention this for thy consideration." On the 24th of *October*, *Lamb* being then in *London*, *Gillett* wrote to him again on the subject, informing him that the necessary documents could be prepared by the defendants' solicitor in *London*, without exposing the matter to the clerks at his office at *Banbury*, and desiring him to call at the solitor's *London* office for the purpose. *Lamb* accordingly saw the solicitor, and agreed to execute a mortgage of the copyhold houses; and the surrender in question was made out of Court, in pursuance of such agreement, on the 7th of *December*, at which time it was admitted that *Lamb* was in insolvent circumstances. On the 23rd of *January*, 1834, he went to prison, and on the 29th of the same month filed his petition; and in *March* following was discharged under the insolvent act. The learned Judge left it to the jury to say, whether the surrender was executed under compulsion, or by way of voluntary preference; and a verdict having been found for the defendants,

Talfourd, Serjt., now moved for a rule *nisi* for a new trial, contending that this evidence shewed nothing like

pressure on the part of the defendants, but rather that the parties were on the most friendly terms; and that the learned Judge ought to have directed the jury that the surrender was voluntary. The defendants did no more than suggest their wish for further security to the consideration of the insolvent.

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PARKE, B.—It is not necessary to shew pressure; *you* must shew that the conveyance originated in the voluntary act of the insolvent, whereas here it was made in consequence of the creditor's asking for it. That is the meaning of the term *voluntary*. Here the transfer originated in a demand for it. I should infer that it was a very clear case for the defendants.

The other Barons concurred.

Rule refused (*a*).

(*a*) See *Davies* v. *Acocks*, ante, 461.

BEES *v.* GEORGE and SAMUEL WILLIAMS.

TRESPASS for breaking and entering a close of the plaintiff, called the *Orchard*, in the parish of *Burrington*, in the county of *Somerset*, forcing open the gates, and spoiling the grass, &c., and ploughing up the soil therein, and carrying away certain trees and wood of the plaintiff, cut and lying in the said close. Plea, as to all the trespasses except the carrying away of the trees and wood, that the Duke of *Cleveland*, before any of the said times when, &c., to wit, on the 26th *March*, 1835, being seised in fee of the said close in which &c., with the appurtenances, demised the same to the defendant *George Williams*, to hold for one year then next following; by virtue of which demise the defendant *George*, afterwards, and

The plaintiff was tenant to *A.* of one close; *K.* was tenant to *B.* of another close. The plaintiff and *K.* verbally agreed to exchange their holdings; "the plaintiff to have *B.*'s land, and pay *K.*'s rent, *K.* to have *A.*'s land, and pay plaintiff's rent." On the same day each took possession of the other's land. *K.* undertook to communicate their bargain to *C.*, who was the agent of both *A.* and *B.*; he did, accordingly, some days afterwards, communicate it to him, and *C.* expressed his concurrence:—*Held*, that this was evidence to go to the jury of a surrender by *K.* to *B.* of his interest in *B.*'s close.

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before any of the said times when &c., to wit, on the day and year last aforesaid, entered into the said close; wherefore the defendant *George* in his own right, and the defendant *Samuel* as his servant, and by his command, committed the several trespasses justified. And as to the carrying away of the trees, &c., the defendants pleaded that they were not the property of the plaintiff; upon which issue was joined. Replication to the first plea, that, long before the making of the demise therein alleged to have been made, to wit, on the 25th *March*, 1820, the said Duke of *Cleveland*, being seised in fee, &c., demised the said close to one *John Keel*, to hold for one year then next ensuing, and so from year to year, for so long a time as the said Duke and *John Keel* should respectively please; by virtue of which demise, the said *John Keel*, on the day and year last aforesaid, entered into and upon the said close, and became possessed thereof; and, being so possessed, the said *John Keel* afterwards, and, during the continuance of the said last-mentioned demise, to wit, on the 23rd *September*, 1834, demised the same to the plaintiff, to hold from the 29th *September* then instant, as tenant at will thereof to him the said *John Keel;* by virtue of which said last-mentioned demise, the plaintiff afterwards, and before &c., to wit, on the day and year last aforesaid, entered into and upon the said close, and became possessed thereof as tenant at will to the said *John Keel;* and that after the making of the said demise from the said Duke to *Keel*, and during the continuance thereof, and also after the making of the said demise from *Keel* to the plaintiff, and during the continuance thereof, while *Keel* was tenant to the Duke, and the plaintiff was so possessed thereof as such tenant to *Keel*, the defendants committed the trespasses complained of. Rejoinder, that, after the making of the said demise by the Duke to *Keel*, and whilst the Duke was seised in fee of the reversion of the said close expectant on the determination

of the said term of *Keel* therein, and before the making of the demise from the Duke to the said defendant *George Williams*, and also before any of the said times when &c., to wit, on the 19th *March*, 1835, all the estate, term, and interest of *Keel* in the said close was ended and determined by surrender thereof made by *Keel* to the Duke. Surrejoinder, that all the estate, term, and interest of *Keel* was not ended and determined by surrender thereof made by him to the Duke, in manner and form as in the rejoinder alleged: upon which issue was joined.

At the trial before *Coleridge*, J., at the last *Somersetshire* Assizes, *Keel*, being called as a witness for the plaintiff, stated on cross examination, that he being tenant from year to year to the Duke of *Cleveland* of the close in question, and the plaintiff being tenant from year to year to Mr. *Vane*, the rector of the parish of *Burrington*, of a piece of glebe land, and the rent of each being the same, it was verbally agreed between them, on the 23rd *September*, 1834, that they should exchange their respective holdings; "the plaintiff was to have the Duke's land, and pay *Keel*'s rent, and *Keel* was to have the rector's land, and pay *Bees*'s rent." On the same day, accordingly, each of them took possession of the other's land. *Keel* informed the plaintiff he should mention the agreement to Mr. *Cockburn*, who was the agent to both the Duke and Mr. *Vane*, and the plaintiff said, "Very well;" a few days afterwards, accordingly, *Keel* told Mr. *Cockburn* that he had exchanged with the plaintiff, and he answered that he was very glad of it. *Keel* had before made repeated application to Mr. *Cockburn* for the plaintiff's land, and *Cockburn* had told him he should be glad to let him have it as soon as it could be made convenient. The plaintiff continued in possession of the close in question, but no rent had yet been paid by him for it. The defendants afterwards entered under a letting by the Duke, and ploughed the land, and carried away some faggots lying

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in the field; which, however, clearly appeared to be the property of a person named *Plumley*, and not of the plaintiff. On this evidence the learned Judge left it to the jury to say, whether there had been a surrender by *Keel* to the Duke of his interest in the close; and stated his opinion to be, that a sufficient assent was shewn on the part of the Duke, by his agent, to the exchange between the two tenants, to constitute a new tenancy in the plaintiff of the close in question. A verdict being found for the defendants,—

Erle now moved for a new trial, and contended that the facts proved did not amount to a surrender by consent of all parties. Neither of the two landlords had any communication with the plaintiff; there was no contract between him and the Duke; nothing to give the Duke a right to claim rent as against the plaintiff. The effect of the agreement was no more than to constitute the plaintiff *Keel*'s under-tenant. The plaintiff, on this record, could not say that the Duke had demised to him. He referred to *Matthews* v. *Sewell* (*a*).

PARKE, B.—*Cockburn* may be considered as representing both the Duke and Mr. *Vane* in the transaction, and must be supposed to have authority to demise for both of them. Therefore, there is an assent by both the Duke and *Vane;* that is sufficient, according to the authority of the case you refer to, to constitute a surrender by operation of law. The effect of the transaction was to create a new demise from the Duke to the plaintiff. At all events, there was evidence to go to the jury.

The other Barons concurred.

Rule refused.

(*a*) 2 Mod. 262; 8 Taunt. 220.

GODSON, Administrator of MILLINGTON, *v.* FREEMAN.

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ASSUMPSIT for the use and occupation of a farm demised to the defendant by the intestate. At the trial before Lord *Denman*, C. J., at the last *Gloucestershire* Assizes, the plaintiff having proved the occupation, and called witnesses to speak to the yearly value of the farm, the defendant put in receipts for the rent, at a much lower rate, on which the plaintiff's counsel elected to be nonsuited.

The Court will not relieve an executor or administrator plaintiff from costs, unless there has been some misconduct on the part of the defendant, which led the plaintiff to proceed with the action, or unless some other very peculiar ground is laid for the interference of the Court. It is not enough that the action was brought *bonâ fide*, that the plaintiff had apparently reasonable grounds for suing, and that he was taken by surprise by the defence.

Talfourd, Serjt., now moved for a rule to shew cause why the judgment of nonsuit should not be entered up without costs, under the 3 & 4 *Will.* 4, c. 42, s. 31, on affidavits which stated that administration had been granted to the plaintiff as a creditor of the intestate; that he had every reason to suppose that the arrears of rent were unpaid; that he had applied for information to the widow of the intestate, who was also the sister of the defendant, and that he had been induced by her representations to believe the debt justly due; and that the production of the receipts took him entirely by surprise. He referred to *Lysons* v. *Barrow* (*a*), *Wilkinson* v. *Edwards* (*b*), and *Southgate* v. *Crowley* (*c*).

Lord ABINGER, C. B.—There is great inconvenience in calling upon a Court of law to exercise in every case an equitable discretion. The act is made in favour of defendants, and we must not take that benefit from them unless we see clearly that they have forfeited their claim to it.

PARKE, B.—The act throws the labouring oar on the

(*a*) 10 Bing. 563; 4 Moo. & Sc. 463.

(*b*) 1 Bing. N. C. 301; 1 Scott, 173.

(*c*) 1 Bing. N. C. 518; 1 Scott, 374.

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executor: you must shew your title to relief very clearly in order to be exempt from its provisions. If it had appeared that the plaintiff had applied to the defendant to ascertain if he had any receipts, and the defendant had concealed them from his knowledge, and so vexatiously induced the plaintiff to prosecute a hopeless suit, the case might have been one calling for our interposition. As it is, I do not think the plaintiff has made out a sufficient claim for the equitable interference of the Court. The defendant has been guilty of no misconduct, and there is no reason why he should bear the costs of a suit towhich it appears he was not liable.

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ALDERSON, B., and GURNEY, B., concurred.

Rule refused (*a*).

(*a*) See *Engler* v. *Twisden*, 2 Bing. N. C. 263.

LIDDARD *v.* HOLMES.

A. and *B.* being co-surveyors of the highways of a parish, it was agreed between them that *A.* should deliver up the rate-book to *B.*, and that *B.* should pay *A.*, out of the moneys he should collect under the rate, the sum of 15*l.* which *A.* had advanced beyond the amount collected by the previous rate. The book was accordingly delivered to *B.*, who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay *A.* the 15*l.*:—*Held*, that *A.* might maintain an action to recover it.

ASSUMPSIT on an account stated. Plea, the general issue. At the trial before the under-sheriff of *Kent*, it appeared that the plaintiff and defendant were appointed co-surveyors of the highways for the parish of *Knockholt* in *Kent*, in *October* 1832; and that, at a vestry meeting held on the 19th of *January*, 1833, some dissatisfaction having been expressed with the plaintiff's proceedings, an arrangement was entered into that the plaintiff should deliver up the rate book to the defendant, the latter engaging to pay him, out of the monies he should collect under a rate then made, the sum of 15*l.*, which the plain-

tiff had advanced beyond the amount collected by him on the previous rate. The book was accordingly delivered to the defendant, who collected a considerable sum of money, but expended it all on the repair of the roads, except a small balance of a few shillings; and the 15*l.* not having been paid to the plaintiff pursuant to the engagement, this action was brought to recover it. For the defendant, it was objected that the action could not be maintained by one co-surveyor against another. The undersheriff reserved the point, and the plaintiff had a verdict for 15*l.*

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Shee now moved for a rule *nisi* to enter a nonsuit. The action will not lie by one surveyor against the other. Each surveyor has in law the custody of the book, though in fact it may be kept by one only. The alleged agreement was, therefore, merely *nudum pactum;* no consideration could arise out of the giving up of the book to the defendant, since it was already in his legal possession. [Lord *Abinger*, C. B.—Your proposition may be true as to the public, but is it true *inter se? Parke*, B.—If the plaintiff had kept the book, he would have collected the money, and paid himself the 15*l.*] The defendant had a legal right to have the book. [*Parke*, B.—But the plaintiff was not bound to give it him. He gets possession of it on the understanding that he shall pay the money over out of the receipts, and then he pays them away for other purposes.] He was bound to apply the money to the purposes for which in law the rate was made, viz. the repair of the roads. At all events, therefore, he could not be liable till a sufficient surplus appeared beyond what was required for that purpose. The contract must always be subject to the consideration what was the duty of the defendant as surveyor independently of the contract. [*Parke*, B.—The repair of the roads was only one purpose to which it was his duty to apply the money; he

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had equally a right to apply it to the reimbursement of the plaintiff.] This is not the mode of proceeding prescribed by the act of Parliament (*a*); the accounts should have been adjusted before the magistrates, before he could sue at law for the balance. [Lord *Abinger*, C. B.—The act of Parliament has nothing to do with the case. This is a private contract between the parties, quite independent of the act, which provides only for the adjustment by the justices of payments to be made by the surveyors to their successors.]

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Per Curiam—

Rule refused.

(*a*) 13 Geo. 3, c. 78, s. 48. See 5 & 6 Will. 4, c. 50, ss. 41, 42.

RAYMOND and Another, Executors of THOMAS WALFORD, deceased, *v.* FITCH.

An executor is entitled to sue the lessee of his testator for the breach of a covenant not to fell, stub up, lop, or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator.

COVENANT.—The declaration stated, that whereas theretofore, to wit, on 5th *December*, 1832, by a certain indenture then made between the said *Thomas Walford* of the one part, and the defendant of the other part, (*profert in curiam*), the said *Thomas Walford*, for the considerations therein mentioned, did demise and to farm let unto the said defendant, certain buildings, lands, hereditaments, and premises, particularly mentioned and described in the said indenture, except as in the said indenture was excepted, to have and to hold the said buildings, lands, hereditaments, and premises, with their appurtenances, unto the said defendant, his executors and administrators, for the term of one whole year from the 29th day of *September* then last, and so from thence from year to year, &c.; and the said defendant, for himself, his executors, and administrators, did by the said indenture, covenant, promise,

and agree, to and with the said *Thomas Walford*, his heirs and assigns, amongst other things, that the said defendant should not nor would, during the continuance of the said demise, fell, stub up, head, lop, or top any of the timber trees, or trees likely to be timber, growing or being on the said demised premises; or cut or take away wood or bushes, lops or tops, except such as had been agreed to be allowed for fire wood; and upon lopping the pollard trees, and cutting down the stub wood and bushes growing in or about the said hedges and ditches of the said demised premises, should at the same time new make and scour the said ditches, and lay one spit of all the earth of the said ditches on the banks thereof, to nourish the quickset there; as in and by the said indenture, reference being thereunto had, will more fully appear. By virtue of which said demise, the said defendant afterwards, to wit, on &c., and in the lifetime of the said *Thomas Walford*, entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof demised as aforesaid. And although the said *Thomas Walford*, in his lifetime, always from the time of making the said indenture, until the day of his death, and the said plaintiffs as executors as aforesaid since his death, have and each of them hath well and truly performed, fulfilled, and kept all things in the said indenture contained, on his and their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said indenture; yet, protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said indenture; in fact, the said plaintiffs, executors as aforesaid, say that the said defendant, after the making of the said indenture, and during the term thereby granted, and before

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the decease of the said *Thomas Walford*, to wit, on the 1st day of *January*, 1832, and on divers other days and times between that day and the day of the decease of the said *Thomas Walford*, felled, stubbed up, headed, lopped and topped divers, to wit, 500 of the timber trees, and 500 trees likely to be timber, growing and being on the said demised premises, and of great value, to wit, of the value of 20*l.*; and during the time aforesaid, he the said defendant cut and took away divers, to wit, 500 cart loads of wood, bushes, lops and tops of a certain other great value, to wit, of the value of other 20*l.*, the same being other and different wood, bushes, lops and tops, than such as had been agreed to be allowed for firewood; contrary to the form and effect of the said indenture, and of the covenant of the said defendant so by him made in such behalf as aforesaid. And the said plaintiffs, executors as aforesaid, in fact further say, that the said defendant did not nor would, upon such lopping the said trees and cutting down the said wood and bushes growing in and about the hedges and ditches of the said demised premises, new make or scour the said ditches, or lay one spit of all the earth of the said ditches on the banks thereof, to nourish the quickset there, according to the tenor and effect of the said indenture, and of the said covenant of the said defendant so by him made in such behalf as aforesaid, but therein wholly failed and made default; contrary to the form and effect of the said indenture, and of the said covenant of the said defendant so by him made in such behalf as aforesaid.

After setting out the deed on oyer, the defendant, as to the breach of covenant first above assigned, excepting so much thereof as relates to taking away the said bushes, wood, lops and tops therein mentioned, demurred generally; and, to the part excepted, pleaded accord and satisfaction; and also as a further plea, that he did not take

away any wood or bushes, &c. He also demurred generally to the second breach.

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Sir *W. W. Follett*, in support of the demurrer.—An executor cannot maintain any action for a damage to the real estate, unless it be shewn that the damage to the real estate has created a damage to the personal estate of the testator. That was so laid down in *Kingdon* v. *Nottle* (*a*). There the plaintiff, as executrix, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of the execution of the deed, seised in fee, and had a right to convey &c.; and assigned for breach, that the defendant was not seised &c., and had not a right to convey &c. Upon special demurrer, this was held ill; and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Lord *Ellenborough* there says, "in the absence of any damage to the testator, which, if recovered, would properly form part of his personal assets, I do not know how to say that this action is maintainable." So that, in order to entitle the executors to sue, they must shew that some damage arose to the personal estate of the testator, which in this case they have not done. In *Fitzherbert's Natura Brevium*, 145, C. it is thus laid down: "If a man make a covenant by deed to another and his heirs, to enfeoff him and his heirs of the manor of *D.*; now if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed." So, in *Shepherd's Touchstone*, 171, it is said, "If a feoffment be made in fee, and the

(*a*) 1 M. & Sel. 355.

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feoffor doth covenant to warrant the lands, or otherwise, to the feoffee and his heirs, in this case the heir of the feoffee shall take advantage of this." And again: "If *A.*, *B.*, and *C.*, have lands in coparcenary, and purchase other lands in fee, and covenant each to the other, his heirs and assigns, to make such a conveyance to the heir of him that shall die first, of a third part, as he shall devise; in this case the heir, not the executor, shall take advantage of the covenant." That shews that the right to sue for a breach of covenant affecting the realty goes to the heir, and not to the executor. It is true that here the plaintiffs have averred that the trees were taken away in the lifetime of the testator, but on that an issue in fact is taken. The only question in issue on this demurrer is, as to the cutting of the trees. If this action will lie at the suit of the heir, the executor cannot be allowed to sue as well as the heir. In *Chamberlain* v. *Williamson* (*a*), it was held that an administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged. There Lord *Ellenborough*, in delivering the judgment of the Court, says, "The general rule of law is, *actio personalis moritur cum persond*, under which are included all actions for injuries merely personal. Executors and administrators are representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the Court cannot intend it." [*Parke*, B.—There is a case expressly in point that the action will lie; *Morly* v. *Polhill* (*b*); which was an action of covenant by the plaintiff as executor to *George Morly*, late Bishop of *Winchester;* and the declaration stated that *Brian*, the predecessor of the bishop, had demised

(*a*) 2 M. & Selw. 408. (*b*) 2 Ventr 56.

a rectory and certain lands to *J. S.*, for twenty-one years, who had assigned it to the defendant's testator; and that the lessee covenanted with *Brian* and his successors to repair the chapel of the church, and the barns, &c., and assigned as a breach the not repairing by the testator of the defendant in the life of *George Morly;* and that the lease afterwards expired; and it was held, that the executor was there well entitled to the action for the breach in the testator's time.] That case is distinguishable, as there was there a covenant to repair. [*Parke*, B.—Is there not a covenant to repair in this case?] There is here a separate demurrer to each of the breaches; and one question is, whether an executor can maintain any action at all for a breach of covenant not to cut trees incurred in the lifetime of the testator. In *Com. Dig. Administration*, B. 13, it is said, that an administrator "shall have covenant, upon a covenant made to his testator for a personal thing: so upon a contract made to the testator;" and *March, Pl.* 23, is cited. The maxim, that *actio personalis moritur cum personâ*, applies equally to an action of contract as to an action of tort—that maxim is a maxim of the common law. Unless the personal estate of the testator is injured, the executor cannot maintain the action. *Jones* v. *King* (*a*) shews that this action is maintainable by the heir. The plaintiffs, at all events, should have averred damage to the personal property of the testator, as was done in *Knights* v. *Quarles* (*b*). In *Orme* v. *Broughton* (*c*), it was held, that, a vendor having omitted to make out a good title within the stipulated time, and the vendee having died, his executor might sue for damage incurred by loss of interest on the deposit money, and the expense of investigating the title. There it was argued, that as there was no damage done to the heir, he could not sue, and that sufficient damage had accrued to the personal property of the

(*a*) 4 M. & Selw. 188.
(*b*) 2 B. & B. 102; 4 Moo. 532.
(*c*) 4 M. & Scott, 417; 10 Bing. 533.

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intestate to entitle his administrator to sue; and *Tindal*, C. J., says, "The only question is, whether we can see on this record a personal contract, a breach of it in the lifetime of the intestate, and a loss to his personal property." All these three things must concur together, to render the action maintainable. He afterwards says, "This, however, is an action not by the intestate, but by his administrator; and we have still to see whether there has been any injury to the testator's personal property;" and then he refers to the statement in the declaration, that "the intestate was necessarily put to great expenses in endeavouring to procure the said title as aforesaid," &c. This declaration cannot be supported, as it has not any allegation of special damage to the personal estate of the testator. *Lucy* v. *Levington* (*a*) may be cited as an authority that this action will lie; but there the declaration alleged an eviction of the testator, and it is therefore distinguishable, because the personal estate of the testator must necessarily have been injured by the loss of the rents and profits of the land. The same answer may be given to *Morly* v. *Polhill* (*b*), as it was necessarily an injury to the personal estate. If not, that case is not law. [*Parke*, B.—It may have proceeded on the ground that the executors of the bishop would be liable for the breach of covenant, and so there would be a damage to the personal estate.] The first breach here is, the cutting of trees; but there is no averment of any damage to the testator. The plaintiffs ought to have given the defendant an opportunity of taking issue upon and denying such an allegation. The second breach is, that the defendant did not new make and scour the ditches; but that is clearly a covenant to do something for the benefit of the real estate, and therefore the heir, and not the executor, would be the party entitled to sue.

(*a*) 2 Lev. 26. (*b*) 2 Ventr. 56.

W. H. Watson, *contrà*.—It is material in this case to observe, that if the present action is not maintainable, no other action would be maintainable at the suit of any other person. It is submitted, however, that this action can well be supported. Wherever there is a covenant in a lease, and an ultimate breach of it in the lifetime of the testator, an action is maintainable at the suit of an executor. There is here a damage to the personal estate. The case of *Morly* v. *Polhill* is also stated in 3 *Salkeld*, 109. In that case the demise was by a prior bishop, and the dilapidations were not owing to the act of the executor's testator; and it is by no means clear that his executor would be liable to the bishop's successor. The reason given is, that the breach occurred in the testator's lifetime. It is said in *Com. Dig. Covenant*, (B 1), "So if he covenants with a bishop and his successors to repair a rectory demised, the executor of the bishop may have covenant for a breach in his lifetime. *R. 2 Vent.* 56." In *Bacon's Abr. Executors*, (N), it is laid down thus:—"An executor (and not heir or assignee), for a covenant broken in the lifetime of the testator, shall have an action of covenant, though it were a covenant real, which runs with the land, as he cannot of that have an heir, &c.; and the damages shall be recovered by the executor, though not named, as he personally represents the testator." And in the margin it is stated, "that executors shall take advantage of covenants in gross." The case of *Lucy* v. *Levington* (*a*) is recognised in all the authorities. There the plaintiff declared, "that *Levington* sold to *Lucy*, the plaintiff's testator, certain lands, and covenanted with him, his heirs, and assigns, that he should enjoy the same against him, *Levington*, and Sir *Peter Vanlore*, their heirs and assigns, and all claiming under them; and assigned as a breach that *Cooke*, claiming under *Vanlore*, ejected him."

(*a*) 2 Lev. 26; S. C. 1 Ventr. 175; 2 Keble, 831.

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And it was held, "that the eviction being to the testator, he cannot have an heir or assignee of this land, and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator." So here there was a destruction of the trees in the lifetime of the testator, and the damage redounded to the executors on his death. In *Chamberlain* v. *Williamson* (*a*), Lord *Ellenborough* puts it throughout on its being a personal wrong. In *Kingdon* v. *Nottle*, there was a continuing breach of the covenant in the time of the devisee, and therefore the action was held maintainable. Here, if the executor cannot maintain the action, no other person can. The question is, was the ultimate damage in the lifetime of the testator? If that distinction is observed, it will reconcile all the cases. Where the ultimate damage arises in the lifetime of the testator, the action is maintainable by the executor.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop or top, timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings or toppings, appearing to have been removed by the defendant. This question was argued in the latter part of the last term, before my Brothers *Parke*, *Bolland*, *Gurney*, and myself, and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative

(*a*) 2 M. & Selw. 408.

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may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute, 4 *Ed.* 3, c. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, that "*actio personalis moritur cum personâ*," is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law. These authorities as to actions of covenant will be found in *Com. Dig. Administrator*, B 13, *Covenant*, B 1; *Bacon's Abridgment*, *Executors and Administrators*, N; and in the cases of *Mason* v. *Dixon*, *Sir William Jones*, 173; *Morley* v. *Polhill* (*a*), which was the case of an action by the executor of a deceased bishop for a breach in his lifetime of a covenant to repair in a former bishop's lease; *Smith* v. *Simonds* (*b*), in which an administrator *de bonis non* recovered on a breach in the time of the testator for not discharging the land from incumbrance; and lastly, *Lucy* v. *Levington* (*c*), where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment. The old authorities are also many, that an action will lie upon every breach of contract, though not under seal. In *March*, p. 9, pl. *23*, Justice *Jones* said, "that it was agreed by the Court, in

(*a*) 2 Ventr. 56; 3 Salk. 109, pl. 10.

(*b*) Comberbach, 64.

(*c*) 2 Lev. 26; 1 Ventr. 176.

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what case soever there is a contract made to the testator or intestate, or any thing which ariseth by contract, there an action will lie for the executor or administrator; but personal actions die with the testator or intestate." And in 9*th Reports*, 89 a., *Pinchon's case*, in which the question was, whether an action of *assumpsit* for payment of a debt lay *against* an executor, it is laid down as follows:—" As to the other objection, that this personal action of trespass on the case *moritur cum personâ*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit, to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then, if he to whom the promise is made dies, his executors should not have any action, which no man will affirm; and an action *sur assumpsit*, upon good consideration, without specialty, to do a thing, is no more personal, *i. e.* annexed to the person, than a covenant by specialty to do the same thing:" and in *Bacon's Abr. Executors*, (N), "An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might." These authorities have certainly been limited by the modern decisions, quoted on the argument, and are to be understood with some qualifications; but it will be found that none of those qualifications affect the present case. The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon* v. *Nottle* (*a*), followed by that of *King* v. *Jones* (*b*), in which cases it was held, that, where there are covenants real, that is, which run

(*a*) 1 M. & Selw. 355, and 4 M. & Selw. 53.

(*b*) 5 Taunt. 519; 1 Marshall, 107.

with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or devisor, and the executor therefore must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the personal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain* v. *Williamson* (*a*), in which it was held, that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord *Ellenborough* enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion

(*a*) 2 M. & Selw. 408.

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of skill and attention, which cases are in substance actions for injuries to the person, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description—it is a case more favourable to the executors than those of *Morly* v. *Polhill*, *Smith* v. *Simonds*, and *Lucy* v. *Levington*, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate, (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We therefore think that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

BOOND *v.* WOODALL.

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SHEE had obtained a sheriff's interpleader rule, but the officer of the Court hesitated to draw it up, because the affidavit of the sheriff did not deny collusion. He submitted, on the authority of *Donniger* v. *Hinxman* (*a*), and *Dobbins* v. *Green* (*b*), that that was not necessary in the case of an application by the sheriff under sect. 6 of the Interpleader Act, although it was on an application by a mere private stakeholder under sect. 1. And the Court, after referring to the act, directed the rule to be drawn up on the affidavit as sworn.

A sheriff or other public officer, applying to the Court under s. 6 of the Interpleader Act, need not deny collusion with the claimant.

Rule accordingly.

(*a*) 2 Dowl. P. C. 424. (*b*) Id. 509.

BUXTON *v.* SPIRES.

BAZETT moved (*November* 3) for a rule to bring up a prisoner under the compulsory clause of the Lords' Act. The only question was, whether the notice, which was given on the 13th of *October*, was in time. It was not twenty clear days before the first day of term; but he contended, on the authority of *Hayward* v. *Priest* (*a*), that it was sufficient if given twenty days before the day on which the motion was made. A rule *nisi* having been granted,

The twenty days' notice necessary to be given before bringing up a prisoner under the compulsory clause of the Lords' Act, must have expired before the first day of the term in which he is brought up.

Humfrey shewed cause, and contended that the notice was insufficient. The twenty days ought to be taken exclusively of the first day, and therefore would not expire until the end of the first day of term. That does not sa-

(*a*) 2 Dowl. P. C. 737.

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tisfy the statute (*a*), which requires the prisoner to give in his account within the first seven days of the term *next after* the expiration of the notice. The word *after* must apply to the next antecedent, that is, the term: in this case, therefore, the defendant cannot be brought up until next term. The case of *Hayward* v. *Priest*, as reported in *Moore & Scott* (*b*), is no authority against this construction, but rather in favour of it; for, according to that report, the Court said that the twenty days' notice should have expired before the first day of the term, adding only, "*or at all events*, before the rule to bring up the defendant was taken out."

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G. T. White was heard in support of the rule.—He urged that the mode of reckoning by excluding the first and including the last day, as directed by the rule *H. T. 2 Will.* 4, No. 8, did not apply to the case of a period of time fixed by an act of Parliament, but only to those prescribed by the rules of practice.

Lord ABINGER, C. B.—If the case of *Hayward* v. *Priest* decided the point as it appears in *Moore & Scott*, we think that decision was right: if it did not distinctly decide it, then we think it ought to have so decided; the word "term" ought to refer to the last antecedent.

Rule discharged.

(*a*) 32 Geo. 2, c. 28, s. 16. (*b*) Vol. 3, p. 388.

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THIS was a writ of *scire facias* on a bond for 1000*l.* given to his Majesty by the defendant, an auctioneer. The defendant craved oyer of the writ of *sci. fa.*, of the return thereon, and also of the condition of the bond; by which, after reciting that by an act of Parliament passed in the 19 *Geo.* 3, (c. 56), every person using or exercising the trade or business of an auctioneer is obliged to take out a licence for that purpose, and to give security by bond to his Majesty with two or more sufficient sureties, that he will, within twenty-eight days after every sale by auction, deliver, at the chief office of Excise in *London*, to the person who shall be appointed by the Commissioners of Excise to receive the same, an exact and particular account in writing of the total amount of the money bid at each sale, and of the several articles, lots, or parcels which shall have been there sold, and the price of each and every such article, lot, or parcel, and at the same time make payment of all such sum and sums of money as shall be due and payable to his Majesty in pursuance of that act; and that the said defendant had been duly licensed as an auctioneer; and that also, by an act of Parliament passed in the 43 *Geo.* 3, (c. 130), every such auctioneer was required at the time of receiving his licence to give security by bond in the sum of 1000*l.* for delivering accounts of sales and making payments of duty: it was conditioned, that if the said defendant should so deliver such account and make such payment to his Majesty, according to the true intent and meaning of the several acts of Parliament in that case made and provided, then the obligation to be void, otherwise to remain in full force. And the defen-

A freehold estate was sold by auction, subject to a mortgage, the mortgagee not concurring in the sale, and refusing then to receive his mortgage money. By the conditions of sale, an apportionment was to be made of the mortgage on the several lots, and the purchaser of each was to have an indemnity against the amount apportioned to the other lots. A purchaser bid the sum of 15,500*l.* for one of the lots, which was to be charged with 10,200*l.* of the mortgage money; and paid a deposit of ten *per cent.* on that sum, and signed an acknowledgment that he had bought the lot for 15,500*l.*, subject to the conditions of sale: —*Held*, that auction duty was payable, in respect of this lot, only on the balance of 5300*l.*, that being the only amount of purchase-money actually payable to the vender for what was bought at the sale.

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dant then pleaded performance of the condition except as to 154*l.* 11*s.* 8*d.*, and a tender and refusal of that sum.

The first replication averred, that the defendant sold an estate in freehold lands by auction; that 15,500*l.* were bid for the same; and that the defendant did not deliver a true and particular account in writing of such sale and bidding, according to the meaning of the several acts of Parliament in that case made and provided. The second replication averred, that the defendant sold an estate in freehold lands, and that the sum of 452*l.* 11*s.* 8*d.* became due to his Majesty for duties upon such sale, and that the defendant did not pay that sum, but made default, contrary to the said acts of Parliament and to the condition of the said bond.

The defendant rejoined to the first replication, that he did deliver an account according to the meaning of the said acts of Parliament; and to the second replication, that no more of the sum of 452*l.* 11*s.* 8*d.* therein mentioned than the sum of 154*l.* 11*s.* 8*d.* became due to his Majesty for duty on the sale therein mentioned.

The cause was tried before Lord *Abinger*, C. B., at the sittings after *Trinity* Term, when a verdict was found by consent for the Crown, subject to the following case.

On the 31st of *May*, 1833, the defendant put up to sale by auction, in the *Auction Mart* in *London*, an estate in freehold and copyhold lands, in the parish of *Watford*, in the county of *Herts*, in three lots. The whole estate was charged with a mortgage of 22,200*l.*, and the mortgagee was not compellable to receive payment of the mortgage money till the 1st of *May*, 1836. He refused to receive the mortgage money before that period, and did not concur in the sale, or in the apportionment of the mortgage money to particular parcels of the estate. The mortgagor employed the defendant to sell the estate, subject to the mortgage, and the particulars of the sale contained (amongst other things) as follows:—

"The whole of these estates are subject to a mortgage of 22,200*l.*, the mortgagee holding the title-deeds. This charge is to be apportioned by the vendor on the respective lots, as mentioned under the same, and the apportionment to be made, and the respective purchasers indemnified, in manner hereinafter provided. The interest is secured at 4½ *per cent.*, payable quarterly. The mortgagee is not compellable to receive his money till the 1st of *May*, 1836. An abstract of the mortgage deed will be produced at the time of sale for the inspection of the purchasers." And in another part of the particulars, with regard to the apportionment of the mortgage debt charged on the estate as before mentioned:—"A deed of mutual charge and indemnity of the respective lots is to be prepared by the vendor, for effecting the apportionment, and indemnifying the respective purchasers from the other portions of the charge, as between themselves, or as between them and the vendor, who is to be substituted as to any lot, if any should not be sold at this sale; the purchaser or purchasers and vendor to give mutual covenants of indemnity and charges, and powers of sale, &c., on the respective lots, for the purposes above mentioned; and, in case of any difference between the parties, the deed to be settled by counsel, to be named by the vendor on behalf of all the parties; and the purchasers are also to indemnify the vendor in the usual manner against their respective portions of the mortgage debt, such indemnity to be prepared by the vendor: the purchasers to bear all their own costs relating to the several indemnities before mentioned."

The third condition of sale was as follows:—That every purchaser shall immediately pay down into the hands of the auctioneer a deposit of 10*l.* *per cent.* in part of the purchase-money, and sign an agreement for payment of the remainder of the money on or before the

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11th day of *October* next, at the office of Mr. *Goldsmith*, solicitor to the vendor, at which time and place the purchases are to be completed, and from which time the respective purchasers are to be entitled to the rents and profits of such parts as are let, and to possession of such as are in hand; all outgoings to that time being cleared by the vendor.

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The fifth condition was, That in case any of the title-deeds shall relate to several lots at this sale, the largest of such purchasers shall be entitled to the custody of such deeds on the mortgage being paid off, subject to his now giving to the other purchasers, at their expense, the usual covenant for production thereof, &c.

The sixth condition was, That upon payment of the remainder of the purchase-money at the time above mentioned, the purchasers shall have conveyances and surrenders of their respective lots, subject to an apportionment of the mortgage debt as before mentioned, to be prepared by their own solicitors at their expense, and left at the office of the vendor's said solicitor on or before the 27th day of *September* next, for execution; and if, from any cause whatever, any purchase shall not be completed at the time stipulated in the conditions, the purchaser shall pay interest at the rate of 4½ *per cent. per annum* on his purchase-money remaining unpaid, from the time appointed for payment thereof to the completion of such purchase.

The particulars of lot 2 stated:—"The apportioned mortgage debt on this lot is 10,200*l.*, with the interest thereon from the 11th day of *October* next ensuing."

The lot No. 2, consisting of freehold lands in the parish of *Watford*, in the county of *Herts*, was put up for sale, and purchased (being the only lot sold, the other two being bought in) by *Bailey Smith* for 15,500*l.*, he being at that sum the highest bidder. After the sale, the following

acknowledgment and agreement was indorsed on the particular of sale, and signed by the purchaser:—"I, the undersigned *Bailey Smith*, acknowledge to have purchased lot 2 comprised in this particular, (called *Bushey Lodge Farm*), at the sum of 15,500*l.*; and I agree to complete the purchase agreeably to the within particulars and conditions of sale. As witness my hand, this 31st day of *May*, 1833. *Bailey Smith*. Witness, *J. Sedgwick*."

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The purchaser also paid the deposit of 10*l. per cent.* on the whole amount of the purchase-money (15,500*l.*). When the defendant appeared to pass the sale at the Excise Office, he returned lots 1 and 3 as bought in by the owner, according to the fact, and lot 2 he returned as follows:—

Sold for	£15,500
Deduct mortgage debt (see below)	10,200
Balance . .	£5300

The words "see below" had an asterisk referring to the apportionment of the mortgage money on the lot. On this return the defendant offered to pay the sum of 154*l.* 11*s.* 8*d.*, being the auction duty on the sum of 5300*l.*, but the Excise accountant refused to accept this return and payment, claiming 452*l.* 11*s.* 8*d.* as the auction duty on 15,500*l.*, the purchase-money for which the lot was sold. A conveyance has been made by the vendor to the purchaser, subject to the payment of 10,200*l.* and interest, the apportioned mortgage debt, according to the conditions of sale.

The question for the consideration of the Court is, whether there was due to the Crown from the defendant the sum of 452*l.* 11*s.* 8*d.*, being the auction duty on the sum of 15,500*l.*; or the sum of 154*l.* 11*s.* 8*d.* only, being the auction duty on 5300*l.* If the Court shall be of opin-

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ion that the sum of 452*l.* 11*s.* 8*d.* was due, then the verdict to be entered for the Crown; but if the Court shall be of opinion that the sum of 154*l.* 11*s.* 8*d.* only was due, then the verdict to be entered for the defendant, on payment of the last-mentioned sum being made to the Crown.

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Kaye, for the Crown.—The case depends entirely on the construction to be put on the language of the act imposing the auction duty, 43 *Geo.* 3, c. 69, Sched. A. The words are, "for every 20*s.* of the purchase-money arising or payable by virtue of any sale at auction in *Great Britain*, of any interest in possession or reversion of any freehold, customary, copyhold, or leasehold lands, tenements, or hereditaments," six-pence; afterwards increased by the 45 *Geo.* 3, c. 30, to seven-pence. On these words two questions arise, with reference to the circumstances of the present case; *first*, what interest in freehold lands has been sold, so as to bring it within the words of the statute; and *secondly*, what is the amount of the purchase-money? The word "interest" in the statute includes an equitable as well as a legal interest. There are two early cases, *Coare* v. *Creed* (*a*), and *Rex* v. *Abbots* (*b*), in which the Court appears to have taken this view as between mortgagor and mortgagee, namely, that there was a sort of mixed ownership of the property; that the mortgagee in reality was possessed of an interest in the estate to the amount of the mortgage debt, and that the mortgagor possessed nothing more than the equity of redemption. [Lord *Abinger*, C. B.—Nothing saleable.] Those cases were, however, reviewed and overruled by this Court in *Rex* v. *Winstanley* (*c*). The mortgagee, in equity at least,

(*a*) 2 Esp. 699. (*b*) 3 Price, 178.
(*c*) 2 Y. & J. 124; 3 Y. & J. 126.

is a mere trustee or bailiff for the mortgagor: nothing real whatever passes to the mortgagee; he is a mere creditor, with a security over the mortgaged estate, which he may reduce into possession. The estate remains in the mortgagor. *Rex* v. *Winstanley* is a strong authority to support that view of the question. There the estate was mortgaged, and the mortgagor became a bankrupt. The question was, whether the estate, being sold by auction by the assignees, was exempt, under the bankrupt acts, from duty. It was argued, on behalf of the Crown, that as the estate was in mortgage, though a part of it, namely the equity of redemption, was in the bankrupt, the rest of the estate was in the mortgagee, and that therefore the only part exempt from the auction duty was that which remained in the mortgagor; but this Court, and the House of Lords on a writ of error (*a*), decided that the whole of the estate was in the bankrupt, and consequently that it was altogether exempt from duty. *Bayley*, B., in delivering the opinion of the Judges, says:—"A mortgagee is a general creditor of the mortgagor; he has a right to proceed against the general personal property of the mortgagor, or against the person of the mortgagor, as a collateral security for the payment of his debt; but his proper character is that of a creditor, and the securities he holds are merely securities to enable him to obtain payment of his debt. Notwithstanding the mortgage, and the security the land mortgaged gives, he has a right to proceed so as to obtain judgment and execution against the person of the mortgagor." And again—"The question then is, upon the sale of an estate subject to a mortgage, whether, within the meaning of this provision, the *whole* of the estate is to be considered as the property of the bankrupt, or whether it is a *mixed* sale of the property of

(*a*) 1 C. & J. 434; 5 Bligh, N. S. 130.

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the bankrupt and of the mortgagee." [*Alderson*, B.—The real question there was, what was the exemption the bankrupt's estate was entitled to receive. If the mortgagee does not concur in the sale, he is entitled to receive his amount in full: if you pay the auction duty, it must fall on the residue, which is the bankrupt's estate; and the act of Parliament has said that the bankrupt's estate is exempt.] The case is referred to, to shew that the whole of the estate remained in the mortgagor. [*Alderson*, B.—That was for the purpose of exemption; you are taking it for the purpose of charge. Lord *Abinger*, C. B.—Where the mortgagor and mortgagee concur in the sale of the estate, no doubt the whole is sold; the question would be similar here, if the mortgagee had concurred in the sale. *Parke*, B.—The whole difficulty of the case arises from the obscure manner in which it is stated; one cannot understand what the contract of the parties was. If the vendee was to pay the vendor 15,500*l.*, and, out of that, to exonerate him from the mortgage, then it was a sale to the amount of 15,500*l.*; but, if he was to pay 5300*l.* only, the mortgage remaining, he is chargeable only with the duty on 5300*l.*] It is conceded that the latter sum is all that was to be actually paid; but it is like the case where a part of the amount of the purchase-money remains on mortgage. The parties have themselves put their own construction on what they considered the sale and purchase, for they have paid the deposit of 10*l. per cent.* on the larger sum.

Sir *W. Follett*, for the defendant, was stopped by the Court.

Lord ABINGER, C. B.—If there had been any difficulty in the case, as to what was really sold, and what was intended to be sold, that ambiguity is cleared away by the

admission that the real intention was to sell the equity of redemption, and that the mortgage was to remain a charge upon the property. That being the case, it is reduced to this question—if a man sells an equity of redemption, is he bound to pay the auction duty on that portion which he does not sell, namely upon the mortgage? I apprehend that he is to pay duty on no more than that which he sells, not that which he cannot sell. It appears to me that the case, as it is put, requires no argument.

