REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

HENRY WHARTON, ESQ.

VOL. XCV.

CONTAINING

THE CASES DETERMINED IN THE COMMON PLEAS AND IN THE EXCHEQUER CHAMBER IN EASTER AND TRINITY TERMS AND VACATIONS, 1859, XXII. AND XXIII. VICTORIA.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.
1870.

STEREOTYPED BY MEARS & DUSENBERY.

COMMON BENCH REPORTS.

New Series.

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IN

THE COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

FROM

EASTER AND TRINITY TERMS AND VACATIONS, 1859.

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. VI.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

HENRY WHARTON, ESQ.

EDITOR.

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☞ The volumes of Reports to which this mark (†) is annexed have been reprinted by T. & J. W. JOHNSON, at $3.00 per volume, with American Notes and References by Messrs. HARE and WALLACE.

JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir JAMES ALEXANDER COCKBURN, Knt.,
Lord Chief Justice.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.

ATTORNEYS-GENERAL.

Sir FITZROY KELLY, Knt.
Sir RICHARD BETHELL, Knt.

SOLICITORS-GENERAL.

Sir HUGH M'CALMONT CAIRNS, Knt.
Sir HENRY SINGER KEATING, Knt.

A TABLE OF THE NAMES OF THE CASES REPORTED IN THIS VOLUME.

☞ The names of the additional cases are printed in *Italic*.

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IN

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XXIInd VICTORIA. 1859.

The Judges who usually sat in Banc in this term, were:

COCKBURN, C. J.	WILLES, J.
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THE EARL OF SHREWSBURY *v.* JAMES ROBERT HOPE SCOTT and Others. *June* 9.

The Duke of S., in 1700, settled lands to certain uses. After his death, viz. in 1718, his heir,—by a settlement, which was confirmed by a private act of 6 G. 1, c. 29, intituled "An act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned," whereby the settled estates were rendered inalienable by any future tenant-in-tail, but with a proviso that any issue male taking under the act might aliene, on his making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing a Protestant,—conveyed the same lands to uses in some respects different from and inconsistent with those of the settlement of 1700:—

Held, that, assuming the settlement of 1700 to have been left as a subsisting settlement so far as its provisions were reconcileable with those of the settlement of 1718, the latter (in conjunction with the act) must be considered as the dominant settlement; and, consequently, that the removal of the disabilities of Roman Catholics by subsequent public statutes did not destroy the efficacy of the parliamentary settlement, so as to enable a tenant-in-tail under the first settlement to bar the entail and dispose of the estate without complying with the conditions imposed by the private act.

Held also, that the acts of parliament imposing disabilities upon Roman Catholics did not prevent persons of that persuasion who were legally in possession of land from alienating it; and therefore that the enactments of the estate act of 6 G. 1, c. 29, were not to be considered as intended to enforce the general law of the realm, and consequently were not affected by the subsequent acts which removed the disabilities which the general law had formerly imposed upon Roman Catholics.

Where the performance of an act is made a condition precedent to the exercise of a power, and such performance subsequently becomes by act of the law impossible,—it does not follow that the power may be exercised without performance of the condition.

Where, therefore, a tenant-in-tail had, under a proviso in an estate act, power to aliene lands on condition of his making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing Protestant, and the statutes requiring the declaration and oaths were afterwards repealed:—Held that the only effect of such repeal was, that the power enabling the issue in tail to aliene could not take effect.

An estate act must be carried into effect according to the intention plainly and clearly expressed therein, and cannot be impeached after the estates have been dealt with for a century and a half under it, by a suggestion that the proper parties were not before the legislature, or that the legislature were imposed upon.

[The judgment affirmed in the Exchequer Chamber, post, p. 221.]

THIS was an action of ejectment brought by the plaintiff to recover the mansion of Alton Towers, and certain lands situate in the township of Farley, in the parish of Alton, in the county of Stafford.

*2] The plaintiff claimed the said mansion and lands as being entitled thereto under the 2d section of an act of 6 G. 1, c. 29, intituled "An Act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned." See the statute, post, p. 64.

The following admissions were entered into before the trial by the defendants' attorneys,—

"1. That the plaintiff is issue male of the body of John the first Earl of Shrewsbury.

"2. That Gilbert Earl of Shrewsbury (named in the 2d section of the 6 G. 1, c. 29) died in 1743 without issue male; and that John Talbot (named in the same section of the same act) died in 1743 without issue male.

"3. That George Talbot, named in the same section of the said act of parliament, died in 1733; and that the issue male of the said George Talbot became extinct upon the death of Bertram Arthur, the last Earl of Shrewsbury, on the 10th of August, 1856.

"4. That, upon the death of the said Bertram Arthur Earl of Shrewsbury as aforesaid, the title, honour, and dignity of Earl of Shrewsbury did by virtue of the letters patent of creation of the said earldom (made and granted by King Henry the Sixth to the said John first Earl of *3] Shrewsbury and the heirs male *of his body) descend and come to the plaintiff, who then succeeded to and inherited the said earldom.

"5. That the plaintiff has been duly summoned to parliament and taken his seat as Earl of Shrewsbury; and that it shall not be necessary for the plaintiff at the trial of this cause to prove his pedigree from the said John first Earl of Shrewsbury, or to give any further or other evidence in proof of the facts and matters above admitted."