PARKE, B.—The only doubt I have felt is from the manner in which it is stated what was the real sum that was to be paid by the purchaser to the vendor; and certainly there is some obscurity still remaining upon the case; but I understand it now to be admitted that the only sum that was to find its way from the vendee to the vendor was the sum of 5300*l.*, the amount to be paid for the equity of redemption. If that is so, *that* is the purchase-money; the purchaser takes the estate, subject to the mortgage, for which, by contract with the mortgagor, he was to pay the sum of 10,200*l.*; then the purchase-money is really only 5300*l.*: and this is all the party was capable of selling. If the contract had been that the vendee should pay 15,500*l.*, that he should undertake to pay off the mortgage money, and take the estate at 15,500*l.*, that would have been a different contract. The case is certainly very obscure. It is said that the contract he entered into was to pay the sum of 15,500*l.*, and that he paid a deposit on that sum, he being, by the conditions of sale, to pay a deposit on the purchase-money; and that payment looks very much as if the purchase-money was 15,500*l.*; but then this is to have relation to the conditions of sale, and by them it appears that he is to pay the balance of the equity of redemption, and, the mortgage money on this portion of the property being considered to be 10,200*l.*, there is to be

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a mutual charge and indemnity for effecting the apportionment and indemnifying the parties; the vendee contracting with the vendor to pay that sum to the mortgagee, he is indemnified by the vendor if he retains any portion of the estate, and by the purchasers of the remainder, against the surplus above 10,200*l.* The real contract then is, that he is to pay to the vendor 5300*l.*, and then is to pay to the mortgagee, when he is bound to receive the money, 10,200*l.*, the amount of mortgage money apportioned on that lot.

ALDERSON, B.—It appears to me that, when the facts of the case are relieved from obscurity, the decision to which the Court ought to arrive is perfectly clear. Here a mortgagor sells subject to the mortgage; the mortgagee does not concur in the sale; it is a sale, therefore, of all the interest that the mortgagor had; that is all which is sold, and which is purchased: it is upon that sale and that purchase that the auction duty is to be calculated. It would have been entirely different if the two had concurred in the sale; they would have then sold the whole, and the auction duty would have been charged upon the whole; if they both take advantage of the sale, they must both pay for the benefit. But here the mortgagor only sells; the mortgagee is entirely passive; he insists upon having his right entire, whether the sale goes forward or not; and all which the mortgagor undertakes to sell is the equity of redemption of the estate, charged with the mortgage. Then, if you look to the terms of the sale, though the mortgagor states in the documents to which Mr. *Smith* put his signature, that he has sold the estate for 15,500*l.*, he refers to the particulars under which it was sold; and those are, that the estates shall be sold for a particular sum of money, which has been apportioned at the will of the mortgagor as the portion which each part of the estate so sold shall bear of the mortgage

money, which the mortgagee refused to accept, and which he was not bound to accept; and it appears to me perfectly clear, in looking at the particulars of sale, that the purchaser was to pay that sum of money to the mortgagee, for this reason, that all which is contained in the particulars is, that the mortgagor shall indemnify him as to the rest of the mortgage money. If he is to indemnify him in respect of the mortgage money, it is clear that the estate is sold charged with that; therefore the party has only purchased the equity of redemption, though he cannot purchase it in that form, the mortgage being one and entire, and remaining over the whole. It appears to me that, in this case, all which the one party has sold, and which the other party has bought, has been sold for 5300*l.*, and that the auction duty ought to be calculated upon that, and no more.

GURNEY, B.—All that the purchaser has purchased is the equity of redemption, at the value of 5300*l.*, and upon that alone the auction duty ought to be charged.

Judgment for the defendant.

PINNER *v.* ARNOLD and Another.

ASSUMPSIT for goods sold and delivered, &c., brought to recover the price of a copper-plate printing press. At the trial before *Gurney*, B., at the *Middlesex* Sittings after last *Trinity* Term, the plaintiff offered in evidence the following unstamped document:—

"Agreement between Mr. *Pinner*, press-maker, on the one part, and Messrs. *Arnold* and *Fisher*, copper-plate printers, on the other part.

The plaintiff contracted to make for the defendants a copper-plate press, to be ready in three months, the defendants to pay part of the price by instalments, up to the delivery of the press, the remainder in six months:—*Held*, that this was a contract relating to the sale of goods, within the exception in the Stamp Act.

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"*Oct.* 19, 1833.—I hereby agree to make for Messrs. *Arnold* and *Fisher*, a very superior grand *Eagle* press, iron frame, with fly-wheel motion on the top roller, for the sum of 90*l.*, to be complete and perfect; Messrs. *Arnold* and *Fisher* agreeing to pay 40*l.* by instalments of 5*l.* in advance up to the delivery of the press, the remainder to be paid in six months. The press to be ready within three months from the date of this agreement. The press to be warranted for twelve months.

"*D. Pinner.*"

Chilton, for the defendants, contended that this instrument required a stamp, and that it did not fall within the exemption in the Stamp Act 55 *Geo.* 3, c. 184, Sched. Part I., title *Agreement*, as being an agreement for the "sale of goods, wares, and merchandize," but that it was a contract for work to be done. The learned Judge, however, overruled the objection, and admitted the document in evidence, and the plaintiff recovered a verdict for the sum of 10*l.* 5*s.*; but the defendants had leave to move to enter a nonsuit, if the Court should be of opinion that the agreement ought to have been stamped.

Chilton now moved accordingly. This case falls within the decision in *Buxton* v. *Bedall* (*a*). The agreement there purported to be an order for certain machines, specifying their quality, stipulating for the payment of the money, and specifying within what time they were to be made. That case is, therefore, like the present; and there, as here, nothing is mentioned in the written order as to the putting up of the machines, although from their nature they required to be put up, as the press did in the present case. In that case the Court were of opinion that the contract did not come within the exception in the act, and therefore ought to be stamped, being a contract not for or

(*a*) 3 East, 303.

relating to the sale, but to the making, of goods, and for work and labour to be done. [*Parke*, B.—What is this contract but a contract for the sale of goods? The plaintiff could not have recovered in an action for work, labour, and materials. That was so held in *Atkinson* v. *Bell* (*a*). Would this have required a note in writing? It would not, according to *Towers* v. *Osborne* (*b*); but it would, according to the more recent case of *Garbutt* v. *Watson* (*c*), where *Towers* v. *Osborne* was very much doubted.]—The distinction in the cases on the Stamp Act is, whether it is a contract for the sale of goods already manufactured, or a contract for something to be afterwards made up. In *Groves* v. *Buck* (*d*), it was held, that a contract for the purchase of a quantity of oak pins, for the price of upwards of 10*l.*, which were not then made, but were to be cut out of slabs and delivered to the buyer, was not within the 17th section of the Statute of Frauds. Lord *Ellenborough* there says—"The subject-matter of this contract did not exist *in rerum naturâ*; it was incapable of delivery and of part acceptance, and where that is the case the contract has been considered as not within the Statute of Frauds." [*Parke*, B.—How did it appear that this press was to be fixed? Was it to be fastened to the floor as a fixture?]—That did not appear. *Hughes* v. *Breeds* (*e*) is distinguishable; and even in that case Lord *Tenterden* recognised the distinction between goods and things to be afterwards made. He says—"It by no means appears that the chimney-pieces did not exist at all, but rather the contrary, for it seems they only required to be finished." In *Wilks* v. *Atkinson* (*f*), the rape-oil had only to be expressed, but there were a number of constituent parts required to constitute this machine. [*Parke*,

(*a*) 8 B. & C. 277; 2 Man. & R. 292.
(*b*) 1 Stra. 506.
(*c*) 7 D. & R. 219; 5 B. & Ald. 613.
(*d*) 3 M. & Selw. 178.
(*e*) 2 Car. & P. 159.
(*f*) 6 Taunt. 11; 1 Marsh. 412.

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B.—The distinction is, that if you employ a tailor to make a coat and deliver it to you, his remedy is for goods sold; but that if you employ him to mend a coat for you, his remedy is for work and labour.]

Lord ABINGER, C. B.—The decision most in your favour is *Buxton* v. *Bedall*, but that was considered very doubtful at the time, and the more modern cases appear to be the other way. I think it cannot be said that this was not an agreement relating to the sale of goods. If a man contracts to sell goods to be made by himself within a certain time, it is still a contract for the sale of goods. Had it stood on the authority of *Buxton* v. *Bedall* alone, I might, perhaps, have felt myself bound to decide the contrary; but considering the other authorities, I must take that case to have been overruled, unless there was something in it which is not stated in the report. I think the present case falls within the modern decisions of *Hughes* v. *Breeds* and *Wilks* v. *Atkinson*, and that this agreement does not require a stamp.

PARKE, B.—I am of the same opinion. This is nothing more than a contract to sell and deliver a copper-plate printing press of the plaintiff's manufacture. If it had appeared that part of the contract was to fix it to the floor, or the walls of the defendant's house, so as to make it a fixture, I should have doubted whether it was a contract for the sale of goods within the meaning of the act, because that would be the same in principle as a contract to erect a pillar. In this case, however, it does not appear to be any part of the contract that it should be so fixed; and its having been put together in the defendant's shop can make no difference in the nature of the contract. I consider the case of *Buxton* v. *Bedall* as overruled by the

subsequent cases of *Wilks* v. *Atkinson* and *Garbutt* v. *Watson*.

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The rest of the Court concurred.

Rule refused.

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THE declaration stated, that whereas heretofore, to wit, on the 12th *August*, 1820, by an agreement then made between the plaintiff of the one part, and the defendant and *A. Fardon*, since deceased, of the other part, the defendant and the said *A. F.* agreed to sell, and the plaintiff agreed to purchase, all the salt of every description that might be manufactured or raised at certain salt works of the defendant and the said *A. F.*, described in the said agreement; but it was then further agreed between the said parties, in and by the said agreement, that all salt from the said works should be sent out on account of the plaintiff, and entered and invoiced accordingly; and that the prices to be charged for manufactured and rock salt should be fixed monthly by the said parties. [Other stipulations, not material to be stated, were here set forth.] And it was further agreed, that all payments connected with the trade should be made quarterly, and the books balanced, and any amount then due to either of the said parties from the other of them should be immediately paid over by his or their accepted bill of exchange, not exceeding three months; and that all books and accounts connected with the manufacture or sale of salt at the said works should, at all times, be open to the inspection of the plaintiff. That the said agreement should continue binding for the term of fourteen years, from the 10th day of *October* then next ensuing; but that the plaintiff

A. and *B.* agreed for the sale by *B.* to *A.* of all the salt that should be manufactured at certain salt works of *B.*; all payments to be made quarterly, by acceptance at three months; the agreement to continue binding for 14 years, but *bankruptcy* or *insolvency* on the part of *A.* was to terminate the contract:—*Held*, that *insolvency* meant an inability in *A.* to pay his just debts, and did not import that he should have been discharged under the Insolvent Debtors' Act.

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should have the liberty of abandoning that contract, and should be released therefrom, at any period during the said term, he having previously given six months' notice in writing of his intention of abandoning the said agreement to the defendant and the said *A. F.*; and that *bankruptcy or insolvency* on the part of the said plaintiff should terminate the contract. The declaration then averred mutual promises. The breaches alleged were, in substance, that the defendant did not sell to the plaintiff all the salt of every description manufactured or raised at the said salt works; that he sold large quantities to other persons; and that he refused the plaintiff permission to inspect the books and accounts connected with the manufacture and sale of the salt. The defendant pleaded, as to each of the breaches, that after the death of the said *A. F.*, and before the neglect and refusal alleged, to wit, on the 1st *August*, 1833, the plaintiff was insolvent and unable to pay and discharge his just debts, whereby and by virtue of the terms and conditions of the said agreement in that behalf, the said contract in the declaration mentioned terminated; and the defendant did then and there rescind and annul the same accordingly, of which the plaintiff then had notice. Replication, that the plaintiff never applied by petition, or in any other way, to any Court, or person or persons, for his discharge from custody, under the provisions or enactments of any statute passed for the relief of insolvent debtors, or touching insolvent debtors; nor has he ever in any way claimed, taken, or received any benefit or relief from any statute or statutes passed for the relief of insolvent debtors, or touching insolvent debtors; nor has he ever in any way been affected, either in his property or his effects, or his person, by any enactment or provision contained in and provided by any such statute or statutes. Demurrer and joinder. The ground of demurrer stated was, that such insolvency of the plaintiff as rendered him unable to pay

and discharge his just debts, was sufficient ground for the defendant to terminate the contract set forth in the declaration, without regard to the facts relied upon by the plaintiff in his replication.

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Sir *W. Follett*, in support of the demurrer, was stopped by the Court.

E. V. Williams, *contrà*.—The plaintiff contends, that the word *insolvency*, in this agreement, is used in the technical sense of the condition of a party who has taken the benefit of the Insolvent Act. It is clear that the word *bankruptcy*, with which it is found in conjunction, means the condition of a party who has become bankrupt, according to the bankrupt acts. If the artificial sense is to be applied to the one word, it ought also to the other; the maxim, *noscitur a socio*, is applicable. Several statutes may be quoted, where the two words are used together, and both in the technical sense. Thus, in the Savings' Banks' Act, 3 & 4 *Will.* 4, c. 14, s. 28, it is directed, "that where any officer of a savings' bank shall die, or become bankrupt or insolvent, his executor or assignee shall pay over all monies due to the bank in the manner therein mentioned." [*Parke*, B.—There, the context enables you to explain the words in one way; so it does here the other way. *Alderson*, B.—It is in the party's option to take the benefit of the Insolvent Act; is he to have the benefit of his contract, because he does not choose to take the benefit of the act?] If the legislature has expressed an intention so to construe the words, why is not an individual to be understood as so intending? In the Friendly Societies' Act, (10 *Geo.* 4, c. 56, s. 16), a similar provision occurs as in the 3 & 4 *Will.* 4, c. 14, the words being there also evidently used in their artificial sense. The Birmingham Benefit Societies'

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Act (*a*), and the General Turnpike Act, 4 *Geo.* 4, c. 95, s. 36, may also be referred to for instances of the same kind. [*Parke*, B.—The ordinary import of the word *insolvency* is an incapability of paying the party's just debts; the context *may* shew it to be used in a different sense; but where do you find here any context shewing that it is used in any other than the ordinary sense?] It may be said, it is hard upon the defendant to be compelled to go on dealing with a person who cannot pay. That is an inconvenience to which a person who makes a pecuniary contract with another is always subject. Here, the balance was to be struck every quarter, so that no great injury could be done; and the defendant, on the other hand, had the power of arresting the plaintiff, and making him bankrupt. Much inconvenience and embarrassment will certainly follow from the opposite construction. If the word *insolvency* be construed technically, it will be clear *when* the contract is determined; if otherwise, there will be perfect uncertainty on that point, and the parties may go on for years dealing with the contract after it has terminated. Again, the fluctuating character of insolvency in the latter sense is another objection; the plaintiff may be insolvent one day, and solvent again the next. [*Parke*, B.—The defendant only reserves the same right which every vendor has, to stop his goods when the buyer is insolvent. He is worse off, if you are right, than if there were no special contract, because then he might clearly have stopped *in transitu*. *Alderson*, B.—It is a hardship on the vendor, who has to prove the insolvency.] The same argument might shew, that the word *bankrupt* was used in its natural sense. [Lord *Abinger*, C. B.—The *natural* sense of that word is, a man who has been bankrupt according to law, though it is metaphorically used to denote an insolvent

(*a*) 33 Geo. 3, c. 54, s. 10. See *In re Birmingham Benefit Society*, 3 Simons, 421.

person. The word insolvency is added here to enlarge the sense.] *Bankrupt* was a well-known word in our language, before the first bankrupt act of *Henry* 8; and that act does not use the word anywhere except in its title; at the time of the passing of the 13th *Eliz.* the word had, in consequence of the act of *Henry* 8, acquired a technical sense, and was so used in that and the subsequent statutes. Both the words, therefore, are in the same condition of having two senses, a natural and an artificial. At all events, the pleas do not apply to the last breach alleged in the declaration. Whether insolvent or not, the plaintiff has a right to look at the books. [*Parke*, B.—It would have been reasonable so to stipulate; but you have agreed to put an end to the contract altogether in case of insolvency.]

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Williams then applied for leave to amend, and to reply denying the insolvency; and the Court permitted him to take a rule *nisi* for such amendment, on payment of costs, and on filing, within a week, an affidavit of solvency; otherwise

Judgment for the defendant.

HOWELL and Another, Assignees of JOHN WATERS and DAVID JONES, Bankrupts, *v.* BOWERS.

In *scire facias* on a judgment recovered in a Court of Great Session in

SCIRE facias on a judgment recovered by the bankrupts, before the passing of the 1 *Will.* 4, c. 70, on a

Wales, the production of the certificate of the prothonotary of such Court, with the transcript of the record annexed, pursuant to the 1 *Will.* 4, c. 70, s. 27, is sufficient proof of the allegation of judgment recovered, "as by the record, duly transferred and remaining in the Court of *Exchequer* at *Westminster*, manifestly appears."

A suit in which judgment was obtained in the Court of Great Session, but in which there has been no execution issued, is a suit *depending* in that Court, within the meaning of the 1 *Will.* 4, c. 70, s. 14, and was transferred to the Court of *Exchequer* by the authority of that act.

To such *scire facias* the defendant pleaded, that judgment was recovered in the Court of Great Session by default, on a *concessit solvere*; and that, by the practice of that Court, execution could not issue in such case without an affidavit previously made by the plaintiff, verifying the amount of the debt; and that no such affidavit was made by the plaintiff:—*Held*, on special demurrer, that the plea was bad, as pleading a mere matter of practice, and *that* a practice which was abolished.

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judgment in the Court of Great Session for *Carmarthenshire*, against the defendant, for 850*l.* 3*s.* 8*d.* damages and costs, "as by the record and proceedings thereof, which had been duly transferred, under and by virtue of the said act, from the said Court of Great Session into the Court of *Exchequer* at *Westminster*, manifestly appeared." The declaration then averred the bankruptcy of *Waters* and *Jones*, and the appointment of the plaintiffs as their assignees. Plea, that there is no record of the said supposed recovery remaining in the said Court of *Exchequer*. The replication took issue thereon, and offered to verify it by the record, "so as aforesaid transferred and remaining in the said Court of *Exchequer*." The plaintiffs gave notice that they would produce the record; and accordingly, in *Easter* Term, a transcript of the record of a recovery in an action of debt on a *concessit solvere*, in which the bankrupts recovered judgment against the defendant, with the certificate of the prothonotary, verified by affidavit according to the rule of *Michaelmas* Term, 1 *Will.* 4 (*a*), being produced—

(*a*) Which directs, that as to all suits at law depending in any of the said Courts on the 12th day of *October* last past, the same should be dealt with and decided according to the practice of this Court, unless this Court, or a Baron thereof at chambers, should, upon special application upon notice to an adverse party, otherwise direct. And that in all cases in which a declaration had been filed or delivered in the Court of Sessions, a certificate thereof should be obtained under the hand of the late prothonotary, or deputy prothonotary, of the Court in which the same should be filed, and be verified by affidavit to be intitled in this Court, &c. &c. And that, in case any interlocutory or *final judgment* should have been signed in any of the said Courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, should be at liberty to proceed therein in like manner as if such judgment had been signed by this Court; but that, in case process of execution should issue on any final judgment signed in any Court abolished by the said act, it should be stated in such process in what Court final judgment was so signed as aforesaid.

Sir *W. Follett* thereupon prayed judgment for the plaintiffs, and contended that the transcript produced was sufficient proof of the allegation of the judgment recovered in the Court of Great Session, under the 1 *Will.* 4, c. 70, ss. 14, 27, and the rule of Court of *Michaelmas*, 1 *Will.* 4, made in pursuance of that act.—It will be objected, that a *certiorari* should have issued to remove the record itself, or that it ought to have been alleged to be remaining in the Court of Great Session. But the possession of the prothonotary is in fact the possession of this Court, and the transcript is itself the record. *Salter* v. *Slade* (*a*). The records of the Courts of Great Session become, by virtue of the act, records of this Court. Unless that be so, it must be contended that the *scire facias* has not issued from the proper authority.

E. V. Williams, contrà.—The allegation ought to have been, "as by the record, now remaining in the hands of the proper officer, manifestly appears;" for no record of the recovery in truth remains in the Court of *Exchequer*. It is only suits actually depending which the act directs shall be removed into this Court; in those already concluded by judgment, the records are to remain in the hands of the same officer until it be otherwise provided by law. The suit was ended by final judgment, although an affidavit of the amount due was necessary by the practice of the Court below before execution could issue.

Lord ABINGER, C. B.—It is true there has been a judgment, but there has been no entry of satisfaction on the roll: I think, therefore, this is still a suit pending in the Court of Great Session. The record is accordingly removed, under the authority of the act of Parliament, into this Court, and the plaintiffs are then to proceed ac-

(*a*) 3 Nev. & Man. 716; 1 Ad. & Ell. 603.

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cording to the practice of this Court. By that practice they are entitled to have execution on production of a certificate of the judgment properly verified.

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PARKE, B.—This Court can interfere only in cases of depending suits; but all unsatisfied judgments are pending suits, within the meaning of the act. This judgment, therefore, is one in a suit which has been removed into this Court, and the officer has become, for the purpose of the suit, the officer of this Court.

E. V. Williams then applied for and obtained leave to amend, by pleading that a proper affidavit of verification had not been filed in the Court below. The defendant thereupon pleaded, that the said judgment in the Court of Great Session was recovered therein on and by default of the appearance of him the said defendant, in and to an action of debt, commonly called debt on a *concessit solvere;* and that, by the rule and practice of the said Court of Great Session, established and prevalent in the said Court at and from the time of the commencement of the said action until and at the time of recovering the said judgment therein, and from thence until the time of the passing of the said act of Parliament, in case of judgment by default of the appearance of the defendant in an action of debt, commonly called debt on a *concessit solvere*, no valid execution could issue against the defendant on such judgment, unless an affidavit had been previously made by the plaintiff in such action before a Judge of the said Court of Great Session, during the time of the Great Session, or before a person authorized by special commission for that purpose during the vacation, in verification of the amount of the debt justly due from the defendant to the plaintiff in such action; and that no such affidavit had ever been made by the said *Waters* and *Jones*, or either of them, pursuant to the said

rule and practice, in verification of the amount of the debt justly due and owing from the said defendant to the said *Waters* and *Jones*, in the said action in which the said judgment was so obtained by them against him as aforesaid. Verification. Special demurrer, assigning for causes that the defendant had pleaded mere matter of practice of the Court of Great Session, the same not being pleadable in bar; that the Court of *Exchequer* is not bound by, and will not take notice of, the practice of an inferior jurisdiction; that the plea attempted to raise an immaterial issue, inasmuch as, for anything that appeared to the Court, *Waters* and *Jones* might yet make such an affidavit as was stated in the plea to be necessary, according to the practice mentioned in the plea, early enough to comply with the said practice; that the matter of the plea was prematurely advanced; that the effect of the act of Parliament was to give the Court of *Exchequer* exclusive power and jurisdiction over the said suit, proceedings, and judgment, and exclusive discretion to regulate the issuing of execution therein, and the proceedings in such execution; that it is at most discretionary with the Court of *Exchequer*, and not compulsory, to require such affidavit as in the plea mentioned; and that a non-compliance by *Waters* and *Jones* with the alleged practice in the Court of Great Session, would at most furnish only ground for application to the Court of *Exchequer*, when they should hereafter proceed to execute the judgment without having previously made such affidavit as in the plea mentioned. Joinder in demurrer.

In the present term, the demurrer came on for argument.

Sir *W. Follett*, for the plaintiffs.—Since the abolition of the *Welch* judicature, it cannot be any answer to a *sci. fa.* on a record removed into this Court, under the 1 *Will.* 4, c. 70, s. 14, that the parties have not used

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a mode of procedure which they no longer can use. The act transferred the records for all purposes, and imported the practice of this Court, for all purposes, into suits arising in *Wales*. All must now be done according to the practice of this Court. The defendant, therefore, must show that judgment cannot issue according to the practice of the Court of *Exchequer*, or rather, according to the law of *England*. [Lord *Abinger*, C. B.—The Court have a discretion to adopt the proceedings of the abolished Courts; but this question cannot arise on demurrer. *Parke*, B.—The defendant should have *pleaded* the *law*, or *moved* on the *practice*.] The Court then called on—

E. V. Williams, for the defendant.—The object of the proceedings in *sci. fa.* is to call upon the defendant to shew cause why execution should not issue on the judgment. If the plea discloses a cause why the judgment cannot issue without gross injustice, it is a sufficient answer to the *sci. fa.* But for the practice of having a verification of the amount of the debt, judgment would have gone against the defendant for the nominal sum claimed in the declaration. The case is not provided for by the act of Parliament. Is, then, the party entitled to take out judgment for the whole nominal amount, without any verification? [Lord *Abinger*, C. B.—There is the same objection to every *sci. fa.* on a judgment in debt in any Court.] The plaintiff, not the defendant, should have come to the Court to ascertain the real amount for which he was to take out his judgment. [*Parke*, B.—You do not mean to say everything is pleadable to a *sci. fa.*, which shows that the judgment ought not to be executed at law or in equity? This objection is mere matter of practice.] It is different where the practice goes to the very merits of the case. [Lord *Abinger*, C. B.—The act allows us to adopt our own practice, or that of the *Welch* Courts: you should have applied to the discretion of the

Court, to see whether this was a case in which they chose to adopt the practice of the other Courts. The only effect of the rule of Court is, that we adopt our own practice, unless a special application be made disclosing sufficient ground for adopting the other. *Parke*, B.—You are pleading what is, first, pure matter of practice; and, secondly, of practice abolished by the act of Parliament.]

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Williams then asked that the proceedings might be stayed until he could make an application to the discretion of the Court.

Lord ABINGER, C. B.—We cannot do that. You must make such application as you think proper.

Judgment for the plaintiffs.

ANDREWS *v.* SMITH.

THE *first* count of the declaration stated, that whereas one *Joshua Hill*, now deceased, heretofore, to wit, on the 12th day of *June*, 1833, was retained and employed by one *J. L. Hesse*, clerk, to do certain work for him

The declaration stated, that *H.* was employed to do work on certain houses, and that the defendant was employed as surveyor over

him, and to receive monies to be paid to *H.* for such work: that, in consideration that the plaintiff would provide and deliver to *H.* such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them, out of such monies received by him as should become due to *H.* for the work, if *H.* should give him an order for that purpose. The declaration then averred, that *H.* gave the defendant such order, and that he required certain materials, which the plaintiff provided and delivered to him, to the value of 1000*l.*, and that that sum became due to *H.* for the work; of all which the defendant had notice, and was requested by the plaintiff to pay him for the materials out of such monies received by him as were due to *H.* for the work:—Breach, that, although the defendant had received 1000*l.* to be paid and then due to *H.*, and though the said order had not been revoked, the defendant refused to pay the plaintiff.

Plea, that the promise in the declaration mentioned was a special promise to answer for the debt of *H.*, and that there was no memorandum or note thereof in writing.

Held, on demurrer, that the plea was bad; for that the defendant's promise was an original, and not a collateral one.

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upon certain premises, to wit, the rectory-house at *Knebworth*, and the defendant was then retained and employed by the said *J. L. Hesse* as surveyor over the said *J. Hill* in respect of the said work, and as such surveyor to receive divers sums of money, to be paid by the defendant to the said *J. Hill* for and in respect of the said work; and thereupon afterwards, on &c., in consideration that the said plaintiff, at the request of the defendant, would find, provide, and deliver to the said *J. Hill*, such materials, goods, wares, and merchandizes, as should be required by the said *J. Hill* to enable him to do the said work, he the defendant promised the plaintiff to pay him on request for the said materials, &c., so much as he should reasonably deserve to have in that behalf, out of such monies received by the defendant as aforesaid, as should become due to the said *J. Hill* for and in respect of the said work, if the said *J. Hill* would give an order to the plaintiff for that purpose. And the plaintiff avers, that afterwards, &c., the said *J. Hill* did give an order to the defendant to pay him the plaintiff for all such materials, &c., as he the plaintiff should supply to the said *J. Hill* for the said work as aforesaid, out of such monies received by the defendant as should become due to the said *J. Hill* as aforesaid; whereof the defendant had notice. And afterwards, &c., the said *J. Hill* did require certain materials, &c., to enable him to do the said work, and thereupon he the plaintiff, confiding in the promise of the defendant, did find, provide, and deliver to the said *J. Hill*, and at his request, the same materials, &c., and therefore then reasonably deserved to have in that behalf the sum of 1000*l.*; and that sum became due to the said *J. Hill*, for and in respect of the said work; of all which premises the defendant had notice, and was requested by the plaintiff to pay him the same sum out of such monies received by the defendant as aforesaid, as were then due to the said *J. Hill* in respect of the said work. Breach,

that although the defendant, before and at the time of such notice and request, had received and had in his hands a large sum of money, to wit, the sum of 1500*l.*, to be paid and then due to the said *J. Hill* in respect of the said work, and although the said order had not been in anywise annulled or revoked, yet the defendant refused to pay out of the said monies so received, &c., the said sum which the plaintiff reasonably deserved to have as aforesaid, or any part thereof. The *second* count was similar in all respects, except that it related to work done by *Hill* for *Robert Baker*, clerk, on premises at *Fulham*.

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The defendant pleaded many pleas, of which the *second* was, as to the first count of the declaration, that the said supposed promise in that count mentioned was and is a special promise to answer for the debt of another person, to wit, of the said *J. Hill*, and that no agreement in respect of or relating to the supposed cause of action in that count mentioned, or any memorandum or note thereof, was or is in writing, or signed by the defendant, or by any other person by him thereunto lawfully authorized, according to the form of the statute, &c. The *seventh* was a similar plea to the second count.

General demurrer, and joinder. The point stated for argument in the margin was as follows:—"The second [and seventh] plea is ill in this, that it asserts the absence of any note or memorandum in writing, signed according to the provisions of the Statute of Frauds, as to a special promise to answer for the debt of another, as avoiding a contract which, as stated in the count and not denied by the plea, is direct, and not collateral."

Erle, in support of the demurrer.—This is not a promise to answer for the debt or default of another, within the meaning of the Statute of Frauds. It is not a promise to be answerable out of the defendant's own funds, but to

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pay out of the funds of another, on receiving his directions for that purpose. *Hodgson* v. *Anderson* (*a*) is an authority to shew that such a contract is direct, and not collateral, and therefore binding without being in writing. The Court here called on

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Thesiger, for the defendant.—Whether the contract is or is not within the statute, depends on this—whether the party to whom the goods are furnished, is or is not *himself* liable to pay for them: *Matson* v. *Wharam* (*b*). If, therefore, *Hill* was himself a debtor for the goods, the defendant's promise was to answer for *Hill's debt*, and was within the statute. In *Simpson* v. *Penton* (*c*), where the plaintiff introduced the defendant to a tradesman, and in his presence asked the tradesman to supply him with goods, saying that, if he would, he (the plaintiff) would be answerable—this was held an original and not a collateral promise. But there the defendant directly pledged his own credit and that of his own property: here the defendant pledged the credit of *Hill's* property. The mere circumstance of *Hill's* giving an order on the defendant would not of itself discharge *Hill's* liability: to do that, something must pass, which, if *Hill* were sued, would be a good defence to the action: *Cuxon* v. *Chadley* (*d*). [Lord *Abinger*, C. B. There, there was an original liability; here, there is no original contract with *Hill*. The difference between this case and *Simpson* v. *Penton* seems to me only to be a difference on paper. The defendant only binds himself to pay out of funds he shall receive.] Wherever there is an understanding among all the parties that the debt shall be *transferred*, it is not within the statute, because the original

(*a*) 3 B. & C. 842; 5 D. & R. 735.

(*b*) 2 T. R. 80.

(*c*) 2 C. & M. 430.

(*d*) 3 B. & C. 591; 5 D. & R. 417.

debt is thereby extinguished: *Fairlie* v. *Denton* (*a*): but there is no such agreement in the present case. In *Morley* v. *Boothby* (*b*), an undertaking by the defendants to pay the plaintiff's draft on *Clark & Co.* at six months, on its becoming due, out of money then to be received from a particular fund, was held within the statute. That case is very like the present. [Lord *Abinger*, C. B.—There it was clearly the debt of *Clark*; it was to pay *Clark's* bill out of such a fund.—*Parke*, B., referred to *Lacy* v. *M'Neile* (*c*).] Suppose *Hill* became entitled to no money, was the plaintiff to be entitled to none? He supplies the goods on the faith and expectation of there being funds of *Hill* in respect of this work. [*Parke*, B.—Even if there was an original debt from *Hill*, the case is no more than a prospective assignment of a particular fund, with an attornment, so to speak, of the defendant to that assignment.] The general rule is, that the undertaking is collateral, wherever there is an original debt. [*Parke*, B.—That is the general rule, but with exceptions; one occurs in *Castling* v. *Aubert* (*d*)].

Lord ABINGER, C. B.—On reading the declaration, the first thing that struck me was, that no debt necessarily appeared on the face of it to be due from *Hill* at all: it is quite consistent with all that is stated on the record, that he never was liable to the plaintiff. That alone is an answer to the objection raised by the defendant. But further, if the defendant contracted, not to pay *Hill's* debt out of his own funds, but only faithfully to apply *Hill's* funds for that purpose, when they should come to his hands, that contract would not be within the operation of the statute.

(*a*) 2 Man. & R. 353; 8 B. & C. 395.

(*b*) 3 Bing. 107; 10 Moore, 395.

(*c*) 4 D. & R. 7.

(*d*) 2 East, 325.

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PARKE, B.—I am of the same opinion. There is nothing on the face of the declaration to imply a contract by the plaintiff with *Hill*. If that be so, it is clear the defendant's contract was an original, not a collateral one, and so not within the statute. But even if that were otherwise, this is nothing more than a prospective assignment of funds which were to come to the defendant's hands for *Hill*, and an attornment, as it were, by the defendant to that assignment: and the authorities shew that, in such case, the contract is not within the statute. On this ground also the plaintiff is entitled to the judgment of the Court.

ALDERSON and GURNEY, Bs., concurred.

Judgment for the plaintiff.

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STAMFORD *v.* M'CANN.

Where the defendant deposited money in Court in lieu of bail, under the 7 & 8 *Geo.* 4, c. 71, s. 2, before the time for putting in and perfecting bail had expired:—*Held*, that he was entitled as of right to enter an *exoneretur* on the bail-piece, and that the Court could not impose on him the condition of paying costs which the plaintiff had incurred, before the money was paid in, in searching after the sufficiency of the bail.

ADDISON had obtained a rule *nisi* to enter an *exoneretur* on the bail-piece on filing common bail, the amount of the debt, with 20*l.* for costs, having been paid into Court under the statute 7 & 8 *Geo.* 4, c. 71, s. 2. Special bail was put in on the 2nd of *November*; the money was paid in on the 5th. The only question between the parties was, whether the plaintiff was entitled to the costs of a search after the sufficiency of the bail between those days.

Erle shewed cause, and contended that the plaintiff ought to have these costs.—The 2nd section of the statute contains no provision for entering an *exoneretur* on the bail-piece. The defendant comes under sect. 4, and he ought therefore to do what that section requires, namely, pay in such further sum to answer the costs incurred by

the plaintiff as the Court may direct. The bail are already, *quoad* the defendant, perfect bail, not having been excepted to; he comes, therefore, within the discretionary power given by s. 4. [Lord *Abinger*, C. B.—If he had perfected the bail, you would not have got these costs; why should you now, because the same thing is done in a mode which is more to your advantage?]

Addison, in support of the rule.—Sect. 2 enables the party to pay in money in lieu of putting in and perfecting bail, within the time for doing so, and then entitles him to his discharge on filing common bail, as matter of *right*; *after* putting in and perfecting bail, it must be, by sect. 4, an application to the discretion of the Court. Bail have not yet been perfected; the present defendant, therefore, comes to the Court by right, not by indulgence, and is entitled to a discharge without any terms being imposed. Suppose the plaintiff had excepted, and the bail had been changed, he would not have got these costs. A plaintiff is never entitled to the costs of searching for bail till he comes to the second set. The plaintiff could not have taken the money out until the time for perfecting bail had expired, because the defendant had till then to pay it in: *Rowe* v. *Softly* (*a*), *Traford* v. *Love* (*b*). If the defendant had put in and perfected bail, or if he had rendered, these would have been costs in the cause; they are so also, therefore, in the present case.

Lord ABINGER, C. B.—The act empowers the defendant to apply for his discharge, as of right, at any time before putting in and perfecting bail. Mr. *Erle* would read it, before putting in only.

(*a*) 6 Bing. 634; 4 M. & P. 464.

(*b*) 3 D. P. C. 593.

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PARKE, B.—I think my former impression was wrong (*a*), and that the defendant has a *right*, until the time for putting in and perfecting bail has expired, to substitute money for bail: as long as there remains an opportunity for issuing an attachment, he may do so, whether the plaintiff excepts or not. But even if he is not within sect. 2, I think he is entitled, under sect. 4, to have this rule made absolute.

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ALDERSON and GURNEY, Bs., concurred.

Rule absolute.

(*a*) The Court had, in the first instance, been disposed to decide in favour of the plaintiff; but on the argument being resumed on the following day, delivered their opinions as above.

RAMSDEN *v.* MAUGHAM.

An affidavit of debt was filed, *April* 9, with the filacer for *Surrey*, and a *capias* issued into *Surrey*; on the 7th of *May* a *capias*, and in *November* an *alias capias* thereon, issued into *Middlesex*, no fresh affidavit being filed, the filacer for *Surrey* and *Middlesex* being the same person:—*Held*, regular.

A *stale* affidavit means one sworn above a year ago.

BALL moved for a rule to shew cause why the writ of *capias*, and subsequent proceedings thereon, should not be set aside for irregularity. On the 9th of *April* an affidavit of debt was put upon the *Surrey* file, and a *capias* issued thereon into *Surrey*, on which nothing was done. On the 7th of *May* another *capias* issued into *Middlesex*, and on the 5th of *November* an *alias capias* thereon into the same county, upon which the defendant was arrested, and the indorsement on which referred to the affidavit filed in *Surrey*. No fresh affidavit was filed in *Middlesex*, nor was any office copy of the original affidavit put on the *Middlesex* file. All the writs were issued by the same officer of the Court. It was contended that the affidavit filed in *Surrey* could not warrant the arrest on the *alias capias* in *Middlesex*. A rule *nisi* having been granted,

Barstow shewed cause.—*Rodwell* v. *Chapman* (*a*), and *Coppin* v. *Potter* (*b*), are authorities to shew that these proceedings were regular. In the latter case, a distinction was attempted to be drawn between the practice before and since the Uniformity of Process Act, but the Court said it made no difference. The same officer remains, whose duty it is to take the affidavit.

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Ball, contrà, admitted that *Rodwell* v. *Chapman* was an authority that the affidavit was a sufficient foundation for the subsequent proceedings, if sworn within proper time; but objected that this was too stale. [*Parke*, B.—A stale affidavit, in such a case, means one a year old.] No case seems to warrant that rule, and *Bayley*, B., in *Rodwell* v. *Chapman*, appears to apply the term to an affidavit of much shorter date. The affidavit ought to be made at the time when the writ is issued. The distinction is, that here there are two original writs; where the second writ is only a continuance of the former process, the first affidavit is no doubt sufficient. *Baker* v. *Allen* (*c*).

PARKE, B.—*Rodwell* v. *Chapman* shews that you may abandon the first writ, and sue out another on the same affidavit, which is not a continuance of the first writ. Then, the established meaning of a stale affidavit is, one sworn more than a year ago.

ALDERSON, B.—*Richards* v. *Stuart* (*d*) is an authority to the same effect.

Rule discharged, with costs (*e*).

(*a*) 1 C. & M. 70.

(*b*) 10 Bing. 441; 4 M. & Scott, 272.

(*c*) 7 B. & C. 526; 1 Man. & R. 232.

(*d*) 10 Bing. 322; 3 Moo. & Sc. 778.

(*e*) A similar decision was pronounced on a subsequent day in another case of *Rock* v. *Johnson*; the only difference being, that there a second affidavit, but a defective one, was put on the Middlesex file. And see also *Boyd* v. *Durand*, 2 Taunt. 161; *Evans* v. *Bidgood*, 4 Bing. 63; S. C. *nom. Martin* v. *Bidgood*, 12 Moore, 236.

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GOODRICKE, Bart., Assignee of the Sheriff of STAFFORDSHIRE, *v.* TURLEY.

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In the *Exchequer*, if bail have been once rejected, a deposit must be made for costs before the second set of bail justify, in the case of country as well as town bail.

It is no objection that bail has been already rejected, unless it appear that he was rejected on the merits.

ARCHBOLD moved to justify bail by affidavit.

J. Jervis claimed a deposit for costs, the bail having been rejected twice before. He referred to *Smith* v. *Cooper's Assignees* (*a*).

Archbold referred to the rule in the *King's Bench* (*b*), and contended, upon the word "appear," that it applied only to bail in person, for which he cited *Henderson* v. *Dowling* (*c*).

The Master certified, that, by the practice of this Court, a deposit was necessary in the case of country bail as well as town bail; and

GURNEY, B., after consulting the other Barons, so decided, and the deposit was paid.

J. Jervis then produced an affidavit that one of the bail had been rejected before Lord *Denman*, C. J., at chambers; but as it did not state that he had been rejected for insufficiency, the Court overruled the objection, and the bail justified.

(*a*) 1 C. & J. 460.
(*b*) Hil. 1822.
(*c*) Archb. Pract. (ed. 1834) 171, note (*b*).

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SAME *v.* SAME.

ARCHBOLD having obtained a rule to stay proceedings on the bail-bond on payment of costs—

A rule was granted on the 13th of *November*, to shew cause on the 17th, upon an affidavit having a defect in the jurat. On the 18th, an affidavit in the same terms, but having the jurat correct, was sworn.

The Court, (on cause being shewn on the 19th) allowed the rule to be enlarged, on filing the second affidavit, and paying the costs of the appearance to shew cause.

J. Jervis (*November* 19) shewed cause, and objected to the affidavit on which the rule was obtained, because it was sworn by several deponents, and their names were not all mentioned in the jurat. The rule was granted on the 13th of *November*, to shew cause on the 17th.

Archbold produced an affidavit sworn on the 18th of *November*, a copy of the former one, but having the jurat correct; and cited *Salloway* v. *Whorewood* (*a*), to show that such affidavits might be read.

Jervis, contrà, contended, that, by the practice of the Court, the affidavit could not be used; and relied on *Phillips* v. *Hutchinson* (*b*), where, on a similar application, *Littledale*, J., said: "How can you have an affidavit dated one day in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then it is said the rule may be enlarged; there also the same objection will arise, because then it will be the original rule which is discharged or made absolute."

PARKE, B.—The officer says it is the practice to reswear the affidavits; and certainly, where a party has obtained a copy of the affidavit on which a rule *nisi* has been obtained, and has framed his answer to meet such affidavit, it would be very unfair to allow the other side, when supporting the rule, to assist their case by fresh

(*a*) 2 Salk. 461. (*b*) 3 Dowl. P. C. 20.

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Doe d. Smith v. Fleming.

Caroline (afterwards married to *Thomas Meyrick*); *Charlotte Caroline*, born 1780; *Matilda*, born 1783; *Harriet*, born 1785; (now the wife of *Henry Metcalfe Wardle*); and *Julia*, born 1786; (late wife of *Edward Orlebar Smith*). The said *John Willis Fleming* is now living, and hath issue *Houria*, born 1814; *John Brown Willis*, born 1815; *Christophina Buchanan*, born 1818; *Thomas James Willis*, the defendant, born 1819; *Harriet Elizabeth*, born 1821; *Charlotte Jane*, born 1821; and *William Henry*, born 1828. The said *Jane Caroline Meyrick* died 1805, leaving issue *Jane*, now the wife of *St. John Charlton*, born 1803; and the said *Jane Charlton* hath issue, *Catherine*, *Louisa*, *Jane*, *St. John*, and *Lucy*. *Charlotte Smith*, one of the lessors of the plaintiff, hath issue *Charlotte*, born 1781; *Jane Maria*, born 1785; *Eliza Diana*, born 1786; *Edward Orlebar*, born 1788; and *Penelope Marshall*, born 1793; *Charles Hervey*, born 1793, and *Boteler Chernocke*, born 1796. The said *Ann Penelope Marshall* hath issue, *Charlotte Hervey*. The said *Charles Hervey*, the son of the said *Charlotte Smith*, the lessor of the plaintiff, hath issue *Charles Hervey*, *Frances Maria Dale*, *Charlotte*, *Julia*, *Elizabeth*, *Emma*, *Jemima*, *Barbara*, and *Villiers S. Chernocke*. And the said *Boteler Chernocke*, the other son of the said *Charlotte Smith*, the lessor of the plaintiff, hath issue *Boteler Chernocke*, *Charlotte Hervey*, and *Sarah Whitby*. All the above-named descendants of *Thomas*, the son of *Henry*, the third son of *Brown Willis*, and of *Charlotte Smith*, the lessor of the plaintiff, were living at the decease of *Francis John Browne*. The defendant is the second son of the said *John Willis Fleming*, and is also devisee in fee of the premises in question under the will of the said *F. J. Browne*, who was the heir at law of the said testator *George Browne*.

The question for the opinion of the Court is, whether the lessors of the plaintiff are entitled to any and what portion of the premises in question, under the will of the said *George Browne*. If the Court

shall be of opinion that the lessors of the plaintiff are not entitled to any part of them, the verdict is to be entered for the defendant: on the other hand, if the Court shall be of opinion that the lessors of the plaintiff are entitled to the whole, then the verdict is to stand; if to any part, then the verdict to be entered for such part.

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The case was argued in *Trinity* term by

Hodgson, for the lessors of the plaintiff.—The question is, whether any and what construction is to be put upon the devise in remainder to the younger and elder branches of the family of *Brown Willis*. The lessors of the plaintiff contend that a reasonable construction may be put upon that devise, and that it gives them a vested remainder in tail, as being the descendants of the survivor of the two daughters and younger children of *Brown Willis;* the defendant says, that no reasonable construction can be put upon it, that the devise is void for uncertainty, and that the property descended to the heir at law, under whom he claims. No case is to be found in which the Court has been called upon to put a construction on the word *branches*. There are, however, certain general rules of construction, directly applicable to the case. In the first place, the Court will not hold the devise altogether void for uncertainty, if they can by possibility put a reasonable interpretation upon the terms of it; and the mere difficulty of arriving at a true construction at once, is no ground for not attempting to find a meaning if possible. But there is a further rule, which is thus expressed by Mr. *Wigram* in his valuable work on the *Interpretation of Wills* (*a*): "It must always be remembered, that the words of a testator, like those of every other person,

(*a*) P. 46.

tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the Court, in aid of the construction of the will, refers to those extrinsic collateral circumstances, to which it is certain the language of the will refers. It may be true, that, without such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention of the testator." A third rule is, that when the words of the will, thus taken in reference to the circumstances under which they were used, will give a vested estate to persons sufficiently shewn to answer the description, the Court will not, by giving them a greater latitude, and taking into account other circumstances and contingencies, make that estate contingent, which the words of the will will make vested, the intention in that respect being *in dubio*. Regard being had to these rules of law, it is submitted that the intention of this testator may be ascertained and effectuated. There might have been much more difficulty in saying what the testator meant by the younger and elder branches of *Brown Willis's* family, had there been any uneven number of descendants of *Brown Willis*—as five, or three—living at the date of the will. The contrary state of circumstances affords a strong ground for applying the rule of law last quoted. There were four different branches, who, at the time of making the will, and of the testator's death, answered the description of the family of *Brown Willis;* two of them, viz. the daughters and their issue, answering the description of the younger branches, and the other two, the grandsons, that of the elder branches. There is a plurality on both sides, and on both sides an even number. Of the word

family, various constructions have been adopted in different cases. A devise to the family of the testator himself is taken to be a devise to the heir at law, the head of the family. *Wright* v. *Atkins* (*a*). But a devise to the families of *A.* and *B.* was construed to mean a gift to the children of *A.* and *B.* collectively, exclusively of their parents: *Barnes* v. *Patch* (*b*). As, therefore, by the family is meant the children collectively, by the branches of the family may well be meant certain of the children individually. Suppose the testator not precisely acquainted with the relationship of the different children to *Brown Willis*; he takes the two sons to represent the two elder, and the two daughters the younger branches. The word is not one referring to personal seniority or juniority, as "members" or "individuals" would. There are many cases in which a daughter has been held a younger child, although elder in point of years. It will be said, suppose any of the four had died in the testator's lifetime, what would have become of the devise? The answer to that is, that though the will speaks from the time of his death, the surrounding circumstances must be considered as they were present to the mind of the testator when making his will; and no alteration having in fact occurred, it is immaterial to consider what would have been the effect of any. Suppose there had been a devise to the younger branches of *George* 2nd's family; could *George* 3rd, although a grandson, have taken under it when he ascended the throne? It may be observed, that in his own family the testator prefers his daughter: that is a sufficient answer to any thing that may be urged as to the improbability of his preferring females. If such, then, be the right construction of the word "branches," the devise to the daughters and their

(*a*) 17 Ves. 255; S.C. on appeal, 19 Ves. 301; Coop. 116; Turn. 143.
(*b*) 8 Ves. 604.

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heirs, as tenants in common, and in default of such issue, then over, clearly gave to both branches in succession vested estates tail. To hold otherwise would give no effect to the devise over, and would offend against the rules of law, which require, first, that an interest capable of taking effect as a vested, shall not operate as a contingent, remainder; and secondly, that a contingent remainder shall be preferred before an executory devise. If there were no younger, there could be no elder branches: it could not, therefore, be in default of objects of the first devise, that the testator intended the objects of the second devise to take. The lessors of the plaintiff, consequently, are entitled, as the heirs of the body of the surviving daughter, to recover the whole premises.

Sir *W. Follett, contrà.*—In the first place, this devise does not give an estate tail to the younger branches, whoever they may be, but an estate in fee, with a substitution of the elder branches for the younger, to take place or not upon a certain contingency, viz. whether upon the spending of the estates tail, there be not, or be, any younger branches *in esse.* If the devise does not give an estate tail, the case of the lessors of the plaintiff is at an end. If it was an estate in fee, with a substitution on the happening of a contingency, the contingency must be determined at the time of the determination of the particular estate; and so the remainder was contingent, and not vested. [*Parke,* B.—I do not at present see that it is essential to the plaintiff's case that there must be an estate tail.] The whole clause must stand together, and the lessors of the plaintiff are bound to make sense of the whole. In order to do so, they must contend that it passed a vested remainder expectant on the determination of an estate tail.—But the devise is altogether void for uncertainty. It is said, if any rational construction can be put upon the

will, the Court is bound to put it. That is true; but the converse is equally true—that the Court is not at liberty to speculate on the testator's meaning. All the authorities applicable to this view of the case are collected in *Jarman's* edition of *Powell on Devises* (*a*), and the result is thus stated:—"Whenever there is an irreconcileable uncertainty in the disposition made by a testator of his real property, the title of the heir at law shall be preferred to all others; because, where a Court cannot find words in a will, which, either expressly or by necessary implication, denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents, which are certain, must prevail, and cannot be superseded by an uncertain devise." The heir is *primâ facie* entitled, and the estate cannot be taken out of him, unless the other party makes out that he is entitled, and makes it out beyond the possibility of a doubt, so as to satisfy the mind of the Judge who determines it. That is what the lessors of the plaintiff undertake to do in this case. But if, on the contrary, the terms of the will leave it uncertain who is to have the estate, the heir has a right to take. No doubt, the plaintiff is at liberty to refer to the existing state of *Brown Willis's* family at the time of making the will; and he says, as it continued the same at the testator's death, it is unnecessary to consider the case where an alteration of circumstances has occurred in the interval. But such a consideration is most important; if you adopt the state of the family at the time of making the will, you ought also to consider—that which the testator must be supposed to have considered—what would be the proper interpretation of the devise in case of a change. For instance, suppose one of the daughters had died in his lifetime without issue, who was to take? [*Parke*, B.—Her share would go to the heir at law.] If she died

(*a*) Vol. 1, p. 348.

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leaving a daughter, what then? [*Parke*, B.—The consequence would be the same. Lord *Abinger*, C. B. —We cannot tell that he would not have altered his will.] The Court is to put a meaning on the clause, which may apply under all circumstances, and at all times. [Lord *Abinger*, C. B.—The true rule seems to be, that the will speaks from the death; but if there be any ambiguous phrase, which may be explained by a reference to circumstances as they existed at the time of making the will, those circumstances may be borrowed in aid to explain the ambiguity.] The testator must be taken to have known the family of *Brown Willis*. If so, would any body intending to designate particular individuals, and knowing their names, designate them as *branches?* Can it be said, with any certainty, that he meant to give a vested estate to the two daughters, and a vested estate to the two grandsons? The testator evidently meant to point at the period of the determination of the previous estates tail; and looking then at who should be the younger branches of *Brown Willis*'s family, to let them take; and if there were then no younger branches, in that case to let the elder take. Otherwise, would he not at once have given the children vested estates by name? He meant to give contingent estates on the determination of the estates tail, to give the elder branches a chance of then taking, if there should be no younger. The word "branches" itself seems necessarily to point to some future period. But then comes the question, who are the younger, and who the elder branches of the family? In *Doe* d. *Chattaway* v. *Smith* (*a*), a devise "to my sister *C.*'s family, to go in heirship for ever," was held to pass the estate to *C.*'s eldest son and heir in fee. Other cases of the same kind are there cited. In *Wright* v. *Atkyns* (*b*), Sir *William Grant* assented to the doctrine laid down in

(*a*) 5 M. & Sel. 126. (*b*) 17 Ves. 261.

Chapman's case (*a*), as stated by Lord *Hobart* in *Counden* v. *Clarke* (*b*), that "a devise to the house, or family, or stock, shall be understood of the heir principal of the house." In *Barnes* v. *Patch*, the word sufficiently appeared from the context to be a *nomen collectivum*. The plaintiff was bound to find out somebody of *Brown Willis*'s family, whom the testator would designate as the younger, and somebody whom as the elder branch; and then (if any construction can be put on this devise) the legal effect would be to give the estate to the heir, first of the family called the younger, then of the family called the elder branch. What the testator had in contemplation probably was, that, looking to the time which would elapse in the spending of the estates tail, there might then be many descendants of an elder and of a younger branch of *Brown Willis*'s family, who might take as tenants in common. The defendant, Mr. *Fleming*, is in fact descended from a younger branch of the family, viz. from *Brown Willis*'s second son. It is reasonable to suppose that the testator meant to give the property, first to the descendants of *Brown Willis*'s younger son, then to those of his elder, because the descendants of the elder would have *Brown Willis*'s family estate; but what is there to point to daughters? It is admitted, that if it were not for the fortuitous circumstance of there being two of each, the argument on the other side could not have been supported, because it could not have been said on which side, elder or younger, the uneven number was to be classed. But it is a far more reasonable interpretation to suppose that he meant not particular *persons*, but particular *lines* of the family. The descendants of daughters, again, cannot properly be designated a branch of the family of their father: they do not bear his name

(*a*) Dyer, 333. (*b*) Hob. 33.

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or arms; they represent the families into which the daughters married. The testator must, therefore, have referred to the descendants of sons. But if this be doubtful, then the estate ought not to be taken out of the heir at law. *Goodright* v. *Dunham* (*a*), *Kenn* v. *Dixon* (*b*), *Doe* v. *Perryn* (*c*), *Doe* d. *Davy* v. *Burnsall*, (*d*), are examples, applicable to the present case, of the substitution of one estate in fee for another. Besides, the lessors of the plaintiff claim under *Mary Hervey* only; what is to be said as to the share of the other daughter? [Lord *Abinger*, C. B.—The plaintiff says there were cross remainders by implication.] There is nothing to warrant that. But however that be, all that the Court is called upon to say is, that the plaintiff has not *satisfied* them that the testator meant to give the estate specifically to *Mary Hervey* and her descendants.

Hodgson, in reply.—If the devise is to be deemed void for uncertainty, it can only be on the ground that the Court can find out *no* construction to put upon it. If the limitation be a contingent remainder, or an executory devise, or anything on which a legal interpretation can be put, it is not void. The plaintiff is not bound to shew a construction that shall not admit of dispute at the bar. But the construction which makes it a contingent remainder is excluded by the rule of law, which gives a vested estate rather than a contingent one. Even, however, if the words compel the Court to pronounce it a contingent remainder, there is no such uncertainty as to avoid the will; the division into branches is still certain, although the individuals falling within them may be less so. Suppose a devise to *A.*, to take at the death of the devisee of the particular estate, or, if he were not then living, to

(*a*) 1 Dougl. 264.
(*b*) 1 Bos. & P. 254.
(*c*) 3 T. R. 484.
(*d*) 6 T. R. 30.

his children, it would be equally certain in both events. [*Parke*, B.—Suppose the Court should think the testator had no particular individuals in his view, who would take under that contingent remainder?] It is impossible to say; but that affords a reason why it may be contended that he did mean to designate particular individuals. It is not, as is alleged on the other side, absolutely necessary to the plaintiff's case that this should be construed an estate tail. Such a construction, with the implication of cross remainders, gives the plaintiff the entirety, and satisfies both parts of the devise. But suppose the younger branches took in fee, and they mean the descendants of *Mary Hervey*, the lessors of the plaintiff are entitled to a moiety. The substitution contended for is impossible, because if there were no younger there would be no elder branches, and *vice versâ*; there must be both to satisfy the words of the devise. But it is said, the words "branches of the family" might exclude the children of *Brown Willis* taken collectively. [Lord *Abinger*, C. B.—It is clear he expected that, whenever the estate did vest, it would vest in more than one person.] The singularity of the case is, in its requiring more than one for the estate to vest in, and more than one also to satisfy it both in the elder and younger branches. *Doe* v. *Smith* is quite distinguishable; there the devise was, "to go in heirship for ever;" a devise to the branches of a family, which implies more takers than one, cannot mean "to go in heirship for ever." Suppose the devise had been to all the branches of *Brown Willis*'s family, would that be void for uncertainty? particularly where it appears that the testator meant to designate children and grandchildren jointly. Or, suppose a devise, first to the *Yorkshire* branches, then to the *Devonshire* branches; and there had been shewn to be two branches in *Yorkshire* and two in *Devonshire*; it would be conclusive in favour of both taking in succession. The branch becomes a branch as soon as it leaves the parent stock; and the branches of a family cannot exclude the

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children, any more than the branches of a tree exclude the tree. To transmit the estate through the whole branch, you must vest it as early as you can; as, on the other hand, you give an estate tail for the purpose of transmitting it as far as you can. That is also a reason for giving it to persons living at the date of the will. Can an intention be imputed to the testator of giving an interest to objects of his bounty, who might not be ascertainable for two centuries? In *Doe* d. *Long* v. *Prigg* (*a*), *Bayley*, J., says—"The law inclines to such a construction as will tend to vest a remainder, unless a contrary intention appears, because contingent remainders are in the power of the particular tenant, and may be destroyed; and it is more likely the testator should have intended that the limitations he made should be secure, than that they should be liable to be defeated." There are no words here to import survivorship at all. In *Ives* v. *Legg* (*b*), Lord *Hardwicke* held, that, under a devise to *M. L.* for life, remainder to the children of her body and their heirs, and in default thereof to *W. L.* in fee, *W. L.* took a vested remainder. Then it is said the will must operate to give the estate to the descendants of sons, because the daughters, not bearing the testator's name and arms, could not be considered branches of his family. That is a curious argument, where the defendant is himself a descendant of one of the sons, who actually no longer bears his name and arms. It is probable the testator knew that the elder branch was likely to succeed to another estate, as proved to be the case, and therefore preferred the younger. But though he knew the individuals, and that they represented four branches, he might not know the precise circumstances of their relationship to *Brown Willis*, and therefore designated them by this word "branches." Such a supposition explains the whole clause. It is objected that this construction makes the will depend on a

(*a*) 2 Man. & Ry. 338; 8 B. & C. 236. (*b*) 3 T. R. 488, n.

mere fortuitous circumstance. No doubt it does; but every will depends on fortuitous circumstances. There is nothing more fortuitous here, if you suppose the testator cognizant of it, than there is in a party's having a son *John*, rather than *Thomas*, to take a particular legacy. *Cholmondeley* v. *Clinton* (*a*), and *Doe* v. *Prigg*, are authorities, that where a will can be made to give a vested estate to particular persons, they shall take. Then, as to the implication of cross remainders, *Atherton* v. *Pye* (*b*), *Watson* v. *Foxon* (*c*), *Green* v. *Stephens* (*d*), are authorities to shew that the words of the devise are amply sufficient for that purpose. The estate is to go over only on failure of issue of both the daughters.

Cur. adv. vult.

In this term the judgment of the Court was delivered by—

Lord ABINGER, C. B.—After stating the material facts of the case, his Lordship proceeded:—The question is, whether the lessors of the plaintiff are entitled to any, and if any, what portion of the premises devised by the will of *George Browne*. Upon the best consideration which we can give to this question, we are of opinion that the lessors of the plaintiff take no portion of those estates. It was admitted in argument on both sides, that there is no case precisely in point, nor any in which a legal construction has been given to the words "branches of a family." In fact, for the purpose of construing an obscure will, antecedent cases, which are not directly in point, can be of no other use than that of establishing or illustrating rules of construction. These rules being once admitted, their application to the case in question, and their effect upon it when applied, must still be open to

(*a*) 2 Meriv. 171, 340; 2 B. & Ald. 625; 2 Jac. & W. 81.
(*b*) 4 T. R. 713.
(*c*) 2 East, 36.
(*d*) 17 Ves. 64.

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discussion. It was said by the counsel for the lessors of the plaintiff, that the mere difficulty of arriving at a true construction at once, is not a sufficient reason for not attempting, if possible, to find a meaning for the testator. It must be admitted, that the Court is bound to apply itself with all diligence and attention to find the meaning of the testator, if it can possibly be found, however difficult and obscure; but if, after every effort to find that meaning, it becomes impossible to solve the difficulty and dispel the obscurity, if no judicial certainty can be obtained of his real meaning, then the Court is not bound to supply a meaning by conjecture, or to adopt an arbitrary meaning, for the purpose of giving some effect to unmeaning or ambiguous clauses. It was also laid down by the plaintiff's counsel, that, in construing a will, the testator must be presumed to speak with reference to existing circumstances; and further, that, wherever the words of the will can bear such an interpretation, the Court should so expound them as to give a vested estate. It may be doubted whether, on a special verdict—(and this is to be turned into a special verdict)—the testator can be presumed, without an express finding by the jury, to have known the circumstances and situation of a family other than his own. Assuming, however, for the argument, that he did know the exact state of *Brown Willis*'s family when he made his will; that is to say, that two daughters were living, one of whom had four children alive, and the other none, and that this last was past child-bearing, being, as appears by the dates, of the age of sixty; and two grandsons, one the son of *Brown Willis*'s eldest son, and the other the son of his third son: the question arises, what the testator meant by "the elder and younger branches of the family?" That he meant more than one person is clear, by his devising to the branches as tenants in common, and by using the words "elder branches" afterwards, in opposition to

"younger branches." It is contended, first, that he meant the two sisters. The first objection to this is, the application of the words "branches of the family" to daughters who were married into other families, and whose descendants do not, in common acceptation, rank among the branches of the parent trunk from whom they had in a manner sprung, more especially when there are male descendants of the male living, who can properly bear the name and represent the branches of the original family. The next objection is, if he had known and meant to make these two sisters tenants in remainder, on failure of issue of his son, it was so obvious to mention them by name, that one cannot on any reasonable ground account for the omission. It was next contended, that if he did not mean the two sisters exclusively, he must be taken to have meant them and the daughters of the elder of them then living. Now here the objection again occurs, why he should not have named the individuals, if he meant certain individuals then living and known to him. Moreover, when once it is supposed he did not mean to treat the two living sisters as the only branches, but he considered their descendants as branches also, then his not naming the living branches, which he might easily have done, if he meant to confine it to them, lets in the more natural supposition, that he meant to limit the remainder in fee to all who should be the younger branches at the time of the failure of issue of his son. And, if he meant to designate by the word "branches," not the children only, but the descendants of the children of *Brown Willis*, then the word would comprehend the male descendants of the third son, who might very properly be called the younger branches of the family of *Brown Willis*, in opposition to the descendants of the elder son, who would be the elder branches. Here, then, on the supposition that he knew the state of the family, we have open to us the following conjectures:—First, he might have meant to limit the re-

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mainder to the two sisters, *Mary Hervey* and *Alice Eyre;* secondly, he might have meant to include the daughters of *Mary Hervey*, then living, with their mother and aunt; thirdly, he might have meant to limit the remainder to such persons as should be living at the time of the failure of issue of his own son, and should then be considered the younger branches of *Brown Willis*'s family; and, lastly, which is not the least probable conjecture, he might have intended to limit the remainder in fee to such of the male descendants of *Brown Willis*, by his third son, as should be then living. Upon one or the other of the two first suppositions only, the lessors of the plaintiff would take any vested interest. But, independently of the reasons afforded against the probability of these conjectures, we do not see why the Court should prefer either of them to the other two. The rule that words should be so expounded as to give, if they can reasonably bear the construction, a vested instead of a contingent estate, is not a rule to assist in finding out who the testator intended for the objects of his bounty; it does no more than suggest the most desirable method of carrying that intent into effect, when those objects are discovered, assuming that a light sufficiently certain can be thrown on the individuals, or classes, whom the testator has designated; for that rule applies thus:—that the person shall take a vested, rather than a contingent interest, if the words of the will are not really and absolutely inconsistent with such an interpretation. If we cannot be satisfied the testator meant either the daughters of *Brown Willis*, or the existing descendants of those daughters, or such of those descendants as might thereafter exist and be alive on failure of issue of the son, this rule does not bind us to select the living among those parties, merely that the remainder might be vested, instead of contingent. Upon the whole, then, the meaning of the testator is open to several different conjectures, none of which appear to us to be of sufficient

force to justify us in adopting any of them. We are of opinion that the limitation in the will of *George Browne*, under which the lessors of the plaintiff claim, is void for uncertainty; and consequently the remainder in fee, after the extinction of the estate tail in the son of the testator, descended to that son as his heir at law. If the Court considered itself under the necessity of choosing between the several conjectures, we should be more inclined to adopt the last as the most probable; but in that case also the judgment would equally be for the defendant.

Judgment for the defendant.

LEWIS *v.* GLOSSOP.

BAIL were opposed on coming up to justify; but, after examination, were admitted.

On bail justifying, the plaintiff was allowed the costs of a former successful opposition, though he did not ask for them until after the bail had passed.

Humfrey then applied for the costs of a former successful opposition.

Mansel, contrà, contended, that they should have been asked for before examination, and said it had been so decided in the *Common Pleas;* they were now costs in the cause.

GURNEY, B., (after consulting the other Barons).—The plaintiff is entitled to the costs of a former successful opposition, unless it be otherwise ordered (*a*). Here there is no reason shewn why he should not have them.

Costs allowed (*b*).

(*a*) Reg. Gen. T. 1 Will. 4, r. 3.

(*b*) In the Common Pleas, the objection that the costs of a former successful opposition have not been deposited, cannot be taken after the bail are sworn. *Knight's bail*, 4 Dowl. P. C. 338.

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REX *v.* The Sheriff of LINCOLNSHIRE, in a cause of BURTON *v.* GEE.

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Bail cannot apply to set aside an attachment against the sheriff, unless they *first* justify or render the defendant.

THIS was a motion on behalf of the bail in the above cause, to set aside an attachment against the sheriff for not bringing in the body, on payment of costs and on an affidavit of merits, and on the terms of rendering the defendant.

Wightman shewed cause, and objected, in the first place, that the affidavit did not deny collusion. [*Parke*, B.—The affidavit of merits supplies that: bail, not denying collusion, stand in the same position as the defendant himself would; then an affidavit of merits supplies that deficiency.] He then went into the affidavits, from which it appeared that the action was on a promissory note for 30*l.*; that the bail were rejected because they were not described in the affidavit of justification as housekeepers, and stated themselves to be *possessed*, instead of *worth*, the requisite amount. No other bail had been perfected or put in. They now swore that they were housekeepers, and were worth the amount required. He contended that they were not, however, entitled to set aside the attachment; otherwise bail had only to give an imperfect description of themselves, and get rejected, in order to get rid of the proceedings against the sheriff.

Tyndale, contrà, referred to *Tidd's Practice*, 317 (8th ed.), where it is said, "the practice, when the sheriff has been fixed, is to move for a rule to shew cause why, *on putting in bail*, the proceedings against him should not be set aside, and to have the bail ready to justify when the rule is disposed of." The present rule was obtained on the terms of rendering the defendant, which is equivalent to justifying bail. [*Parke*, B.—You can justify bail,

or render, and then move. There is a difference between the practice in proceedings on the bail-bond and in attachments against the sheriff; perhaps the passage you have cited has confounded them.] The reference there given, to the judgment of *Buller*, J., in *Williams* v. *Waterfield* (*a*), supports the statement as applying to the case of an attachment. [*Parke*, B.—At all events, the rule must not be drawn up until the defendant has actually rendered. The practice has certainly been generally understood to be otherwise.]

Wightman suggested that this application was virtually the same as if it had been to set aside proceedings on the bail-bond; being made, not on behalf of the sheriff, but of the bail.

Some difficulty occurred in settling the terms of the rule, so as to secure the immediate render of the defendant; and

PARKE, B., said,—The difficulty of arranging the terms of the render shews the convenience of what we understood to be the practice. If we make this rule absolute, it is not to be understood as deciding that the same course is to be pursued in future.

Wightman urged, that if the Court thought a departure from that which had been considered to be the established practice would lead to inconvenience, it would be advisable not to introduce such a precedent. And ultimately the rule was

Discharged without costs.

(*a*) 1 Bos. & P. 334.

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STAINES *v.* STONEHAM.

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The plaintiff cannot have the bail bond to stand as a security where he has not declared *de bene esse*, although he was prevented from declaring by the vacation.

A RULE had been obtained to stay proceedings on the bail-bond on payment of costs, the defendant having been rendered; and the only question was, whether the bail-bond should stand as a security or not. The arrest was on the 2nd of *October*. The plaintiff had not declared *de bene esse*. The assignment of the bail-bond was taken on the 20th of *October*.

Blackburne, for the plaintiff, urged, that, inasmuch as by the 2 *Will.* 4, c. 39, s. 11, no declaration could be filed or delivered between the 10th of *August* and the 10th of *October*, and therefore it was impossible for the plaintiff to have declared *de bene esse* before he took the assignment of the bail-bond, the rule of Court could not apply to this case. The plaintiff had lost a trial through the defendant's irregularity.

But *per Curiam*.—The rule of Court entitles the plaintiff to have the bail-bond to stand as a security only where he has declared *de bene esse*. He has not complied with the condition, because he could not; he cannot, therefore, entitle himself to the benefit. He brought upon himself the loss of the trial, by taking an assignment of the bail-bond.

Rule absolute.

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NICOLLS *v.* BASTARD, Esq.

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TROVER against the late sheriff of *Devonshire*, for divers cattle, goods, and chattels, to wit, thirty horses, thirty mares, thirty bulls, thirty cows, &c.; hay, corn, furniture, &c. Pleas, *first*, not guilty; *secondly*, that the cattle, goods, and chattels, in the declaration mentioned, were not, nor was any or either of them, the property of the plaintiff, in manner and form, &c.; *thirdly*, that one *J. Horne* was possessed of the said cattle, goods, and chattels, in the declaration mentioned, and in order to avoid an execution about to be levied upon his goods, fraudulently sold the same to the plaintiff; that a writ of execution against the goods of *Horne* (which was set out) being delivered to the defendant, he seized the cattle, goods and chattels, in the declaration mentioned, under such writ. Replication to the third plea, that *Horne* did not, for the purpose of fraudulently preventing the said cattle, goods, and chattels in the declaration mentioned from being taken in execution, sell them to the plaintiff: and issue thereon. The particular of demand comprised only "one cow." At the trial before *Gurney*, B., at the last *Devonshire* Assizes, it was proved that the plaintiff was the owner of a cow, which he had lent to *Horne*, to be kept in his pasture, where it was seized by the defendant under the execution. For the defence, the writ and proceedings under it were given in evidence; and it was proved that a great quantity of property was sold by auction by *Horne*, in order to avoid the execution, a large part of which was purchased by the plaintiff; that the plaintiff's cow was put into the catalogue, but was not sold; nor was any cow sold at all. The defendant's counsel contended, that the

In the case of the simple bailment of a chattel, without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession.

Trover for horses, cows, furniture, &c. &c. Plea, that *J. H.* was possessed of the cattle, goods, and chattels in the declaration mentioned, and fraudulently sold them to the plaintiff, to avoid an execution against the goods of *J. H.*, and that the defendant (the sheriff) seized them under such execution. Replication, that *J. H.* did not fraudulently sell the cattle, goods, and chattels in the declaration mentioned to the plaintiff; and issue thereon. The particular of demand was merely "one cow." It appeared that the plaintiff had lent a cow to *J. H.*; that the goods of *J. H.* were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale:—*Held*, that the plaintiff was entitled to a verdict on the above issue.

The plea of no property in the plaintiff, in trover, means no property *as against the defendant*.

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plaintiff could not maintain trover for the cow, inasmuch as he had not the possession of it at the time of the seizure. The learned Judge overruled the objection, and the jury found for the plaintiff on the plea of not guilty, and that the cow was the property of the plaintiff, and had not been sold by *Horne;* but that the sale of *Horne's* goods was fraudulent. The learned Judge thereupon directed a verdict to be entered for the plaintiff on the second issue, and for the defendant on the third; but reserved leave to the plaintiff to move to enter a verdict for him on that plea also.

Fraser having obtained a rule *nisi,* pursuant to the leave reserved—

Erle also moved, on behalf of the plaintiff, for a rule *nisi* for a new trial, in case the former rule should be made absolute; and renewed the objection taken at the trial. He contended, that, at the time of the seizure, the legal possession of the cow was in *Horne,* and that the plaintiff could not recover in trover, unless he had the legal possession of the chattel in question as well as the property; although the party having the legal possession, without the property, might: *Gordon* v. *Harper* (*a*), *Roberts* v. *Wyatt* (*b*), *Pain* v. *Whittaker* (*c*). [*Parke,* B.—I think you will find the rule is, that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction.] This is in the nature of an action by a reversioner; whereas, according to the modern cases, trover must be brought by a party having a right to the immediate possession. [*Parke,* B.—In *2 Roll. Abr.* 569, *pl. 22,* it is stated, that the bailor may sue in *trespass;* there is no distinction in this respect between trespass and trover. In the cases cited, the party had given an

(*a*) 7 T. R. 12. (*b*) 2 Taunt. 268. (*c*) Ry. & M. 99.

interest in the chattel for money. Here, *Horne* was a simple bailee.]

Rule refused.

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On a subsequent day, cause was shewn against the other rule by—

Erle and *W. C. Rowe*.—The particular of demand may be laid out of consideration; the plaintiff's claim is to be looked at as he has stated it in his declaration. Now, the declaration comprises many different descriptions of goods; and though the claim was abandoned at the trial as to all except the cow, the defendant had a right to look to the issues on the record. The replication admits that *Horne* was possessed of "the cattle, goods, and chattels in the declaration mentioned," as stated in the plea; and puts in issue only the fraudulent sale. The plea collects all the articles mentioned in the declaration into one subject matter, and predicates of them, taken collectively, that they were the goods of *Horne* up to the time of the sale. That statement the replication does not deny, nor that the plaintiff claimed them through the sale from *Horne*; then the jury have found that that sale was fraudulent. [*Parke*, B.—You had to shew, on this replication, that *Horne* fraudulently sold that cow to the plaintiff. You certainly did not shew that, if it was the plaintiff's cow, and not *Horne*'s. *Alderson*, B.—You seem to take the admission on the record as an admission of the fact for all purposes, instead of a mere waiver of contest as to that fact.] Whatever facts are not traversed on the record, the sheriff has a right to take as admitted. [*Parke*, B.—He stands in the same situation as if the plaintiff had protested; a protestation being no longer necessary, since the new rules. Then the issue puts it on you to shew that this individual cow was fraudulently sold; which could not be, because she was not sold at all.] In

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Barnes v. *Hunt* (*a*), where the plea averred the identity of the trespasses, and set up a licence, it was held that the plaintiff might prove a trespass not covered by the licence.

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PARKE, B.—You might have applied that case, if a cow had been fraudulently sold; then you might fairly have said, this is *the* cow, and the plaintiff ought to have new assigned. But there was no cow at all sold; it is clear, therefore, your plea was not sustained. There would have been no confusion if that had been done which ought to have been done—that is, if all the articles claimed, except the cow, had been struck out of the declaration. But when the case is properly considered, it comes just to the same thing; the effect of the particular is in substance to restrict the issue to the cow. The whole defence stated in the last plea would, in truth, have been admissible under the second; the plea of no property in the plaintiff, means no property as against the defendant, which the plaintiff could not have if the sale was fraudulent.

ALDERSON and GURNEY, Bs., concurred.

Rule absolute.

Fraser appeared to argue in support of the rule.

(*a*) 11 East, 451.

HUGHES *v.* HUGHES.

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TRESPASS for breaking and entering the plaintiff's close, and with pigs consuming and spoiling his barley and potatoes being therein. Plea, not guilty. At the trial, at the last *Carnarvon* Assizes, the jury found a verdict for the plaintiff, damages 13*s*. The Master having taxed the plaintiff his full costs, *Welsby* obtained a rule to show cause why he should not review his taxation, and allow the plaintiff no more costs than damages.

Since the rules of *H. T.* 4 *Will.* 4, on not guilty pleaded in trespass *qu. cl. freg.*, the plaintiff is entitled to full costs, although he obtains less than 40*s.* damages, and the Judge does not certify.

J. Jervis shewed cause, and contended that the effect of the new rules as to pleading in trespass was to entitle the plaintiff to full costs. The rule of *H. T.* 4 *Will.* 4, title Trespass, provides that the plea of not guilty, in trespass *quare clausum fregit*, "shall operate as a denial that the defendant committed the trespass alleged in the place named, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." The title or freehold, therefore, cannot now by possibility come in question under the plea of not guilty; and the plaintiff is consequently, according to all the cases, entitled to his full costs, it being a case in which the Judge cannot certify under the stat. of 22 & 23 *Car.* 2, c. 9 (*a*).

Welsby, contrà.—If the rule is to be so construed, it amounts to a virtual repeal of the statute of *Charles* 2 in cases of trespass to real property; for in every case it must appear by the record, either that the title of freehold *did* come in question, or that it *could not* come in question; in either of which cases the statute, according to the cases, does not apply. [*Parke*, B.—There is one

(*a*) Extended to Wales by the 11 & 12 Will. 3, c. 9.

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case in which it might be a matter of doubt whether the freehold came in question—where there was a plea that the close was not the close of the plaintiff.] The effect of such a plea would be defined by a judicial decision, as soon as the point arose. No power is given to the Judges by the 3 & 4 *Will.* 4, c. 42, to repeal former acts of Parliament; and if it was, the new rules contain no reference to the statute of *Charles*, or to the subject of costs at all. The decisions on that statute have been long considered to be a deviation from its letter and meaning; and if the Court extend them to take in such a case as the present, all the mischief will be let in which the statute was intended to remedy.

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PARKE, B.—I quite agree in that observation. But the only question is, whether we can depart from the course of the modern decisions; and although it has frequently been regretted that the terms of the statute were so far deviated from, the Courts have never felt themselves at liberty to return to them; we must, therefore, now abide by those decisions. From them it follows, that if it appears from the pleadings that the freehold cannot come in question, the statute does not apply. Formerly, the freehold might have come in question on the plea of not guilty; since the new rules, it cannot. The plaintiff, consequently, is entitled to full costs, just as he would have been before the new rules on a plea of licence, or any other that did not bring the title or freehold in question.

ALDERSON and GURNEY, Bs., concurred.

Rule discharged (*a*).

(*a*) In a case of *Smith* v. *Edwards*, in this term, the Court of King's Bench decided, that where it appears by the pleadings, since the new rules, that the freehold cannot come in question, and therefore that the case is taken out of the statute of *Charles*, it is then brought within the 43 *Eliz.* c. 6, and the Judge may certify to *deprive* the plaintiff of costs.

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LESTER, Assignee of MACKAY, an Insolvent Debtor, *v.* LAZARUS.

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THIS was an action for an attorney's bill, tried before the under-sheriff of *Surrey*, when there was a verdict for the plaintiff for 4*l.* 10*s.* The only question was, whether a proper bill had been delivered according to the statute, the name of the Court in which the business was done not being stated. It appeared that the name of the Court was not entered in the insolvent's books. The defendant, on being arrested, was brought in custody to the *Exchequer* office to put in bail. *Mansel* had obtained a rule *nisi* for a new trial, on the above ground; against which

The assignee of an insolvent attorney need not deliver a bill signed by the attorney, before suing for business done by him.

The name of the Court in which the business is done is not required by the 3 *Jac.* 1, c. 7, to be stated in an attorney's bill delivered to his client: nor, *semble*, by the 2 *Geo.* 2, c. 23, s. 23.

Mahon shewed cause.—It is impossible that the defendant could have been misled by the omission, because, being brought to the *Exchequer* office to put in bail, he must have known that the business was done in this Court. But a party suing as an assignee need not deliver a bill at all under the 2 *Geo.* 2, c. 23, s. 23. An assignee, acting for the benefit of creditors, stands in the same condition as an executor or administrator, who, as it has been repeatedly decided, need not deliver a bill: *Penson* v. *Johnson* (*a*). Neither are parties to the contract; both sue for the benefit of creditors, and for the purpose of marshalling the assets. [*Alderson*, B.—Do you know of any provision in the insolvent acts by which an assignee can compel an insolvent attorney to deliver a bill? Because, if he cannot compel him, and cannot sue without a bill being delivered, he is disabled from suing at all.]

(*a*) 4 Taunt. 724. That case, however, only decided that an attorney's bill might (in C. P.) be referred for taxation, though it was his executor who sued on it. But see Andr. 276; 1 Barnard. 433; *Chapple* v. *Chapman*, Barnes, 122; *Griffiths* v. *Squire*, Ca. Prac. C. P. 58; *Barrett* v. *Moss*, 1 Carr. & P. 3.

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There is no such provision. Then, the assignee could not supply the name of a Court, which he did not find in the insolvent's books; nor is there any way of eliciting in what Court the business was done, unless the question happens to be asked of the insolvent on his examination. The statute itself says nothing about the name of the Court. [*Alderson*, B.—If there must be a bill delivered, signed by the attorney, it puts it in his power to enable his assignee to sue or not.] The Court here called on

Mansel, in support of the rule.—The Insolvent Act gives the largest powers of compelling a disclosure of the insolvent's property. It was competent to the commissioners to have required a full account as to this claim. Even if the delivery of a bill was not necessary under the 2 *Geo.* 2, c. 23, it was under the 3 *Jac.* 1, c. 7, which requires that all attorneys shall give a true bill to their masters or clients, of all charges concerning the suits they have for them, subscribed with their own hand and name, before they shall charge their clients with any fees or charges. Until a bill had been delivered pursuant to this provision, no perfect debt accrued to the attorney. Now, all that passes to the assignee is, the rights which were in the insolvent at the time of the assignment. There not being at that time a perfect debt, the right must be perfected by the assignee strictly according to the provisions of the statute. The client is no party to the proceedings under the Insolvent Act; his rights, derived from the legislature, are paramount to any rights as between the insolvent and his assignee. The case of executors is quite different; they cannot obtain the signature of the party after his death, and can only make out the bill from his books and papers. [*Parke*, B.—Your construction of the statute of *James* applies quite as much to executors as assignees, because you say there is no perfect debt till the delivery of the bill. *Alderson*, B.—So that if an

attorney happens to die without having delivered his bill, his executors have no claim for the money.] The law views the act of God and the act of man in an essentially different light. Here the plaintiff got the bill signed in fact by the insolvent, thereby at once negativing the impossibility.

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PARKE, B.—It seems to me that this case falls within the same principle as the case of an executor or administrator, and that the statute imposes only a personal prohibition on the attorney himself. That is the ground on which it has been held not to extend to executors; the case of an assignee is just as much within that distinction; and I am of opinion that he is not required to deliver a bill under the statute. But Mr. *Mansel* argues, that no debt at all accrued to the attorney, on the true construction of the statute of *James* 1, until the delivery of a bill; and that the provisions of that statute differ in this respect from those of the *2 Geo. 2.* If that were so, executors and administrators could not sue for a bill due to their testator; but I am clearly of opinion, that such is not the true construction of the act, but that it only operates to prevent the party from suing for the debt, until he shall have complied with its provisions. But even if that were otherwise, there is enough here to satisfy the statute of *James*, which requires no more than the delivery of a bill signed by the attorney. The objection here arises on the statute of *Geo. 2*, which requires the delivery, a month before action brought, of such a bill as shall enable the party charged to apply to the Court in which the greatest part of the business shall have been done, to have it taxed. Such being the object of that statute, the statement of the Court may be a necessary part of the bill. Under the statute of *James*, therefore, a sufficient bill has been delivered; so that there was clearly a debt under that statute, which was assignable to

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and recoverable by the assignee; although I should have held without difficulty that there was a sufficient debt before the delivery of the bill. Then does the statute of *Geo. 2* apply to the case of an assignee? It clearly does not to executors; and that on the ground that it imposes only a personal prohibition, and that otherwise they would lose the debt, since they are under a physical impossibility of doing what the statute requires. For the same reason it ought not to extend to assignees, who, though they are not under a physical impossibility of obtaining the signature of the attorney himself, would nevertheless be placed in a great difficulty, which often they could not surmount; as, if the attorney had committed an act of bankruptcy by going out of the realm, and other cases that might be referred to; and it would in all cases be left at the option of the insolvent whether the debt should be recoverable or not. The case falls, therefore, within the same principle as that of executors; and it comes to this, that it is unnecessary to decide whether this was a sufficient bill or not. If it is sufficient, all is done that the statute requires; if it is insufficient, then I think no delivery of a bill is required by the statute at all.

BOLLAND, B.—I am of the same opinion. Any other interpretation would be productive of very great injustice to creditors, inasmuch as it would be putting them to the risk of losing the debt, because the insolvent has not at the time done that which they have no power of compelling him to do.

ALDERSON, B.—I am of the same opinion. I am by no means prepared to say that this is not a sufficient bill within the *2 Geo. 2.* I do not at present see the necessity for stating the Court in which the business was done; it is not expressly required by the statute, and can only be necessary by implication from the provision as to the ap-

plication to be made to the Court for taxation of the bill. But why may not the fact in what Court the business was done be ascertained by evidence extrinsic of the bill itself? On the other points, which have been so fully gone into by my Brother *Parke*, it is unnecessary for me to say more than that I entirely concur in all he has stated.

GURNEY, B.—I am not at all prepared to say, that if this were an action by the attorney himself, this motion ought to succeed; but I am clearly of opinion, that the statute imposes only a personal prohibition.

PARKE, B., afterwards added,—Perhaps the more extensive language of the statute of *James* might operate to preclude an attorney, not only from suing for, but also from *setting off* the amount of the bill unless delivered. It has been held, that the 2 *Geo.* 2 applies only to the case of attorneys suing as plaintiffs.

Rule discharged, with costs.

ATTORNEY-GENERAL *v.* GREAVES.

THIS was an information founded on the 3 & 4 *Will.* 4, c. 53, s. 44, charging the defendant with assisting and being otherwise concerned in unshipping from a certain vessel divers goods, to wit, 2196 *lbs.* weight of foreign nux vomica, of the value of 284*l.* 6*s.*, and 1626 *lbs.* weight of foreign coculus indicus, of the value of 210*l.* 8*s.* 8*d.*, the said nux vomica and coculus indicus being liable to the duties of customs, the said duties of customs for the

Goods, the importation of which is prohibited when coming from particular places, may, under the 3 & 4 *Will.* 4, c. 53, s. 30, be described in an information for penalties as goods liable to and unshipped without payment of duty, and the defendant may be charged with having been concerned in the unshipping, the duties not having been first paid or secured; although it appear that they were in fact imported from a place to which the prohibition applies.

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same not having been first paid or secured, contrary &c. At the trial before Lord *Abinger*, C. B., at the sittings after *Trinity* Term, the following appeared to be the facts of the case:—

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On the 8th of *August*, 1834, the ship *Earl Clancarty* was entered at the Custom House, from *Rotterdam*, having on board thirty-four bales directed to the defendant, described in the Custom House report as "contents unknown, consigned to order." On the same day the defendant applied for the goods, and passed an entry and paid duty for them, agreeably to the forms required at the Custom House, as bay berries. On the 11th of *August*, the bales were landed under the inspection of the landing waiter; and were about to be weighed for the purpose of ascertaining the amount of duty, when one of the bags burst, and was found to contain, together with the bay berries, a quantity of nux vomica and coculus indicus; and the other bales being subsequently examined, twenty of them were found to be filled with nux vomica and coculus indicus. The duty on bay berries is *2s.* the *cwt.*, on nux vomica and coculus indicus *2s.* 6*d.* the *lb.* It was admitted that both of the latter articles are the produce of tropical climates. The counsel for the defendant thereupon objected, that, inasmuch as by the Navigation Act, 3 & 4 *Will.* 4, c. 54, s. 3, goods, the produce of *Asia*, *Africa*, or *America*, were prohibited (with certain exceptions not applying to the present case), to be imported from *Europe* into the United Kingdom to be used therein; the goods in question, coming from *Rotterdam* for home consumption, were, under the circumstances, goods absolutely prohibited to be imported, and on which no duty would be payable; and therefore the defendant could not properly be charged with having unshipped them, "the duties for the same not having been first paid or secured;" and they cited the *Attorney-General* v.