The following admissions were also made on the part of the defendants at the trial,—

"That the lands described in the schedule hereunder written, being the lands sought to be recovered in this action, are situate in the township of Farley, in the parish of Alton, in the county of Stafford, and are parts of the estates in that county mentioned or referred to in the 6 G. 1, c. 22, intituled, &c.; and that the duke in the said section

referred to, at the time of his decease, had an estate of inheritance in possession, reversion, remainder, or expectancy, in the said premises; and that the said premises were at the commencement of this action, and still are, in the actual possession of the defendants or some of them, and were not subject to any estate or interest under which the right to possession might be outstanding in some person not party to this action: and that it shall not be necessary for the plaintiff at the trial of this cause to give any further or other evidence in proof of the facts and matters above admitted."

The schedule above referred to described the several premises sought to be recovered, with their respective quantities, and the names of the occupiers.

The following admissions were also made at the trial, on the part of the plaintiff,—"That the said Gilbert Earl of Shrewsbury, John Talbot, and George Talbot, mentioned in the 2d section of the 6 G. 1, c. 29, were *Roman Catholics; and that search had been made in vain for all documents connected with the residence of Gilbert Earl of Shrewsbury at the colleges of Jesuits abroad, in Belgium and in France." [*4

It was also agreed that the pedigree set out on next page should be used as evidence at the trial of the cause, for the purposes of the action.

The plaintiff gave in evidence the following documents:—

1. The settlement on the marriage of the Hon. George Talbot with Mary Fitzwilliam, dated the 3d and 4th of March, 1718.

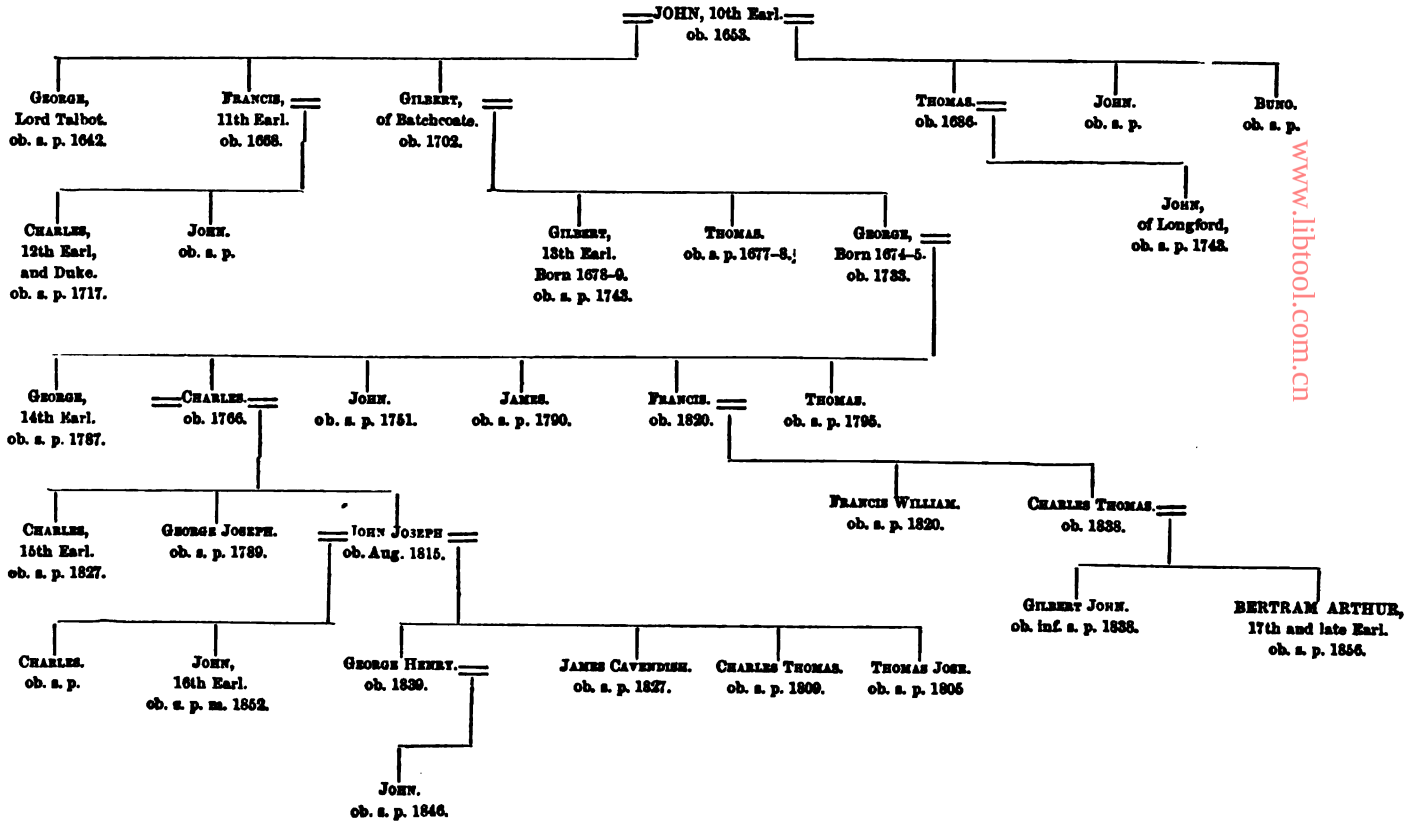
2. The Shrewsbury Estate Acts, 6 G. 1, c. 29, 43 G. 3, c. 40, and 6 & 7 Vict. c. 28.