Key (*a*), as an authority for this position. For the Crown, the 30th section of the 3 & 4 *Will.* 4, c. 53, was relied on; by which it is provided, "that all goods, the importation of which is *in any way restricted*, which are of a description admissible to duty, and which shall be found and seized in the *United Kingdom* under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, be described in any information exhibited on account of such penalty or forfeiture, as goods liable to and unshipped without payment of duties." The Lord Chief Baron inclined to the opinion that the offence was misdescribed in the information, but reserved the point; and other evidence having been given for the purpose of shewing the defendant's guilty knowledge of the fraudulent importation, the jury found a verdict for the Crown, leave being reserved to the defendant to move to enter a verdict for him. A rule having been obtained accordingly,

The *Solicitor-General*, *Tancred*, and *Kaye*, shewed cause.—The goods in question were rightly described in the information, and did not fall within the meaning of *prohibited* goods, in the sense in which that term is used in the acts relating to the customs; but of goods the importation of which is *restricted*. As such, they were properly described, under the provision of the 3 & 4 *Will.* 4, c. 53, s. 30, as goods liable and unshipped without payment of duty. *Prohibited* goods are a class well known to the revenue laws, and entirely different from those, the importation of which is restricted when coming from a particular place, or being the growth of a particular climate. By the 58th section of the 3 & 4 *Will.* 4, c. 52,

(*a*) 1 C. & J. 159; 2 C. & J. 2, on error.

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(the Customs Regulation Act), it is enacted, that the several sorts of goods enumerated or described in the table following, denominated "A Table of Prohibitions and Restrictions Inwards," shall either be *absolutely prohibited* to be imported, or shall be imported only under the restrictions mentioned in such table, according to the several sorts of such goods as are respectively set forth therein. Then follow two lists, the first of goods absolutely prohibited to be imported, the second of goods subject to certain restrictions on importation; in neither of which, however, coculus indicus or nux vomica is to be found. But they are clearly not goods absolutely prohibited *in their own nature*, because a duty of *2s. 6d.* a *lb.* is imposed upon them on importation; and, although the importation of them from the place from which these goods in fact came is prohibited, yet they fall within the provision of the 3 & 4 *Will.* 4, c. 53, s. 30. That section was enacted in place of the proviso contained in the 6 *Geo.* 4, c. 107, s. 128, which was in force at the time when the case of the *Attorney-General* v. *Key* was decided, and which provided, "that all goods, the importation of which was in any way restricted, either on account of the packages, or the place from whence the same should be brought, or otherwise, should be *deemed and taken to be prohibited* goods; and that if any such goods should be imported into the United Kingdom other than to be legally deposited or warehoused for exportation, the same should be forfeited." [*Alderson*, B.—That provision might be for the purpose of forfeiture, not for the purpose of description—that they might be *forfeited* as such.] The Court held, in the *Attorney-General* v. *Key*, that it could not be confined to that narrow construction, but imposed upon the Crown the necessity of *describing* such goods as prohibited goods. [Lord *Abinger*, C. B.—They were not liable to the payment of duties, under the circumstances, but liable to forfeiture.] They were spirits,

on which an actual duty was imposed; but the judgment proceeded upon the ground that, although they were, in fact, goods liable to duty, yet, as the statute had in terms declared that they should be deemed and taken to be prohibited goods, they must be so charged. In the *Attorney-General* v. *Jewers* (*a*), which was cited in that case, and which was an action of debt for duties, it was objected, as to part of the goods, viz. the *French* wines coming from *Holland*, that they were prohibited and forfeited, and so no duties were payable. But, *per* Lord Chief Baron *Pengelly*, "this is not an absolute prohibition, but a prohibition *sub modo*, as in case of brandies had been resolved since the case of *Doe, qui tam*, v. *Cooper, Mich. 2 George.*" The same argument did not prevail in the *Attorney-General* v. *Key*, by reason of the proviso in the 6 *Geo.* 4, c. 107, s. 128. The 3 & 4 *Will.* 4, c. 52, s. 132, is in the same terms as the 6 *Geo.* 4, c. 107, s. 128, except that the proviso is omitted. By that omission, the whole force of the argument on which the decision in the *Attorney-General* v. *Key* was rested, and the authority of the *Attorney-General* v. *Jewers* was resisted, falls to the ground; and if the question rested merely on the absence of that proviso, the present objection would be sufficiently answered. But the provision of the 2 & 3 *Will.* 4, c. 84, s. 30,—re-enacted in the 3 & 4 *Will.* 4, c. 53, s. 30,—which was evidently introduced in consequence of the decision in the *Attorney-General* v. *Key*, meets the very difficulty, and places the question beyond doubt. That clause is framed for the benefit of defendants, so as to make the description most easily liable to the apprehension of the party charged. The case of the *Attorney-General* v. *Tomsett* (*b*) is a direct authority against the defendant. The importation of silks of the description there charged, was illegal just in the same way as the importation

(*a*) Bunb. 225. (*b*) Ante, 170.

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of coculus indicus from *Holland* is illegal; and the present objection was taken at *Nisi Prius*, and overruled, but was made no ground of the motion for a new trial. These, in their nature, are customable goods; it was only by the force of the proviso in the repealed act that they were made otherwise for the purpose of proceeding for the penalties; by the repeal of that proviso, they relapsed into their natural state; but even if that were otherwise, the direct enactment of the 3 & 4 *Will.* 4, c. 53, s. 30, enables the Crown to describe them as they are described in this information.

But there are also several ways in which the importation of such goods might be allowable from *Europe*. For instance, if they had been brought in a *British* ship from a tropical climate, and then exported to *Holland*, they might be re-imported from *Holland* without incurring any penalty, by means of a bill of store, under the provisions of the 3 & 4 *Will.* 4, c. 52, s. 33. They would, in such case, be liable to duty, but would come directly within the terms of the information, as imported without the payment of duty. That may, for aught that appears, have been the case in the present instance.

J. Jervis and *Welsby*, for the defendant.—With respect to the last argument, even if there were any foundation for it in the facts of the present case, it is sufficiently answered by referring to the provision in the 34th section of the same act, which requires that the consignee or proprietor of the goods shall subscribe a declaration on the bill of store to the identity of the goods so exported and returned, and the continuance of the property in the same person, in default of which they are to be deemed foreign goods, and imported for the first time.

Then, as to the main question. The argument on the other side has throughout fallen into the error of confounding the description of the *goods* in the information, with the description of the *offence* charged. The clause

on which the information is founded contemplates two classes of cases only: *first*, the unshipping, &c., of *prohibited* goods; and *secondly*, of *customable* goods. Each of these is admitted to form a distinct class known to the laws of customs. There is also a *third* class, which is described by the title of *restricted* goods, and is provided for, not by that clause, but by the 3 & 4 *Will.* 4, c. 53, s. 30. But the goods in respect of which this offence is charged were not *restricted*, but *prohibited* goods. It is said they cannot be so, because they are of a description on which a duty is imposed. But in the list of goods absolutely prohibited to be imported, in s. 58 of the Regulation Act, there are to be found several, *e. g.* clocks, beef, fish, &c., which are found also in the table of duties. The argument drawn from the enumeration of coculus indicus and nux vomica in the table of duties has therefore no weight: but, being imported from *Europe*, they are absolutely inadmissible to duty. The 60th section of the Regulation Act directly enacts, that if by reason of the sort of any goods, *or the place from whence*, or the country or navigation of the ship in which they have been imported, they be such, or be so imported, as that they may not be used in the United Kingdom, they shall not be entered except to be warehoused, and it shall be declared upon the entry that they are entered to be warehoused for exportation only. The commissioners, therefore, have no power, in such a case as the present, to remit the penalty, and allow the goods to come in for home consumption; so that under no conceivable circumstances can a duty be payable on these goods. Then, what is the effect of the 3 & 4 *Will.* 4, c. 53, s. 30? Two things are requisite in order to make it applicable; first, the goods must be *restricted* goods, that is to say, goods mentioned in the table of restrictions, which these are not; and, secondly, they must be goods admissible on payment of duty, which it has been shewn that these are not. Restricted goods

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may, at the option of the commissioners, be admitted to duty, and may accordingly be described as goods admissible to duty; prohibited goods, whatsoever the ground of the prohibition, cannot. In respect of them, therefore, no penalty can be incurred for importing them *without payment of duty*, which is the offence charged against this defendant. A mere provision as to the mode of describing the *goods* cannot alter the nature or character of the *offence*.

The case of the *Attorney-General* v. *Tomsett* is not an authority against the defendant. In the first place, it was ruled without a reference to all the clauses bearing on the question; and the ruling was acquiesced in by the defendant's counsel, because it fell in with what he considered the main ground of defence, viz. that there was there no importation at all. In the next place, silks, which were the subject of the information in that case, are in the table of restrictions, and it may be admitted that they fall within the 30th section, without touching the present argument. But, on the other hand, the *Attorney-General* v. *Key* is strongly in favour of the defendant. The goods in that case were of a description admissible to duty; but because the legislature had said, that, coming in particular packages, they should be "deemed and taken to be" prohibited goods, it was held essential that they should be so described; but in the present case, there is a positive prohibition, by the statute itself, on their coming in at all. Suppose the proper rate of duty had been paid on these goods, but the Crown, afterwards discovering that they were imported from *Rotterdam*, had chosen to proceed for the penalties, and had described them as liable to the payment of duties, it would have been no defence to shew the payment of duties; the answer would have been, that they were prohibited goods, not admissible to duty, and that the duties had been received by mistake. Various clauses in the present statute may be referred to

to shew that the legislature do not put the same construction on the words "deemed and taken," as on the word "described." Thus, s. 29 provides, that spirits and tobacco found removing without a permit, shall *primâ facie* be *deemed and taken to be* unshipped without payment of duty. So, by s. 76, vessels or goods seized and ordered to be prosecuted, shall be *deemed and taken to be* condemned, unless the owner gives notice that he intends to claim them. The same words occur in ss. 77, 92, 100, 117, and 118; and in ss. 119, 120, 121, and 125, of c. 52. In the present case, the ordinary terms are deviated from, and the less extensive word "described" is alone employed.

It has been said, that the effect of s. 30 is, that the goods shall, for the purpose of the information, be deemed to have come from a legal port. But that is repugnant to s. 48 of the Regulation Act, which enacts, that no goods shall be deemed to be imported from any particular place, unless they be imported direct from such place, and shall have been there laden on board the importing ship, either as the first shipment of the goods, or after they shall have been actually landed at such place. The goods, therefore, must be *deemed* to have come from *Rotterdam*, where they were last shipped, and whence they could not be lawfully imported for home consumption. [*Alderson*, B.—If your argument is well founded, there is no clause whatever directed against the unshipping of goods prohibited *sub modo*.] The whole difficulty is avoided by applying the term *restricted* in s. 30 to the goods which the statute points out in the table as being restricted, and which are, in fact, prohibited *sub modo*. But in that table no goods are to be found which are prohibited by reason of the place from which they come. [*Parke*, B.—Is there any clause authorizing the commissioners to admit to duty goods which are restricted as imported from improper

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places or in particular packages?] There is no such provision.

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The *Solicitor-General*, in reply.—[Lord *Abinger*, C. B. —I will put this case: suppose, after this offence, you had filed a second information against the defendant, describing the offence as the unshipping of goods coming from *Rotterdam*, and prohibited to be imported thence, and he had pleaded that he had been before convicted, and demurred to the information?] It is submitted the demurrer could not have been sustained. [*Parke*, B.—If the argument for the Crown is right, the consequence, however absurd, would certainly be, that an information stating the offence according to the fact would be demurrable; because, if the 30th section applies to all goods prohibited *sub modo*, it is imperative upon the Crown to describe the offence in the manner there pointed out.] That is the necessary consequence of every enactment which says that one thing shall be deemed and taken, for the purposes of the enactment, to be something else than it is in fact. But if the argument on the other side be correct, the Crown must be thrown into the difficulty of finding out in every case, however clear the intention to defraud the revenue, whether the ship came direct from *Europe* or from *Asia*. The intention of s. 30 was clearly to relieve the Crown from the embarrassment of going into any such inquiry. If the defendant had actually paid the duties, he would be subjected to no hardship or injustice by being afterwards compelled to pay the penalty for the breach of the Navigation Act. It is clear the legislature meant to make a distinction between goods prohibited altogether, and those prohibited *sub modo*: but the argument for the defendant in effect applies to every article which is the subject of restriction, for they all become prohibited when the clauses of restriction apply to them. Then s. 30 is made inoperative altogether.

Lord ABINGER, C. B.—The Court cannot but regret that, in a case of this kind, likely to be of such great importance and frequent occurrence, there had not been somewhat more pains bestowed on the act of Parliament. I have no doubt, on full consideration of the case, that the Solicitor-General is right; that the legislature really meant that the *offence* should be so described; and if the words of the clause had been somewhat different, there would have been undoubtedly no ambiguity upon them,—if they had stated that the *offence* should be described in that manner; but the ambiguity arises from saying that the *goods* shall be so described. Looking, however, at the whole clause together, it appears to me that the intention was that they shall be so described *for the purpose of recovering the penalty*. The legislature evidently meant to avoid the inconvenience which had resulted from the former decision, which I do not at all impugn. The act of Parliament had stated the way in which goods, under such circumstances, should be described; and I am not at all disposed to quarrel with the doctrine there laid down, that, by force of the terms of that act of Parliament, they were brought under the title of prohibited goods, and therefore the Crown could not aver, against the act of Parliament, that they were not prohibited. By this act that difficulty is removed; it says, that goods which were within a certain predicament shall be described as goods liable to the payment of duty, for the purpose of recovering the penalty; and I think the object of the legislature was to say, that the mode of information shall be the same as if the goods had been imported without payment of duty. That is the short ground on which I think this objection fails. It has been very ingeniously argued, and I was staggered a good deal in the course of the argument. I do not wish now to explain my impression of the different clauses, lest I should put a wrong construction on them, which one

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had rather not do. It appears to me, substantially, that the information is correct, and that the defendant could not meet that charge by saying that he had imported the goods from *Rotterdam*. On that short ground I think that the objection fails, and that the Crown is entitled to sustain this verdict.

PARKE, B.—I am of the same opinion, that the Crown is entitled to sustain the verdict. This information is founded on the 3 & 4 *Will.* 4, c. 53, s. 44, which imposed a penalty on any person who should "assist or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom, or into the *Isle of Man*, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed," any such goods. The question is on the construction of this clause, taken in conjunction with other clauses on which the point mainly depends. The clause appears to have adopted almost precisely the same words as the corresponding clause in the stat. 6 *Geo.* 4, which was the subject of discussion in the case of the *Attorney-General* v. *Key*. It appears that there are three descriptions of goods; goods absolutely prohibited by law, in respect of which there could be no mistake; goods specially prohibited to be imported under particular circumstances, including goods prohibited to be imported by the general provisions of the Navigation Act; and goods permitted to be imported on the payment of certain duties, under the Customs Act. This clause in the 6 *Geo.* 4, and the clause of the act now in question, are intended to apply to all those cases. The question is, whether the goods in question, which may be imported *sub modo*, fall under the description of prohibited goods, or of goods unshipped without payment of duty. It is a question merely of form, for there is no

doubt that an offence has been committed. When this point was before the Court in the *Attorney-General* v. *Key*, the Court were of opinion that the goods fell under the description of prohibited goods. They mainly relied upon the express provision of the 6th of *Geo.* 4, c. 107, s. 128, which provides, "that all goods, the importation of which is restricted, either on account of the packages, or the place from whence the same shall be brought, or otherwise, shall be deemed and taken to be prohibited goods; and if any such goods shall be imported into the United Kingdom other than to be legally deposited or warehoused for exportation, the same shall be forfeited." That clause put a qualification on another clause, which enables the officer to seize all goods so imported. The argument in that case was, that this being a qualification of the other clause, was meant to extend to seizure only, leaving the penalty clause just as it was. That was an argument worthy of much attention; but the Court disposed of it by saying, that they must put the same construction on the proviso in all cases; that it was intended to apply to all cases; and that all goods capable of being imported *sub modo*, and not capable of being imported at all, were to be deemed prohibited goods; and it was on that ground that the judgment of the Court proceeded. Now, that proviso has been left out; and on the present occasion, an argument arises on that which was a very considerable question, whether, if there were no other clause iu lieu of it, this might not be described as an aiding and assisting in the illegal unshipping of goods without payment of duty. But it appears to me that all difficulty is removed by the enactments of 3 & 4 *Will.* 4, c. 53, s. 30, and the 2 & 3 *Will.* 4, c. 84, s. 30. The latter section seems to have been introduced, for the very purpose of obviating all difficulty. It provides, "that all goods, the importation of which is restricted, either on account of the package, or the place from which the same shall be brought,"

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—which precisely applies to the case in question—"or otherwise, which are *of a description* admissible to duty, and which shall be found and seized in the United Kingdom, under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture, or for any penalty incurred in respect of them, be described in any information exhibited on account of such forfeiture or penalty, as goods liable to and unshipped without payment of duties." If the question had arisen upon that clause, there could, I apprehend, have been no doubt that it applied to the present case. The goods in question, which were restricted on account of the place from which they came, were liable to be seized; the only difficulty would arise on the words "admissible to duty." As I understood Mr. *Jervis*, he contended that the section is meant to apply only to those cases where the goods were, in fact, admissible on the payment of duty. Now it appears, on inquiry, that there is no case in which goods prohibited *sub modo* could be admitted on payment of duty. If they are imported under circumstances in which they are liable to forfeiture, there is no clause enabling those specific goods to be admitted on payment of duty. Therefore, we must see whether the words of this section are not to receive a different interpretation—whether the words "of a description admissible to duty" do not mean, not that those specific goods so imported are to be capable of being imported on the payment of duty, but that they are goods that could be imported on payment of duty if they were not subject to those restrictions. Then if we look to the 3 & 4 *Will.* 4, c. 53, s. 30, (and there is no doubt we must put the same construction upon this clause, for it is nothing more than a re-enactment of the same clause), that is—"That all goods, the importation of which is in any way restricted,"—and therefore that clearly includes the case of goods from a port from which they could not legally come—"which are of a description

admissible to duty, and which shall be found and seized in the United Kingdom under any law relating to the customs or excise, shall, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, be described in any information exhibited on account of such forfeiture or penalty, as goods liable to and unshipped without payment of duties." Therefore it appears to me that the construction of the clause is, that all goods, except those totally prohibited, are to be described as goods unshipped without payment of duties. On this ground I am of opinion that the information is properly laid.

ALDERSON, B.—I am of the same opinion. I cannot help thinking that, before the case of the *Attorney-General* v. *Tomsett*, this question must have come before the Court of *Exchequer* since I have been in it, for it was not at all new to me when the point arose in that case, and when the clause was pointed out to my mind. Whether that be so or not, the ruling at *Nisi Prius* was fully admitted when the case came before the Court. It was a case of great importance to the parties on account of the great value of the goods, I think 14,000*l.* or 15,000*l.*; but no objection was made on that ground, and the Court pronounced judgment against the defendant—quite wrongfully, if this objection was a valid objection; for undoubtedly the objection was upon the face of that information as it is upon the face of this. I consider, therefore, the case of the *Attorney-General* v. *Tomsett* not merely as bearing upon the question, but as a decision of considerable weight; the decision at *Nisi Prius*, when that case came before the Court, being confirmed and acquiesced in by the Court; for that is the undoubted effect of the proceedings: the objection would certainly have been taken, if the counsel had felt that there was any doubt that the Court would have come to the same conclusion. It appears to me that

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the offence charged being, the being concerned in the unshipping of prohibited or uncustomed goods, in order to describe the offence you must look to the 30th section; that directs that, in the information for the penalty or forfeiture, the goods shall be described in a particular way. Now, how are those goods to be described in the information as that section directs? It appears to me that to say that goods, under certain circumstances, shall be described in a particular way, is in substance saying, that that shall be the description of the offence; the description of the goods necessarily involving the description of the offence, which consists in unshipping those goods. In construing the clause, it appears to me also that you must take into consideration the previous clause, the 2 & 3 *Will.* 4, c. 84, s. 30, for I consider the words of the 3 & 4 *Will.* 4, c. 53, s. 30, as only describing in general words that which is to be found more specifically stated in the corresponding section of the former act. Trying it by that test, what are the words of the 2 & 3 *Will.* 4, c. 84?—"that all goods, the importation of which is restricted either on account of the package, or the place from which the same shall be brought, or otherwise, which are of a description admissible to duty, and which shall be found and seized in the United Kingdom, &c. under any law relating to the customs or excise, shall be described as goods liable to and unshipped without payment of duties." I therefore read the 30th section of the 3 & 4 *Will.* 4, c. 53, as if it contained the words "on account of the package, or on account of the place from which brought, or otherwise." Then, these being goods which are prohibited from being imported by reason of the place from which they are brought, they are to be described as goods uncustomed.

A difficulty occurred to my Brother *Parke,* as to the "description admissible to duty." Now, the words "admissible to duty" follow on the words "the importation of which is restricted;" therefore the goods admissible to

duty must be, goods admissible to duty provided they are not imported under the restriction. If that is so, the whole becomes plain and clear, and the 30th section applies to those goods which are admissible to duty if the importation is made in a proper manner, and describes them as uncustomed goods. Possibly this clause may have been inserted for the reason the Solicitor-General assigned, that of preventing the Crown from being at the necessity of proving the manner of the importation—whether they were in the proper manner admissible to duty. With respect to goods actually prohibited, there is no difficulty; for they are expressly named in the act of Parliament, and consequently naming them in the information would of itself shew that they were goods of a prohibited description. With respect to the difficulty which occurred to the mind of my Lord Chief Baron, of an information for a second offence, it strikes me that would not really occur, for the prohibited goods would be found *nominatim* in the act of Parliament. It appears to me that the clause referred to in the *Attorney-General* v. *Key* would be utterly incomprehensible if this were not the right construction; for it would be absurd to say that goods, the actual importation of which is prohibited in a clear manner, were to be taken as prohibited goods. I do not think the legislature could be guilty of such absurdity. I apprehend the reason of the difference of phraseology that occurred between the 2 & 3 *Will.* 4, c. 84, and the 3 & 4 *Will.* 4, c. 53, is this, that at the time the former act passed, the clause under which the *Attorney-General* v. *Key* had been determined remained in force, and consequently the legislature thought fit to negative it *in terminis;* and after that, they enacted in the 3 & 4 *Will.* 4, c. 53, the same clause without those words. Had they put in the whole of the general words in the 3 & 4 *Will.* 4, c. 53, that would have removed all difficulty. There is another reason why the clause in question should have been passed. When goods are pro-

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hibited in the strictest sense, they are named. If these goods are prohibited *sub modo*, in order to bring them within the four corners of the information, it might be necessary to describe the manner of the importation, and that might subject the Crown to great difficulty. The information might describe them as coming from *Rotterdam*, and they might in fact have come from *Amsterdam*.

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GURNEY, B.—I am of the same opinion. If we were to allow this objection to prevail, we should defeat the purpose for which the 30th section was framed, and I think we should violate both its spirit and its letter. Every ingredient in that section is to be found in this case. The goods imported are goods the importation of which is in a certain way restricted; being the growth of *Asia* or *Africa*, they are not to be imported from any port in *Europe*. The goods are of a description admissible to duty—the meaning of which must be, that, but for the restriction, they are admissible to importation on payment of duty. They have been found and seized in the United Kingdom under the laws relating to the customs. Therefore, for the purpose of proceeding for their forfeiture, or for a penalty, the act directs that the goods shall be described in the information as goods liable to and unshipped without the payment of duty, and the information has so described them.

Rule discharged.

FERGUSON and Another, Assignees, *v.* MITCHELL.

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DEBT by the plaintiffs, assignees of *J. W. Bromley*, an insolvent debtor, for goods sold and delivered by the insolvent to the defendant, and on an account stated between them. The declaration stated, that the defendant was summoned to answer the plaintiffs, assignees as aforesaid, and that they demanded of him 40*l.*, which he owed to and unjustly detained from them; that he was indebted to the said *J. W. Bromley*, before he subscribed his petition for his discharge from imprisonment, and before he executed the conveyance and assignment of his estate and effects according to the statute, for goods sold and delivered by the said *J. W. Bromley*, before he became insolvent, to the defendant, at his request, and for money found to be due from the defendant to the said *J. W. Bromley* on an account stated between them; which several monies were to be paid by the defendant to the said *J. W. Bromley*, before he became insolvent, on request: and concluded, that an action had accrued to the plaintiffs, as assignees as aforesaid, to demand and have from the defendant the said several monies respectively. Special demurrer, assigning for causes, that it does not sufficiently appear by the declaration in what capacity or character the plaintiffs sue the defendants; that though the plaintiffs state themselves to be assignees of the estate and effects of the insolvent, yet they do not sue the defendant *as* such assignees; that the defendant was summoned to answer the plaintiffs in their individual character, and not as such assignees; that, though the plaintiffs in the declaration state themselves to be assignees, and sue the defendant for special demurrer, for want of an allegation of the time when the account was stated. It should be "on an account *then* stated between them."

If a demurrer be pleaded to the whole of a declaration consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment.

In debt by assignees of an insolvent or bankrupt, it need not be stated that the plaintiffs sue "as assignees;" it is enough if it sufficiently appears that they are assignees.

Assignees may declare in the *debet* and *detinet*, and the omission of the *queritur* is immaterial.

The declaration stated, that the defendant was indebted to the insolvent, before he subscribed his petition, or executed the assignment of his estate under the Insolvent Act, for goods sold and delivered by him, *before he became insolvent:*— *Held*, a sufficiently certain allegation of the time when the debt accrued.

A count, stating that the defendant was indebted to the plaintiff on an account stated between them, is bad, on special

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a debt alleged to be due to the insolvent, they nevertheless complain that the defendant owes the same debt to them, the plaintiffs; that though they state that the defendant is indebted to another party in a certain sum, they nevertheless demand the same debt as due to themselves; that the plaintiffs claim a debt growing out of a contract to which they were not parties; that it is not stated in the first count of the declaration, that the goods therein alleged to have been sold or delivered by the said *J. W. Bromley* to the said defendant, were so sold and delivered previously to the time of subscribing or of filing the petition for his discharge from imprisonment, or of executing the conveyance and assignment of his estate and effects under the act; that it does not distinctly appear that the said debt in the first count claimed was due or growing due at the time of filing such petition; that it does not by the first count appear, but that the said goods were sold and delivered by the said *J. W. Bromley* to the defendant after such conveyance and assignment, or at what time they were sold and delivered; that it does not appear but that the account in the second count alleged to have been stated, was stated after such conveyance and assignment; and that no time is mentioned or set forth when the said alleged account was stated, and that it does not clearly appear between what parties such alleged account was stated; that it does not appear that the said several monies in the declaration mentioned were to be paid by the defendant to the said *J. W. Bromley*, or that the defendant was liable to pay the same, before the said *J. W. Bromley* subscribed his petition or filed the same, or before the execution of the said conveyance and assignment; and that it is not stated in the declaration that the defendant has not paid the same several monies therein demanded to the said *J. W. Bromley*, before he subscribed his said petition.

Joinder in demurrer.

Arnold, in support of the demurrer.—*First*, the declaration ought to have stated that the defendant was indebted to the plaintiffs *as* assignees, otherwise it does not appear in what capacity they sue: *Brigden* v. *Parkes* (*a*), *Henshall* v. *Roberts* (*b*). In *Cobbett* v. *Cochrane* (*c*), a breach in non-payment to the plaintiffs, assignees as aforesaid, was held sufficient; but there they had declared *as* assignees. [*Parke*, B.—If you take the meaning here to be, "*A.* and *B.* being assignees as aforesaid," it is sufficient. If there was a debt due to the insolvent before his insolvency, and they are his assignees, they are entitled to recover. The cases you refer to were cases of joinder of contracts with a testator and with his executors.] *Secondly*, it is clear that *executors* cannot sue in the *debet* and *detinet*; *Fitz. Nat. Brev. Dette*, 119 *b*; 1 *Wms. Saund.* 112, *n.* 1; and the same reason applies to assignees of an insolvent, because they are not parties to the contract. [*Parke*, B.—In *Lord* v. *Houston* (*d*), it was held that the *queritur*, the omission of which you complain of, is superfluous, and may therefore be rejected. It is but a recital of a supposed writ, which is unnecessary; and now, if you look at the new rules, you will find that no recital of the writ is necessary in making up the issue. The writ itself would be bad, if not laid in the *debet* and *detinet*.]

Thirdly, the declaration states, that the debt arose for goods sold and delivered by *Bromley* before he became insolvent, which is a vague and indefinite expression, and a departure from the rule of pleading, which requires all important allegations to be certain to a certain intent. The title of the assignee arises from the 11th section of the Insolvent Act, 7 *Geo.* 4, c. 57, which requires a conveyance from the prisoner to the assignee "of all debts due or growing due to the said prisoner." These words

(*a*) 2 Bos. & P. 424.
(*b*) 5 East, 150.
(*c*) 8 Bing. 17; 1 Moo. & Sc. 45.
(*d*) 11 East, 65.

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perhaps mean, that the debts then inchoate, which shall become due before the discharge of the insolvent, shall vest in the assignee; if so, the declaration should allege that the cause of action accrued before discharge. An insolvent differs from a bankrupt; the latter is adjudicated to be so by act of law, and the moment, therefore, of bankruptcy is determinable; there is no point of time which can be fixed upon as the commencement of insolvency. It may be at the time of signing the petition, or of the prisoner's discharge, or at any moment when he is unable to pay his debts. On the allegation in the declaration, *non constat* but that the debt in question might have accrued due years before, and the defendant is accordingly precluded from pleading the Statute of Limitations.

Fourthly, no time is set forth when the account was stated; which is in direct contravention of the rule, that all material allegations must be laid with time, and if not so laid, advantage may be taken of the omission on special demurrer; *Higgins* v. *Highfield* (*a*), *Denison* v. *Richardson* (*b*); and the rule, as stated by Mr. Serjeant *Stephen* (*c*), shews that the time is an essential part of the contract.

Platt, contrà.—The 7 *Geo.* 4, c. 57, s. 19, provides, "that it shall be lawful for the Court to appoint proper persons, being creditors of the prisoner, to be assignees of the estate and effects of such prisoner, for the purposes of the act." When parties sue, therefore, as assignees, this Court will take for granted that all has been done by them which is necessary, and which has not been traversed. By s. 11, the insolvent is to make assignment to the provisional assignee of all his debts due and grow-

(*a*) 13 East, 407. (*b*) 14 East, 291.
(*c*) Principles of Pleading, 343.

ing due. As the insolvent cannot get discharged without such assignment, any debt due to the insolvent must relate back to the time of the assignment. The allegation "before he became insolvent," must either refer to the time of filing the petition, or the time when he became unable to pay his debts. And there is no greater difficulty of pleading the Statute of Limitations in this than in other actions. As to the omission of time in the account stated, the time is sufficiently pointed out in the previous allegation, "before he became insolvent."

PARKE, B.—The first question remaining for consideration is, whether the allegation of the defendant being indebted for goods sold and delivered by *Bromley* before he became insolvent, is laid with sufficient certainty or not. Now, in the old pleadings, before the new rules, it would have been sufficient to state that the defendant was indebted for goods sold "before that time," as it was open to prove, on such a statement in the record, the delivery of goods at different times, and therefore greater certainty of time was not required. Here, whether the words "before he became insolvent" mean the time of signing the petition, or the time of inability to discharge his debts, we think in either case the allegation is good; and as the declaration properly lays the time to be before the subscribing the petition, and before the conveyance, the defendant would have had no difficulty in pleading the Statute of Limitations. As to the omission of time in the count on the account stated, it certainly is a valid objection, and on so much of the declaration the defendant would have been entitled to judgment, if his demurrer had been confined to that count: for as it is clear that the plaintiff might have recovered on one part of the declaration, and not on the other—for the goods sold and delivered, and not on the account stated,—the declaration must be considered as

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consisting of several counts, not of one only. But the case of *Pinkney* v. *Inhabitants of East Hundred of Rutland* (*a*) shews that the demurrer, being to the whole declaration, is too large, and judgment must therefore be entered for the plaintiff on the whole record; and as the objection to the account stated can only be taken on writ of error, the plaintiff as to that may enter a release.

The other Judges concurred.

Judgment for the plaintiff.

(*a*) 2 Saund. 379 *a*.

SPYER *v.* THELWELL.

Declaration on a bill of exchange drawn by *N.* on the defendant, requiring the defendant to pay "to *his* order" the sum therein mentioned, accepted by the defendant, and indorsed by *N.* to the plaintiff: —*Held*, that the Court could see that the word "his" referred to the drawer, and therefore there was no fatal ambiguity.

If a demurrer be pleaded to the whole of a declaration consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment.

ASSUMPSIT on a bill of exchange, drawn by *P. Nathan* upon the defendant, whereby *Nathan* required the defendant to pay to *his* order the sum of 127*l.* 7*s.* 6*d.* for value received; accepted by the defendant, and indorsed by *Nathan* to the plaintiff. There was also a count on an account stated, which alleged that the defendant, on the 17th *July* 1835, was indebted to plaintiff in 200*l.* for money found to be due from the defendant to the plaintiff on an account stated between them. Special demurrer to the whole declaration, assigning for causes, that it was ambiguous and doubtful whether the words "to his order," in the first count, meant the order of the drawer or of the acceptor: and also "that the count on the count stated was informal;" and that the declaration was in other respects uncertain, informal, and insufficient, &c.

Joinder in demurrer.

Addison, in support of the demurrer.—It is ambiguous whether "his order" means the order of *Nathan* or of the defendant. If it be referred to the last antecedent, which is the general rule, unless the context shews that such a construction would be impossible or incongruous, it means the order of the acceptor. And, as a man may draw a bill upon himself, *Starke* v. *Cheeseman* (*a*), there is no absurdity or inconsistency in such a construction. There is, then, a fatal ambiguity. The objection to the second count is, that no time is alleged at which the accounting took place. The Court have already expressed an opinion, in *Ferguson* v. *Mitchell*, that the want of the word "then" is fatal on special demurrer.

PARKE, B.—This is not a separate demurrer to each count, but a demurrer to the whole declaration. It is sufficient, therefore, if either count is good. Now, with regard to the objection to the first count, although certainly *primâ facie* the word "his" would refer to the last antecedent, viz. the defendant, yet if we call in aid a little common sense, we see plainly that it does not and cannot refer to him, but to the drawer. That count is therefore good, and the demurrer being too large, the plaintiff is entitled to judgment.

Judgment for the plaintiff (*b*).

(*a*) Carth. 509.

(*b*) See the preceding case.

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Oyer is demandable at any period before the time for pleading is out, though it has been extended by a Judge's order on terms; unless the order expressly except the right to demand *oyer*.

And the right is not waived by pleading, unless the plea be to the bond or other instrument of which *oyer* is demanded.

A party has not a right to have his demand of *oyer* entered of record, unless it was regularly made according to the practice of the Court.

DEBT on a bail-bond. *Archbold* had obtained a rule for entering the demand of *oyer*, made by the defendant, on record. The circumstances of the case, as disclosed on the affidavits, were these:—On the 23rd of *September*, 1834, the defendant entered an appearance; on the 24th of *October*, the plaintiff took out a rule to plead; and on the 3rd of *November*, the defendant obtained an order for six days' time to plead, on the usual terms. On the 9th he obtained further time to plead, on the same terms; on the 10th, he served a demand of *oyer* on the plaintiff's attorney, but no *oyer* was given pursuant to the demand; on the 11th he pleaded that there was no valid assignment of the bail-bond by indorsement; and on the same day the present rule was obtained. Issue was joined, and notice of trial given for the second sittings in this term. On the 13th, the defendant obtained a rule to stay the proceedings on payment of costs.

John Jervis shewed cause, and contended, *first*, that the latter rule was a waiver of the rule for entering the demand of *oyer* on record. *Secondly*, that the *oyer* ought to have been demanded before the regular and ordinary time for pleading was out; or at all events, on obtaining further time to plead, time to demand *oyer* ought also to have been obtained as part of the terms. In *Sparkes* v. *Simpson* (*a*), it was admitted *arguendo*, that *oyer* must be demanded before the *time for pleading* is out, though it is not distinctly stated that those words are restricted to the ordinary and regular time. But in *Gerrard* v. *Early* (*b*), *oyer* was refused because it was not demanded till after

(*a*) 2 Bos. & P. 379. (*b*) 2 Wils. 413.

the *rule to plead* was out: and *Hartley* v. *Varley* (*a*) is to the same effect. In the *Duke of Leeds* v. *Vevers* (*b*), however, the Court said, that though the four days' rule had expired, a demand of *oyer* within the time which *by the course of the Court* was allowed for pleading, viz. eight days, was good: but none of the cases go so far as to allow *oyer* during the whole time for pleading, however it may have been extended by a Judge's order. [*Alderson*, B.—It is equally material to the defendant to have *oyer*, in order to know what to plead, whenever the time for pleading is out, and however it is enlarged.] Then he ought to obtain it as part of the terms of time for pleading: *Farrance* v. *Brignall* (*c*). [*Parke*, B.—That would seem to be so; otherwise he may always extend the time granted for pleading by a demand of *oyer*.] The consequence here would be to throw the plaintiff over a sittings. If the defendant asked time for *oyer* as part of the order for time to plead, the Judge would impose terms to put the plaintiff in the same situation. But, *thirdly*, the defendant has waived his demand of *oyer* by pleading, and more especially as he has pleaded a plea which shews that *oyer* was unnecessary; for he does not rely on any objection to the bond itself, but merely says it was not properly assigned. [*Parke*, B.—He should have stood on his demand, good or bad, in order to raise the question.]

Archbold, in support of the rule.—All that is urged on the other side might be good ground of counter-plea to the demand of *oyer*, but is no answer to the defendant's right to have his demand entered of record. Even if he had waived it, he has still a right to have it put on record, that

(*a*) Barnes, 329. (*b*) Ibid. 268.
(*c*) Ibid. 241.

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the question may be tried on error. [*Parke*, B.—You have no right to have your demand entered of record unless you made it regularly. *Alderson*, B.—The counter-plea is properly some statement shewing that you never had any right to *oyer* at all; not that you have waived it by being too late, or by pleading.] It is said the defendant has waived his demand by pleading; but he has not pleaded to the bond; he wants *oyer* in order to be able to do that. If he had pleaded to the bond or the condition, it may be admitted that would have been a waiver; but that the plea purposely avoids, and the defendant is still at liberty to plead to the bond when the plaintiff grants him *oyer*. But it is objected that the defendant cannot have *oyer* after the rule to plead has expired. The application was made before the Judge's order for time to plead expired, and it is submitted that was in time. The defendant could not plead issuably to the bond at all without having *oyer:* 1 *Saund.* 9 *c*; *Com. Dig. Pleader*, p. 12. The Judge's order, therefore, implies that he should be at liberty to demand *oyer*, since otherwise he could not comply with its terms. [*Parke*, B.—Then you may always extend the time to plead by demanding *oyer*.] If the plaintiff gives *oyer* as soon as it is demanded, then the defendant is bound to plead within the time limited in the order; but if by his default the time is necessarily extended, that is no fault of the defendant. [*Parke*, B.—The question is, whether your taking an order binding you to plead within a limited time, does not, by implication, exclude you from the ordinary right to have time for *oyer*.] The one rule is of necessity engrafted on the other. The order leaves the cause in the same state as before, merely extending the time for pleading.

PARKE, B.—The Court is of opinion that the defendant has not waived his right to have *oyer* by having pleaded, because he has pleaded a plea beside the contents of the

bond, and only raising an issue on the assignment. He has no right, however, to have his demand of *oyer* entered on record, unless it was made in due time; if he was out of time by the practice of the Court, he has no right to call upon the plaintiff to counterplead. Then the question is, whether the defendant had a right to demand *oyer* at the time he did, or whether, by going before a Judge, and obtaining time to plead on terms, he waived his common law right to demand *oyer*. On this we have some doubt, and there are inconveniences both ways. The officer tells us that the defendant retains the same right, unless it be expressly excepted in the Judge's order. If so, the consequence is, that the time is extended at the option of the defendant. On the other hand there is this inconvenience, that to hold the defendant bound to demand *oyer* within the time limited, might put him to great expense, which might turn out to be useless, and immaterial to his case. None of the cases cited are precisely in point. We have, however, sent to request information from the officers of the *King's Bench* and *Common Pleas*, and if that agrees with what is stated to us by the officers of this Court, the rule will be absolute; if not, we will take time to consider a little how the practice ought to be settled.

The officers of the *King's Bench* subsequently reported that they knew of no rule of practice on the subject; the officers of the *Common Pleas*, that it was the same in that Court as in the *Exchequer*. The Court thereupon ordered that the defendant should be at liberty to crave *oyer*, and should have the same length of time to plead after allowance of *oyer*, as he had under the Judge's order.

Rule absolute accordingly.

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REX *v.* The Sheriff of SURREY, in a cause of SHOWELL *v.* YOUNG.

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The sheriff took a bail-bond with one surety only; he afterwards made a day's default in returning the writ. The Court set aside an attachment obtained against him, on payment of costs.

ERLE shewed cause against a rule which had been obtained to set aside an attachment against the sheriff on payment of costs. It appeared that the sheriff had taken a bail-bond in the name of one surety only, who was the defendant's attorney, on the 8th of *September*. On the 9th the sheriff was ruled to return the writ; that rule was returnable on the 15th; but by the inadvertence of a clerk in the office, the return was not made till the 16th, which was also the day for justifying bail. *Erle* contended, that this was an irregularity which fixed the sheriff, and that he could not be relieved on any terms: *Fuller* v. *Prest* (*a*), *Rex* v. *Sheriff of Surrey* (*b*). The plaintiff had determined, as soon as the bail-bond was given without proper security, to take his remedy against the sheriff if he could, and had watched the proceedings for that purpose; and he had a right to take advantage of any default. He cited *Rex* v. *Sheriffs of London* (*c*), *Rex* v. *Sheriff of Middlesex* (*d*).

ALDERSON, B.—In those cases the irregularity was in not returning the rule to bring in the body; then the party had only two courses, either to fix the sheriff, or to have an assignment of the bail-bond with one surety only; but here the only default is in not returning the writ, and the only consequence is a delay of a day in obtaining your rule to bring in the body. Could you have taken an assignment of the bail-bond? If not, what matters it whether there were one or two sureties?

(*a*) 7 T. R. 109.
(*b*) Ibid. 239.
(*c*) 9 Moore, 422; 2 Bing. 227.
(*d*) 2 Dowl. P. C. 140.

Per Curiam—

Rule discharged, with liberty to the plaintiff to except to the bail.

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Platt in support of the rule.

AGAR *v.* BLETHYN and COLLINS.

A husband is entitled to the personal property of his wife which she has acquired while living apart from him in adultery.

A woman living apart from her husband acquired a sum of money, which she deposited in a bank. —She married another man, and on that occasion the money was vested in trustees for the benefit of herself and her illegitimate children. She was afterwards tried, convicted, and executed for murder. The trustees expended a considerable sum in her defence, and made an application to the bankers for the money so deposited, but it appeared that such application was not made *bonâ fide* in execution of the trusts of the settlement. The first husband claimed the money, and the parties having all been brought before the Court by an interpleader rule, an issue was directed to try whether he was entitled to it, in which he recovered. The Court refused to allow the trustees their costs out of the fund, and directed that the costs of the bankers should be paid by the plaintiff (the husband); to be repaid to him by the trustees.

THIS was an issue directed by this Court under the Interpleader Act, to try whether or not the plaintiff was entitled to two sums of 400*l.* and 100*l.*, or either of them, which had been assigned to the defendants in trust, under the following circumstances, as disclosed at the trial before *Gurney*, B., at the last *Bristol* Assizes.

In the month of *April* last, a woman, who then passed by the name of *Mary Burdock*, was tried, convicted, and executed for the murder of one Mrs. *Smith*. A short time before her apprehension, she had been married to one *Burdock;* and these two sums of 400*l.* and 100*l.*, which had been paid by her into the bank of *Stuckey's* banking company at *Bristol*, the former under the name of *Williams*, the latter under that of *Agar*, were then assigned to the defendants, in trust to pay the interest to herself and her husband during their lives, and the principal, at the decease of the survivor, to two illegitimate children she had had by a person named *Wade*, who had bequeathed to her all his property. It was clearly proved that she had been married to the plaintiff in 1819,

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and that, after living with her for a short time in *Bristol*, he had left her, and had had no intercourse or communication with her since. During this period, she had lived with several persons, and latterly had carried on trade on her own account. Before her trial, she and her trustees applied to the bankers to pay them the 500*l.*, but Mrs. *Smith*'s administratrix having also laid claim to it as part of her property, the bankers refused to pay it. Considerable expenses were incurred in her defence by her attorney, who was the partner of the defendant *Collins*, and was retained by the defendants on her behalf. After her execution, the defendants as trustees, and the plaintiff, severally commenced actions against one *Maningford*, a director of the banking company, for the amount of the two sums so deposited; and by a Judge's order proceedings were stayed in both actions, and the present issue directed. The learned Judge told the jury, that if they believed the plaintiff was the husband of the woman *Burdock*, he was clearly entitled to recover; and the jury found a verdict for the plaintiff.