3. The counterpart of a lease of mines of copper, lead, &c., in the townships of Stanton and Cotton, in the county of Stafford, granted on the 1st of September, 1855, by Bertram Arthur Earl of Shrewsbury to Messrs. Richmond & Niness, and which lease purported to be executed by the earl "in pursuance and by virtue and in exercise of the powers and authorities vested in him in and by an act of parliament passed in the session held in the 6th and 7th years of the reign of Her present Majesty (6 & 7 Vict. c. 28), intituled 'An act for vesting part of the settled estates of the Right Hon. John Earl of Shrewsbury, in the counties of Oxford, Chester, Salop, Worcester, and Stafford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments to be settled in lieu thereof to the same uses and subject to the same restrictions, and for other purposes therein mentioned,' and of every other power and authority, estate, or interest enabling him in that behalf."

4. An affidavit of one of the attorneys for the defendants, showing that the defendants were trustees for the devisee under the will of Earl Bertram Arthur.

*The settlement of 1718 was as follows:—

THIS indenture quinquepartite, made the 4th day of March, in the 5th year of the reign of our Sovereign Lord George by the grace of God of Great Britain, France, and Ireland, King, defender of the faith, &c., and in the year of our Lord 1718, between the Right Hon. Gilbert Earl of Shrewsbury, cousin and heir of the most noble Charles Earl and Duke of Shrewsbury, deceased, and the Hon. George Talbot, only brother of the said Gilbert Earl of Shrewsbury, of the first part, The Right Hon. Richard Lord Viscount Fitzwilliam, of Merion, in the [*6



kingdom of Ireland, and the Hon. Mary Fitzwilliam, sister of the said viscount, of the second part, the Right. Hon. George Earl of Cardigan, the Right Rev. Father in God, William Lord Bishop of Salisbury, Sir John Stanley of London, Knt., and Charles Talbot, Esq., eldest son and heir apparent of the said William Lord Bishop of Salisbury, of the third part, the Right Hon. Richard Lord Lumley and John Talbot of Longford, in the county of Salop, Esq., of the fourth part, Sir John Webb, of Great Cantford, in the county of Dorset, Bart., George Pitt, of Stratfield Sea, in the county of Southampton, Esq., and Nevile Ridley, of the parish of St. Ann, Soho, in the county of Middlesex, Esq., of the fifth part: Whereas, the said Charles Duke of Shrewsbury, by his indentures of lease and release bearing date respectively the 30th and 31st of October which was in the year of our Lord 1700, the release being tripartite, and made between the said duke of the first part, the Lord Godolphin and William Walsh of the second part, the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Lord Bishop of Oxford, Sir John Talbot, and John Arden, of the third part, did settle and convey all his manors, messuages, farms, advowsons, rectories, tithes, lands, and hereditaments, in the several counties of Salop, Worcester, Berks, Chester, *Stafford, Oxon, Wilts, and Derby, or elsewhere in the kingdom of England and Ireland, on failure of issue [*7 male of his body, to the uses following, that is to say, as to such of the said manors, lands, tenements, and hereditaments as are situate in the said counties of Worcester, Salop, and Berks, to the use of the said George Talbot for life, without impeachment of waste, remainder to preserve contingent remainders, remainder to his first and other sons in tail-male, remainder to the said John Talbot for life, remainder to his first and other sons successively in tail-male, remainder to the said Charles Duke of Shrewsbury and his heirs; and, as for and concerning all and every the said manors, lands, tenements, and hereditaments in the several counties of Chester, Stafford, Oxford, Wilts, and Derby, to the use of the said duke for life, remainder to the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Bishop of Oxford, Sir John Talbot, and John Arden (both since dead), and their heirs, upon trust for raising money for payment of the debts of the said duke as his personal estate should not be sufficient to pay, and to pay all annuities he by deed or will should appoint, and, charged and chargeable therewith, to convey the same to such person and persons, and for such estate and estates, and subject to such powers, provisoes, limitations, and agreements as are therein mentioned for and concerning the aforesaid manors, lands, tenements, and hereditaments in the said several counties of Worcester, Salop, and Berks: in which said indenture is a power enabling the said George Talbot and John Talbot, when they should be in the actual possession of the said manors and premises, by any deed or writing executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, messuages, lands, tenements, hereditaments, and premises *as shall not [*8 exceed the yearly value or sum of 2000*l.* a year for the jointure of any wife or wives, or the life of such wife or wives, as by the said indentures, relation being thereto had, may more fully and at large appear: And whereas the said Duke of Shrewsbury, in and by his last will and testament in writing, bearing date on or about the 19th of July, which was in the year of our

Lord 1712,—reciting that, since the making of the said will, he had purchased the manors of Dunthropp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, situate, lying, and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tew, Little Tew, and elsewhere in the county of Oxford; and that he had likewise purchased a farm called Broadstone farm, lying in Dunthropp, Chalford, Lidston, and Broadstreet, in the said county of Oxford, held, by a college lease,—he did thereby devise the said purchased freehold premises to the said William Lord Bishop of Salisbury, Sir John Talbot, and John Arden, and their heirs, to the same uses, intents, and purposes as the manors, lands, tenements, and hereditaments in the said recited indenture tripartite, are limited and settled, and did thereby devise the said leasehold premises called Broadstone farm to the said Lord Bishop of Oxford, [sic,] Sir John Talbot, and John Arden, their executors and administrators, upon trust to permit the persons entitled to the freehold of the said manors in the county of Oxon to enjoy the same; and by his said will did charge his said manors, lands, tenements, and hereditaments in the counties of Chester, Stafford, Oxford, and Wilts, and elsewhere in the said kingdom of England and Ireland, with the payment of the several annuities to his servants and others for their respective lives; and of the said will made the said George Earl of Cardigan, William Lord Bishop
*9] *of Salisbury, Sir John Stanley, and John Arden, his executors; and some time after making the said will the said duke died: And whereas the said duke left assets to pay all his debts and legacies, with a great overplus: And whereas several disputes have arisen touching the said settlement and will; but the said Gilbert Earl of Shrewsbury, heir-at-law to the said duke, being determined not to marry, hath agreed to confirm the said settlement made by the said duke, and to marry his said brother, and make such further provisions as is usual in such cases: And whereas the said Sir John Talbot and John Arden are dead: And whereas the legal estate of and in the manor of Dunthropp and other the purchased premises in the county of Oxford is now vested in the said Bishop of Salisbury, and the said George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley are likewise interested in other parts of the said premises for payment of debts and legacies of the said duke: And whereas a marriage is by God's permission intended to be shortly had and solemnized between the said George Talbot and Mary Fitzwilliam: Now, this indenture witnesseth, that, in consideration of the said intended marriage, and of the sum of 13,000*l.* of lawful money of Great Britain to the said Gilbert Earl of Shrewsbury and George Talbot, or one of them, in hand paid by the said Richard Lord Fitzwilliam, Mary Fitzwilliam, and George Pitt, some or one of them, at or before the sealing and delivery of these presents, as and for the marriage portion of the said Mary Fitzwilliam, and of the further sum of 5*s.* of like money to the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, in hand likewise paid by the said Richard Lord Lumley and Nevile Ridley, at or before the ensealing and delivery of these
*10] presents, the respective *receipts of which said sums of 13,000*l.* and 5*s.* they the said Gilbert Earl of Shrewsbury, George Talbot, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir

John Stanley, do hereby respectively acknowledge, and thereof and of and from every part and parcel thereof do acquit, release, and for ever discharge the said Richard Lord Viscount Fitzwilliam, Mary Fitzwilliam, George Pitt, Richard Lord Lumley, and Nevile Ridley, their heirs, executors, and administrators, by these presents, and, for settling and confirming the manors, lands, tenements, and hereditaments hereinafter mentioned to the several uses, intents, and purposes, and subject to the trusts, provisoes, limitations, and agreements hereinafter declared and expressed, and for divers other good and valuable considerations hereunto specially moving, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, according to their respective estates and interests, and subject to the annuities and annual payments, and to the jointure of the Duchess of Shrewsbury charged on some of the said manors, and to the remedies for recovering the same, have, and each and every of them hath, bargained, sold, aliened, released, and confirmed, and by these presents do, and each and every of them doth, bargain, sell, alien, release, and confirm unto the said Richard Lord Lumley and Nevile Ridley (in their actual possession now being by virtue of a bargain and sale to them thereof made by the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, for one year, in consideration of lawful money, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession), and to their heirs, all those the manors of Dunthropp, alias Dunthorpe, *and Showell, alias Sowell, in the county of Oxford, and all the [*11 freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, villages, fields, and hamlets of Heathrop, Swarford, Great Tew, and Little Tew, in the said county of Oxford, and also all and every the manors, freehold messuages, farms, advowsons, rectories, tithes, lands, tenements, and hereditaments, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, or elsewhere in the kingdom of Great Britain or Ireland, whereof or wherein the said duke, or any other in trust for him, at the time of the death of the said duke, were seised of any estate of inheritance in possession, reversion, remainder, or expectancy, with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances, and all and every the manors, lands, tenements, and hereditaments granted or settled, or intended to be granted and settled, comprised or intended to be comprised in the said recited indenture tripartite, together with all and singular messuages, houses, outhouses, edifices, buildings, barns, stables, yards, orchards, gardens, lands, tenements, meadows, pastures, feedings, closes, enclosed grounds, demesne lands, commons, wastes, heaths, furzes, moors, marshes, waters, fishings, ponds, pools, streams, woods, underwoods, free-warrens, rents, reversions, services, courts-leet, courts-baron, view of frankpledge, perquisites and profits of courts, fairs, markets, tolls, piccage, stallage, waifs, estrays, heriots, goods and chattels of felons, fugitives, and felons of themselves, rights, royalties, privileges, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said several manors or lordships and premises, every or any of them, belonging or in anywise appertaining, or accepted,