Merewether, Serjt., moved for a new trial on the ground of misdirection; and urged, that, under the circumstances, the general rule of law by which a husband was entitled to his wife's personal property, did not apply to the present case. A husband is not liable for his wife's contracts when she is living apart from him in adultery; it must follow, therefore, that being compelled to procure her own maintenance, she must be able to contract for herself. If she can contract, it is necessary that she should be enabled to acquire property to meet her contracts; and if she can acquire property, her power to dispose of it follows. [*Alderson*, B.—Is there any example of an action being maintained against a wife under such circumstances?] In *Cox* v. *Kitchen* (*a*), *Buller*, J., expressed an opinion

(*a*) 1 Bos. & P. 338.

that she might contract under such circumstances, and would be liable on her contracts, even without a separate maintenance. It is clear that a married woman may dispose of personal property given to her separate use: *Fettiplace* v. *Gorges* (*a*). [*Alderson*, B.—It is a strange thing to say that crime should produce privilege.] The crime produces the liability; then the privilege follows as a necessary consequence. [*Alderson*, B.—You must first make out the liability. I do not see that an adulteress need have credit.]

Lord ABINGER, C. B.—There is no instance of a married woman suing in her own name, because she lived in adultery. I think there is no ground for the application.

PARKE, B.—*Marshall* v. *Rutton* (*b*) is directly opposed to this application. The privilege contended for is confined to cases where the husband is *civiliter mortuus*.

ALDERSON, B.—That is giving to the innocent wife a privilege in consequence of her husband's crime; but why give such a privilege to a guilty woman, the husband being innocent?

Rule refused.

Merewether, Serjt., then moved for an order that the money should be retained by the bankers, as a fund out of which to discharge the costs incurred by the defendants in the defence of *Mary Burdock*. The husband would have been liable for the costs incurred in the defence of his wife.

Lord ABINGER, C. B.—We cannot make any such order. The trustees have no claim whatever.

(*a*) 1 Ves. jun. 46; 3 Bro. Ch. Ca. 8. (*b*) 8 T. R. 545.

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PARKE, B.—The husband may be liable, but what claim have the trustees on this fund? If he is liable, the amount may be recovered from him by action. When he comes forward, he claims the fund liable to all the equities to which it was subject in the bankers' hands, and no more. If the trustees had been proceeding in execution of the trusts, they might have been entitled to be exonerated for all they had expended up to the time when they had notice of the husband's claim; but that does not appear.

ALDERSON, B.—Even if the defence had been successful, the trustees would only have had authority to charge the interest of the fund during the joint lives of the husband and wife.

GURNEY, B.—The trustees had no power, from the very nature of the trust, to apply the principal money to the defence; that was for the benefit of the children; they could only apply the interest for this woman's use.

On a subsequent day, the plaintiff obtained a rule, calling on the defendants and *Maningford* to shew cause why the money should not be paid over to him, and why the defendants should not pay the costs of his action against *Maningford*, and of his appearance on *Maningford*'s application, and the costs of this issue.

Ludlow, Serjt., appeared for the bankers, and claimed to have their costs out of the fund, as having been merely innocent stakeholders. [Lord *Abinger*, C. B.—If *Agar* had succeeded in his action against them, they must have paid his costs.] They would have had their costs on a bill of interpleader in equity out of the fund in Court; and the practice of the equity courts in this respect has been adopted by the Court of *Common Pleas*, in applications

under the Interpleader Act. *Parker* v. *Linnett* (*a*), *Duear* v. *Mackintosh* (*b*), *Cotter* v. *Bank of England* (*c*).

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Merewether, Serjt., again urged the claim of the trustees to have the expenses of the defence out of the fund.

Erle, for the plaintiff, admitted that the bankers were entitled to their costs, but contended that they must be paid by the defendants, not out of the fund. And as to the claim of the trustees, he alleged that they had not acted *bonâ fide*; and

GURNEY, B., thereupon stated, that, although the trustees, on their first negotiation with the bankers, proceeded *bonâ fide*, with the purpose of obtaining the money to employ it in the woman's defence, they afterwards acted *malâ fide*, and endeavoured to obtain it, not for any of the purposes of the trust, but for their own benefit.

Lord ABINGER, C. B.—The bankers ought to have their costs, but whether they have them from the plaintiff or out of the fund is immaterial. It is not clear that the plaintiff would have succeeded against them, since he did not deposit the money with them. As to the costs incurred by the trustees, if they had made a *bonâ fide* defence, and applied the money as they honestly thought best under the circumstances, it would hardly have been fair to say that they should bear these expenses. But the learned Judge states, and the facts shew, that they proceeded, not *bonâ fide* for the benefit of the *cestui que trust*, but for the purpose of paying their own bill. That being the case,

(*a*) 2 Dowl. P. C. 562. (*b*) 3 Moo. & Sc. 182.
(*c*) Ibid. 180.

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we think they ought to pay the costs of the interpleader rule, and to bear the expenses they have incurred in these proceedings.

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The other Judges concurred.

Rule absolute: the plaintiff to pay the costs of the bankers, and to be repaid by the defendants.

LEWIS *v.* LYSTER.

Indorsee against acceptor of a bill of exchange. Plea, that the drawer indorsed the bill to *B.*, who indorsed it to *C.*, in whose hands it remained when due; that *C.* being unable to obtain payment of it, returned it to *B.*, who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to *B.* another bill, drawn by the same party, and accepted by the defendant, for a greater amount, which *B.* accepted in full discharge and satisfaction of the former bill.

ASSUMPSIT by indorsee against acceptor of a bill of exchange for 165*l.*, dated 13th *April*, 1831, drawn by *Henry James Bouverie* upon and accepted by the defendant, payable to the order of *Bouverie* two months after date, indorsed by *Bouverie* to *John Aldridge*, and by him to the plaintiff. Plea, that, long before the said bill of exchange became due and payable, according to the tenor and effect thereof, the said *H. J. Bouverie* duly indorsed the same to one *Anthony Calvert*, who afterwards, and also long before the said bill became due and payable, indorsed the same to certain persons using the name, style, and firm of *Braithwaite & Jones*, who afterwards, and before it became due and payable, indorsed the same to one —— *Chawner*, in whose possession the same, at the time it became due and payable according to the tenor and effect thereof, remained and continued; and he the said *Chawner*, when the said bill of exchange became due and payable as aforesaid, so being the holder

Held, on demurrer, that this was a sufficient answer to the action, although it did not appear that the second bill was payable to order.

The plea went on to aver that the latter bill was indorsed by *B.* to *A.*, and that after it became due the defendant paid the amount of it to *A.*, in satisfaction and discharge of that bill, and of all damages sustained by *the plaintiff* by reason of the non-payment thereof when due:—*Held*, that all this might be rejected as surplusage, and did not vitiate the plea.

thereof, caused the same to be presented to the defendant for payment of the sum of money therein mentioned; but default being made in payment thereof, the said *Chawner* afterwards, and before either of the said indorsements in the declaration mentioned, returned the said bill to the said *Braithwaite & Jones*, and the same remained and continued in the possession of those persons, who thenceforth, and until and at the time of the discharge and satisfaction of the amount thereof as aftermentioned, continued holders of the said bill, and entitled to receive the sum of money therein mentioned. That afterwards, and long before the commencement of this suit, and before the indorsement and delivery of the said bill to *Aldridge*, or to the plaintiff, the defendant handed over and delivered to *Braithwaite & Jones*, so then being the holders of the said bill as aforesaid, and they then accepted and received from the defendant, a certain bill of exchange, drawn by the said *H. J. Bouverie* upon and accepted by the defendant, at three months' date from the 26th *May*, 1831, for 500*l.* value received, in full satisfaction and discharge of the said sum of money in the said bill of exchange in the declaration mentioned, and of all damages by them sustained by reason of the non-payment thereof, on the day when the same became due and payable. That afterwards, to wit, on the day and year last aforesaid, the said *Braithwaite & Jones* indorsed and delivered the said last-mentioned bill to one *F. Seagood;* and that afterwards, and after the said bill of exchange for 500*l.* became due and payable, to wit, on the day and year aforesaid, the said *F. Seagood* then being the holder thereof, and entitled to demand and have and receive the amount thereof, he, the defendant, paid to the said *F. Seagood*, so being such holder thereof, the sum of 500*l.* 10*s.*, in full satisfaction and discharge of the sum of money in the last-mentioned bill of exchange specified, and all damages by the said plaintiff sustained by reason

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of the non-payment thereof when the same became due and payable. That the said bill of exchange in the declaration mentioned was not transferred or delivered to the said *John Aldridge*, or indorsed to or by him, until long after the same became due and payable, nor until after the said *Braithwaite & Jones*, so being holders thereof, when the same became due and payable, so accepted and received the said bill of exchange of 500*l.*, in full discharge and satisfaction of the said bill of exchange in the declaration mentioned; and this the defendant is ready to verify, &c. Special demurrer, assigning for causes, that it did not appear, nor was stated in or by the plea, that the said bill of exchange for 500*l.* was payable *to the order* of *Braithwaite & Jones*, or otherwise negotiable; and therefore the said *F. Seagood* had no legal right to or interest in that bill, nor was entitled to receive the amount thereof, or give any acquittance or discharge for the same; and therefore it did not appear that that bill had ever yet been legally paid or satisfied: and that it was stated in the plea that the defendant paid the said *F. Seagood* the said sum of 500*l.* 10*s.* in satisfaction of damages *by the plaintiff* by reason of the non-payment thereof, whereas it did not appear that *the plaintiff* was entitled to any damages by reason of that non-payment. Joinder in demurrer.

Humfrey, in support of the demurrer, contended that it did not sufficiently appear from the plea that the second bill was a negotiable instrument; unless it were, *Seagood* could have no right to receive it, and it would be no satisfaction of the first, which would be outstanding until the money was paid on some *negotiable* instrument. [*Parke*, B.—Would not the plea have been good, if it had stopped with the allegation of the acceptance of the second bill by *Braithwaite & Jones?* There is a sufficient averment of satisfaction, by giving a new bill to the parties entitled,

not "for and on account of" the first bill, but absolutely in *satisfaction and discharge* of it.] Then, certainly, the second bill was not given in satisfaction of *the plaintiff's* damages. [*Parke*, B.—All that part of the plea may be rejected as surplusage, and enough remains to shew a good answer to the action.]

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Per Curiam—

Judgment for the defendant.

GREEN *v.* BUTTON.

CASE.—The declaration stated, that the plaintiff, before and at the time of the committing of the grievances by the defendant thereinafter mentioned, used and carried on the business of a carpenter and builder, and had, just before the time of the committing, &c., to wit, on the 27th of *June*, 1835, purchased of certain persons using the name, &c., of *Cosser & Son*, and *Cosser & Son* had then sold to the plaintiff, a certain large quantity of wood, to wit, 200 spruce battins, to be used by the plaintiff in his said trade or business, at and for the sum of 11*l.*, which sum the plaintiff, at the time of the said purchase and sale, paid to *Cosser & Son*, who then accepted and received the same from the plaintiff in payment for the said spruce battins, &c.; and the defendant, at the time of the said

A declaration in case stated, that the plaintiff (a carpenter and builder) had purchased of *C.* certain spruce battins, to be used by him in his trade, for 11*l.*, which sum the defendant had lent to the plaintiff for the purpose of making payment for them, and on the personal credit of the plaintiff, without any agreement that the defendant should have any lien or control over the battins as a security for its repayment; yet that the defendant, well knowing the premises, and contriving, &c., to deprive the plaintiff of the possession and use of the said battins, and falsely and wrongfully assuming and pretending that he was entitled to a lien on them, and had a right of staying and preventing the delivery of them to the plaintiff until the said sum of money should be repaid, wrongfully and maliciously, and without reasonable or probable cause, but under colour of the said pretended lien and right of detainer, directed *C.* not to deliver them to the plaintiff until further order from the defendant; whereby, and in consequence whereof, *C.* being induced to believe that the defendant had such lien, &c., did, in consequence of such order, refuse to deliver them to the plaintiff for three weeks, whereby the plaintiff was prevented from using them in his business, and certain houses which he was then building were greatly delayed, &c.—*Held*, on demurrer, *first*, that it sufficiently appeared on the face of the declaration, that the defendant made a knowingly false claim of lien; *secondly*, that the special damage alleged, viz. the non-delivery of the battins to the plaintiff, was sufficiently connected with the wrongful act of the defendant, to support the action.

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purchase and sale, had lent and advanced to the plaintiff the said sum of 11*l.*, for the purpose of making such payment, of which *Cosser & Son* had notice; and which said sum of money was so lent and advanced by the defendant to the plaintiff as aforesaid, upon the personal credit and responsibility of the plaintiff, without any agreement being then, or at any other time, either before or afterwards, made or entered into between the plaintiff and the defendant, that the defendant should have or be entitled to any lien on the said spruce battins in respect of the said loan, or any power or control over the same, or any part thereof, as a security for the repayment of the said sum of money, or otherwise: yet the defendant, well knowing the premises, and contriving, &c., to deprive the plaintiff of the possession, use, and benefit of the said spruce battins, and falsely and wrongfully assuming and pretending that he, the defendant, had and was entitled to a lien on the said spruce battins, and had then a right of staying and preventing the delivery thereof to the plaintiff until the said sum of money should be repaid; and falsely and wrongfully pretending that the plaintiff was in embarrassed circumstances, and unable to pay his just debts; afterwards, and after the said purchase and sale of the said spruce battins by the plaintiff, and after the payment of the price thereof by the plaintiff, wrongfully and maliciously, and without reasonable or probable cause in that behalf, but under colour of the said pretended lien and right of detainer, ordered and directed the said *Cosser & Son* not to deliver the said battins, or any part thereof, to the plaintiff, but to retain and keep the same in their possession, until they the said *Cosser & Son* should receive further orders and directions from the defendant concerning the same; whereby, and in consequence whereof, the said *Cosser & Son* being then and there, by the means aforesaid, induced by the defendant to believe that he, the defendant, in fact had and was entitled to such lien as afore-

said on the said spruce battins, and had a legal right to make such order for the staying and preventing the delivery thereof to the plaintiff, did, in pursuance of the said order and direction of the defendant in that behalf, keep and retain the said spruce battins in their custody for a long space of time, to wit, for the space of three weeks then next following, without the consent and against the will of the plaintiff, and did during all that time absolutely refuse to give up or deliver the same, or any part thereof, to the plaintiff or his order, although the said *Cosser & Son* were requested by the said plaintiff so to do: whereby, and by reason of the committing of the said grievances by the defendant, the plaintiff was during all that time deprived of the possession of the said spruce battins, and of the benefit of the said sale and purchase thereof, and prevented from using the same in his said trade or business of a carpenter and builder; and divers houses and buildings then erecting and building by the plaintiff, during all the time aforesaid, remained incomplete, and the work and progress thereof was greatly delayed and retarded, &c. &c.

Several pleas were pleaded, of which the third was, that the plaintiff did not pay the said price or sum, or any part thereof, to the said *Cosser & Son*, in manner and form, &c.: concluding to the country. General demurrer, and joinder.

The points marked for argument in the margin of the demurrer book were as follows:—On the part of the plaintiff —that the non-payment by the plaintiff of the price of the spruce battins, mentioned in the declaration, to *Cosser & Son*, is no justification in law for the grievances alleged to have been committed by the defendant. On the part of the defendant—That on the pleadings it does not appear that there is either wrong or damage sufficient to support the action; the wrong alleged being the ordering *Cosser & Son* not to deliver the goods to the plaintiff until

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further orders; but no legal obligation to obey that order appearing, and the expression of a wish to that effect not being actionable, *Cosser & Son* would be alone liable if they retained the goods without legal right. No misrepresentation is alleged as the ground of action; and if any assertion of a right to prevent the delivery of the goods can be implied, it would not sustain an action, being only the expression of an opinion not alleged to be to the defendant's knowledge erroneous, and on which, if erroneous, it was the indiscretion of *Cosser & Son* to rely. No sufficient damage appears; for the plaintiff was not entitled by law to the delivery of the goods till the price was paid, and the plea denies that he paid the price; and there is nothing to show that *Cosser & Son* would have delivered the goods even if no order or direction had been given.

Wightman, for the plaintiff.—The plea is clearly bad: but the main question is, whether the declaration discloses a sufficient cause of action, the averment of the payment of the price being struck out. It is submitted that the damage is sufficiently shown to have been the necessary consequence of the defendant's wrongful act, to enable the Court to hold that the plaintiff is entitled to some damages, to be afterwards ascertained in amount. *Vicars* v. *Wilcocks* (*a*), which will be relied on by the other side, is distinguishable, because there was there no necessary connection between the slander uttered by the defendant, and the wrongful act of the party who was supposed to have been induced by it to dismiss the plaintiff from his service. The rule of law is laid down correctly by *Tindal*, C. J. in *Ward* v. *Weeks* (*b*):—"Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original

(*a*) 8 East, 1. (*b*) 4 M. & P. 706; 7 Bing. 215.

uttering of the words. It was the repetition of them by *Bryce* to *Bryer*, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." So here, if some third party had informed *Cosser & Son* that the defendant had a lien on the battins, and they had thereupon refused to deliver them, this case would have been within the rule so laid down: but it is the defendant himself who directly forbids their delivery, stating that he has a lien. And he might have some right arising out of a special contract, though not strictly a lien, which might render it unsafe for *Cosser & Son* to deliver them to the plaintiff. In *Plunket* v. *Gilmore* (*a*), it was held that case lay by a vintner against a party who procured men to come to the plaintiff's house, one of them dressed in woman's clothes and pretending to be a prostitute, and to call out "a bawdy-house," so as to have the plaintiff's house reputed as such, by which the mob broke the windows: for these acts would have been evidence to convict the plaintiff on a charge of keeping a disorderly house. Here it is admitted on the pleadings, that the plaintiff has been unable to obtain his goods from *Cosser & Son* by reason of the defendant's unfounded representation of a lien, and forbidding them to deliver them. It is like a case of slander of title, where it is necessary to show that the defendant had good grounds for saying what he did. The plaintiff would have had the goods he had purchased but for the defendant's wrongful and voluntary act, which has directly prejudiced him.

J. Henderson, contrà.—Nothing appears on the face of this declaration to show that the defendant was not acting in the assertion of a *bonâ fide* claim of lien. If he was,

(*a*) Fortesc. 211; 1 Mod. 215.

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the action cannot be maintained: *Gerrard* v. *Dickinson* (*a*). The assertion of a *bonâ fide* title, unless it appears to have been wrongful and malicious, gives no right of action. [*Parke*, B.—It is stated to have been so here.] It is not directly alleged; the plaintiff only sets forth certain facts from which he invites the Court to draw that inference. It is stated that the defendant had in fact no lien by agreement with the plaintiff, and that he knew the facts alleged; but not that he knew there was no foundation for his claim of lien. That being so, the defendant's representation is fairly referable to a *bonâ fide* belief that he had a lien, and therefore is not actionable. The assertion of a lien, even without reasonable or probable cause, would not confer a right of action, unless it were fraudulently made. [*Parke*, B.—It is said here to have been done *maliciously*.] The mere allegation of a malicious intent will not give the act an actionable character; *Haycraft* v. *Creasy* (*b*); *Polhill* v. *Walter* (*c*); and the words "well knowing the premises" import only this—well knowing the matters of fact before stated; with which it is consistent that the defendant had a lien, or *bonâ fide* believed himself to have it.

But further, it does not even distinctly appear that the defendant asserted that he had such lien in fact: but only that he gave *Cosser & Son* an "order and direction," not to deliver the goods to the plaintiff. That of itself is nothing, unless it carried with it an obligation on *Cosser & Son* to obey it; it imports no more than a mere *request*. At all events, it would give no right of action, without consequential damage being shown to have been the natural, necessary, or legal result of the defendant's act. In *Morris* v. *Langdale* (*d*), which was an action for saying of a stock-jobber that he was a "lame duck,"

(*a*) 4th resolution, 4 Rep. 18.
(*b*) 2 East, 92.
(*c*) 3 B. & Ad. 114.
(*d*) 2 Bos. & P. 284.

innuendo that he had not fulfilled his bargains in stock; and the special damage alleged was, that certain persons named had, in consequence of the words, refused to fulfil certain contracts of the same kind with the plaintiff—Lord *Eldon*, C. J., said this was damage for which the plaintiff might compensate himself in actions against those persons, and the law supposed that in such actions he would receive a full indemnity. So here, *Cosser & Son* were lawfully bound to deliver to the plaintiff, as the declaration assumes, and might have been sued by the plaintiff for not delivering. *Vicars* v. *Wilcocks* lays it down distinctly that the injury to the plaintiff, to entitle him to damages, must be the legal and natural result of the defendant's act, not the wrongful act of a third person arising out of it. [*Parke*, B.—Considerable doubt has been thrown on that authority in a very learned work (*a*).] *Ward* v. *Weeks* is an authority to the same effect. [*Alderson*, B.—Those cases, in which the damage arose from the wrongful act of a third person, are perfectly distinguishable from this.] Suppose *Cosser & Son* had been sued by the plaintiff, and made responsible in full damages for the non-delivery; could they have an action over against the defendant? His act is not the *causa causans* of the injury, because it imported no compulsion on *Cosser & Son* to withhold the goods.

Again, it does not appear that the plaintiff is entitled to the possession of the goods, not having paid for them. If so, he cannot allege their non-delivery as a ground of legal damage. To apply the judgment of Lord *Ellenborough* in *Vernon* v. *Keys* (*b*), "he has not been deprived by deceitful means of any benefit which the law entitled him to demand or expect." In *Ashley* v. *Harri-*

(*a*) 1 Starkie on Libel, 205, note. See also *Knight* v. *Gibbs*, 1 Adol & Ell. 47; 3 Nev. & M. 467.

(*b*) 12 East, 636; 4 Taunt. 488.

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son (a), which was an action by the proprietor of a theatre against a person who had libelled a female singer at the theatre, by reason whereof she was deterred from appearing on the stage, it was ruled that the action was not maintainable, because it would be making the right to sue depend on whether she had nerve enough to appear in spite of the libel. So here, the result of the action is made to depend on the choice of *Cosser & Son* whether they will recognise the defendant's claim or not.

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Wightman, in reply.—It is submitted that it quite sufficiently appears, on all the allegations of this declaration taken together, that the defendant was actuated by a malicious motive, and that his representation was false to his own knowledge. It was for the defendant to have shown that the non-delivery was in consequence of the non-payment of the price, and not in consequence of the false representation. It is true that the plaintiff might have a ground of action against *Cosser & Son*, but that is no defence here. In cases of slander of title, although there is an action against the party who fails to perform his contract, there is an action also against the author of the slander: *Bac. Abr. Action on the Case*, (B.) (*b*). [*Alderson*, B.—If *Cosser & Son* have not been paid, there may have been no breach of their contract, and therefore no right of action against them.] At all events, their doubt as to the defendant's title, whether well or ill founded, induced by his representation, has caused them not to deliver the goods. That is an injury to the plaintiff, and it results directly from the defendant's wrongful act, and, as it must be inferred on these pleadings, from it only.

(a) Peake's N. P. C. 194; 1 Esp. 48.

(b) Citing *Newman* v. *Zachary*, Alcyn, 3.

PARKE, B.—I think this action is maintainable, and that the demurrer must be overruled. It is in substance an action on the case for a false and malicious representation; and there is no doubt, on the authority of *Gerrard* v. *Dickinson*, which has been cited, and also of *Lovett* v. *Weller* (*a*), that the action is maintainable, though the defendant makes a claim of right, if it be made maliciously, and without reasonable or probable cause, and the special damage accrues from the claim so made. Then the questions here are, *first*, whether it sufficiently appears that the defendant made the claim *falsely* and maliciously; and *secondly*, whether the special damage appears to result from that wrongful act. [His Lordship read the material parts of the declaration, and then proceeded:] It appears to me that there is here a sufficient allegation that the defendant knew that there had been no agreement for a lien, that he falsely and wrongfully pretended that he was entitled to a lien, and made the representation from improper and malicious motives: and that if it is necessary that his claim of lien should be disproved, in order to maintain the action, that also is sufficiently averred. In considering the effect of this demurrer, we must lay out of the question the averment in the declaration, of payment of the price. Then the second question is, whether the averment of special damage is sufficiently connected with the alleged wrongful act. It seems to me that there is a sufficient allegation that the false representation was the cause of the non-delivery of the goods by *Cosser & Son*. But it is said they were under an absolute contract to deliver to the plaintiff, and that he might take his remedy against them for the breach of that contract; and *Vicars* v. *Wilcocks*, and Lord *Eldon*'s dictum in *Morris* v. *Langdale*, are cited to show that the plaintiff's right of action against them bars him from recovering against the defendant. It is unnecessary to

(*a*) 1 Roll. Rep. 309.

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consider how far those cases would be supported, if the same question arose directly; if it did, we should desire time to give them a full consideration, some doubt having been thrown upon their authority; but in order to raise that question, we must import into the declaration an allegation that *Cosser & Son* were under such absolute obligation to deliver; whereas, the averment of payment being struck out, nothing like an obligation to deliver is to be collected from the declaration: it only appears that these were goods sold on credit, and not paid for. Then the result of the whole is, that the defendant had no reasonable or probable cause for his representation, and that there was a damage to the plaintiff resulting therefrom, viz. the non-delivery of the goods. Our judgment must therefore be for the plaintiff.

ALDERSON, B.—I am of the same opinion, and my brother *Parke* has expressed all the reasons I can give.

GURNEY, B., concurred.

Judgment for the plaintiff.

WANDLEY and Another *v.* SMITH.

A bastardy-bond, conditioned for the payment of the charges incurred "by reason of the birth, education, and maintenance of a bastard child," cannot be enforced after the bastard has attained twenty-one and ceased to be chargeable, although he may afterwards become chargeable again.

THIS was an action of debt brought by the plaintiffs, as overseers of the township of *Middleton*, in *Yorkshire*, on a bastardy bond given by the defendant, conditioned to indemnify, as well the then churchwardens and overseers, and their successors for the time being, as also the parishioners and inhabitants for the time being, from all manner of costs, taxes, rates, assessments, and charges whatsoever, for or by reason of the birth, education, and maintenance of a bastard child, and of and from all ac-

tions, suits, troubles, charges and demands whatsoever, touching or concerning the same. The declaration averred that the child was born, and was still living, and assigned two breaches: *first*, that, in the year 1834, the overseers were bound and obliged to pay and expend, and did pay and expend, certain monies in and about the maintenance of the bastard; *secondly*, that they expended monies in the maintenance of the bastard's wife and children. The defendant, after craving *oyer* of the bond and condition, pleaded to each of the breaches, that, in the year 1827, the said bastard child attained the age of twenty-one years, and had, for a long time previously, ceased to be chargeable to the said township, and had maintained himself. General demurrer and joinder.

J. Henderson, in support of the demurrer.—The question is, whether the obligation imposed by the bond is necessarily limited to the period of the child's being under age, or unemancipated. It is submitted that the obligor is responsible during the life of the bastard. There is nothing in the condition of the bond itself to support the limitation contended for. [*Parke*, B.—The responsibility is for charges incurred by reason of the birth, &c., of such *child*. Here, the bastard became chargeable after he attained twenty-one. Can it be contended that the bond applies to such a case as that?] The word "child" is not used with reference to the age of the bastard, but as a *designatio personæ*, in the same way as a testator would use it in his will. In *Rex* v. *St. John Bedwardine* (*a*), the word was undoubtedly held to signify a person under twenty-one; but that was by reason of the obvious meaning of the act of Parliament for binding out poor children apprentices. The parish continues liable for the maintenance of the bastard, though he is

(*a*) 2 Nev. & M. 86; 5 B. & Ad. 169.

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of age; and the obligations of the bond ought to be co-extensive with that liability. But even if the bond be not now enforceable under the statute 6 *Geo.* 2, c. 31, it may still be good at common law: *Middleham* v. *Bellerby* (*a*). There is nothing in the statute, or in any other rule of law, to prohibit the extension of the father's liability during the life of the child. A parent is liable for the support of his legitimate children as long as they live. In mere popular construction, a person ceases to be a child long before he attains twenty-one. If this view be correct, there is no objection to the second breach; since, by the Poor Laws' Amendment Act, 4 & 5 *Will.* 4, c. 76, s. 56, relief given to the wife and children is to be considered as given to the husband; such relief was therefore "incidental to the maintenance" of the bastard.

J. L. Adolphus, contrà, was stopped by the Court.

PARKE, B.—It is quite clear that the object and language of this bond are confined to charges by reason of the birth, education, and maintenance of the child *as a child.* When he attains twenty-one, having ceased to be chargeable, the obligation entirely ceases.

ALDERSON, B.—I think the plea is a complete answer to the action. The bastard had ceased to be chargeable at the age of twenty-one, and remained without relief from the parish for a considerable time; then having become payable again after he is married, it is sought to charge the putative father on this bond. I think there is no pretence for such a charge.

GURNEY, B. concurred.

Judgment for the defendant.

(*a*) 1 M. & Selw. 310.

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CONNOP v. HOLMES.

ASSUMPSIT by indorsee against drawer of two bills of exchange, the first for 100*l.*, dated 13th *April*, 1835, payable two months after date; the second for 200*l.*, dated 14th *April*, 1835, payable two months after date; both accepted by *T. P. Barlow;* with counts for money paid and on an account stated. Plea, to the *first* and *second* counts, that before and at the time of the making of the said several bills of exchange by the defendant, to wit, on the said 13th *April*, 1835, the said *T. P. Barlow* was in want of a loan of a sum of money, to wit, the sum of 300*l.*, and then applied to the plaintiff to lend and advance him the same, which the plaintiff was unwilling to do, unless the said *T. P. Barlow* agreed to accept the same partly in money and partly in wine, that is to say, two-thirds money and one-third wine, and to pay for the same by the said plaintiff's having the security of a bill or bills drawn by the defendant, and accepted by the said *T. P. Barlow;* that the said *T. P. Barlow* then consented and agreed to the said terms, and gave notice thereof to the defendant; and that thereupon the said two several bills of exchange in the first and second counts respectively mentioned, were accordingly drawn by him, the defendant, and accepted by the said *T. P. Barlow.* Averment, that the defendant never received any consideration or value, nor did any consideration ever move or pass from the said parties, or either of them, to the defendant, for the drawing by him of the said several bills of exchange, or either of them, except as aforesaid; that the said wine hath not, nor hath any part of it, hitherto been delivered; and that the said contract for the sale and delivery thereof was a gross fraud, both on the said *T. P. Barlow* and on

Assumpsit by the indorsee against the drawer of a bill of exchange, accepted by *B.* Plea—that *B.*, being in want of a loan of money, applied to the plaintiff to advance it, which he was unwilling to do, unless *B.* agreed to accept it in two-thirds money and one-third wine, and unless the plaintiff had the security of a bill drawn by the defendant and accepted by *B.;* that *B.* agreed to the said terms, and thereupon the bill declared on was drawn by the defendant, and accepted by *B.;* and that the defendant never received any consideration or value, nor did any consideration move or pass from either of the said parties to the defendant for his drawing the bill, except as aforesaid; and that the said wine has not been delivered, and that the said contract for the sale and delivery thereof was a gross fraud on the defendant:—*Held* bad on demurrer.

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the defendant. Verification. Second plea, as to the residue of the causes of action, ***non assumpsit.***

Replication to the first plea, that there was, at the respective times of drawing the said bills of exchange, a good and sufficient consideration and value for the drawing and indorsing by the defendant of the said bills of exchange, and each of them; concluding to the country. Special demurrer, assigning for causes, that the said replication is no answer to the second plea, and neither traverses, nor confesses, and avoids the same; that nothing is put in issue by the said replication; and that the same concludes to the country, though no traverse is contained therein. Joinder in demurrer.

Miller appeared to support the demurrer. [*Parke*, B.—Supposing the replication to be bad, as concluding to the country, the plea is bad also as not answering the whole declaration. It only avers that the wine was not delivered; then we must assume that the money was paid: so that the plea is an answer only as to one-third of the amount of the bills.] The plea alleges that the contract was a gross fraud; that vitiates it altogether. [*Alderson*, B.—What is the meaning of a "gross fraud," on the face of a plea?] If any possible fraud may be conceived, which might be given in evidence under this allegation, it is sufficient. [*Parke*, B.—The plea does not enable us to say what the fraud consists in; of what kind or nature it was; it is wholly unintelligible. Then, that part being struck out, there is no answer at all.] Fraud and covin may be alleged in a plea in general terms: 1 *Chitty on Pleading*, 570; *Mason* v. *Ditchburn* (*a*).

(*a*) Exch. E. T. 1835. Debt on bond. Plea, that the bond was obtained by the covin, fraud, and misrepresentation of the plaintiff, and issue thereon. At the trial, evidence was tendered to shew that the plaintiff had fraudulently misrepresented the value of the property, to secure the purchase-money of which

PARKE, B.—The question there was as to the proof of a plea already pleaded. But, admitting that position to be correct, you cannot apply this allegation of fraud to any thing stated in the declaration. And the defect is not cured by the plaintiff's replying over, because the plea only answers a part of the declaration.

ALDERSON and GURNEY, Bs., concurred.

Judgment for the plaintiff.

the bond was given, but such evidence was rejected; and on the argument on the rule for a new trial, the question was, whether such evidence was admissible under the plea, or whether the defendant was confined, at law, to evidence of fraud in the concoction or execution of the bond itself. The Court sent the case to a new trial, in order that the question might be more distinctly raised; and the evidence being then received, the verdict was nevertheless again found for the plaintiff. See the opinion of *Alderson*, B., in *D'Aranda* v. *Houston*, 6 Car. & P. 511; *Edwards* v. *Brown*, 3 Y. & J. 423.

SMEDLEY *v.* JOYCE.

In debt, the defendant pleaded that he *never did owe* the sum demanded:—*Held*, bad on special demurrer.

THIS was an action of debt, to which the defendant pleaded that "he never did owe" the sum demanded, in manner and form, &c. The plaintiff demurred specially, on the ground that the plea did not follow the form prescribed by the rule of Court, *H.* 4 *Will.* 4.

Mansel, in support of the demurrer, was stopped by the Court.

Carrington, contrà, urged that the rule was directory only; that the terms used were perfectly equivalent to saying that the defendant never was indebted, and

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that the party was not bound to the express words of the rule.

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But, *per Curiam.*—It is much better to abide by the rules, and then there can be no argument: if we do not, we shall have an argument in every case as to what is an equivalent.

Judgment for the plaintiff.

GILBERT and Another *v.* MATTHEW and THOMAS WHALLEY.

Where a defendant, against whom a *fi. fa.* had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods:—*Held*, that the sheriff could not be ruled to return the writ on behalf of the bankrupt.

JOHN JERVIS had obtained a rule *nisi*, calling upon the late sheriff of *Staffordshire* to return the *fieri facias* issued in this cause, under which, as the affidavit alleged, effects of both the defendants had been seized and sold.

Whitmore shewed cause, on an affidavit which stated that the defendant *Matthew Whalley*'s goods had not been sold, but had been restored to him, and that he had released all right of action in respect of the seizure; and that a fiat of bankruptcy had issued against *Thomas*, and his assignees had become parties to an agreement with the sheriff for disposing of the goods in a particular way. He contended, that all the bankrupt's interest in the execution having passed to his assignees, he could not call on the sheriff to return the writ.

J. Jervis admitted that the application must fail as to *Matthew*, but urged that *Thomas*, having an interest in the surplus of his estate, had a right to know how and for

what amount the goods had been disposed of; and referred to *Wilton* v. *Chambers* (*a*).

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Lord ABINGER, C. B.—If the bankrupt thinks his assignees have not made a good bargain, he may call them before the Court of Bankruptcy to verify their accounts; he must look to them, not to the sheriff. In the case referred to, there were divided interests between the plaintiff *Wilton* and the bankrupt, and the application was made by *Wilton*, and not by the bankrupt. The rule must be discharged.

Rule discharged, with costs.

(*a*) 3 Dowl. P. C. 333.

WATERS and Another, Executors of WATERS, deceased, *v.* TOMPKINS.

ASSUMPSIT on five promissory notes, one for 100*l.*, two for 50*l.* each, and two for 20*l.* each, given by the defendant to *William Waters*, the deceased; with counts for money lent by the deceased, interest, and on an account stated with the deceased; and also on an account stated with the plaintiffs as executors. Pleas,—as to the common counts, *non-assumpsit;* as to the whole declaration, *actio non accrevit infra sex annos*, and issue thereon. At the trial before *Gurney*, B., at the last *Bristol* Assizes, the plaintiff had a verdict. A rule was obtained for a new trial, on the ground that there was no evidence to go to the jury of any payment of principal and interest on any of the notes declared on, (all of which were above six years old), so as to take the case out of the statute. Cause was

The meaning of *part payment*, to take a case out of the Statute of Limitations, is payment of a *smaller* on account of a *greater* sum of money, due from the party making the payment to the party to whom it is made.

The appropriation of such part payment of principal, or of payment of interest, to a particular debt, may be shewn by any medium of proof, and does not require an express declaration of the debtor, at the time of the payment, to establish it; it may therefore be proved by previous or subsequent declarations of the debtor; although the *fact* of the payment must be proved by independent evidence.

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shewn by *Erle* and *Crowder*; and *Bompas*, Serjt., and *Ball*, were heard in support of the rule. The evidence and arguments are fully stated in the judgment of the Court, which was delivered on the last day of this term, by—

PARKE, B.—In this case, which was tried before my Brother *Gurney*, and was argued before us a few days ago, on shewing cause against a rule for a new trial, the question was, whether there was sufficient evidence to go to the jury to take the case out of the Statute of Limitations. The action was brought to recover the amount of five promissory notes from the defendant to the testator, due more than six years before the commencement of the suit; one for 100*l.*, two for 50*l.*, and two for 20*l.* each. The evidence of a promise within six years was, that the defendant, on an application made to him, said that his wife would have called on the testator, and paid him money on account of the interest on 200*l.*, but she had not called in consequence of the illness of his child; that in about a fortnight afterwards the wife called, and paid 15*s.*, without saying on what account. On another occasion, the defendant sent word to the testator, that his wife was in *Wales*, or she would have called *with the interest*; and that the wife, on other occasions, made payments to the testator, who said at the time he should be glad if *the interest* was more regularly paid.

This evidence was left to the jury, and the plaintiff recovered a verdict. We are of opinion that it was sufficient to warrant the verdict.

The objections to it were two:—

1st. That the payments made to the testator were not sufficiently proved to be payments of *interest*.

2ndly. That there was no proof that they were payments of interest *on the notes* for which the action was brought, or any of them.

The first of these points depends upon the construction of the 9 *Geo.* 4, c. 14, s. 1. [His Lordship read the clause.]

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On the first perusal of this clause, it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore, that these facts would not only have the same effect, but might be proved exactly in the same way, that they would have been if the act had not passed; and consequently by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgments of the debt itself. But the Court of *Exchequer*, in the case of *Willis* v. *Newham* (*a*), decided that the verbal acknowledgment of part payment of a debt was insufficient, and they construed the act as containing a general provision, that in *no case* should an acknowledgment or promise, by words *only*, be sufficient to take the case out of the Statute of Limitations, whether such acknowledgment were of the existence of the debt, or of the fact of part payment; and they considered the proviso as *leaving* to the fact of part payment, *if properly proved*, that is, *not by an acknowledgment only*, the same effect which it had before the statute. And this construction of the act certainly extends the remedy, and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do.

But if part payment, or payment of interest, is proved in any legal mode, and not by admission *only*, this case is no authority that such proof is not sufficient. The act of 9 *Geo.* 4, as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect, save that it requires something *more* than *mere* admission.

(*a*) 3 Y. & J. 518.

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The meaning of *part payment* of the principal, is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the act is, that it is not a *mere* acknowledgment by *words*, but it is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by a mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party making it at the time; such appropriation may be shewn by any medium of proof, and many instances might be put of full and cogent proof of such appropriation, where nothing was said at the time by the debtor; as, for example, if, the day before, the debtor had called and informed the creditor that he would, the day after, send his clerk with a specific sum on account of the larger debt than described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum, and took the creditor's receipt, expressly stating the account on which it was received, and delivered it to his employer; there could be no doubt that such evidence would not only be admissible, but, if distinctly proved, at least as satisfactory as a declaration accompanying the act of payment. In the present case, there is evidence to *the same effect*, though by no means so cogent as in the instance put, but still sufficient for the consideration of the jury.

There is evidence which is in effect this, that the defendant, before the payment, said that his wife was his agent to pay interest on a debt of 200*l.*, by his authority. There is a statement that she had been prevented from

calling before by a temporary cause, which amounts to a representation that she would soon call and pay such interest. She did call soon after, and paid a sum of money; and, on other occasions, she did pay sums, which the testator in her presence in effect treated as *interest*, and she acquiesced. This evidence has been properly submitted to the jury, and they have been satisfied with it. If they had not, we should by no means have disapproved of their verdict; but, on the other hand, we cannot say that it is wrong.

The other objection is, that the payment of interest is not sufficiently connected with the debt on which the action was brought. We agree that there must be reasonable evidence of the identity of the debt on which the interest was paid with that sued for; but we are clearly of opinion that there was sufficient in the case. There is the defendant's statement that interest was to be paid, and on a debt of 200*l.* bearing *interest;* and the two notes for 50*l.*, and the one for 100*l.*, on which the action is brought, agree with that description; and there is no proof or suggestion of any other transaction between the parties to which such a description will apply, for it is clearly inapplicable to the other claim of 40*l.* on two notes (*a*). The case by no means resembles that of *Holme* v. *Green* (*b*), in which the only proof was the simple fact of payment of a sum of money by *one of two* debtors, without any proof whatever of its being paid on account of any debt due from both; still less of its having been paid on account of a greater

(*a*) It appeared that the 40*l.* was due for money lent to the defendant by one *Ann Flower*, who, by her will, of which the testator *Waters* was executor, had bequeathed it to another *Ann Flower*, an aunt of the witnesses who deposed to the conversations in question; and that the occasion of their applying to the defendant was, to receive the interest on that sum of 40*l.*

(*b*) 1 Stark. N. P. C. 488.

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debt, so as to amount to an acknowledgment or promise to pay that greater debt.

We, therefore, think that the rule for a new trial must be discharged.

Rule discharged.

DOE *d.* RANDLE CHETHAM STRODE *v.* SEATON and Others.

A lessee for years covenanted to pay the rent to the lessor, his heirs and assigns, and also to deliver up possession of the demised premises at the expiration of the term, to the lessor, his *heirs and assigns.* In an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises:—*Held,* that the assignee was not estopped by such covenant from shewing that the lessor was only tenant for life of the premises demised.

A judgment recovered by the defendant in a former ejectment, is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties.

EJECTMENT to recover certain messuages, &c., in the city of *Bristol.* The cause was tried before *Gurney,* B., at the last *Bristol* Assizes, when it appeared that the lessor of the plaintiff claimed under the will of Colonel *John Strode,* dated the 31st of *March,* 1806, whereby the said *John Strode* (who then held the property now in dispute), devised all his manors and other messuages, lands, &c., whereof he was then seised or in possession for any estate of inheritance or freehold, to the use of his nephew *Thomas Chetham,* for life; remainders to the first and other sons, and to the daughters of the said *Thomas Chetham;* remainder to the testator's nephew *Richard Chetham* for life, with like remainders; remainder to the use of the testator's nephew *Randle Chetham* (who afterwards took the name of *Strode,* and was the lessor of the plaintiff) for life, with remainders over. Col. *John Strode* died in possession of the property in question, and without issue, in *December,* 1807. *Thomas Chetham* (then *Thomas Chetham Strode*) entered into receipt of the rents, and died without issue, in *September,* 1827; and *Richard Chetham* (then *Richard Chetham Strode*), also died without issue, in *August,* 1828. The defendants were the devisees in trust under the will of *John Weeks.* It ap-

peared that Col. *John Strode* had, in the year 1796, granted a lease of the premises in question to one *Samuel Thomas*, for twenty-one years, at an annual rent. *Thomas* died in the year 1800, leaving an only daughter, who took out letters of administration, sold and conveyed the estate to one *John Hall*, who, in 1802, conveyed his interest to *Weeks*, who took possession, and regularly paid rent until and for some time after the death of Col. *John Strode*. At the trial, the assignment of the lease having been called for, it was produced by the defendants. It recited the covenant in the original lease to pay the rent to Col. *John Strode, his heirs* and assigns, and to deliver up possession to him, his heirs and assigns. That having been read, it was contended on the part of the lessor of the plaintiff, that the defendants were not at liberty to shew that Col. *Strode* was not seised in fee but had only an estate for life, and that the defendants were in the situation of tenants, who are not allowed to dispute the title of their landlord. The learned Judge, however, decided that the estoppel did not apply to these defendants. The defendants then adduced evidence to shew that the property in question had formerly belonged to *James Strode*, an uncle of Col. *Strode's*, who died in 1749, and under whose will Col. *Strode* was only entitled to a life estate, and that upon his dying without issue, the estate in question descended to the said *Thomas Chetham Strode*, his nephew, who by indentures of lease and release, dated *September*, 1813, for a valuable consideration, conveyed the premises to *Weeks* in fee. They also put in evidence the record of the judgment, and the particulars of the premises in a former ejectment brought against them by the lessor of the plaintiff to recover the same premises. This evidence was also objected to as inadmissible, but the learned Judge overruled the objection. The jury found that Col. *John Strode* was tenant for life only, and gave their verdict for the defendants.