reputed, enjoyed, deemed, taken, or known as part, parcel, or member
*12] of them or any of them; and the reversion *and reversions, remainder and remainders, rents, issues, and profits of the said premises; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand of the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, in and to the same, except out of this present grant and release all manors, messuages, lands, tenements, and hereditaments, in the county of Middlesex, and also except the said farm called Broadstone farm, and all lands, tenements, and hereditaments thereunto belonging, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowes, closes, coppices, wood grounds, boileries of salt-water, or salt-fatts, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, deceased, late father of the said Earl and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elm Bridge, Purshall Green, Timber Hanger, Bromesgrove, Dodderhill, and Droitwich, or elsewhere in the county of Worcester, To have and to hold the said manors, lands, tenements, rectories, tithes, hereditaments, and all and singular the premises hereby bargained, sold, released, ratified, and confirmed, or intended so to be, with their and every of their rights, members, and appurtenances (except as is hereinbefore excepted), unto the said Richard Lord Lumley and Nevile Ridley, and their heirs, to and for the several uses, intents, and purposes, and subject to the several trusts, provisoes, limitations, and agreements hereinafter mentioned and declared concerning the same, that is to say, until the said intended marriage shall take effect, to the same uses, intents, and purposes as the said manors, lands, tenements, rectories, tithes, hereditaments, and premises are and stand limited in and by the said recited indenture tripartite of settlement; and, from and
*13] *immediately after the solemnization of the said intended marriage of the said George Talbot and Mary Fitzwilliam, then, as for and concerning all and every the manors, lands, tenements, and hereditaments in the several counties of Worcester, Salop, and Berks, with their and every of their rights, members, and appurtenances, to the use and behoof of the said Richard Lord Viscount Fitzwilliam, and George Pitt, their executors, administrators, and assigns, for and during the term of ninety-nine years, if the said George Talbot and Mary Fitzwilliam his intended wife shall jointly so long live,—Upon trust that they the said Richard Lord Viscount Fitzwilliam, and George Pitt, and the survivor of them, his executors, administrators, and assigns, shall, out of the rents, issues, and profits of the said premises so to them limited for the term aforesaid, raise and pay, or cause to be raised and paid, the yearly rent or sum of 400*l.* of good and lawful money of Great Britain during the joint lives of the said George Talbot and Mary Fitzwilliam, not to the said George Talbot or as he shall appoint, but to such person and persons only, and for such uses, intents, and purposes as the said Mary Fitzwilliam alone, without the order, direction, intermeddling, or control of him the said George Talbot, notwithstanding the coverture between them, shall by any writing or writings to be signed by her the said Mary Fitzwilliam with her name of her own proper handwriting, from time to time direct or appoint, wherewith the said George Talbot,

her intended husband, shall not intermeddle; the said yearly sum of 400*l.* to be paid quarterly, at the four most usual feasts or days of payment in the year, that is to say, Lady Day, Midsummer, Michaelmas, and Christmas, by even and equal portions,—the first payment thereof to begin and to be made at such of the said feasts or days of payment as shall first and next happen after the *solemnization of the said intended marriage; and the said yearly sum of 400*l.* to be paid [*14 without any deduction or abatement for or by reason of any manner of taxes, assessments, or impositions to be assessed thereon or on the said premises by authority of parliament or otherwise howsoever, or for or by reason of any other matter, cause, or thing whatsoever; And upon this further trust, that, after payment of the said yearly sum of 400*l.* as the same shall become payable and to be paid as aforesaid, and subject to the payment thereof and such charges and expenses as they the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, shall sustain in and about the execution of the trusts hereby in them reposed, which they are to be paid in the first place, they the said Richard Lord Viscount Fitzwilliam, and George Pitt, their executors, administrators, and assigns, shall permit and suffer the said George Talbot and his assigns, during so many years of the said term of ninety-nine years as he and the said Mary Fitzwilliam, his intended wife, shall jointly live, to have, receive, and take the residue and remainder of the rents, issues, and profits of the said manors, lands, tenements, and hereditaments, over and above the said 400*l.* a year, as the same shall become payable, to his and their own use and uses absolutely: And as for and concerning the said manors, lands, tenements, and hereditaments limited in use to the said Lord Viscount Fitzwilliam and George Pitt for ninety-nine years, determinable as aforesaid, and as for and concerning all and every other the said manors or lordships, advowsons, rectories, messuages, lands, tenements, tithes, hereditaments, and premises hereby bargained, sold, released, ratified, and confirmed, or intended so to be, with their and every of their appurtenances, after solemnization of the said intended marriage, *to the use and behoof [*15 of the said George Talbot and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and Nevile Ridley and their heirs during the life of the said George Talbot, upon trust to support and preserve the contingent uses and estates thereof hereinafter limited from being destroyed or discontinued, and for that purpose to make entries as occasion shall require, but nevertheless to suffer the said George Talbot and his assigns, to have, receive, and take the rents, issues, and profits of the same premises to his and their own use and uses for and during the term of his natural life; And, from and after the decease of the said George Talbot, then to the use, intent, and purpose that the said Mary Fitzwilliam and her assigns, in case the said intended marriage shall take effect and she the said Mary Fitzwilliam shall happen to survive the said George Talbot, her intended husband, shall and may have, receive, and take yearly and every year during the term of her natural life the annual payment or yearly rent-charge of 1500*l.* of good and lawful money of Great Britain, to be issuing and going out of all and every the said manors or lordships, rectories, messuages, lands,

tenements, hereditaments, and premises aforesaid, and out of every part and parcel thereof, with their appurtenances, without any abatement for taxes, charges, assessments, or impositions of any kind whatsoever,—the said annual payment or yearly rent-charge of 1500*l.* to be payable and paid at four of the most usual feasts or days of payment in the year, that is to say, Lady Day, Midsummer, Michaelmas, and Christmas,—the first payment to begin and to be made on such of the said feasts or
*16] times of payments as shall first and next happen after *the decease of the said George Talbot; and to this further use and intent, that, if it shall happen the said annual payment or yearly rent-charge of 1500*l.*, or any part thereof, shall be behind and unpaid by the space of thirty days next after any of the said feasts or days of payment thereof as aforesaid, that then and so often it shall and may be lawful to and for the said Mary Fitzwilliam and her assigns, during the term of her natural life, into and upon the said manors, lands, tenements, hereditaments, and premises aforesaid charged with the yearly sum or rent of 1500*l.* as aforesaid, and into and upon every or any part or parts thereof, to enter and distrain, and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain until she the said Mary Fitzwilliam and her assigns shall be fully satisfied and paid the said yearly sum or rent-charge of 1500*l.*, and every part thereof, and all arrears thereof, together with the costs and charges of such distress: And, for the better assuring the said jointure, the said George Talbot, by this present writing, sealed in the presence of the credible persons whose names are endorsed on these presents as witnesses hereunto, doth, by virtue of the power in the said recited indenture contained, and all other powers enabling him in this behalf, grant, limit, and appoint, that, in case the said marriage shall take effect, and the said Mary Fitzwilliam shall survive the said George Talbot, her intended husband, that then and in such case she the said Mary Fitzwilliam shall, during her natural life, out of the said manors, lands, tenements, and hereditaments in the said recited indenture and in these presents comprised, have and receive the annual sum of 1500*l.* for her jointure, payable as is hereinbefore mentioned: Provided always, and it is hereby declared and agreed that the said Mary Fitzwilliam shall only have one annual sum of
*17] *1500*l.* for her life for her jointure, which said annual sum of 1500*l.* is hereby declared to be in the name or nature of a jointure to and for the said Mary Fitzwilliam, the intended wife of the said George Talbot, and to be in full recompense, lieu, and satisfaction of her dower and thirds at common law which she may or otherwise might have, claim, challenge, or demand, of, into, or out of all or any of the manors, lands, tenements, and hereditaments of the said George Talbot, her intended husband: And as for and concerning all and every the said manors or lordships, lands, tenements, rectories, tithes, hereditaments, and premises aforesaid, and every part thereof, from and after the decease of the said George Talbot, so charged and chargeable with the said annual sum of 1500*l.*, and the remedies for recovering thereof as aforesaid, to the use of the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, for and during and unto the full end and term of two hundred years, to commence and be accounted from the day of the death of the said George Talbot, and fully to be complete and ended, without impeachment of

waste, on the trust and confidence hereinafter mentioned touching the said term; and, after the end, expiration, or other sooner determination of the said term of two hundred years, or the performance or determination of the said trusts concerning the said term, whichsoever of them shall first happen, then to the use and behoof of the first son of the said George Talbot on the body of the said Mary Fitzwilliam, his intended wife, lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing, charged and chargeable as aforesaid; and, for want of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and every other son and sons of the said George Talbot on *the body of the said Mary Fitz- [*18
william, his intended wife, lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger of such sons and the heirs male of his or their bodies issuing: And, for default of such issue, then as for, touching, and concerning the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, to the use and behoof of the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, and assigns, for and during the term of five hundred years, without impeachment of waste, on the trusts hereinafter declared: And as for and concerning the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, from and after the expiration or other sooner determination of the said term of five hundred years, and all other the manors, lands, tenements, and hereditaments hereby granted, or intended so to be, from and after the several determinations of the several and respective estates and interests hereinbefore limited, and as the same shall severally end and determine, and charged and chargeable as aforesaid, to the use and behoof of the first son of the said George Talbot on the body of any other after-taken wife or wives he shall happen to marry after the death of the said Mary Fitzwilliam, lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other son and sons of the said George Talbot on *the body or bodies of such after-taken wife and wives to be [*19
begotten, severally and successively, one after another, as they and every of them shall be in seniority of age or priority of birth, and of the several and respective heirs males of the body or bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger of such sons and the heirs male of his or their bodies issuing; and, for default of such issue, to the use and behoof of the said John Talbot for and during the term of his natural life, without impeachment of waste: And, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and Nevile Ridley and their heirs, during the natural life of the said John Talbot, upon trust only to preserve the contingent uses and estates hereinafter limited from being destroyed or discontinued, but nevertheless in trust to permit and