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Bompas, Serjt., now moved for a new trial, on two grounds:—First, that the defendants were estopped from disputing the title of the lessor of the plaintiff, he claiming title under Col. *John Strode*, their original lessor. Secondly, that the judgment in the former ejectment ought not to have been received in evidence.

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First—The defendants had no legal right to dispute the title of the lessor of the plaintiff, as the parties stood in the situation of lessor and lessee. This does not come within the principle of the cases which have established, that the lessee may shew that his landlord's title has determined, as in *England* d. *Syburn* v. *Slade* (*a*), *Doe* v. *Ramsbotham* (*b*), and *Doe* v. *Watson* (*c*). But the question here is, whether the defendants are to be allowed to set up this defence contrary to the words of the covenant in the lease, to give up the possession of the premises to the lessor, his heirs and assigns. It is submitted that they cannot be allowed to set up an interest contrary to an express covenant. [*Parke*, B.—Is there any case which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel, because Col. *Strode* having a life estate, had a right to grant a lease for twenty-one years, determinable upon his life, and therefore an interest passed, and where an interest passes, there is no estoppel. In *Co. Lit.* 47. b., it is said, "A lessee for the life of *B.* makes a lease for years, by deed indented, and after purchases the reversion in fee; *B.* dieth; *A.* shall avoid his own lease, for he may confess and avoid the lease which took effect *in point of interest*, and determined by the

(*a*) 4 T. R. 682. (*b*) 3 M. & Selw. 516.
(*c*) 2 Stark. N. P. C. 230.

death of *B.*" That case is similar to the present, except that there the reversion was purchased by the lessor instead of the lessee. That shews that an interest passes, and then there is no estoppel. The old doctrine is, that if an interest passes, and here it does pass for twenty-one years, then there is no estoppel.]

Secondly, the judgment in the former ejectment ought not to have been admitted in evidence in this action against the lessor of the plaintiff. A judgment in one action of ejectment is not evidence in another action of ejectment, because the parties are not the same (*a*), and the term is not the same; it is technically another term. [Lord *Abinger*, C. B.—Its being a different term signifies nothing. The question is, are they the same parties? When there is the same plaintiff and defendant, the judgment is admissible in evidence. It is uniformly so laid down.] That rule, it is submitted, does not apply to ejectment. The term here is not the same as the term in the former ejectment. [Lord *Abinger*, C. B.—Suppose there had been a real lease, and the lessee had been ejected, and brought his action, could it not be shewn that his landlord had previously granted a lease, but that his lessee had been turned out of possession by the judgment of a Court of law? *Parke*, B.—The rule is, that if the parties are substantially the same, the judgment in the former ejectment may be given in evidence; but it is not an estoppel, unless it be pleaded.] The text books treat it as if it were not admissible; and Mr. *Phillips*, in his treatise on evidence, seems to think that it is not evidence, unless conclusive (*b*).

(*a*) As to this, see *Buller's Nisi Prius*, 232, where, in speaking of the admissibility in evidence of verdicts in ejectment, it is thus laid down: "the Court will take notice, that in ejectment the lessor is the real party interested, and that the lessee (or nominal plaintiff), is a fictitious person."

(*b*) See 1 Phill. Ev. 324, 7th Ed. But see *Doe* v. *Huddart*, ante, 324.

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DOE *d.* STRODE *v.* SEATON.

Lord ABINGER, C. B.—A judgment in ejectment is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another; but it is clearly admissible in evidence.

PARKE, B.—A judgment is in no case conclusive, unless pleaded by way of estoppel. It cannot be pleaded in ejectment, because the defendant is bound, by the terms of the consent rule, to plead not guilty. But if the parties are the same, it is evidence to go to the jury. In this case, the former judgment shows that the lessor of the plaintiff had no title to demise the premises in question on the particular day of the demise.

ALDERSON, B.—It is laid down in *Buller's Nisi Prius, 232*, that a verdict in one action of ejectment may be given in evidence in another ejectment between the same parties. And there is the same point to be found in 4 *Bacon's Abr. Evid.* (F), which is precisely in point.

Rule refused.

LEWIS *v.* NEWTON.

The Uniformity of Process Act requires that the place and county of the defendant's actual or supposed residence shall be correctly stated; but the Court will not set aside a writ of summons, unless the defendant produces a positive affidavit that the residence has been misdescribed.

MANSEL had obtained a rule to set aside the writ of summons in this case for irregularity. It appeared that the writ was directed to the defendant, describing his residence as of "*Symond's Inn, Chancery Lane*, in the city of *London*." The affidavit, in support of the motion, stated that the deponent had been informed and believed that no part of *Symond's Inn* was situate in the city of *London*, but that it was situate in the county of *Middlesex*.

Humfrey shewed cause.—The Court will not try on affidavits whether the residence stated in the writ is cor-

rect or not; but, at all events, the defendant ought to have sworn positively that *Symond's Inn* is not in the city of *London*, which he has not done, but only that he has been so informed and believes.

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Mansel, contrà.—The act of the *2 Will.* 4, c. 39, s. 1, is imperative that the place and county of the residence, or supposed residence, of the defendant shall be mentioned in the writ. In this case a wrong county is given, if the defendant's affidavit be true; and if not, the plaintiff might have answered it, which he has not done. The affidavit is therefore sufficient.

PARKE, B.—The act imports that the description of the defendant's actual or supposed residence shall be correctly stated. If it had appeared distinctly that *Symond's Inn* was not in the city of *London*, the writ would be bad. But the defendant's affidavit is not sufficiently positive upon that subject. It only states that the party is informed and believes that it is not. That is not sufficient in support of an application like the present.

ALDERSON, B.—The plaintiff's not having answered the defendant's affidavit does not confirm it; he may not have had any knowledge on the subject.

Rule discharged with costs.

BELL *v.* HARRISON.

WIGHTMAN had obtained a rule, under the *3 & 4 Will.* 4, c. 42, s. 22, to change the venue in a local action upon

The venue cannot be changed in a local action, under the 3 & 4 *Will.* 4, c. 42, s. 22, until after issue joined.

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special grounds. It appeared that issue had not been joined nor plea pleaded.

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W. H. Watson shewed cause.—The application is made too early. The Court has no jurisdiction under this statute until issue is joined.

Per Curiam.—We have no jurisdiction under the act before issue is joined: How can the Court know what the issue will be before the defendant has pleaded? The words of the act are, "that the Court or any Judge may order the *issue* to be tried in any other county or place than that in which the venue is laid." The Court cannot, therefore, order an issue to be tried in a different county from that in which the venue is laid, where there is no issue joined.

Rule discharged.

BAXTER *v.* CLARKE.

In an application under the 48 *Geo.* 3, c. 123, s. 1, for the discharge of a prisoner out of custody, who has lain in prison twelve months, in execution for a debt not exceeding 20*l.*, the Court will not inquire into other circumstances; but require only to be satisfied of those facts.

IN this case *Mansel* moved, under the 48 *Geo.* 3, c. 123, s. 1, for a rule to shew cause why the defendant should not be discharged out of custody, he having lain in prison for the space of twelve calendar months, under an execution upon a judgment for a debt not exceeding the sum of 20*l.*

W. C. Rowe shewed cause in the first instance.—The whole question, in this case, turns on the meaning of the words in the first section of the 48 *Geo.* 3, c. 123. By that section it is enacted, "that all persons in execution upon any judgment for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison

thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, shall and may, upon his, her, or their application for that purpose, in term time, made to some one of his Majesty's superior Courts of record at *Westminster*, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution, by the rule or order of such Court." The only question is, whether the Court has jurisdiction to refer to other facts than those mentioned in the act. The words, "to the satisfaction of the Court," imply, that the Court may look to other circumstances in the case than the mere amount of the debt and the time the party has lain in prison. If the Court will permit it, the plaintiff is prepared to shew reasons why the defendant should not be discharged.

Lord ABINGER, C. B.—The case of *Stacey* v. *Fieldsend* (*a*) is an authority to shew that the Court has no discretion in such a case.

PARKE, B.—The facts stated are not denied; and the words "to the satisfaction of the Court" mean, that the Court shall be satisfied as to those facts which are mentioned in the first part of the section. The plaintiff cannot be allowed to enter into any other facts in opposition to such an application.

Rule absolute.

(*a*) 1 Dowl. P. C. 700.

DUCKWORTH and Another *v.* FOGG.

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Where a party, against whom a judgment has been obtained in the Court of *C. P.* at *Lancaster*, has removed out of the jurisdiction, it is necessary, in order to obtain a writ of execution against him, to produce an affidavit of the fact of his removal.

IN this case *Tomlinson* applied, under the 4 & 5 *Will.* 4, c. 62, s. 31, for leave to issue a writ of execution on a judgment recovered in the Court of *Common Pleas* at *Lancaster*, against a person who had removed out of the jurisdiction of that Court. He made the application on producing a certificate from the prothonotary of the Court that final judgment had been signed.

Per Curiam.—There must be an affidavit that the party has removed his person or his goods and chattels out of the jurisdiction.

Rule refused (*a*).

(*a*) See *Lord* v. *Cross*, 2 Ad. & Ell. 81; 4 Nev. & M. 30.

WITHAM *v.* GOMPERTZ.

In an action by the indorsee against the drawer of a bill of exchange, it is not necessary to allege, in the affidavit of debt, a presentment to the acceptor, or that the drawer has had notice of dishonour.

THIS was an action on a bill of exchange by the indorsee against the drawer, and the affidavit of debt stated that "the defendant was indebted to the plaintiff in 250*l.* for principal money due to the plaintiff as indorsee of a bill of exchange drawn by the defendant on Mr. *G. P.* for the payment of the said sum of 250*l.* to the order of the said defendant, at a day now past, and by the said defendant indorsed to the said plaintiff, and which said bill hath been refused payment by the said *G. P.*" The defendant having been arrested on this affidavit, an order was made by *Bolland*, B., for the defendant's discharge out of custody, on the ground that the affidavit was insufficient. *Humfrey*, on a former day in this term, having obtained a rule to shew cause why this order should not be rescinded—

Wordsworth now shewed cause.—The affidavit is defective, because it does not shew that the bill was presented to the acceptor on the day it became due, or that the bill is over-due, or that any notice of dishonour was given to the acceptor; and unless such a notice had been given, the drawer would be discharged from all liability on the bill. In *Simpson* v. *Dick* (*a*), which was an action like the present, by the indorsee against the drawer, the affidavit stated, that the defendant was indebted to the plaintiff on the bill, which was over-due, and that the money was still due and owing, and it was held to be insufficient, because it did not state either presentment or notice. This case is much stronger, for in that case it was stated that the money still remained due and owing; whereas, in this case, there is no allegation either that the bill is unpaid or that it is due. In *Buckworth* v. *Levi* (*b*), an affidavit was held ill for not averring a presentment to the acceptor.

Humfrey, *contrà*.—The case of *Buckworth* v. *Levi* only decided that the affidavit must shew a default by the acceptor; it does not decide that it is necessary to allege a presentment. This affidavit is according to the form given in *Tidd's Appendix*, which has been usually followed in practice. It was held in *Weedon* v. *Medley* (*c*), that such an averment is not necessary. It is sufficient to shew that there has been a default by the acceptor, without stating all the facts necessary to be proved in order to maintain the action.

Lord ABINGER, C. B.—The Court think that this affidavit is sufficient, as it appears to be according to the form which has long been used in practice; otherwise, I certainly should have thought that it was defective.

(*a*) 3 Dowl. P. C. 731. 1 Dowl. P. C. 211.
(*b*) 5 M. & P. 23; 7 Bingh. 251; (*c*) 2 Dowl. P. C. 689.

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PARKE, B.—I think it better to adhere to the form which has been usually followed. I do not know where we are to stop, if we were to hold that in the affidavit of debt you must state all the special circumstances which it may be necessary to prove in evidence, in order to entitle a party to recover upon a bill of exchange. I think a person making such an affidavit as this might be indicted for perjury, if it could be shewn that he knew that there had been no presentment, or was aware of some circumstances by which the drawer had been discharged from his liability.

ALDERSON, B.—I think it safer to adhere to the form which has been used in practice, as given by Mr. *Tidd* in his *Appendix*. I still entertain the opinion I expressed in *Weedon* v. *Medley*, that some authority ought to be shewn to induce the Court to depart from the rule of practice.

Rule absolute.

CREASE *v.* BARRETT.

Where, in granting a new trial, the Court directed that certain portions of the evidence should be admitted upon the proof already given:—*Held*, that the plaintiff, who had a verdict, was not entitled to the costs of fair copies of the shorthand-writer's notes of the evidence, for the use of counsel: but that he ought to have applied for copies of the judge's notes.

ON the new trial being granted in this cause (*a*), it was made one of the terms of the rule, that certain portions of the evidence should be admitted upon the proof given on the first trial. After preparations had been made for the second trial, the case was compromised, the plaintiff taking a verdict for the smaller toll of tin. On the taxation of costs, the plaintiff claimed to be allowed for three fair copies of the shorthand-writer's notes of the evidence on the trial, as being necessary to enable the

(*a*) See 1 C. M. & R. 919.

counsel to determine what evidence should be offered again. The Master having disallowed these costs, Sir *W. Follett* obtained a rule for a review of the taxation.

Erle shewed cause, and urged that the claim was wholly unprecedented. The counsel ought to take notes of the evidence; if their notes were not sufficient, and the plaintiff thought it useful to his case to have fuller statements of the evidence, he ought to pay for them himself, and not charge them upon the defendant.

Sir *W. Follett*, in support of the rule.—The short-hand notes were *bonâ fide* and necessary instructions to counsel; and, as such, the costs of them ought in fairness to be allowed. This was not an ordinary case, the rule for a new trial having been moulded in a peculiar manner. [*Parke*, B.—Why could you not apply to Lord *Lyndhurst*'s clerk for a copy of his notes of the evidence, relating to the particular matters in question; they would have furnished you with all the information that could be needed?] It is generally understood that judges are unwilling to have their notes copied.

PARKE, B.—I am not aware of that; I should make no difficulty whatever about it. To allow these costs would be opening a door to claims for the costs of the short-hand-writer's notes in every case. You might perhaps be entitled to the probable expense you would have incurred by applying for and obtaining a copy of Lord *Lyndhurst*'s notes from his clerk: but that would be so very trifling, that it is not worth while to come to the Court. The rule must be discharged.

Rule discharged.

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WAINWRIGHT *v.* BLAND and Others.

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Where a cause was tried, and the jury, not being able to agree in their verdict, were discharged by consent of both parties, and the plaintiff afterwards gave a new notice of trial:—*Held*, that an application for security for costs, on the ground that the plaintiff had gone to reside abroad, was too late; it appearing that the defendants had been fully aware of that fact before the first trial.

THIS case was tried at the *Middlesex* sittings after last term; and it appeared that the action was brought by the executor of a lady deceased, to recover the amount of a policy on her life. The defendants, who were three of the directors of the *Imperial Life Insurance Company*, defended the action on the ground that there was a fraudulent misrepresentation of the interest that the insurer had on the policy. The jury not being able to agree in their verdict, were discharged by the consent of both parties. The plaintiff afterwards gave a fresh notice of trial: and now

The *Attorney-General* applied for security for costs, and why in the mean time all proceedings should not be stayed. The affidavit on which he moved stated, that there were no assets of the testatrix left unadministered, and that the plaintiff was resident abroad, and in all likelihood he would continue resident abroad; and the ground for that belief alleged was, that he had forged certain powers of attorney, and would not return to meet the charges made against him. It was admitted that the defendants were aware of this before the trial.—This is in the nature of a new action. [*Parke*, B.—The objection is, that you ought to have made your application before issue joined.] The defendant was then within the jurisdiction of the Court. [*Parke*, B.—You ought to have applied before issue joined, or else as soon as you knew that the plaintiff was abroad and would not return, and then the plaintiff might not have gone on to incur expenses.] In this case the jury were discharged, and no costs have been incurred since the first trial, and the plaintiff only seeks to have security for the costs of the next trial. [*Alderson*, B.—The party who ultimately succeeds will be entitled to the costs of the first trial.] It was decided

in *Seeley* v. *Powers* (*a*), that where a Judge discharges the jury from giving their verdict, the party who ultimately succeeds is not entitled to the costs of the first trial. [*Alderson*, B.—In that case there was an agreement between the parties; and in such a case the parties may stipulate as to terms.]

Lord ABINGER, C. B.—It appears, as I understand, that proceedings have been taken in this cause since the defendants knew that the plaintiff had gone to reside abroad, which proceedings necessarily caused him to incur expenses. According to the general rule, therefore, this application would be too late. It is however said, that the circumstance of the jury having been discharged takes this case out of the ordinary rule; but that makes no more difference than if there had been a wrong verdict, and an application had been made to set it aside.

PARKE, B.—The rule of *Hilary* Term, 2 *W.* 4, s. 98, provides, that "an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined." This being made after that time, the Court ought to be satisfied that the defendants were not previously aware that the plaintiff had gone to reside abroad. The question whether one side or the other will be entitled to costs, has no bearing on the point.

ALDERSON, B.—Where the party does not come to the Court as soon as he has a knowledge of the facts which will warrant the application, he suffers the other party to incur expenses, which he might not have done, if the application had been made promptly, since he might have withdrawn from the contest. It was held in *Duncan* v.

(*a*) 3 Dowl. P. C. 372.

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Stint (*a*), that the defendant must have an affidavit stating that he was not acquainted with the act when he pleaded.

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GURNEY, B., concurred.

Rule refused.

(*a*) 5 B. & Ald. 702.

POTTER *v.* NEWMAN.

Semble, that, under the 3 & 4 *Will.* 4, c. 42, s. 39, the Court or a Judge has the power to enlarge the time for an arbitrator to make his award, although the order of reference does not contain any power to enlarge the time, and there has been no revocation of the arbitrator's authority.

IN this case an award had been made, in pursuance of an order of reference, the time for making the award having been enlarged under a Judge's order the day before it expired; but the order of reference did not contain any power to enlarge the time, and there had been no revocation of the arbitrator's authority.

Channell, on a former day in this Term, obtained a rule to shew cause why this award should not be set aside, on the ground, amongst others, that the arbitrator had enlarged the time without authority, submitting that a Judge, under the 3 & 4 *Will.* 4, c. 42, s. 39, had no power to make an enlargement of the time, except in cases where there had been a revocation of the umpire's authority. By that section it is enacted, "That the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of Court, or Judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by

leave of a Judge; and the arbitrator or umpire shall, and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award." He insisted that the words "any such arbitrator," in the latter part of the clause, referred to an arbitrator whose authority had been revoked. The Court having granted a rule,

Humfrey shewed cause.—Under the words of the above clause a Judge has power to enlarge the time for making the award, whether there has been a revocation of the authority of the arbitrator or not; for, looking at the whole section, and attending to its construction, the words, "any such arbitrator," plainly relate to the words "any arbitrator," in the early part of it. If that part of the sentence which directs that the arbitrator shall and may proceed with the reference, notwithstanding any revocation,—which is quite useless, as it merely enforces what was said before,—be struck out, the construction now contended for will be obvious. If the construction put on the other side were held correct, an arbitrator would be placed in this situation, that where there was no revocation, he could not proceed after the original time had expired; but, where there was a revocation, he might proceed, by procuring a Judge's order for an enlargement of the time.

The parties having ultimately agreed to refer the matter again to a professional arbitrator, the Court gave no judgment on the point, but

PARKE, B. said,—I wish it to be understood that I do

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not adhere to the opinion I threw out when this rule was moved for, that the act only applies to cases where there has been a revocation of the submission. It is a good rule to take words in their ordinary sense, and according to their grammatical construction. In this case, if we do so, the words "any such arbitrator," appear to refer to the words "any arbitrator," in the early part of the clause.

ALDERSON, B.—This is a very nice point, and we desire it to be understood that we do not decide against Mr. *Humfrey*'s argument (*a*).

(*a*) In *Burley* v. *Stevens*, H. T., 1836, the Court expressed a still more decided opinion that the statute has a general application.

SOAMES *v.* RAWLINGS.

The jurisdiction of the *Westminster* Court of Requests is confined to cases of debt, and it has no power to inquire into a matter which is the subject of an action on the case for unliquidated damages.

KELLY had obtained a rule to shew cause why a writ of prohibition should not issue to the Commissioners of the *Westminster* Court of Requests, to stay proceedings on the judgment given in this cause. The rule was obtained on an affidavit, pursuant to the 1 *Will.* 4, c. 22, which stated, that the plaintiff, having been inserted in the lists by the overseers of the poor of the parish of *St. Martin's-in-the-Fields*, as a scot and lot voter for the city of *Westminster*, and also as a householder, the defendant caused a notice of objection to be served upon him, according to the provisions of the 2 *Will.* 4, c. 45; and the plaintiff, in consequence, attended the court of the Revising Barristers for three days, but during that time the lists of voters for the plaintiff's parish did not come before the court for revision. Subsequently, however, and in the plaintiff's absence, his name was struck out of the list of

scot and lot voters, but was retained on the householders' list. He afterwards sent in a bill to Mr. Rawlings, demanding the sum of one guinea for loss of time in attending the court of the Revising Barristers. The defendant having refused to pay this demand, he was summoned by the plaintiff to the *Westminster* Court of Requests, where the question as to the defendant's liability was entered into, and a majority of the commissioners decided that he was liable, and gave judgment accordingly against him.

Mr. *Fenn* and Mr. *Watkins*, two of the commissioners, now shewed cause in person.—This Court of Requests was established by the *23 Geo. 2*, c. *27*; by the *first* section of which act the court is empowered to hear and determine all such causes as are thereinafter mentioned; and by the sixth section, the commissioners are empowered "to make such orders, decrees, judgments, and proceedings, touching such debts, not amounting to the sum of 40*s*., as they shall find to stand with equity and good conscience." The act, therefore, extends to all equitable cases, where right ought to be done between parties residing within the jurisdiction. This was a species of debt: the plaintiff had been compelled to leave his business to attend the court of the Revising Barristers, by the act of the defendant. The Court of Requests examined into the case, and found that there was no foundation for the objection, and they awarded that the amount claimed ought to be paid as money fairly and reasonably due. A reasonable construction ought to be put on the act, otherwise the utility of the court will be much diminished. Suppose a passenger in the streets were to break a pane of glass, it would be greatly inconvenient if such a matter were not inquirable into, and the damage recoverable in the Court of Requests.—They also mentioned several similar cases, which they contended were equitable debts within the

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meaning of the act, though not strictly cases of debt, and over which they exercised jurisdiction.

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Kelly and *Wrangham*, *contrà*, were stopped by the Court.

Per Curiam.—The jurisdiction of this court is by the act confined to cases of debt. This was not a debt, but the subject of an action upon the case, to substantiate which an improper motive on the part of the defendant must be established, which this Court of Requests has no power to inquire into. Nothing is within the jurisdiction of the commissioners but claims for debt, although in exercising that jurisdiction they may proceed by the rules of equity as well as of law.

Rule absolute.

WRIGHT *v.* SKINNER.

Where the defendant obtains an order to try before the sheriff, the Judge has no authority to impose terms on the plaintiff, as to the time of trying, without his consent.

A RULE had been obtained in this case for judgment as in case of a nonsuit. It appeared that issue was joined on the 22nd *July*; the defendant took out a summons before a Judge for a trial before the sheriff, and the learned Judge made an order (without consent) to try before the sheriff in a fortnight, unless the parties consented to a *stet processus*. The plaintiff then took out another summons to rescind that order, and to obtain further time, which was heard before the same learned Judge, and he made another order on the plaintiff to try at the next Court day. The defendant drew up the orders, but the plaintiff declined to give any notice of trial accordingly, and no trial took place.

Humfrey shewed cause, and contended that the learned

Judge had no authority under the act of Parliament, to make an order on the plaintiff to proceed to trial before the time at which he was bound to do so by the practice of the Court. The plaintiff has the same time to try before the sheriff as before a Judge, unless he gives notice of trial for a particular sheriff's court; *Butterworth* v. *Crabtree* (*a*), *Harle* v. *Wilson* (*b*), *Lenney* v. *Poulter* (*c*). The orders, therefore, were inoperative, and the defendant is too early in this application.

Mansel, contrà, contended that the learned Judge had jurisdiction to make the order; and that, at all events, the plaintiff had deferred to it, by taking out the summons for further time.

PARKE, B.—I certainly do not see how a Judge can impose terms as to time on the plaintiff, where the defendant asks for permission to try before the sheriff. The order, therefore, was inoperative; but as thepresent application was made on the authority of a Judge's order, and the plaintiff so far treated it as a binding order as to apply for time, the Court will not visit it as an irregularity to such an extent as to discharge the rule with costs. The rule will be discharged without costs.

ALDERSON, B.—I agree that the Judge had no power to introduce into the order any terms as to time, without the consent of both parties.

The other Barons concurred.

Rule discharged without costs.

(*a*) 1 C. M. & R. 519. (*b*) 3 Dowl. P. C. 658. (*c*) Id. 650.

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Ex parte SMYTH.

In a suit for a divorce in the Consistory Court of *London*, the defendant put in an answer under protest, which protest was afterwards overruled, but the Court refused to compel the defendant to appear absolutely, or to admit the plaintiff's libel. The plaintiff appealed to the Court of Arches from that decision, but not in due time, and the appeal was dismissed. The plaintiff afterwards applied to the Consistory Court to be allowed to correct her libel, but the Court refused the application. The plaintiff appealed from that decision to the Court of Arches, who pronounced in favour of the appeal. From that decree the defendant appealed to the king in council, praying that it might be reversed, and the cause retained, and he be dismissed from all observance of justice therein. The plaintiff also prayed that the cause might be retained. The appeal was referred to the judicial committee of the Privy Council, who reported in favour of the appeal, that the decree ought to be reversed, and the principal cause retained, but that the defendant should appear absolutely. The report was confirmed, and the order for the appearance was made and served upon the defendant. On a motion for a prohibition to the judicial committee:—*Held*, that the judicial committee had jurisdiction over the cause, and they having retained the cause, this must be taken to be a step taken in the cause, and if wrong, that it was a matter of practice, over which this Court had no jurisdiction.

Semble, that the Court of *Exchequer* has jurisdiction to issue a prohibition to the judicial committee, if they exceed their jurisdiction.

THIS was an application by Mr. *W. H. C. Smyth*, for a rule to shew cause why a writ of prohibition should not issue to the judicial committee of the Privy Council, and the surrogates thereof, to *E. A. C. Smyth*, the promovant or plaintiff, *J. H. Rayford* her proctor, and *J. Phillimore* her advocate, forbidding them from proceeding in a suit which was originally instituted in the Consistory Court of *London*, in 1831, and afterwards appealed from to the Court of Arches, and from thence to the king in council, and referred to the judicial committee of the Privy Council. The application was made upon an affidavit, which stated, that in the month of *February*, 1831, the applicant Mr. *Smyth* was served with a citation to appear in the Consistory Court of *London*, to answer to a suit for divorce, instituted by his wife, which he did under protest; that protest was afterwards overruled by the Judge of that Court, who nevertheless refused to direct the applicant to appear absolutely, or to admit the libel of his wife the plaintiff. From his decision she appealed to the Arches Court of *Canterbury*; but on the 5th of *July*, the Judge of that Court decreed that she, the plaintiff, had not appealed in due time. From this decision she appealed to the Court of Delegates, who, on the 5th of *June*, 1832, pronounced against the appeal, and remitted the cause to the Court of Arches, who directed a relaxation of the

inhibition, which relaxation the plaintiff, on the 25th of *January*, 1833, brought into the Consistory Court; that Court directed the cause to proceed, as though no appeal had been made. On the fourth session of *Hilary* Term, 1833, additional articles were brought in by Mrs. *Smyth*, the plaintiff, and she prayed leave to correct the libel, by altering the word *November* to *December;* but the Judge refused to receive the articles, and rejected the prayer. From this decision she appealed to the Court of Arches, and the Judge of that Court pronounced in favour of the appeal, reversed the decree, and retained the principal cause, and directed a monition for the transmission of the original libel, and gave leave to the applicant's wife to correct the libel. Mr. *Smyth* appealed from the decree to the King in council, and his petition was referred to the judicial committee of the privy council, and the appeal came on to be heard before the judicial committee, on the 12th of *February*, 1835, when they made the following decree, which was afterwards confirmed by his Majesty:—

"*Smyth* v. *Smyth*.

"*William Henry Carmichael Smyth*, the appellant, prayed that their Lordships would be pleased to report to his Majesty in favour of the appeal and complaint made and interposed in this cause, that the decree or order of the Judge appealed from should be reversed, the principal cause retained, and therein that he the appellant ought to be dismissed from all further observance of justice in this cause.

"*Eliza Ann Carmichael Smyth*, wife of the said *W. H. C. Smyth*, and the respondent in this cause, prayed that their Lordships would be pleased to report to his Majesty against the said appeal and complaint, that the decree or order appealed from ought to be affirmed, the principal cause retained, and therein that their Lordships should assign to hear an admission of the libel and exhibits given

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in on behalf of her, the said respondent, in the Consistory Court of *London*, and the additional articles and exhibits tendered to the Judge of that Court, and allowed to be brought in by the Judge of the Arches Court of *Canterbury;* and that a monition should issue against the Judge of the said Consistory Court to transmit the said original libel and exhibits, and also a monition against the Judge of the Arches Court to transmit the said additional articles and exhibits.

"Their Lordships having heard the said *William Henry Carmichael Smyth*, the appellant, and an advocate on behalf of the said *Eliza Ann Carmichael Smyth*, the respondent, were pleased to agree to report to his Majesty in favour of the appeal and complaint made and interposed in this cause, that the decree or order of the said Judge appealed from ought to be reversed, the principal cause retained, and therein that the said *William Henry Carmichael Smyth* should appear absolutely; that their Lordships should assign to hear an admission of the libel and exhibits given in the Consistory Court of *London*, on behalf of the said *Eliza Ann Carmichael Smyth*, and of the additional articles thereto, and exhibits tendered to the Judge of that Court, and afterwards allowed to be brought in, in the Arches Court of *Canterbury*, and should decree a monition against the Judge and registrar of the said Consistory Court to transmit the said original libel and exhibits, and a monition against the Judge of the said Arches Court of *Canterbury* to transmit the said additional articles and exhibits to this committee or their surrogate.

"And their Lordships were pleased further to order and direct that, in case his Majesty should be pleased to confirm such their report, the said *William Henry Carmichael Smyth* should appear absolutely before their Lordship's surrogate, at the Common Hall of Doctors' Commons, at ten o'clock in the forenoon, on the court-

day next following his Majesty's confirmation of such report; and admonished the said *William Henry Carmichael Smyth* to attend before their Lordships' surrogate, in the Common Hall of Doctors' Commons, at ten o'clock in the forenoon, on the by-day after this present *Hilary* Term.

" *Arden* (Registrar.)"

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Mr. *Smyth* having been served with a copy of the decree of the judicial committee of the privy council, citing him to appear and see further proceedings, now applied in person for a writ of prohibition to the judicial committee.—This Court has power to grant this prohibition, as such a power is inherent in all the superior Courts of *Westminster Hall* over all inferior courts. *Bacon's Abr. Prohibition* (A.); *Grant* v. *Sir Charles Gould* (*a*). By the stat. 25 *Hen.* 8, c. 19, s. 4, the Court of Delegates was established to determine appeals from the Ecclesiastical Courts definitively; yet the writ of prohibition has been issued to that Court when it has proceeded beyond its jurisdiction. *Rowth* v. *Bishop of Chester* (*b*), reported more fully in *Hobart, nomine Hutton's case* (*c*). 2 *Roll's Abr.* 317. By the 2 & 3 *Will.* 4, c. 92, the powers of the Court of Delegates are transferred to the King in council; and, by s. 3 of that statute, their judgments, orders, and decrees are to have the same force as if made by the Court of Delegates, and are to be final and definitive, and no commission is hereafter to be granted to review any judgment or decree to be made by virtue of that act. By the 3 & 4 *Will.* 4, c. 41, s. 3, all such appeals are to be referred by his Majesty to the judicial committee of the privy council, who are to hear and report thereon to his Majesty for his decision, in the same manner and form as had been before the custom with

(*a*) 2 H. Bl. 100. (*b*) E. Moore, 861.
(*c*) 15.

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respect to matters referred to the whole council. Therefore it is submitted that the Court of *Exchequer* has now the same power to issue a prohibition to the judicial committee of the privy council as it before had to the Court of Delegates. The jurisdiction of the superior Courts is not ousted in express terms, and, unless that be done, it necessarily remains. That point has frequently been decided with respect to cases of *certiorari*. *Rex* v. *Dukes* (*a*), *Rex* v. *Hales* (*b*), *Hartley* v. *Cooke* (*c*), *Rex* v. *Moreley* (*d*).

Secondly, this is a case in which this Court, having that jurisdiction, ought to exercise it, because the judicial committee have exceeded their jurisdiction in several respects: first, they have adjudicated on a matter not before them *de facto*. This was an appeal from the decree of the Court of Arches respecting a matter different from the appearance of the applicant, and that was not prayed for by the appeal. The appeal to the King in council was, simply, whether the Court of Arches were right in their decree. Therefore, admitting the right of the judicial committee to determine the appeal, they exceeded their jurisdiction in decreeing that the defendant should appear absolutely. Thus, in *Wood's Inst.*, b. 4, c. 1, it is said, "If the Court of Delegates revoke a will, they cannot grant letters of administration; for their power is to hear and determine the appeal." That is precisely in point. The subject matter to be decided in this case was the subject of the appeal. After deciding that, the committee were *functi officio*, and had no right to make any further order. The subject of the defendant's appearance was *coram non judice de facto*. Secondly, they have decreed upon a matter which was *coram non judice de jure*. The question as to the defendant's appearing absolutely

(*a*) 3 T. R. 542.
(*b*) 5 T. R. 668.
(*c*) Id. 542.
(*d*) 2 Burr. 1040.

was decided by the Court of Arches in favour of the defendant, and that decree was not appealed from at all. By the stat. 24 *Hen.* 8, c. 12, ss. 5, 6, 7, an appeal must be made within fifteen days; and, there having been no appeal within that time, no Court had jurisdiction to consider that question afterwards. The effect of the decree of the judicial committee was to authorize the plaintiff to appeal, after the time limited by the statute had expired, which they clearly had no right to do. By the 3 & 4 *Will.* 4, c. 41, s. 20, the times of appeal previously allowed are expressly preserved, and appeals must be brought within the same periods as they before were required to be brought. It is submitted, therefore, that the decree that the defendant must appear absolutely was *coram non judice de jure.* He also cited *The King* v. *The Justices of Yorkshire,* to shew that a party, having once appealed, cannot have a second appeal, though the appeal be dismissed on a point of form, and not upon the merits. This is not an erroneous judgment, on which a writ of error lies to a superior Court, in which case, perhaps, the Court would not grant a prohibition, but it is an extra-judicial decree, against which there is no other remedy.

Lord ABINGER, C. B.—Although I am, *ex officio,* one of the judicial committee of the privy council, yet, not having ever been summoned, I shall feel no hesitation in giving my judgment in this case. I must defer to the authorities and the dicta of the learned men who have laid it down that the Courts of *Common Pleas* and *Exchequer* have power to issue writs of prohibition; but it is unnecessary in the present case to give an opinion on that point. Assuming, however, that this Court has the power to issue writs of prohibition, the question is, whether there is here any case made out which calls upon the Court to interfere. The grievance

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which is alleged is, that the judicial committee came to a wrong decision (I do not say that they have) in a matter in which they had jurisdiction. Mr. *Smyth* says, that they had no jurisdiction; but in that he is mistaken. They have the power to remove the original suit into their own Court, and there to retain it, and take cognisance of it, in the same way that the Court of Delegates might have done. If so, they have jurisdiction in the case. If they have made a mistake, whether in some interlocutory matter or in their final judgment, we cannot remedy it; this Court cannot sit in appeal upon it. I might have said, that it is not very consistent with our law to give a Court an original jurisdiction and no power of appealing to some other Court to have its judgment reversed. The error, if any, is, that the judgment is erroneous; not that the Court had not jurisdiction; but this Court is not a Court of error. The matter complained of is matter of practice, which is never the ground for prohibition, though it may be sometimes of a writ of error. The Court has jurisdiction of the cause, and has power to make decrees and orders in regard to it.

PARKE, B.—Although I am also a member of the privy council, I was not present and took no part in the proceedings in this particular cause, and, therefore, I have no hesitation in giving my judgment upon it. I perfectly concur with the Lord Chief Baron in the view he has taken of this case. It may be conceded, that the Court of *Exchequer* has power to grant the writ of prohibition in cases where it is shewn that an inferior Court is proceeding beyond its jurisdiction; and, it may be conceded also, that a party is entitled to the writ of prohibition, not as a matter of discretion, but *ex debito justitiæ*. All, however, that we are called upon to do is, to see that the inferior Court does not exceed its jurisdiction. But this was a matter over which the judicial committee had juris-

diction. The fallacy lies in supposing that the act complained of was an adjudication upon the prior proceedings upon appeal, whereas it was a distinct step taken in the cause after it was removed. On the appeal being lodged, the judicial committee might either remit or retain the cause. If they decide on retaining it, the cause goes on before the surrogates of the judicial committee, by virtue of their jurisdiction in the cause, which may be called in this respect an original jurisdiction. In this case they have retained the cause, and have ordered the Court below to transmit the proceedings into their Court; and having, by virtue of that removal, obtained jurisdiction in the cause, they make an order that Mr. *Smyth* shall appear absolutely. That order may be wrong, as to which I give no opinion; but, whether right or wrong, it is a step taken by the Court, having competent jurisdiction, in the cause. If the law of the country allowed of any appeal from this decision, the matter complained of might or might not be the subject of an appeal. But the law supplies no Court of appeal, and if the decision is wrong, it is without a remedy; but I am far from thinking that it is wrong. This is a step taken in the cause over which the Court had jurisdiction.

ALDERSON, B.—I am of the same opinion. It may be conceded that this Court has jurisdiction to issue a prohibition, if the judicial committee exceeded their jurisdiction. The matter was brought before the committee by both parties. The prayer of Mr. *Smyth* was, that the Court should retain the cause and dismiss him from all further observance of justice therein: Mrs. *Smyth* prayed them to retain and to grant her alimony. So that both parties refer the cause to the decision of the judicial committee of the privy council, and require them to proceed in the cause. Incidentally the committee has taken a step in a matter of form in the course of the proceedings.

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The Court had jurisdiction, and if there was any thing really wrong, they have committed an error in a matter of practice over which we have no jurisdiction.

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GURNEY, B., concurred.

Rule refused.

MILLIGAN *v.* THOMAS.

On an application for a new trial, in a case tried before the sheriff, the affidavits need not state the pleadings; for the writ of trial is presumed to be in Court.

IN this case, which was an action of debt for goods sold and delivered, tried before the under-sheriff of *Berkshire*, *Lumley* had obtained a rule for a new trial, on the ground that the under-sheriff had admitted evidence which was admissible only under a plea of payment, the only plea on the record being *nunquam indebitatus*.

Channell, on shewing cause, objected that the under-sheriff's notes and the affidavits, on reading which the rule was obtained, did not any of them state the pleadings: the Court, therefore, could not take notice of them; so that, for aught that appeared, there might be a plea of payment on the record.

PARKE, B.—It is not necessary that the pleadings should be set out in the affidavits on which a new trial is applied for. In a case before a Judge, the *postea* is supposed to be in Court; in a case before the sheriff, the writ of trial directed to him, and with respect to which he is the officer of the Court, must also be taken to be in Court.

The rule was made absolute on terms.

END OF MICHAELMAS TERM.

AN

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TO THE

PRINCIPAL MATTERS.

ACTION (WHEN MAINTAINABLE).

A. and *B.* being co-surveyors of the highways of a parish, it was agreed between them that *A.* should deliver up the rate-book to *B.*, and that *B.* should pay *A.*, out of the moneys he should collect under the rate, the sum of 15*l.* which *A.* had advanced beyond the amount collected by the previous rate. The book was accordingly delivered to *B.*, who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay *A.* the 15*l.*: —*Held*, that *A.* might maintain an action to recover it. *Liddard* v. *Holmes*, 586

AFFIDAVIT.

1. An affidavit of merits is not sufficient, which states that both the defendant and his attorney "are advised and believe" that there is a good defence on the merits.

If an application made at chambers be referred to the Court, an affidavit sworn in answer to the application at chambers may be used on shewing cause before the Court. *Worthington* v. ——, 315

2. An affidavit of debt was filed, *April* 9, with the filacer for *Surrey*, and a *capias* issued into *Surrey*; on the 7th of *May* a *capias*, and in *November* an *alias capias* thereon, issued into *Middlesex*, no fresh affidavit being filed, the filacer for *Surrey* and *Middlesex* being the same person:—*Held*, regular.

A *stale* affidavit means one sworn above a year ago. *Ramsden* v. *Maugham*, 634

3. In an action by the indorsee against the drawer of a bill of exchange, it is not necessary to allege, in the affidavit of debt, a presentment to the acceptor, or that the drawer has had notice of dishonour. *Witham* v. *Gompertz*, 736

AMENDMENT,

Under 3 & 4 Will. 4, c. 42.

In an action on the case against the defendants, as *carriers*, for negligence, it appeared from the evidence, that the defendants, if liable at all, were liable as *wharfingers*, on a contract to *forward*. Just before the plaintiff's counsel commenced his reply, he applied to the Judge to amend the declaration, which, however, the learned Judge refused to do, but left it to the jury to say, whether there was a

contract to forward, or a contract to carry, and they found that there was a contract to forward. He then directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the Court might proceed thereon according to the 3 & 4 *Will.* 4, c. 42, s. 24. The Court allowed the amendment on payment of costs, and granted a new trial, on payment of costs, observing, that the learned Judge might have allowed the amendment, and postponed the trial to a future day, pursuant to s. 23 of that statute. *Parry* v. *Fairhurst*, 190

ARBITRATION.

See AWARD.

Semble, that under the 3 & 4 *Will.* 4, c. 42, s. 39, the Court, or a Judge, has the power to enlarge the time for an arbitrator to make his award, although the order of reference does not contain any power to enlarge the time, and there has been no revocation of the arbitrator's authority. *Potter* v. *Newman*, 742

ARREST.

A defendant was arrested for the sum of 70*l.*, but it appearing that to part of that amount the defendant had a defence under the Statute of Limitations, it was agreed that he should be discharged out of custody on giving a bill of exchange for 30*l.* drawn by a third person, and accepted by himself. The defendant having been arrested on this bill:—*Held*, that the defendant was not entitled to be discharged out of custody, as having been a second time arrested for the same debt. *Hamber* v. *Cooper*, 148

ASSIGNMENT (VOLUNTARY).

See INSOLVENT DEBTOR.

ASSUMPSIT.

See EVIDENCE.

When not maintainable.

A. having been arrested whilst he was privileged, as attending on a summons at a Judge's chamber, the Judge made an order for his discharge out of custody, on condition that if *B.*, the officer who made the arrest, paid *A.* his costs, to be taxed by the Master, *A.* should not bring any action for the arrest. The costs were taxed, and the amount was accordingly paid. *A.*, however, subsequently obtained an order for the Master to review his taxation, which the Master accordingly did, and allowed *A.* a further sum for costs. This *B.* refused to pay, upon which *A.* brought an action of *assumpsit* against *B.* as upon an agreement by *C.* to pay the costs, in consideration that *A.* would relinquish all right of action against *B.*, on occasion of the arrest:—*Held*, that under these circumstances the action was not maintainable. *King* v. *Taylor*, 235

AWARD.

See ARBITRATION.