suffer the said John Talbot to receive the rents, issues, and profits of the said premises for and during the term of his natural life; and, from and after his decease, to the use and behoof of the first son of the body of the said John Talbot lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other son and sons of the body of the said John Talbot lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son or sons issuing, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger of such sons and the heirs male of his
*20] or their bodies issuing: *And as for and concerning the said term of two hundred years hereinbefore limited to the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, the same is so limited to them on the trusts and confidences, and to the ends, intents, and purposes hereinafter mentioned, declared, and expressed, that is to say, upon trust, that, in case the said intended marriage shall take effect, and the said Mary Fitzwilliam shall survive and outlive the said George Talbot, her intended husband, and shall be disturbed in the quiet enjoyment of the said annual sum of 1500*l.* to be limited for her life for her jointure as aforesaid, by the heir-at-law of the said George Talbot or any other person whatsoever, that then and in such case they the said Richard Lord Viscount Fitzwilliam and George Pitt, and the survivor of them, or the executors and administrators of such survivor, shall and do, by and out of the rents, issues, and profits of the said premises, or by mortgage or sale thereof or of a competent part thereof, or by any other ways or means as they in their discretion shall think fit, levy and raise the gross sum of 13,000*l.*, and pay the same to the said Mary Fitzwilliam, her executors, administrators, or assigns, or to such person or persons as she shall appoint, within three months after such disturbance, with legal interest for the same from the time of such disturbance till payment; and, after raising and paying the said sum of 13,000*l.* and interest, and the trustees' charges, the said term of two hundred years to cease: And as touching and concerning the said term of five hundred years hereinbefore limited to the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, and assigns, the same is so limited to them upon the trust and to the intents and purposes hereinafter expressed, that is to say, Upon trust, that,
*21] *in case there shall no son of the said George Talbot on the body of the said Mary Fitzwilliam, his intended wife, begotten, or if all the sons between them begotten shall all happen to die without issue male before any of them attain the age of twenty-one years, and that there be issue between them the said George Talbot and Mary Fitzwilliam one or more daughter or daughters living at the time of the decease of the said George Talbot, or born after his death, which shall attain the age of twenty-one years or be married, that then such daughter and daughters shall have the several and respective sums of money hereinafter expressed for their respective portions, that is to say, if there shall be but one daughter only and no more such, then such only

daughter to have the sum of 20,000*l.* for her portion; and if there shall be two or more such daughters, then such two or more daughters to have the sum of 20,000*l.* to be equally divided between them share and share alike, the said portions to be raised by the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, their executors, administrators, or assigns, by and out of the rents, issues, and profits of the premises so to them limited in use for the term of five hundred years as aforesaid, or by lease or leases, mortgage or mortgages, sale or sales, to be made thereof, and to be payable to the said daughter and daughters respectively at her and their several and respective ages of twenty-one years, or days of marriage, which shall first happen; and upon further trust, that, in the mean time, and until the said portions shall be payable, the said daughter or daughters be allowed, out of the rents, issues, and profits of the said premises, interest for their respective portions after the rate of 5*l.* per cent. till their said respective portions shall become due and payable; and upon trust, that, in the mean time, and until the said *portions shall be payable, to permit and suffer such person and persons to whom the next and immediate reversion and remainder [*22 of the premises expectant upon the said term of five hundred years shall for the time being appertain, to receive the rents, issues, and profits thereof over and above the said interest for the said 20,000*l.*, and, after raising the said sum of 20,000*l.* and interest, or in case the said George Talbot shall not have any daughter or daughters by him begotten on the body of the said Mary Fitzwilliam, or if all such daughter and daughters between them begotten shall in the lifetime of the said George Talbot have been preferred with any portions of less value than the portions hereby for them intended, and that such portion and portions to such one or more daughters, and she or they, or any issue of her or their bodies, be then living, be made up to such one or more daughters or her or their issue 20,000*l.*; or, if the said George Talbot shall in his lifetime pay to such one or more daughters the sum of 20,000*l.*, or if such issue female shall happen to die before any of their portions shall become payable as aforesaid, and that the said trustees, their executors, administrators, and assigns, shall have been satisfied and paid out of the rents and profits of the said premises (which they are to be and shall be satisfied in the first place, such money and damages as they or either or any of them shall have sustained or expended in and concerning the trust aforesaid or the execution thereof), that then the said estate and term for five hundred years in the premises, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall go with and attend upon the reversion and inheritance of the premises immediately expectant thereon, according to the uses and estates thereof hereinbefore limited: Provided always, and it is declared and agreed by and between the said parties *to these presents, that, if the person or persons to whom the next immediate freehold or inheritance expectant upon the said [*23 term of five hundred years, according to the uses and estates thereof hereinbefore limited, shall belong or appertain, shall satisfy and pay, or, to the good liking of the said Richard Lord Viscount Fitzwilliam, Sir John Webb, and George Pitt, or the survivors or survivor of them, his executors, administrators, or assigns, shall secure to be paid, to the said daughter or daughters the said sum of 20,000*l.* and interest hereinbefore limited to be charged and raised for the said daughter and