1. An award recited, that by an agreement in writing between the plaintiff and defendant, reciting, that they had for some years carried on business as builders and excavators in copartnership, and that they had, in pursuance of the copartnership, become possessed of certain messuages, buildings, and premises, sum and sums of money, and other chattels and effects, and that divers disputes had arisen between them touching their accounts, reckonings, and dealings, and as to a division of the said copartnership messuages &c. and other their estate and effects, and that they had agreed to refer the matter to the decision &c. of *J. C.* and

W. B., and that the said arbitrators should have power to direct a division of the messuages, buildings, and premises, and other the partnership effects between them, and that each party thereby agreed to execute to the other a conveyance of the messuages &c. according to such division between them, as the arbitrators should award. The award further recited, that the partnership between the defendant and the plaintiff had been dissolved by mutual consent. The arbitrators then awarded that the defendant should pay to the plaintiff the sum of *223l. 4s. 6d.*, in full of all demands, in respect of his one equal moiety, half part, or share of the said copartnership property, estate, and effects; and that, upon payment thereof, and upon having such conveyances as thereinafter mentioned tendered to him for execution, the plaintiff should, at the defendant's request, execute a proper conveyance unto and to the use of the defendant of, in, and to certain messuages &c. therein mentioned, subject to certain mortgage debts charged thereon. They also awarded, that all the debts then due and owing to and from the copartnership concern should be received and paid by the defendant and the plaintiff in equal proportions; and that, if either party should advance or pay any sum or sums of money over and above his half share or proportion of the copartnership debts, then the amount so overpaid should, on demand, be made good, and repaid to the party paying the same, by the party making default. To an action upon this award, to recover the sum of *223l. 4s. 6d.* from the defendant, he pleaded, (after setting out the award as above), that the several messuages &c. in the said award mentioned, and directed to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there is not in the said award any other provision than those thereinbefore specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof: —*Held*, on demurrer to this plea, that the award was final; that it was sufficiently certain, and that it was not inconsistent.

Quære, whether, upon the supposition that there had been no arrangement between the partners, by which the premises were ultimately to become the property of one partner, subject to the mortgages, the arbitrators did not exceed their authority in awarding the messuages, &c., to one of the parties, and not dividing them between both. *Wood* v. *Wilson*, 241

2. A cause and all matters in difference were referred, costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrators awarded that the action should cease and be no farther prosecuted; that, on the balance of accounts, 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. The Court refused to set aside the award, on the ground that it did not sufficiently determine the action. *Eardley* v. *Steer*, 327

3. An agreement of submission recited that a rate had been made and allowed for the relief of the poor of the parish of *H.*; and that the plaintiff, a parishioner, was rated for several messuages &c. in aid of such rate; and that the plaintiff, conceiving himself to be over-rated, had given notice to the defendants, the churchwardens and overseers of the parish, of his intention to appeal against the rate at the next general sessions of the peace for the county; and that the defendants did intend to defend

the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them as stated in the said notices, to arbitration, no appeal was entered against the rate as by law required; and that the parties, in order to put an end to all further expense, and to prevent litigation respecting such poors' rate, and in order to settle and ascertain the subject of the said poors' rate, and the equality or inequality thereof, so far as related to the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the same matters in difference between the parties thereto to arbitration. The agreement then witnessed that the defendants (as far as they lawfully might or could as such churchwardens and overseers) and the plaintiff did thereby severally and respectively mutually promise and agree to abide by the award of *W. A.*, *R. D.*, and *P. B.*, or any two of them, to award and determine of and concerning the abovementioned matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement, and the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers, in consequence of such notices of appeal, and of their preparation to resist such appeal and to support the rate, and all matters relating thereto respectively, so that they or any two of them made their award before the 5th of *May* then next; the costs of the arbitration and the award to be in the discretion of the arbitrators: and it was thereby further agreed that that agreement and submission should be made a rule of the Court of *K. B.* The arbitrators took upon themselves the burthen of the award, and the time for making the award was by agreement enlarged to the 5th of *June*, before which day they published their award of and concerning the premises and matters to them referred, whereby they awarded that the defendants should, on delivery of that award, pay unto *T. E. F.*, attorney for the plaintiff, 16*l.* 12*s.*—his bill already delivered, and the amount of the costs of the said *T. E. F.* attending that arbitration, and of the procuring the signatures of his client and the other parties to the said enlargement of time; and they further directed, that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation. The award further directed, that, as a dispute was made with regard to the quantity of the lake occupied by the plaintiff, the quantity should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by the arbitrators in a schedule to the award. To a declaration on the above award, the defendants, after setting out the submission and award at full length, pleaded as follows:—"And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

On demurrer to this plea, *held* that it was good in point of form and substance.

Held, also, (*Parke*, B., *dissentiente*), that the submission and award were bad, inasmuch as the main object of the reference, namely, the rate, was not by law capable of being referred to the decision of an arbitrator; that the costs incurred were merely incidental to the determination of the former question; and that the consideration for the submission therefore wholly failed.

Held, also, by Lord *Abinger*, C. B., that the award was bad, in directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that was not binding upon them, inasmuch as they could not by law do so, and there was no power to make them obey the award in this respect. That the direction, that the quantity of the lake occupied by the plaintiff should be ascertained by *the parish*, was also too vague and uncertain, and left it in doubt by whom it was to be done.

Held, by *Parke*, B., that, notwithstanding the reference of the rate was not binding on the churchwardens and overseers, the submission and award were still valid as to the other matters in difference referred to the arbitrators:—and that the ascertaining the quantity of the lake was a mere ministerial act, which might be delegated to another, and the award was not invalid in this respect. *Thorp* v. *Cole and others*, 367

ATTACHMENT.

See PRACTICE (*Bail*).
SHERIFF.

ATTORNEY.

1. Where an attorney, not an attorney of this Court, had liberty to practise here in the name of another, and signed a notice of bail, "*A. B.* by *C. D.*," it was *held* irregular; for the signature should have been in the name of the attorney of this Court only. *Chadwick* v. *Hough*, 29

2. Where a defendant is entitled, as against the plaintiff, to be relieved from a verdict obtained against him, the Court will not abstain from interfering on the ground of the lien of the plaintiff's attorney upon the verdict for his costs. *Symons* v. *Blake*, 416

3. The assignee of an insolvent attorney need not deliver a bill signed by the attorney, before suing for business done by him.

The name of the Court in which the business is done is not required by the 3 *Jac.* 1, c. 7, to be stated in an attorney's bill delivered to his client: nor, *semble*, by the 2 *Geo.* 2, c. 23, s. 23. *Lester, Assignee of Mackay*, v. *Lazarus*, 665

AUCTION DUTY.

A freehold estate was sold by auction, subject to a mortgage, the mortgagee not concurring in the sale, and refusing then to receive his mortgage money. By the conditions of sale, an apportionment was to be made of the mortgage on the several lots, and the purchaser of each was to have an indemnity against the amount apportioned to the other lots. A purchaser bid the sum of 15,500*l.* for one of the lots, which was to be charged with 10,200*l.* of the mortgage money; and paid a deposit of 10*l. per cent.* on that sum, and signed an acknowledgment that he had bought the lot for 15,500*l.*, subject to the conditions of sale:—*Held*, that auction duty was payable, in respect of this lot, only on the balance of 5300*l.*, that being the only amount of purchase-money actually payable to the vendor for what was bought at the sale. *Rex* v. *Sedgwick*, 603

AUCTIONEER.

Liability for Negligence.

The defendant, an auctioneer, was employed by the plaintiff to sell some furniture, and was desired to sell it for ready money only. The defendant, however, sold the furniture to one *M.* on his giving him a bill of exchange for the amount, drawn by

himself upon, and accepted by one *D*. The plaintiff afterwards applied for payment of the amount of the sale, and the bill, though at first refused to be taken by the plaintiff, was ultimately taken by an agent of the plaintiff, in order to get it discounted. The bill never was presented nor was any notice of dishonour given either to *M*. or the defendant, until ten days after the bill had become due. In an action brought against the defendant for negligence, in selling the furniture otherwise than for ready money, the jury having found that the plaintiff had not accepted the bill in satisfaction for the furniture:—*Held*, that the negligence of the plaintiff in not presenting the bill, and not giving notice of dishonour, by which *M*. was discharged from any liability on the bill, was no answer to the action.

Semble, that if, by the negligence of the plaintiff, any of the parties to the bill were discharged, the defendant might maintain a cross action against the plaintiff to recover such damages as he could prove he had sustained thereby. *The Earl of Ferrers* v. *Robins*, 152

AUDITA QUERELA.

The Court will not interfere upon motion to give that relief to which it is suggested that the parties applying would be entitled under an *auditâ querelâ*, unless upon the facts appearing on the affidavit, it is clear that the party would be entitled to such remedy. *Symons* v. *Blake*, 416

BANKRUPT.

See SHERIFF.

A party made a composition with his principal creditors, paying the smaller ones in full. He afterwards became bankrupt, and did not pay 15*s*. in the pound:—*Held*, that (having obtained his certificate and released his surplus) he was a competent witness to support an action by his assignees. *Roberts and others* v. *Harris*, 292

BARON AND FEME.

A husband is entitled to the personal property of his wife which she has acquired while living apart from him in adultery.

A woman living apart from her husband acquired a sum of money, which she deposited in a bank.—She married another man, and on that occasion the money was vested in trustees for the benefit of herself and her illegitimate children. She was afterwards tried, convicted, and executed for murder. The trustees expended a considerable sum in her defence, and made an application to the bankers for the money so deposited, but it appeared that such application was not made *bonâ fide* in execution of the trusts of the settlement. The first husband claimed the money, and the parties having all been brought before the Court by an interpleader rule, an issue was directed to try whether he was entitled to it, in which he recovered. The Court refused to allow the trustees their costs out of the fund, and directed that the costs of the bankers should be paid by the plaintiff (the husband); to be repaid to him by the trustees. *Agar* v. *Blethyn*, 699

BASTARDY-BOND.

A bastardy-bond, conditioned for the payment of the charges incurred, "by reason of the birth, education, and maintenance of a bastard child," cannot be enforced after the bastard has attained 21, and ceased to be chargeable as a child, although he may afterwards become chargeable again. *Wandley and another* v. *Smith*, 716

BILLS AND NOTES.

See PLEADING (*Plea in bar*, 6, 8, 11, 12, 15, 16; *and Replication*, 2.)

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1. Action by the indorsees against the indorser of a promissory note for 500*l.* Plea, except as to the sum of 200*l.*, that the note was made and delivered to the defendant in order that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced to the amount of 200*l.*, and that there was no consideration for the residue.—Replication, that the plaintiffs were the holders of the note for good and valuable consideration given to the maker in respect of their being the holders of the note to the full amount thereof.

Held, first, on this issue, that it was not incumbent upon the plaintiffs, in the first instance, to prove the consideration given for the note; but that it was necessary for the defendant to begin, and impeach the plaintiffs' title.

Held, secondly, it having been proved that more than 500*l.* being due from the maker to the plaintiffs at the time the note was paid in to them, they entered the note as a bill discounted to his credit, but that 198*l.* only was actually paid to him; that that was equivalent to their having advanced the amount mentioned in the note, and was a giving of a valuable consideration within the meaning of the issue.

Held, thirdly, that if the note were given to them as a security for a previous debt, the plaintiffs might be properly stated to be the holders for a valuable consideration. *Percival and others* v. *Frampton*, 180

2. *Assumpsit* for goods sold, &c.—Plea, as to 9*l.* 15*s.* 9½*d.*, that, after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew, upon a piece of paper having a bill of exchange stamp upon it of 1*s.* 6*d.*, an instrument, purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was required to pay to such person, or his order, who should place his name thereto as drawer, 20*l.*, two months after date, as for value received; which instrument the plaintiff requested the defendant to accept towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby became liable to the plaintiff, or to such person who should place his name thereto as drawer, or his order, the sum of 20*l.*, viz. towards payment of the sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.* 15*s.* 9½*d.*, and which bill was not due at the commencement of the suit.—Non-assumpsit to the residue.—Replication, that the bill remained unnegotiated in the hands of the plaintiff, without any drawer's name to it, and unpaid:—*Held*, on demurrer, that, under the circumstances alleged in the plea, the plaintiff's right to sue for the original debt was suspended until the expiration of the two months, and of the instrument's becoming due and being dishonoured. *Symon* v. *Lloyd*, 187

3. Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it. *Swain and others* v. *Lewis*, 261

4. An alteration in a bill of exchange, after acceptance, may be taken advantage of on a plea that the defendant did not accept the bill. *Cock* v. *Coxwell*, 291

5. In an action on a bill of exchange

(for 98*l.* 5*s.* 3*d.*) by a second indorsee against the acceptor, the pleadings admitted that the acceptance and first indorsement were without consideration, and the issue was whether the plaintiff gave value for the indorsement to him. He relied in the first instance on the mere production of the bill, but on the defendant's objecting that he was bound to prove consideration, he gave evidence of a debt to the amount of 57*l.* due to him from the first indorser, and of another debt to the amount of 20*l.* 18*s.*, due to him from his immediate indorser, for goods sold:—*Held*, that he was entitled to a verdict only for the latter amount.

Quære, whether the indorsee of an accommodation bill is bound to prove consideration in the first instance, or whether the indorsement of itself *primâ facie* imports consideration, until the defendant proves the contrary. *Simpson* v. *Clarke*, 342

6. A bill of exchange drawn in *London*, payable to the order of the drawer in *London*, upon a merchant residing at *Brussels*, and accepted by him, payable in *London*, is an inland bill of exchange, and must be stamped as such. *Amner* v. *Clark*, 468

7. Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it. *Swain* v. *Lewis*, 263

CANAL ACT (CONSTRUCTION OF).

By a canal act, 30 *Geo.* 2, c. 82, s. 7, the owners of certain works called the *Pentyrch* works, were entitled to all the surplus water, or such as was not wanted for the purposes of the canal. By a subsequent act, 36 *Geo.* 3, c. 69, the canal company were required to finish the canal and all the works and extension of the same, within the space of two years, and were restricted from making any alterations in the canal after the expiration of that time. After the expiration of the two years, the canal company erected an engine for the purpose of forcing up water into the canal, by which the quantity of water was increased, and the company were enabled to pass down a greater number of barges than could have been passed down before the erection of this engine:—*Held* that this, having had the effect of diminishing the quantity of surplus water, in consequence of the increased trade, was an injury to the owners of the *Pentyrch* works, for which they were entitled to recover consequential damages.

The 30 *Geo.* 3, c. 82, s. 7, also provided, for the purpose of better securing the surplus water for the benefit of the *Pentyrch* works, that the lock which should be made below and nearest to the *Pentyrch* works, should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or waste of water, &c. The canal company constructed a notch for the purpose of conveying water below the lock directed to be kept in repair:—*Held*, on the construction of this section, *Parke*, B., *dubitante*, that the company had no right to pass any water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the lock, and that the notch was not authorized by the act of Parliament. *Blakemore and Booker* v. *The Glamorganshire Canal Company*, 133

CAPIAS.

1. Where the sheriff arrested a person named *Cocken*, on a writ issued against him under the name of *Cocker*, such arrest is illegal, and a bail-bond taken upon it, reciting that

the defendant *Cocken* had been arrested by the name of *Cocker*, is illegal also.

Where the plaintiff averred that a writ of *capias* issued against the defendant *Cocken* by the name of *Cocker*, and the defendant traversed this allegation:—*Held*, that, on proof of the writ being issued in the name of *Cocker*, and that the defendant was the party intended, the issue ought to be found for the plaintiff. *Finch* v. *Cocken and others*, 196

2. "*F. H., late* of *Devonshire Terrace, New Road*," *held* a sufficient description in a *capias*, where it appeared that the party had been found by that description, and that he had no settled residence at the time of the arrest, and no other means of identification appeared. *Hill* v. *Harvey*, 307

COMMISSIONER OF BANKRUPT.

Power to fine for Contempt.

A commissioner of bankruptcy appointed under the 1 & 2 *Will.* 4, c. 56, has no power, when sitting alone, under the authority of the 7th section, to fine or commit for a contempt. *The King* v. *Faulkner*, 525

CONSIDERATION (PROOF OF).

See BILLS AND NOTES.

CONTRACT.

A foreigner selling and delivering goods abroad to a *British* subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country. *Pellecat* v. *Angel*, 311

COPYHOLD.

Where lands are held by copy of court-roll, according to the custom of the manor, they are copyhold within the 55 *Geo.* 3, c. 192, although they are not held *at the will of the lord*.

By the special verdict it was found, that, previous to the passing of the 55 *Geo.* 3, c. 192, there did not appear upon the court-rolls of the manor any entry of a surrender of lands, parcel of the manor, and held by copy of court-roll thereof, to such uses as should be declared, by the last will of the person making such surrender, had ever been made:—*Held*, notwithstanding, that they were within the above statute.

Quære, whether a negative custom that copyhold lands, surrendered to the use of a will, should not pass thereby, is good?

A testator devised all the rest, residue, and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same might be:—*Held*, that the words of this devise were sufficient to pass the copyhold estate; and that a copyhold estate would pass by a general devise of real estate, although the devisor had made no surrender to the use of his will. *Doe* d. *Edmunds* v. *Llewellin*, 503

COSTS.

See EJECTMENT.

SLANDER.

I. *Of Justification of Bail.*

Where an affidavit of sufficiency omits to state the place where the property of the bail is situate, and only ascribes the value to several kinds of property collectively, it is a departure from the form given by the rule 3, *T. T.* 1 *W.* 4; and the bail having justified, the defendant is not entitled to the costs of justification. *Hodgson* v. *Cooper*, 43

II. *Of Opposition of Bail.*

On bail justifying, the plaintiff was

allowed the costs of a former successful opposition, though he did not ask for them until after the bail had passed. *Lewis* v. *Glossop*, 655

III. *Of Proof of Deeds.*

Where a notice to admit the execution of certain documents was given to the defendant's agent in *London* only four days before the commission day of the assizes at which the cause was to be tried, and the defendant's agent, on being applied to two days afterwards, refused to admit the execution, without objecting to the sufficiency of the notice, as to its having been given a reasonable time before trial:—*Held*, that the plaintiff, who succeeded at the trial, was entitled to the costs of proof. *Tinn* v. *Billingsley and others*, 253

IV. *Security for.*

Where a cause was tried, and the jury, not being able to agree in their verdict, were discharged by consent of both parties, and the plaintiff afterwards gave a new notice of trial:—*Held*, that an application for security for costs, on the ground that the plaintiff had gone to reside abroad, was too late; it appearing that the defendants had been fully aware of that fact before the first trial. *Wainwright* v. *Bland and others*, 740

V. *Of several Defendants.*

1. Where there are several defendants, and a verdict passes against some and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40*s.* each. *Griffiths* v. *Jones and others*, 333

2. In trespass against four defendants, the declaration contained two counts. One defendant was found guilty on the first count, but acquitted on the second, and the other three defendants were acquitted on both counts:—*Held*, that the defendant, who was found guilty on the first count, was entitled to have the costs of such of his witnesses as related to his defence to the second count, to be deducted from the plaintiff's costs; and that the other three defendants were entitled to a fourth share of the costs of the defence, unless it appeared that they had not employed the attorney, and that it must be taken *primâ facie* that they had done so. *Starling* v. *Cozens and others*, 445

VI. *Of Short-hand Notes.*

Where, in granting a new trial, the Court directed that certain portions of the evidence should be admitted upon the proof already given:—*Held*, that the plaintiff, who had a verdict, was not entitled to the costs of fair copies of the short-hand writer's notes of the evidence for the use of counsel: but that he ought to have applied for copies of the Judge's notes. *Crease* v. *Barrett*, 738

VII. *Of Taxation.*

Where the Master on taxation decided that one of the actions in which the costs had been incurred, had been improperly brought, and disallowed those costs, by which more than one-sixth of the bill was taken off:—*Held*, that the attorney was bound to pay the costs of taxation. *Morris and another* v. *Parkinson*, 178

VIII. *In Trespass.*

Since the rules of *H. T.* 4 *Will.* 4, on not guilty pleaded in trespass *qu. cl. freg.*, the plaintiff is entitled to full costs, although he obtains less than 40*s.* damages, and the Judge does not certify. *Hughes* v. *Hughes*, 663

IX. *Of Witnesses.*

At the trial of an action for diverting a water-course, the cause and

all matters in difference were referred to an arbitrator, with power to determine the right between the parties, the costs of the cause to abide the event. The arbitrator awarded, that a nonsuit should be entered, on the ground that there was no sufficient evidence of the defendant's having committed the injury, but he decided the right in favour of the plaintiff:—*Held*, that the defendant was entitled to the costs of all his witnesses, as well those relating to the commission of the injury, as those who came to speak to the question of right. *Ratcliffe* v. *Hall*, 258

X. *Of Writ of Inquiry.*

Where, upon the execution of a writ of inquiry, the under-sheriff improperly rejected some evidence, in consequence of which, on application, the Court ordered a new writ of inquiry, but the defendant, in order to avoid further expense, paid the amount assessed by the jury on the first inquiry:—*Held*, that the plaintiff was not entitled to the costs of that inquiry. *Porter* v. *Cooper*, 232

COURT OF REQUESTS.

See ENTERING SUGGESTION.

COVENANT.

1. The assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises. *Harley and another* v. *King*, 18

2. An executor is entitled to sue the lessee of his testator for the breach of a covenant not to fell, stub up, lop or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator. *Raymond and another, executors of T. Walford, deceased*, v. *Fitch*, 588

DAMAGES (ESTIMATING).

In *assumpsit* for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence, that the plaintiffs, pursuant to contract, had paid part of the purchase-money to the vendor in advance; that the defendant, at the time when the linseed ought to have been delivered, had given notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into Court, with interest up to the time it was so paid in, as a condition for a commission to examine witnesses abroad, and was only obtained out of Court by the plaintiffs a short time before the trial:—*Held*, that, in estimating the damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial as a criterion; and the plaintiffs not having proved that they had sustained any special damage from the non-delivery of the seed, and the non-return of the money, that the repayment of the money advanced, with simple interest upon it, and payment of the difference between the contract price and the price of the linseed at the time when it ought to have been delivered, was that to which the plaintiffs were entitled; and the jury having found accordingly, that the verdict was right. *Startup and another* v. *Cortazzi*, 165

DEMURRER.

If a demurrer be pleaded to the whole of a declaration consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment. *Ferguson* v. *Mitchell*, 687; *Spyer* v. *Thelwell*, 692

DEPARTURE.

See PLEADING (*Replication*).

DEVISE (CONSTRUCTION OF).

1. A testator, after giving a pecuniary legacy to his heir-at-law, directed his debts and funeral expenses to be paid and discharged by his executrix hereinafter named. He afterwards gave to his daughter, *E. S.*, whom he made, constituted, and ordained his executrix, all and singular his lands, tenements, and messuages, by her freely to be possessed and enjoyed:—*Held*, that the executrix took only a life estate. *Doe* d. *Ashby and others* v. *Baines*, 23

2. Devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail; remainder to the testator's son for life, and his sons and daughters in tail: "and for default of such issue, to the younger branches of the family of *B. W.* and their heirs, to be equally divided amongst them, as tenants in common; and in default of such issue, to the elder branches of the family of *B. W.*" (in the same terms). At the time of the making of the will, and of the testator's death, there were living two daughters of *B. W.*, four daughters of one of those daughters, an only son of *B. W.*'s eldest son, and an only son of his third son. At the expiration of the estate tail limited to the testator's grandchildren, there were living many descendants of one of *B. W.*'s daughters, and of his third son.

Held, that the devise to the branches of *B. W.*'s family was void for uncertainty. *Doe* d. *Smith and another* v. *Fleming*, 638

DISCONTINUANCE.

To a declaration on a bill of exchange for 65*l.*, with acount in *indebitatus assumpsit*, concluding to the plaintiff's damage of 200*l.*; the defendant pleaded as to the sum of 35*l.*, parcel of the money in the bill of exchange mentioned, that he accepted the bill so far as respected that sum, for the accommodation of the plaintiff, concluding with a verification; as to the sum of 40*l.*, other parcel of the sums in the declaration mentioned, payment of that sum into Court, and no damages *ultra* that sum; and as to the residue of the sums mentioned in the last count, *non assumpsit*. The plaintiff replied, denying that the bill was an accommodation bill, and joined issue on the plea of *non assumpsit*, but took no notice of the payment of money into Court:—*Held*, on motion in arrest of judgment after verdict for the plaintiff, that there was no discontinuance on the record, and that the plaintiff might enter a *nolle prosequi* on the record. *Fallows* v. *Bird*, 457

EASEMENT.

A unity of possession of the land *a qud* and of the land *in qud* an easement exists, does not extinguish but only suspends the easement, where the party is seised in fee of the one parcel, and possessed for the residue of a term of the other.

Where a party has a right to have the droppings of rain fall from his wall upon the premises of another, the right is not destroyed by his raising the height of the wall. *Thomas* v. *Thomas and another*, 34

EJECTMENT.

See EVIDENCE (*Verdicts and Judgments*).

I. *Consent Rule.*

Twelve defendants in ejectment entered into a general joint consent rule, not specifying the premises for which they severally defended. At the assizes the Judge made an order that

the *record* should be amended, by allowing two of the defendants to withdraw their plea, and suffer judgment by default; but no express order was made as to any amendment of the consent rule. The trial proceeded; these two defendants did not appear, but the other ten made out a complete defence: — *Held*, that the order did not virtually operate as an amendment of the consent rule also, and that the plaintiff was, notwithstanding the order, entitled to a verdict against all the defendants. But the Court directed that the ten defendants who went to trial should be allowed the costs of their defence on taxation. *Doe* d. *Bishton and others* v. *Hughes and eleven others*, 281

II. *Service of Declaration.*

Where a portion of the premises in ejectment consisted of three unfinished and uninhabited houses, the Court refused to permit the affixing of the declaration on the doors of the houses to be deemed good service. *Doe* d. *Showell* v. *Roe*, 42

ENTERING SUGGESTION.

1. By the Building Act, 14 *Geo.* 3, c. 78, s. 100, it is enacted, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs. *Semble*, that in such a case it is not necessary for the defendant to enter a suggestion on the roll to entitle himself to treble costs. *Wells* v. *Ody*, 184

2. In an action tried before the secondary, under the Writ of Trial Act, the plaintiff recovered a verdict for 4*l.* 10*s.* only, upon which the defendant applied to enter a suggestion on the roll to deprive the plaintiff of costs on an affidavit, stating that at the time the action accrued, and until *June* last, the defendant had a warehouse and counting-house in the city of *London*, where he carried on his business of a silk-broker; that since that time, and down to the commencement of the action, he had a house and warehouse in *Crown Court, Old Broad Street*, where he and his brother carried on the business of silk-brokers; that from the month of *January*, 1833, he had sought and still seeks his livelihood in the city of *London*, by carrying on his trade and business at those houses and warehouses respectively:—*Held* sufficient to entitle the defendant to enter a suggestion.

Held, also, that the defendant having consented to the trial before the secondary, it did not affect his right to enter a suggestion.

Held, also, the judgment having been signed and execution issued in vacation, that an application within the first four days of the ensuing term was not too late. *Bond* v. *Bailey*, 246

3. The defendant pleaded payment of 1*l.* 18*s.* into Court in satisfaction of the cause of action, and the plaintiff took the money out of Court:—*Held*, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of costs on the ground that the action was brought to recover a less sum than 40*s.*, and therefore recoverable in the County Court. *Tarrant* v. *Morgan*, 252

ESTOPPEL.

A lessee for years covenanted to pay the rent to the lessor, his heirs and assigns, and also to deliver up possession of the demised premises, at the expiration of the term, to the lessor, *his heirs and assigns*. In an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises:—*Held*, that the assignee was not estopped by such co-

venant from shewing that the lessor was only tenant for life of the premises demised. *Doe* d. *Strode* v. *Seaton*, 728

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EVICTION.

See RENT.

EVIDENCE.

See PLEADING (*Plea in bar*). PORT DUTIES.

I. *Under General Issue.*

1. In trespass for building upon and heightening the plaintiff's wall, and thereby obstructing his lights, the defendant pleaded the general issue. At the trial, the defendant having proved that the wall was a party wall, and that he had acted under a *bonâ fide* impression that the provisions of the Building Act, 14 *Geo.* 3, c. 78, s. 43, justified him in raising the wall, the plaintiff was nonsuited, he not having given a notice of action, as required by s. 100 of that act:—*Held*, that the evidence was properly received under the general issue, and that the nonsuit was right. *Wells* v. *Ody*, 128

2. Under the general issue to an action for goods sold and delivered, or for work and labour done; the defendant may prove (even since the new rules) that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price; and the plaintiff can then recover only on the *quantum meruit*. *Cousins* v. *Paddon*, 547

II. *Privileged Communication.*

The meaning, in law, of a *privileged communication*, is, a communication made on such an occasion as rebuts the *primâ facie* inference of malice, arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact: but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.

The defendant was the solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend, (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in his office:—*Held*, that this was a privileged communication. *Wright* v. *Woodgate*, 573

III. *Surrender.*

The plaintiff was tenant to *A.* of one close; *K.* was tenant to *B.* of another close. The plaintiff and *K.* verbally agreed to exchange their holdings; "the plaintiff to have *B.*'s land, and pay *K.*'s rent, *K.* to have *A.*'s land, and pay plaintiff's rent." On the same day each took possession of the others land. *K.* undertook to communicate their bargain to *C.*, who was the agent of both *A.* and *B.*: he did, accordingly, some days afterwards, communicate it to him, and *C.* expressed his concurrence:—*Held*, that this was evidence to go to the jury of a surrender by *K.* to *B.* of his interest in *B.*'s close. *Bees* v. *Williams*, 581

IV. *Verdicts and Judgments.*

1. In an action brought by *A.* and *B.*, for diverting water from their works, it appeared that *A.*, when in the sole possession of the same works, had brought a former action for a similar injury, against the same defendants, in which he had recovered a verdict and judgment against them; and it being proved that *A.* and *B.* were now in possession of the same works:—*Held*, that this was abundant *primâ facie* evidence that the present plaintiffs were privy in estate to the former plaintiff, and that the verdict and judgment in the former action were admissible in evidence against the same defendants in this action.

Held, also, that the circumstance of *B.*'s having been examined as a witness in the former action, when he was disinterested, did not render such verdict and judgment inadmissible. *Blakemore* v. *Glamorganshire Canal Company*, 133

2. A judgment in ejectment is not *conclusive* evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary form) that the premises in the declaration mentioned were not the premises of the plaintiff, it was held, that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment. *Doe* v. *Huddart*, 316

3. A judgment recovered by the defendant in a former ejectment is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties. *Doe* d. *Strode* v. *Seaton*, 728

V. *Wilful Misrepresentation.*

The plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant paid to the plaintiff as a deposit a check for 100*l.* There being a wilful misrepresentation in the description of the premises, the defendant refused to pay the check, upon which the plaintiff brought an action against him on the check. The defendant having pleaded that there was no consideration for making the check:—*Held*, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have been bad on special demurrer. *Mills* v. *Oddy*, 103

EXECUTION OF PROCESS.

The sheriff is a constituent part of the county court, and acts as such in issuing process of execution, and is not liable for the wrongful act of the bailiff, done in the execution of such process. *Tunno* v. *Morris*, 298

EXECUTORS.

1. The Court will not relieve an executor or administrator plaintiff from costs, unless there has been some misconduct on the part of the defendant, which led the plantiff to proceed with the action, or unless some other very peculiar ground is laid for the interference of the Court. It is not enough that the action was brought *bonâ fide*, that the plaintiff had apparently reasonable grounds for suing, and that he was taken by surprise by the defence. *Godson* v. *Freeman*, 585

2. An executor is entitled to sue the lessee of his testator for the breach of a covenant not to fell, stub up, lop or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator. *Raymond and another* v. *Fitch*, 588

EXTENT (SALE UNDER).

Lands having been purchased at a sale by auction under an extent, and the purchaser having re-sold them for a less sum than that which he had contracted to give, the Court, with the consent of the Attorney-General, made an order that the name of the second purchaser should be substituted in the contract, and that the conveyances should be made to him, the original consideration being expressed in the deed. *Rex* v. *Rawlings, ex parte Hand,* 471

FEOFFMENT WITH LIVERY.

See TENANCY AT WILL.

FERRY.

Where there is an ancient ferry from *A.* to *B.*, which leads to a public highway, and another constructs a landing-place at *C.*, a short distance from *B.*, and carries passengers over from *A.* to *C.*, from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, does not preclude persons from using the river as a public highway, from or to all the towns or places on its banks which are not in the line leading from one *terminus* of the ferry to the other.

Where the owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master:—*Held*, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry. *Huxley* v. *Field,* 432

GENERAL ISSUE.

See ASSUMPSIT.
EVIDENCE.

GUARANTEE.

One *R. S.*, a builder, having contracted to perform certain works for government, and given a bond to the Crown for the due performance of the work, in which the defendants were his sureties, applied to the plaintiff to supply him with bricks to carry on the works, which the plaintiff accordingly did to the amount of 560*l.* on the faith of the following guarantee signed by the defendants: "Please to deliver to Mr. *R. S.* for the completion of his contracts at *Deptford* and *Woolwich* yards, 500,000 best stock bricks, to be delivered at the said dockyards at 32*s.* per thousand; and we, as his sureties, do hereby consent that the proper officer, *Navy-office, Somerset House*, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered, and we do hereby agree to become guarantees for the payment of the same to you, *when the amount of the contract is paid.*" After the bricks were delivered, *R. S.* partially performed the work, and requiring an advance of money, applied to and received from the Crown, with the plaintiff's consent, 300*l.* on account. After this payment, *R. S.* performed extra work for the Crown

beyond that stipulated for in the contract, for which he was entitled to 284*l.* 5*s.* *R. S.* was subsequently dismissed by the Crown for neglect, the contract having been only partially executed, and the Crown employed other persons to complete it on their own terms, and paid them for it accordingly, without the assent of either *R. S.* or the defendants. After all the works had been completed, an arrangement took place between the Crown and *M.*, one of the defendants, on behalf of himself and his co-surety, and with the privity of *R. S.*, and an account was stated by the proper officer between the Crown and *R. S.*, in which account *R. S.* was credited with the amount of the contract prices, and 284*l.* 5*s.* for extras, and debited with the 300*l.* paid him, and the amount paid to the persons who were employed by the Crown to complete the contract, leaving a balance of 241*l.* 16*s.* 11*d.*, for which a bill was made out payable to *R. S.* as being "the balance upon a final settlement of all claims which he or any one through him might have on the public, in respect of works undertaken and partly performed by him at *W.* and *D.*;" which bill was given to *M.*, who gave a receipt in the terms of the bill:—

Held, that, under these circumstances, the money paid to the persons who completed the contract was not money paid to *R. S.* or his agents; and the whole amount of the contract not having been paid to *R. S.*, the plaintiff was not entitled to recover upon the guarantee.

Held, also, that even if that were not so, the plaintiff had no claim on the 300*l.* paid to *R. S.*, as he had expressly waived it by his consent to the payment.

Held, also, that if the balance of 241*l.* was to be considered as part of the allowance for extras, the plaintiff could have no claim on that balance; and that if it was a sum partly composed of extras and partly of money due for work done under the contract, it being impossible to say what amount was due on the latter, the plaintiff could only be entitled to nominal damages. *Hemming* v. *Trenery and Malim*, 385

INFORMATION.

See SMUGGLING ACT.

INNUENDO.

See PLEADING (*Declaration*).

INSOLVENCY (MEANING OF).

A. and *B.* agreed for the sale by *B.* to *A.* of all the salt that should be manufactured at certain salt works of *B.*; all payments to be made quarterly, by acceptance at three months; the agreement to continue binding for 14 years, but *bankrupcy* or *insolvency* on the part of *A.* was to terminate the contract:—*Held*, that *insolvency* meant an inability in *A.* to pay his just debts, and did not import that he should have been discharged under the Insolvent Debtors' Act. *Parker* v. *Gossage*, 617

INSOLVENT DEBTOR.

1. An assignment by a debtor, he being at the time in a state of insolvency, of all his property, for the benefit of *all* his creditors, is not void within the meaning of the 7 *Geo.* 4, c. 57, s. 32; *dubitante*, *Alderson*, B.

An insolvent person being in prison, endeavoured to make terms with his creditors, they proposing that he should execute a composition-deed for their benefit, which he at first refused; subsequently, a letter was written by an agent of the creditors, stating that they would not consent to his discharge, and that he must either execute an assignment or be made a bankrupt. The insolvent,

after taking three days to deliberate upon it, with great reluctance executed the assignment:—*Held*, that this was not a voluntary conveyance, within the above section of the Insolvent Act. *Davies, assignee of Watts*, v. *Acocks*, 461

2. It is not necessary, in order to support a conveyance or transfer made by an insolvent trader to a creditor, to shew that it was made in consequence of pressure on the part of the creditor: in order to invalidate it, it must appear to have originated in the voluntary act of the trader, and not in a *bonâ fide* application by the creditor. *Doe* d. *Boydell and another* v. *Gillett and another*, 579

INTERPLEADER ACT.

1. The sheriff cannot apply to the Court under the Interpleader Act, unless the goods or money in dispute are actually in his hands. *Scott, assignee of Jones*, v. *Lewis*, 289

2. A sheriff or other public officer, applying to the Court under s. 6 of the Interpleader Act, need not deny collusion with the claimant. *Boond* v. *Woodall*, 601

JUDGE'S ORDER.

See PRACTICE.

LANCASTER COURT OF COMMON PLEAS.

Where a party, against whom a judgment has been obtained in the Court of *Common Pleas* at *Lancaster*, has removed out of the jurisdiction, it is necessary, in order to obtain a writ of execution against him, to produce an affidavit of the fact of his removal. *Duckworth and another* v. *Fogg*, 736

LEGACY DUTY.

A testator devised real estates to trustees for the benefit of several parties for life, and after their deaths to be distributed amongst their children, &c.; and the will contained a power by which the testator directed that it *should be lawful* for the trustees to sell the same, or part &c. "as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property and affairs."

Some portion was sold shortly after the testator's death, because, being suitable for building, it was advantageous to the estate to sell it; and the remainder, after being subject to the trusts for ten years, was sold under an order of a Court of equity in a cause.

Held, that the money arising from neither sale was liable to legacy duty. *In re Evans*, 206

LIBEL.

In an action for a libel, on not guilty pleaded, it appeared that the libel (which was contained in a newspaper) purported to be the account of the trial of a former action, brought by the same plaintiff for a libel against third parties, and after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the Judge, stated that the jury found a verdict for the plaintiff, with 30*l.* damages. No evidence was given as to any such trial having, in fact, taken place, or whether the report was fair or not. The Judge left it to the jury to say, whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether, with the statement of the verdict being in his favour, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the Court refused to grant a rule for a new trial. *Chalmers* v. *Payne and another*, 156

LIEN.

See PLEADING (in *Trover*).

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LIMITATIONS (STATUTE OF).

1. *A.* occupied a house and land under *B.*, at the rent of 16*l.* a year, and *A.*, at *B.*'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by *A.*, and had been paid 12*s.* a week. *A.* continued in *B.*'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by *A.*, to recover wages for twelve years, deducting the rent:—*Held*, that this was not such an open account as would take the case out of the Statute of Limitations since the 9 *Geo.* 4, c. 14; but that there must be a part payment in cash, or what is equivalent to it, to have that effect. *Williams* v. *Griffiths*, 45

2. If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that *is* part payment, so as to prevent the operation of the Statute of Limitations. *Hart* v. *Nash*, 337

3. The meaning of *part payment*, to take a case out of the Statute of Limitations, is payment of a *smaller* on account of a *greater* sum of money, due from the party making the payment to the party to whom it is made.

The appropriation of such part payment of principal, or of payment of interest, to a particular debt, may be shewn by any medium of proof, and does not require an express declaration of the debtor, at the time of the payment, to establish it; it may, therefore, be proved by previous or subsequent declarations of the debtor, although the *fact* of the payment must be proved by independent evidence. *Waters* v. *Tompkins*, 723

LORDS' ACT.

The twenty days' notice necessary to be given before bringing up a prisoner under the compulsory clause of the Lords' Act, must have expired before the first day of the term in which he is brought up. *Buxton* v. *Spires*, 601

MASTER AND SERVANT.

Liability of Master.

Where the owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion took a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master:—*Held*, that the servant was acting at the time in the course of his master's service, and for his master's benefit, and that the master was answerable for his act. *Huzzey* v. *Field*, 432

MENIAL SERVANT.

The plaintiff agreed to enter the defendant's service as head gardener, and to have the management and superintendence of the defendant's hot-houses, pineries, &c., at the wages of 100*l.* The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking in apprentices, and had taken in two, at 15*l.* per annum premium. The plaintiff remained with the defendant in the capacity above mentioned about four years; when the defendant gave him a month's warning. In an action, brought by the plaintiff to recover a

quarter's wages, as being a yearly servant:—*Held*, that he was a menial servant only, and was only entitled to a month's warning. *Nowlan* v. *Ablett*, 54

MONEY HAD AND RECEIVED.

See PAYMENT UNDER LEGAL PROCESS.

A. contracted with *B.* for the purchase of the good-will and fixtures of a public-house, at the sum of 120*l.*; 50*l.* was to be paid as a deposit on the landlord's consenting to the change of tenancy, and, on the remainder of the purchase-money being paid, *A.* was to have possession. The landlord, on application, gave a verbal consent, and the 50*l.* was accordingly paid. *A.* sent part of his furniture to the house, and went to reside in part of it; *B.*, however, still continuing to reside and carry on the business there. Some time afterwards, the remainder of the purchase-money not having been paid, and possession not having been given up to *A.*, the landlord withdrew his consent:—*Held*, that the contract was conditional on the landlord's consent being obtained; and that the verbal consent originally given having been withdrawn before any change of tenancy had taken place, it must be considered as not having been given, and, the condition not having been performed, that the money was paid on a consideration which had failed, and that *A.* might maintain money had and received, to recover back the 50*l.* paid. *Wright* v. *Newton*, 124

NEW TRIAL.

Where a verdict has been found with damages in an action of defamation for words imputing felony, the Court will not stay the proceedings, or grant a new trial, on the ground that, since the trial, the plaintiff has been convicted and attainted of the same felony; *a fortiori* where the defendant has been examined as a witness upon the trial of the indictment.

The Court will not interfere upon motion to give that relief to which it is suggested that the parties applying would be entitled under an *auditâ querelâ*, unless, upon the facts appearing on the affidavit, it is clear that the party would be entitled to such remedy.

Where a defendant is entitled, as against the plaintiff, to be relieved from a verdict obtained against him, the Court will not abstain from interfering on the ground of the lien of the plaintiff's attorney upon the verdict for his costs. *Symons* v. *Blake*, 416

NON PROS (JUDGMENT OF).

See PRACTICE (*Pleading*).

NOTICE OF ACTION.

A notice of action to justices, under the 24 *Geo.* 2, c. 44, s. 1, is sufficient, which is indorsed with the name and *place of business* of the attorney, although he actually resides elsewhere. *Roberts* v. *Williams and another*, 561

OFFICER OF EXCISE.

Quære, whether, since the statute 4 & 5 *Will.* 4, c. 51, the keeper of an excise office is an *officer of excise*, within the meaning of the 7 & 8 *Geo.* 4, c. 53, s. 9, so as to be liable to the penalties imposed thereby on such officers for voting at elections for members of parliament.

Where, in an action for such penalties, the only evidence against the defendant was that he kept an inn, over the door of which was a board with the words "excise office" painted on it; that, his vote being ob-

jected to before the revising barrister in *October*, 1834, and his commission being called for, he had produced what the witnesses described as "something framed and glazed like a picture;" that he had received entries of buildings before the passing of the 4 & 5 *Will.* 4, c. 51, (*August*, 1834), but had since ceased to do so; and a witness stated that he had seen the defendant's commission, which was partly written and partly printed, and appointed him to collect duties of excise:—*Held*, that this was not evidence to go to the jury that on the 19th of *January*, 1835, when the defendant voted at the election, he was an officer of excise. *Gooday* v. *Clark*, 272

OYER.

1. Where a declaration in covenant sets out the deed according to its legal effect, and the defendant sets it out on oyer *in hæc verba*, he cannot demur to the declaration on the mere ground of *variance;* because the deed, as set out on oyer, becomes part of the declaration. *Paine and others* v. *Emery*, 304

2. *Oyer* is demandable at any period before the time for pleading is out, though it has been extended by a Judge's order on terms; unless the order expressly except the right to demand *oyer*.

And the right is not waived by pleading, unless the plea be to the bond or other instrument of which *oyer* is demanded.

A party has not a right to have his demand of *oyer* entered of record, unless it was regularly made according to the practice of the Court. *Goodricke* v. *Turley* 694

PART PAYMENT.

See LIMITATIONS (STATUTE OF).

PATENT.

In the recital of a patent it was stated, 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 alleged, that the invention consisted in a means of discolouring syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, or even of animal charcoal alone. It then alleged, that the discolouration was to be effected by means of a filter made of charcoal, and that there was nothing particular in the carbonization of the bituminous schistus, only that it was "convenient, before the carbonization, to separate the sulphurets of iron which are mixed with it." To an action for infringing this patent, the defendant pleaded, that the patentee did not, by any instrument, particularly describe and ascertain the nature of his invention, and in what manner the same was to be and might be performed:—*Held, first*, that the specification sufficiently described the invention stated in the title of the patent, it being shewn that it was applicable with advantage to the extracting of syrup from cane-juice, before it is baked to such a consistency as to granulate and become sugar. *Secondly*, it was proved, that sulphuret of iron was combined with the bituminous schistus found in this country; and there was no evidence to shew that the presence of iron in the charcoal produced by the schistus was not injurious to the matter going through the process of discolouration:—*Held*, that it was incumbent on the patentee to prove that the presence of iron in the bituminous schistus used in the process

of filtering would not be injurious; or else, that the method of extracting the iron from it was so simple and well known, that a person ordinarily acquainted with the subject could remove it with ease; or that the bituminous schistus, as known in *England*, could be used in the process with advantage. *Derosne* v. *Fairie and others*, 476

PAYMENT UNDER LEGAL PROCESS.

A. on being arrested gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a Judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by *A.*'s attornies, on the 27th of *October*. *A.* had supplied his attornies with a sum of money towards the payment of the debt and costs on the 10th of *October*, and on the 14th he became bankrupt:—*Held*, that this was a payment under process of law, and that the assignees of *A.* had no right to recover the money back from the party to whom it was paid. *Belcher and others* v. *Mills and another*, 150

PLEADING.

See BILLS AND NOTES.
OYER.
PRACTICE (*Pleading*).

I. *Declaration.*

1. Where a declaration in *assumpsit* states several matters as a consideration for the defendant's promise, though all be not good, yet, if a sufficient consideration remains, it is enough to support the promise laid in the declaration.

It is only necessary in cases of executed considerations to state that the consideration for the defendant's promise moved at the defendant's special instance and request. *King* v. *Sears*, 48

2. *Assumpsit* on an agreement, by which the defendant agreed to sell, and the plaintiff to purchase, all the naptha which the defendant might make from the 1st of *June* next, for and during the term of two years, say from 1000 to 1200 gallons per month, at the rate of *2s. 6d.* per gallon, &c.; and it was agreed, that, should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do, on giving the defendant three months' notice. The declaration averred, that the quantities of naptha that the defendant ought to have made during a period of ten months, under the agreement, at the rate of from 1000 to 1200 gallons per month, and to have sold and delivered to the plaintiff, amounted to a much larger quantity than he had sold and delivered, viz. 7000 gallons more; yet that the defendant had not sold and delivered the same to him:—*Held*, on demurrer, that the declaration could not be sustained. *Gwillim* v. *Daniell*, 61

3. In libel, one of the counts set forth the following libel, addressed in a letter to one *C. A. P.*—"I (meaning the defendant) have reason to suppose that many of the flowers of which I (meaning the defendant) have been robbed, are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to *C. A. P.*, and unlawfully placed them in the garden of the last-mentioned person)." Upon motion in arrest of judgment, on the ground that larceny could not be com-

mitted of flowers, and that the *innuendo* was too large :—*Held*, that the count was good. *Gardiner* v. *Williams*, 78

4. In a declaration by an administratix, the plaintiff made profert of letters of administration, " duly granted by the *Consistory Court* of *St. Asaph*," without making the usual statement of the grant of the letters of administration in the body of the declaration:—*Held*, bad on special demurrer, as not sufficiently shewing that the letters of administration were granted by the proper authority.

Held, also, that the omission of the *date* of the grant was immaterial. *Hughes* v. *Williams*, 331

5. The common counts are, notwithstanding the rule of *Trinity* Term 1 *Will.* 4, separate counts for the purposes of *pleading*, as well as for the purposes of costs. *Jourdain* v. *Johnson*, 564

6. In debt by assignees of an insolvent or bankrupt, it need not be stated that the plaintiffs sue " as assignees;" it is enough if it sufficiently appears that they are assignees.

Assignees may declare in the *debet* and *detinet*, and the omission of the *queritur* is immaterial.

The declaration stated, that the defendant was indebted to the insolvent, before he subscribed his petition, or executed the assignment of his estate under the Insolvent Act, for goods sold and delivered by him, *before he became insolvent*:—*Held*, a sufficiently certain allegation of the time when the debt accrued.

A count, stating that the defendant was indebted to the plaintiff on an account stated between them, is bad, on special demurrer, for want of an allegation of the time when the account was stated. It should be " on an account *then* stated between them."

If a demurrer be pleaded to the whole of a declaration consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment. *Ferguson and another* v. *Mitchell*, 687

See also as to the last point, *Spyer* v. *Thelwell*, 692

7. Declaration on a bill of exchange drawn by *N.* on the defendant, requiring the defendant to pay " to *his* order" the sum therein mentioned, accepted by the defendant, and indorsed by *N.* to the plaintiff: —*Held*, that the Court could see that the word " his " referred to the drawer, and therefore there was no fatal ambiguity. *Spyer* v. *Thelwell*, 692

8. A declaration in case stated, that the plaintiff (a carpenter and builder) had purchased of *C.* certain spruce battins, to be used by him in his trade, for 11*l.*, which sum the defendant had lent to the plaintiff for the purpose of making payment for them, and on the personal credit of the plaintiff, without any agreement that the defendant should have any lien or control over the battins as a security for its repayment; yet that the plaintiff, well knowing the premises, and contriving, &c., to deprive the plaintiff of the possession and use of the said battins, and falsely and wrongfully assuming and pretending that he was entitled to a lien on them, and had a right of staying and preventing the delivery of them to the plaintiff, until the said sum of money should be repaid, wrongfully and maliciously, and without reasonable or probable cause, but under colour of the said pretended lien, and right of detainer, directed *C.* not to deliver them to the plaintiff until further order from the defendant, whereby, and in consequence whereof, *C.* being induced to believe that the defendant

had such lien, &c., did, in consequence of such order, refuse to deliver them to the plaintiff for three weeks, whereby the plaintiff was prevented from using them in his business, and certain houses which he was then building were greatly delayed, &c.:—*Held*, on demurrer, *first*, that it sufficiently appeared on the face of the declaration, that the defendant made a knowingly false claim of lien; *secondly*, that the special damage alleged, viz. the non-delivery of the battins to the plaintiff, was sufficiently connected with the wrongful act of the defendant to support the action. *Green* v. *Button*, 707

II. *Plea in bar.*

1. Debt on bond, for the penal sum of 12,000*l.* The declaration set forth the condition, which was for the payment of 6000*l.*, *with interest*, and assigned as a breach the non-payment of the 6000*l.* (omitting interest). Plea, that the defendant paid the 6000*l.*, *with interest*, according to the form and effect of the condition:—*Held*, ill on special demurrer. *Bishton* v. *Evans*, 13

2. Where, in an action on a promissory note, the defendant pleads that there was no consideration for the note, and the plaintiff replies that there was a good consideration, the issue lies on the defendant to shew that the note was given by way of accommodation, and without value, *Lacey* v. *Forrester*, 59

3. In *assumpsit* on a promissory note by the payee against the maker, the defendant pleaded, that he made the promissory note without any value or consideration whatever for his so doing, or for his paying the amount thereof, or any part thereof:—*Held*, that the plea was ill on special demurrer. *Stoughton* v. *The Earl of Kilmorey*, 72

4. To a declaration in *indebitatus assumpsit* for money had and received, and on an account stated, the defendant pleaded "as to 25*l.*, parcel," &c., that the plaintiff ought not further to maintain his action, because the defendant brings into Court here the said sum of 25*l.* ready to be paid to the plaintiff. And the defendant further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned, as to the sum of 25*l.* concluding with a verification. The defendant as to the *residue of the monies* in the declaration mentioned, pleaded *non assumpsit*:—*Held*, on special demurrer, that the plea as to the payment of money into Court, was ill, for not concluding with a prayer of judgment to the further maintenance of the action. *Sharman* v. *Stevenson*, 75

5. The plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant paid to the plaintiff, as a deposit, a cheque for 100*l.* There being a wilful misrepresentation in the description of the premises, the defendant refused to pay the cheque, upon which the plaintiff brought an action against him on the cheque. The defendant having pleaded that there was no consideration for making the cheque:—*Held*, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have been bad on special demurrer. *Mills* v. *Oddy*, 103

6. Declaration in debt on a promissory note. Plea—that, after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards indorsed it to a person unknown to the defendant, and who, at

the time of the commencement of the suit, was the holder thereof, and entitled to sue the defendant thereon. Replication, *de injuria*: *Held*, on demurrer to the replication, that the plea was bad, inasmuch as it did not aver that the bill was *given* as well as *taken* in satisfaction of the note.

Quære, whether the general replication *de injuria*, was sufficient? *Crisp* v. *Griffiths*, 159

7. Where, in debt on simple contract, the defendant pleads payment of a certain sum, he must prove payment of *that* sum, (even though it be laid under a *videlicet*), in order to entitle him to a verdict on the whole plea. But the plea may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue for the plaintiff.

The like as to a plea of set-off.

Therefore, where, in debt for goods sold and delivered, and work and labour done, the defendant pleaded, *first*, *nunquam indebitatus*; *secondly*, as to parcel of the sum demanded, to wit, 338*l*., payment of 338*l*. in discharge of that parcel; *thirdly*, a set-off for money paid; the plaintiff proved a special contract for good, sound, saleable bricks, to be made for him by the defendant, at a certain price per thousand, and delivery of so many as amounted, at that rate, to 396*l*.; the defendant proved payment of 314*l*., and a set-off for 21*l*., and proved also that the bricks were badly made, and the jury found the value of those delivered to be not more than 335*l*.: —the Court directed the verdict to be entered, on the plea of payment, as to 314*l*. for the defendant, as to the residue for the plaintiff; on the plea of set-off, as to 21*l*., for the defendant, as to the residue for the plaintiff; on the plea of *nunquam indebitatus*, as to the whole sum demanded, except 335*l*., for the defendant; so as to give the defendant judgment on the whole record. *Cousins* v. *Paddon*, 547

8. Action by the indorsee against the drawer of a bill of exchange. Plea—that the defendant's indorsement was in blank; that the defendant delivered the bill to *A*. (not a party to the bill) only to get it discounted for him; that *A*. fraudulently, and in violation of that special purpose, delivered it to *B*. to secure a debt due from *A*. to *B*.; of all which the plaintiff had notice:—*Held*, on general demurrer, that the plea was bad for not shewing distinctly that the defendant never had value for the bill. *Semble*, that a replication to such plea, "that the defendant broke his promise without the cause alleged by him in his plea," is good. *Noel* v. *Rich*, 360

9. To a declaration in *assumpsit*, the defendant pleaded as to 83*l*. &c., that after the several causes of action in respect of that sum had accrued, the plaintiffs, by agreement with the defendant, in consideration that the defendant would secure the above sum by executing a mortgage of certain premises, when called upon to do so, the amount to carry interest and to be payable by instalments, undertook that no proceedings in respect of that sum should be instituted against the defendant, unless default were made in payment of the instalments. The defendant then averred, that he had been always ready to execute the mortgage, but had never been called upon so to do:—*Held*, on special demurrer, that the plea was bad. *Allies and others* v. *Probyn*, 408

10. A declaration in trespass for assault and battery stated that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick, and with his fists, gave the plaintiff many violent blows, &c. &c. Plea, as to the assaulting the plaintiff

with the said stick and with his fists giving him blows, &c., *son assault demesne:—Held*, after verdict, that the plea sufficiently justified the *battery* with the stick, as well as the assault with it. *Blunt* v. *Beaumont*, 412

11. To a declaration on three bills of exchange, the defendant pleaded, that he was also indebted to *E. F.*, and to divers other persons, in divers other sums of money, of which the plaintiffs had notice; and that afterwards, and before the said bills became due, and whilst he was so indebted to the said *E. F.*, and the said other persons, he, the defendant, became insolvent, and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce, the other creditors of the defendant to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the said plaintiffs, half the amount of the said bills, when the same respectively became due, the said plaintiffs agreed to accept a composition of one half of the amount of the bills as they became due; and that afterwards the said agreement, so made and entered into by the plaintiffs, was, by the defendant, with their knowledge, and by their direction, represented and made known to the said *E. F.*, so being such creditor as aforesaid; who thereupon, in consideration of the premises, and in faith of that agreement, was lured and induced to accept that composition; and that he, the said *E. F.*, had not at any time since recovered or received, or sought to recover or receive, any greater or other sum than half the amount of his said debt:—*Held*, in arrest of judgment, that this plea was bad, inasmuch as it did not shew that all, or the great body of the defendant's creditors, had come into the arrangement, and agreed to take the composition.

In order to prove the agreement stated in the plea, the defendant put in a letter from one of the plaintiffs, containing the terms of the agreement for the composition:—*Held*, that evidence of a previous conversation, when the plaintiff made inquiries as to what the other creditors were likely to do, was admissible to shew the motive which induced him to write the letter, and the intention with which the agreement was entered into. *Reay* v. *Richardson*, 422

12. To a declaration on a bill of exchange, by an indorsee against an indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement; and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement:—*Held*, after verdict, that the plea was sufficient. *Easton* v. *Pratchett*, 542

13. The *common counts* are, notwithstanding the rule of *Trinity* Term 1 *Will.* 4, separate counts for the purposes of *pleading*, as well as for the purposes of costs.

To a declaration for 31*l.* on a bill of exchange, and 100*l.* for money paid, lent, interest, goods sold, and on an account stated, the defendant pleaded, as to the 31*l.*, and as to 12*l.*, parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into Court of 51*l.*; and alleged that the plaintiff had not sustained damage to a greater amount, in respect of so much of those causes of actions as in the plea mentioned. *Quære*, whether such plea is good on special demurrer?

Semble, the defendant ought to have shewn distinctly what portion of the money paid into Court was to be

ascribed to the bill of exchange. *Jourdain* v. *Johnson*, 564

14. The declaration stated, that *H.* was employed to do work on certain houses, and that the defendant was employed as surveyor over him, and to receive monies to be paid to *H.* for such work: that, in consideration that the plaintiff would provide and deliver to *H.* such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them, out of such monies received by him as should become due to *H.* for the work, if *H.* should give him an order for that purpose. The declaration then averred, that *H.* gave the defendant such order, and that he required certain materials, which the plaintiff provided and delivered to him, to the value of 1000*l.*, and that that sum became due to *H.* for the work; of all which the defendant had notice, and was requested by the plaintiff to pay him for the materials out of such monies received by him as were due to *H.* for the work:—Breach, that, although the defendant had received 1000*l.* to be paid and then due to *H.*, and though the said order had not been revoked, the defendant refused to pay the plaintiff.

Plea, that the promise in the declaration mentioned was a special promise to answer for the debt of *H.*, and that there was no memorandum or note thereof in writing.

Held, on demurrer, that the plea was bad; for that the defendant's promise was an original, and not a collateral one. *Andrews* v. *Smith*, 627

15. Indorsee against acceptor of a bill of exchange. Plea, that the drawer indorsed the bill to *B.*, who indorsed it to *C.*, in whose hands it remained when due; that *C.*, being unable to obtain payment of it, returned it to *B.*, who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to *B.* another bill, drawn by the same party, and accepted by the defendant, for a greater amount, which *B.* accepted in full discharge and satisfaction of the former bill.

Held, on demurrer, that this was a sufficient answer to the action, although it did not appear that the second bill was payable to order.

The plea went on to aver that the latter bill was indorsed by *B.* to *A.*, and that after it became due the defendant paid the amount of it to *A.*, in satisfaction and discharge of that bill, and of all damages sustained by *the plaintiff* by reason of the non-payment thereof when due:—*Held*, that all this might be rejected as surplusage, and did not vitiate the plea. *Lewis* v. *Lyster*, 704

16. *Assumpsit* by the indorsee against the drawer of a bill of exchange accepted by *B.* Plea—that *B.*, being in want of a loan of money, applied to the plaintiff to advance it, which he was unwilling to do, unless *B.* agreed to accept it in two-thirds money and one-third wine, and unless the plaintiff had the security of a bill drawn by the defendant and accepted by *B.*; that *B.* agreed to the said terms, and thereupon the bill declared on was drawn by the defendant and accepted by *B.*; and that the defendant never received any consideration or value, nor did any consideration move or pass from either of the said parties to the defendant for his drawing the bill, except as aforesaid; and that the said wine has not been delivered, and that the said contract for the sale and delivery thereof was a gross fraud on the defendant:—*Held*, bad on demurrer. *Connop* v. *Holmes*, 719

17. In debt the defendant pleaded that he *never did owe* the sum demanded:—*Held*, bad on special demurrer. *Smedley* v. *Joyce*, 721

III. *Replication.*

1. A declaration in *assumpsit* stated that, by the usage of racing, it was regulated that in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, in cash, bank bills, or bankers' notes, payable on demand, and be placed in the hands of the person appointed by the stewards to receive the same; and in default thereof by any person, he should pay the whole stake as a loser. The declaration then stated, that, it being so regulated, certain races were appointed to be run, and were run at *L.*, of which one *R. B.* was steward, and one *J. J.* clerk of the races; and that there were at the races certain produce stakes to be run for, &c., and that a certain filly of the plaintiff and a certain colt of the defendant had been nominated for the stakes—that, by a regulation of the races at *L.*, it was provided that all stakes, &c., should be paid to the clerk of the races before eleven o'clock on the day of running, or the owner should not be entitled, though a winner. The declaration then alleged that the plaintiff had, before the hour of starting, and before the hour of eleven o'clock on the day of running, made and paid his stake into the hands of the clerk of the races—that the defendant's colt ran, and came in first, and but for the defendant's default, according to the usage of racing, would have been entitled to the sweepstakes; but that the defendant did not, before the hour of starting for the first race of the day, or before eleven o'clock on that day, being the day of running, make his stake, or pay the same into the hands of the clerk of the races. It then averred that the plaintiff's filly did run, and came in second only to the defendant's colt, whereby the defendant became liable to pay the whole of the stake, &c. Plea—that before the defendant had notice of the regulation of the races at *L.*, and before the hour of starting for the first race of the day, and before the running for the race for the said sweepstakes, the defendant was ready and willing, and offered to make his stake for his said colt for the said sweepstakes in bankers' notes payable on demand, and then tendered and offered to pay the said stakes in such bankers' notes, into the hands of the said *J. J.*; but that the said *R. B.* then refused to allow the said *J. J.* to accept or receive the said stake, or to allow the defendant's colt to run for the sweepstakes, on the ground that the colt was disqualified to run for the said sweepstakes; and that the said *J. J.* did, in pursuance of such refusal of the said *R. B.*, refuse to accept or receive from the defendant his stake, and to allow his colt to run for the said sweepstakes, on the ground and for the reason aforesaid, and on no other ground whatsoever. Replication—that the defendant did not tender or offer to make his stakes for his said colt for the said sweepstakes, or to pay the same into the hands of the said *J. J.* until long after eleven o'clock on the day of running for the said sweepstakes, (although before and at that hour he had notice of the regulation of the said races at *L.*):—*Held*, on special demurrer, that the replication was ill, and that, if it was not a departure from the declaration, at all events that the replication did not shew any cause of action. *Lacey* v. *Umbers*, 112

2. *Assumpsit*, to recover 5000*l.*, for money had and received. Plea—as to the sum of 5000*l.* in the declaration mentioned, stated to have been received by the defendant to the plaintiffs' use, that the money so received by the defendant was the

amount of the proceeds of the sale of goods consigned to him by Messrs. *P. & C.* as their own goods, with the plaintiffs' knowledge and assent, (but which, in fact, were the goods of *P. & C.* and the plaintiffs jointly), as a security for any money the defendant might advance to *P. & C.*; with power of sale to reimburse himself for such advances; that he, not knowing that the plaintiffs had any interest in the goods, made advances to *P. & C.* to the amount of 6000*l.* on the security of the goods, which he afterwards sold, and thereby offered to set off the amount of the advances against the damages claimed by the plaintiff. Replication, *de injuria;* and new assignment, that the plaintiffs brought their suit, not only for the proceeds of the sale of the goods mentioned in the plea, but also for money received by the defendant to the plaintiffs' use, being the proceeds of other goods, which the defendant, by a letter to the plaintiffs, declared to be under his care on their account.

Held, on demurrer to the replication, that, as the plea was not matter of excuse, but a denial of the promise to the plaintiff, and also as it claimed an interest in the money, and derived an authority from the plaintiff, the replication was bad.

Held, also, that the plea would have been bad on special demurrer. *Solly and another* v. *Neish*, 355

IV. *In Trespass.*

Trespass for assault and battery. Plea—that plaintiff was defendant's apprentice, and conducted himself improperly, wherefore defendant *moderately* chastised him. Replication, *de injurid:—Held*, that on these pleadings the plaintiff could not recover on the ground of the chastisement being *excessive;* for the replication *de injurid* puts in issue only the *cause* alleged in the plea; that is, in this case, whether the plaintiff misconducted himself as an apprentice. *Penn* v. *Ward*, 338

V. *In Trover.*

Since the new rules, a defendant who pleads not guilty alone in an action of trover admits thereby only that the plaintiff has *some* property in the goods in respect of which he would be entitled to recover against the defendant, and such admission does not preclude the defendant from shewing that he is tenant in common with the plaintiff; if, however, there has been a conversion in fact, as by seizure and sale, he must justify such conversion specially by way of confession and avoidance, and he cannot, under the plea of not guilty, shew that he was justified, as tenant in common with the plaintiff, in committing the conversion in fact.

The conversion which is put in issue by the plea of not guilty, since the new rules, is a conversion in fact, and not merely a wrongful conversion; and wherever there has been a conversion in fact, and the defendant insists that such conversion was lawful, he must confess and avoid it, by pleading specially the right or title by virtue of which he was justified in the conversion.

Where the defendant has a lien on the goods, and there has been no actual conversion, but a demand and refusal only: *quære* as to the necessity of pleading the right of lien specially. *Stancliffe* v. *Hardwick*, 1

POLICY OF INSURANCE (CONSTRUCTION OF).

In a policy of insurance against fire on certain cotton mills, millwrights' work, including standing and going gear therein, engine-house adjoing and the steam-engine therein, &c., it was recited that, the "build-

ings were brick-built and slated; warmed exclusively by steam, lighted by gas, &c., worked by the steam-engine above mentioned, in the tenure of one firm only, standing apart from all other mills, and '*worked by day only:*'"—*Held*, that the words "worked by day only," referred to the mill only, and not to the steam-engine or any part of the gear; and that it was no breach of the policy that the steam-engine was kept going by night, and that some parts of the machinery were turned by it, the cotton mill not being worked except by day only.

One of the conditions indorsed on the policy provided, "That every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially indorsed on the policy, so that the risk might be fairly understood; if not so expressed, or if any misrepresentation should be given, &c., or if, after the insurance should be effected, the risk should be increased by the erection of any stove, the carrying on any hazardous trade, operation, or process, or hazardous communication, the insured would not be entitled to any benefit under the policy." In an action of covenant on this policy by the assured, the defendants pleaded "That, after the making the policy, the steam-engine, in the said policy of assurance mentioned, was worked by night and not by day only, whereby the risk in the said policy of assurance was increased:"—*Held*, that the plea was bad, and that the plaintiff would be entitled to judgment, notwithstanding a verdict were entered up on this plea. *Whitehead* v. *Price and others*, 447

POOR'S RATE.

See AWARD.

PORT DUTIES.

The first count of the declaration stated, that the mayor and burgesses of the borough of *Truro* had from time whereof the memory of man was not to the contrary held and exercised, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor and burgesses for the time being, or their deputy or deputies, a certain ancient office or place of meter, for the measuring of all coal imported by sea and brought within the limits of the port of *Truro*, to be there disposed of; and that from time whereof &c. there had belonged to the said mayor and burgesses &c. by reason of the said office, an ancient fee, reward, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, &c., *i. e.* the fee of &c. 4*d.* the chaldron, to be received for the measuring, or being ready and willing to measure, each chaldron of coal imported as aforesaid, to be disposed of by measure: and the fee &c. of 8*d.* by the three tons, to be received for the weighing, or being ready and willing to weigh, each three tons of coal imported, &c. as aforesaid, to be disposed of by measure. The count then stated a demise by the corporation to the plaintiff of the office of meter, with the fees and privileges belonging to it, under which the plaintiff claimed a toll from the defendant in respect of a cargo of coals imported by him into the port of *Truro*. The second count claimed the same fee as a perquisite of the office, not stating it to be immemorial. The third count claimed a reasonable fee. Other counts claimed the toll as a duty receivable by the corporation or their

lessees, from all merchants importing coal by sea within the limits of the port.

The jury found a written verdict in these terms:—"We find for the plaintiff: and that the corporation of *T.* 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:"—*Held*, that the finding sufficiently supported the first count of the declaration; that it did not import that the corporation were entitled only on actually measuring the coals, and that it did not disconnect their right to the toll from their ownership of the port, and their obligation to maintain it, in respect of which ownership and obligation only they could be entitled to the payment without performing some actual service for it.

Held, also, that the toll being due to the corporation as owners of the port, as well as for the measuring, no objection could be maintained against it on the ground of its rankness.

Two leases from the corporation of the office and dues in question were put in, the first dated in 1752, (in consideration of 631*l.*), the second in 1795. It was proved that the fee of 4*d.* a chaldron had been paid without interruption, from the year 1772 to 1828, although the meter never actually measured them himself, the only measurement being for the purpose of ascertaining the custom-house duties payable on them. A corporation book of the date of 1630 was also produced at the trial. *Held*, that this was sufficient *prima facie* evidence that the corporation and the office of meter were immemorial: and that it sufficiently supported the immemorial claim for coals not actually meted. *Jenkins* v. *Harvey*, 393

PRACTICE.

I. *Affidavit.*

A rule was granted on the 13th of *November*, to shew cause on the 17th, upon an affidavit having a defect in the jurat. On the 18th, an affidavit in the same terms, but having the jurat correct, was sworn.

The Court (on cause being shewn on the 19th) allowed the rule to be enlarged, on filing the second affidavit, and paying the costs of the appearance to shew cause. *Goodricke* v. *Turley*, 637

II. *Appearance.*

1. Where the sheriff has levied 40*s.* under a *distringas*, and made a return that he has so levied, the plaintiff is entitled to enter an appearance, without an affidavit from the sheriff's bailiff of the due execution of the writ. *Page* v. *Hemp*, 494

2. The defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct it; but instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of *non pros.* The Court held, that the irregular appearance might have been corrected in the book, and set aside the judgment of *non pros*, the costs to be costs in the cause. *Bate* v. *Botten*, 365

III. *Bail.*

1. Where the defendant deposited money in Court in lieu of bail, under the 7 & 8 *Geo.* 4, c. 71, s. 2, before the time for putting in and perfecting bail had expired:—*Held*, that he was entitled as of right to enter an *exoneretur* on the bail-piece, and that the Court could not impose on him the

condition of paying costs which the plaintiff had incurred, before the money was paid in, in searching after the sufficiency of the bail. *Stamford* v. *M'Cann*, 632

2. In the *Exchequer*, if bail have been once rejected, a deposit must be made for costs before the second set of bail justify, in the case of country as well as town bail.

It is no objection that bail has been already rejected, unless it appear that he was rejected on the merits. *Goodricke* v. *Turley*, 636

3. Bail cannot apply to set aside an attachment against the sheriff, unless they *first* justify or render the defendant. *Rex* v. *the Sheriff of Lincolnshire, in a cause of Burton* v. *Gee*, 656

IV. *Bail-Bond.*

The plaintiff cannot have the bail-bond to stand as a security where he has not declared *de bene esse*, although he was prevented from declaring by the vacation. *Staines* v. *Stoneham*, 658

V. *Capias ad Satisfaciendum.*

In debt on bond in a penalty of 312*l.*, the *ca. sa.* was indorsed to satisfy 188*l.* 9*s.*, *with further interest upon* 156*l. until paid*:—*Held*, sufficient. Judgment was signed in *Michaelmas* vacation; on the last day of *Hilary* Term a warrant to take the defendant on a *ca. sa.* was delivered to the deputy in *London* of the sheriff of *Denbighshire*:—*Held*, that the defendant was charged in execution in due time. *Williams* v. *Waring*, 354

VI. *Charging in Execution.*

A prisoner in custody of the marshal cannot be brought up to be charged in execution on an attachment, but it must be lodged with the sheriff, who will take him upon it as soon as he is out of the custody of the marshal. *Boucher* v. *Sims*, 392

VII. *Concurrent Writs of Execution.*

The plaintiff sued out a *fi. fa.* into *Bedfordshire*, and lodged it in the office of the deputy under-sheriff in *London*. On the receipt of it the under-sheriff wrote to say the defendant had no effects; the plaintiff thereupon immediately sued out a *ca. sa.*, and lodged it at the same office. Before the return of the *fi. fa.*, finding that the defendant had effects, the plaintiff's attorney wrote to the under-sheriff not to execute the *ca. sa.*:—*Held*, that the sheriff was bound to return the *fi. fa.*

And, *semble*, the issuing of the *ca. sa.* was not a countermand of the *fi. fa.* *Smith* v. *Johnson*, 350

VIII. *Declaration.*

A writ of summons was issued against two persons, but the declaration was against one only:—*Held*, no irregularity. *Caldwell* v. *Blake*, 249

IX. *Declaring de bene esse.*

Notwithstanding the rule of *M. T.* 3 *Will.* 4, s. 11, a plaintiff may still declare *de bene esse* wherever bail have not been perfected, and whether they have been put in or not. *Baisley* v. *Newbold*, 325

X. *Demurrer Books.*

1. The rule of *Hilary* Term 4 *Will.* 4, which requires the grounds of the demurrer to be stated in the margin, does not extend to revenue cases, in which the three Courts have not a concurrent jurisdiction.

A demurrer on the part of the Crown in a revenue cause must be signed by the Attorney-General. *Rex* v. *Woollett*, 256

2. Where the defendant has neg-

lected to deliver his demurrer-books, and does not appear at the argument to support his pleadings, but has offered to give a *cognovit*, the Court will give judgment for the plaintiff, without requiring the delivery of the defendant's demurrer-books. *Scott* v. *Robson*, 29

XI. *Discontinuance.*

After a general verdict for the defendant, the Court will not allow the plaintiff to discontinue by a side-bar rule. *Goodenough* v. *Beetles*, 240

XII. *Irregularity.*

It is no irregularity to declare before the expiration of eight days after service of the writ of summons, if the defendant has appeared. *Morris* v. *Smith*, 314

XIII. *Judgment as in Case of a Nonsuit.*

It is not an answer to a motion for judgment as in case of a nonsuit in an ejectment where the landlord defends, that the tenants in possession have given up possession of the premises to an agent of the lessor of the plaintiff. *Doe* d. *Draycott* v. *Dyos*, 60

XIV. *Judge's Order.*

1. On an application to a Judge at chambers, under the Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers. *Drake and another* v. *Brown*, 270

2. A Judge at chambers has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of Court as of course, without a rule to shew cause. *Wilson* v. *Northop*, 326

XV. *Notice of Trial.*

If the issue be delivered with a notice of trial indorsed for one day, and with it a separate notice of trial for a different day, it is an irregularity. *Kerry* v. *Reynolds*, 310

XVI. *Pleading.*

1. Where in trespass for false imprisonment, the defendant justifies under process of outlawry, and the plaintiff replies that there was no affidavit of debt made and filed, &c., and the defendant rejoins that there was such affidavit, and sets out an *irregular* affidavit, and the plaintiff demurs:—*Held*, that the defendant was entitled to judgment, trespass not being maintainable where the process is *irregular* merely, and not void. *Riddell* v. *Pakeman*, 30

2. To a declaration in *assumpsit* brought to recover the sum of 30*l.*, the defendant pleaded, *first*, to the whole declaration, payment of the sum of 27*l.* 4*s.* 4*d.* into Court, and that the plaintiff had not sustained damages to a greater amount; *secondly*, except as to 27*l.* 4*s.* 4*d.*, *non assumpsit*; *thirdly*, payment of the sum of 10*l.* before action; and *fourthly*, as to all, except 27*l.* 4*s.* 4*d.*, a set-off. The plaintiff replied, that he accepted the money paid into Court, and was satisfied:—*Held*, that the defendant was not justified in signing judgment of *non pros*, for want of a replication to the pleas. *Coates and another* v. *Stevens*, 118

XVII. *Writ of Summons.*

1. The addition of the defendant need not be inserted in the writ of

summons. It is sufficient to state his residence. *Morris* v. *Smith*, 120

2. Where the indorsement on a writ of summons was "This writ was issued by &c., attorney for the said plaintiffs," instead of "Attorney for the said *A. B.*"—*Held*, good. *Hennah and another* v. *Whyman*, 239

3. The Uniformity of Process Act requires that the place and county of the defendant's actual or supposed residence shall be correctly stated; but the Court will not set aside a writ of summons unless the defendant produces a positive affidavit that the residence has been misdescribed. *Lewis* v. *Newton*, 732

XVIII. *Writ of Trial.*

1. An order was obtained for a trial before the sheriff under the Writ of Trial Act. The bill of particulars claimed 16*l.* 10*s.* 8*d.* The writ of summons, when produced in evidence, appeared to be indorsed for 58*l.* After verdict for the defendant, the Court, in directing a new trial on the ground of misdirection, gave the plaintiff leave to amend the writ of summons by reducing the indorsement to 16*l.* 10*s.* 8*d.*, without applying to a judge. *Edge* v. *Shaw*, 415

2. Where the defendant obtains an order to try before the sheriff, the Judge has no authority to impose terms on the plaintiff, as to the time of trying, without his consent. *Wright* v. *Skinner*, 746

3. On an application for a new trial in a case tried before the sheriff, the affidavits need not state the pleadings; for the writ of trial is presumed to be in Court. *Milligan* v. *Thomas*, 756

PRISONER.

In an application under the 48 *Geo.* 3, c. 123, s. 1, for the discharge of a prisoner out of custody who has lain in prison twelve months, in execution for a debt not exceeding 20*l.*, the Court will not inquire into other circumstances, but require only to be satisfied of those facts. *Baxter* v. *Clarke*, 734

PROHIBITION.

In a suit for a divorce in the Consistory Court of London, the defendant put in an answer under protest, which protest was afterwards overruled, but the court refused to compel the defendant to appear absolutely, or to admit the plaintiff's libel. The plaintiff appealed to the Court of Arches from that decision, but not in due time, and the appeal was dismissed. The plaintiff afterwards applied to the Consistory Court to be allowed to correct her libel, but the Court refused the application. The plaintiff appealed from that decision to the Court of Arches, who pronounced in favour of the appeal. From that decree the defendant appealed to the King in Council, praying that it might be reversed, and the cause retained, and he be dismissed from all observance of justice therein. The plaintiff also prayed that the cause might be retained. The appeal was referred to the judicial committee of the Privy Council, who reported in favour of the appeal, that the decree ought to be reversed, the principal cause retained, but that the defendant should appear absolutely. The report was confirmed, and the order for the appearance was made and served upon the defendant. On a motion for a prohibition to the judicial committee:—*Held*, that the judicial committee had jurisdiction over the cause, and they having retained the cause, this must be taken to be a step taken in the cause, and, if wrong, that it was a matter of practice over which this Court had no jurisdiction.

Semble, that the Court of *Exchequer* has jurisdiction to issue a prohibition to the judicial committee, if they exceed their jurisdiction. *Ex parte Smyth*, 748

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RENT.

Where apportionable.

A lessee of 100 acres of land for one year accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until a half-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder:—*Held*, that this was not a case of eviction by the landlord, but that the rent was apportionable, and that the landlord was entitled to distrain for such apportioned rent. *Neale* v. *Mackenzie*, 84

SEAMEN'S WAGES.

Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles:—*Held*, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen.

The plaintiff's wages were adjusted, and the balance struck, subject to certain deductions for insurance and interest on advances made to him before and during the voyage. It was proved that such charges were the usual ones in trading voyages, and that the accounts were always made out so. The plaintiff remonstrated against those deductions, but ultimately accepted the balance, and gave a receipt for the whole wages:—*Held*, that he could not recover the amount of such deductions.

So also, where, in another voyage, he had stipulated for a 90th share of the net proceeds of the cargo on a whaling adventure in lieu of wages, and was charged with insurance on such share.

Held also, that such deductions need not, under the circumstances, be made the subject of a set-off. *M'Auliffe* v. *J. Bicknell and others*, 263

SCIENTER.

In an action on the case for keeping dogs, well knowing them to be used and accustomed to bite cattle, &c., and which bit and worried the plaintiff's cattle:—*Held*, that the plea of not guilty puts in issue the *scienter*, it being of the substance of the issue.

Where the defendant, on being informed that his dogs had bitten the plaintiff's cattle, offered to settle for them, if it could be proved that his dogs had done it:—*Held*, that this was some evidence to go to the jury of the *scienter*, though entitled to but little weight; but the proof that the dogs were of a savage disposition, and had bitten the cattle of other persons, was not evidence that the defendant knew they were accustomed to bite cattle. *Thomas* v. *Morgan*, 496

SEQUESTRATION.

Where a sheriff returned to a writ of *capias utlagatum* that the defendant had no goods, nor any lay fee in his bailiwick, but that he was pos-

sessed of a rectory, the Court awarded the writ of sequestration, although the sheriff did not return that he had seized the rectory into his hands. *Rex* v. *Armstrong*, 205

SHERIFF.

1. A writ of *fi. fa.* was delivered to a sheriff, to be executed, on the 20th of *December*, 1833, returnable on the 30th of the same month. The sheriff went out of office in the *February* following. On the 14th of *June* a rule to return the writ was served upon the new sheriff, and the writ not having been returned, another rule to return the writ was served upon the under-sheriff of the late sheriff on the 12th of *November*, which, however, was more than six months after the late sheriff had gone out of office:—*Held*, that an attachment against the late sheriff for not making a return could not be supported, he not having been duly ruled to return the writ. *Yrath* v. *Hopkins*, 250

2. The sheriff is a constituent part of the county court, and acts as such in issuing process of execution, and is not liable for the wrongful act of the bailiff done in the execution of such process. *Tunno* v. *Morris*, 298

3. The sheriff took a bail-bond with one surety only; he afterwards made a day's default in returning the writ. The Court set aside an attachment obtained against him, on payment of costs. *Rex* v. *The Sheriff of Surrey*, 698

4. Where a defendant, against whom a *fi. fa.* had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods:—*Held*, that the sheriff could not be ruled to return the writ on behalf of the bankrupt. *Gilbert* v. *Whalley*, 722

SHERIFF'S POUNDAGE.

Under a writ of extent for penalties under the excise laws, the sheriff levied goods of the defendant of the value of 824*l.* A negotiation took place; the sheriff remained in possession, and ultimately the Crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1000*l.*:—*Held*, that the sheriff was entitled to poundage only on 500*l.* *Rex* v. *Robinson*, 334

SLANDER.

Where in an action for slander spoken of a person in the way of his trade, the plaintiff recovered less than 40*s.* damages:—*Held*, that the plaintiff was entitled to no more costs than damages, and that the Judge had no power to certify to entitle the plaintiff to full costs. *Goodall* v. *Ensell*, 249

SMUGGLING ACT (CONSTRUCTION OF).

1. In an information founded upon the 6 *Geo.* 4, c. 108, s. 45, the first count charged the defendant with assisting and being otherwise concerned in unshipping goods liable to the duties of customs, the duties not having been paid or secured. The second count charged that certain goods, liable to the payment of duties, which had been unshipped without the duties having been paid, came to the hands and possession of the defendant, he well knowing that the same had been illegally unshipped; and the third count charged the defendant with knowingly harbouring, keeping, and concealing certain goods liable to the payment of duties, he well knowing that the same were goods that had been illegally unshipped. On the

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trial it was proved that the goods were received from a boat in the *Downs*, a mile or two from the shore, within the limits of the port of *Dover*, into a hoy hired by the defendant at that port for the purpose of receiving them; and that they were brought in the hoy into the river *Thames*, and were there seized by the custom-house officers within the port of *London*:—*Held*, that the information was sustained by the evidence, inasmuch as it shewed that the defendant at *Dover*, and therefore clearly within the United Kingdom, was "*concerned* in the unshipping," as he there hired the master of the hoy to take the goods on board.

Held, also, that, even supposing that the defendant's act of assistance or concern in the unshipment must be considered to have taken place through the agency of the master of the hoy, at the place where the unshipment was made, namely, in the *Downs*, and that such place was not "within the United Kingdom," in the sense ascribed to those words in the 6 *Geo.* 4, c. 108, s. 45, that when the master of the hoy, he being the defendant's agent, brought the goods into the port of *London*, the defendant was properly charged as having them in his possession within the United Kingdom. *The Attorney-General* v. *Tomsett*, 170

2. A vessel which comes within a league of the coast of the United Kingdom, having had contraband goods on board in the same voyage, though she has unshipped them before coming within the league, is liable to forfeiture under the 3 & 4 *Will.* 4, c. 53, s. 2. *The Attorney-General* v. *Schiers*, 286

3. The King's Warehouse is a warehouse within the meaning of the 3 & 4 *Will.* 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited. *Lowe* v. *The Attorney-General*, 544

4. Goods, the importation of which is prohibited when coming from particular places, may, under the 3 & 4 *Will.* 4, c. 53, s. 80, be described in an information for penalties as goods liable to and unshipped without payment of duty, and the defendant may be charged with having been concerned in the unshipping, the duties not having been first paid or secured; although it appear that they were in fact imported from a place to which the prohibition applies. *The Attorney-General* v. *Greaves*, 669

SPECIFICATION.

See PATENT.

STAMP.

1. A bill of exchange drawn in *London*, payable to the order of the drawer in *London*, upon a merchant residing at *Brussels*, and accepted by him payable in *London*, is an inland bill of exchange, and must be stamped as such. *Amner* v. *Clark*, 468

2. The plaintiff contracted to make for the defendants a copper-plate press, to be ready in three months, the defendants to pay part of the price by instalments, up to the delivery of the press, the remainder in six months:—*Held*, that this was a contract relating to the sale of goods, within the exception in the Stamp Act. *Pinner* v. *Arnold and another*, 613

SURRENDER.

See EVIDENCE.

SUSPENSION OF SUIT.

See BILLS AND NOTES.

TENANCY AT WILL.

A feoffment by a lessor, with livery

of seisin made on the land, operates as a determination of a tenancy at will, although the tenant at will be off the land at the time the livery is made, and has had no notice of the determination of the will. *Ball* v. *Cullimore and others*, 120

TRANSFER OF DEBT.

The plaintiff sought to recover 50*l.* from the defendant on the account stated, and gave evidence of an admitted account between them, in which that sum appeared as an item against the defendant, and of payment of interest in respect of it, and promises to pay the principal. The defendant proved that the debt arose out of a written undertaking on his part (which he had obtained from the plaintiff and destroyed) "to remit the plaintiff 50*l.*, which sum he, the defendant, held of *H. P.*, and by him authorized to pay" the plaintiff; and called *H. P.*, who swore that he never authorized the defendant to pay the money for him, and that he had since settled all his accounts with the plaintiff:—*Held*, that the defendant was not precluded from giving this evidence, and that, if believed, it entitled him to a nonsuit. *Pierce* v. *Evans*, 294

TRESPASS.

See Costs.

TRESPASS FOR MESNE PROFITS.

Where there is judgment by default in an ejectment, the plaintiff may, in the action for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. *Doe* v. *Huddart*, 316

TROVER (CONVERSION).

1. In an action of trover for a chaise, it appeared that one *B.* had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that whilst it was in the defendant's possession, in the city of *London*, it was attached by process out of the Sheriff's Court. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it:—*Held*, that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not of the defendant. *Verrall* v. *Robinson*, 495

2. In the case of the simple bailment of a chattel, without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession.

Trover for horses, cows, furniture, &c. &c. Plea—that *J. H.* was possessed of the cattle, goods, and chattels in the declaration mentioned, and fraudulently sold them to the plaintiff, to avoid an execution against the goods of *J. H.*, and that the defendant (the sheriff) seized them under such execution. Replication—that *J. H.* did not fraudulently sell the cattle, goods, and chattels in the declaration mentioned to the plaintiff; and issue thereon. The particular of demand was merely "one cow." It appeared that the plaintiff had lent a cow to *J. H.*; that the goods of *J. H.* were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale:—*Held*, that the plaintiff was entitled to a verdict on the above issue.

The plea of no property in the plaintiff, in trover, means no property *as against the defendant*. *Nicolls* v. *Bastard*, 659

VENUE.

The *venue* cannot be changed in a local action, under the 3 & 4 *Will.* 4, c. 42, s. 22, until after issue joined. *Bell* v. *Harrison*, 733

WESTMINSTER COURT OF REQUESTS.

The jurisdiction of the *Westminster* Court of Requests is confined to cases of *debt*, and it has no power to inquire into a matter which is the subject of an action on the case for unliquidated damages. *Soames* v. *Rawlings*, 744

WITNESS.

See BANKRUPT.

WRIT OF SUMMONS.

See PRACTICE.

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