daughters respectively, according to the true intent of these presents, that then and from thenceforth the said term of five hundred years to cease and be void: Provided also, and it is declared and agreed by and between the said parties to these presents, that, after the decease of the said Mary Fitzwilliam, and in case she shall happen to die, the said George Talbot surviving her, it shall and may be lawful to and for the said George Talbot and the first and other sons of his body lawfully to be begotten, and also that it shall and may be lawful to and for the said John Talbot and the first and other sons of the body of the said John Talbot lawfully to be begotten, when and as he and they shall be in the actual possession of the freehold of the said manors, lands, tenements, hereditaments, and premises by virtue of the limitations aforesaid, by any deed or deeds, writing or writings, to be by them respectively signed, sealed, or executed in the presence of two or more credible witnesses, to grant, limit, or appoint, so much of or out of the said manors, lands, tenements, hereditaments, and premises (other than and except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford), as shall not exceed the yearly value or sum of
*24] 2000*l.* a year, to and for the jointure *of his and their wife and wives respectively, for the life and lives of such wife or wives, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: Provided also, that it shall and may be lawful to and for the said George Talbot, and also to and for the said John Talbot, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors and premises whereof the person making such lease shall be actually possessed (except the capital messuage, outhouses, gardens, and parks of Hethrop, in the said county of Oxford), to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases, anything hereinbefore contained to the contrary notwithstanding: And whereas Broadstone farm, part of the premises purchased by the said Charles Duke of Shrewsbury, was devised by the said duke by his said recited will to the said Lord Bishop of Salisbury, by the name of Dr. William Talbot, Bishop of Oxford, and to the said Sir John Talbot and John Arden, their executors, administrators, and assigns, upon trust to be enjoyed by the persons who enjoyed his freehold estate; and, the said Sir John Talbot and John Arden being both dead, the said farm, with its appurtenances, is
*25] *now legally vested in the said William, Lord Bishop of Salisbury, by survivorship, for all the term and estate in the lease thereof granted now to come and unexpired, on the trust aforesaid: Now, this indenture further witnesseth, that the said William, Lord Bishop of Salisbury, in performance of the trust in him reposed, hath assigned and set over, and by these presents doth fully, clearly, and absolutely assign

and set over unto the said Richard Lord Lumley and Nevile Ridley, their executors and administrators, the recited lease from Brazenose College, and all his trust, term, and estate therein, to hold to the said Richard Lord Lumley and Nevile Ridley, their executors, administrators, and assigns, during all the term and estate for years that is therein now to come and unexpired,—upon trust and confidence that they the said Richard Lord Lumley and Nevile Ridley shall and will from time to time during the continuance of the said lease, permit and suffer such person and persons as by virtue of the aforesaid limitations hold and enjoy the freehold premises hereby granted, to receive and take the rents, issues, and profits of the said farm and other premises held by lease under the principal and scholars of King's Hall College of Brazenose, in the University of Oxford, and according to the devise, direction, and intention of the said Charles Duke of Shrewsbury expressed and contained in his said recited will: And the said George Talbot, for himself, his heirs, executors, and administrators, doth covenant, promise, and grant, to and with the said Richard Lord Lumley and Nevile Ridley, their heirs, executors, administrators, and assigns, by these presents, that, for and notwithstanding any act, matter or thing by them the said Gilbert Earl of Shrewsbury and George Talbot done, committed, or suffered to the contrary, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, *William Lord Bishop of Salisbury, and Sir John Stanley, have, or some one of them hath, good right, full [*26 power, and lawful and absolute authority to bargain, sell, release, and convey the said manors and premises to and for the uses, intents, and purposes, and under the provisoes, trusts, and agreements aforesaid; and that the said manors and premises at all times from henceforth shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof had and taken, according to the several uses, estates, and interests thereof hereinbefore limited, expressed, and declared, without the lawful let, suit, trouble, interruption, or demand of the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, Sir John Stanley, and George Talbot, their heirs and assigns, or any or either of them, or any person or persons lawfully claiming or to claim by, from, or under them, any or either of them, or in trust for them, any or either of them; and that free and clear, and freely, clearly, and absolutely acquitted, freed, and discharged, or otherwise upon reasonable request saved harmless and kept indemnified by the said George Talbot, his heirs and assigns, of and from all and all manner of former and other bargains, sales, leases, mortgages, jointures, uses, wills, entails, debts, statutes, recognisances, judgments, extents, executions, and of and from all former and other estates, titles, troubles, forfeitures, and encumbrances whatsoever, had, made, committed, done, or wittingly or willingly suffered by the said Gilbert Earl of Shrewsbury and George Talbot, or Charles Duke of Shrewsbury, deceased, or any other person or persons whatsoever lawfully claiming or to claim, by, from, or under them, or either of them, or in trust for them or either of them, except the annual rent-charge of 1200*l.* per annum payable to the Duchess of Shrewsbury for her life for her jointure, and also except the several annuities charged on some part *of the said premises to the several [*27 persons for their lives by the said will of the said Charles Duke of Shrewsbury, or otherwise, and also except the several leases made to the

respective tenants of the said premises; and that they the said Gilbert Earl of Shrewsbury and George Talbot and their heirs, and all and every other person and persons anything having, or lawfully claiming any estate or interest into or out of the said manors, messuages, farms, lands, tenements, hereditaments, and premises, or any part or parcel thereof, by, from, or under the said Gilbert Earl of Shrewsbury and George Talbot, or either of them, shall and will from time to time, and at all times hereafter, upon the reasonable request, costs, and charges in the law of the person and persons requiring the same, his and their heirs, executors, administrators, or assigns, do, make, acknowledge, suffer, and execute, or cause and procure to be made, done, acknowledged, suffered, and executed, all and every such further and other lawful and reasonable act and acts, thing and things, assurances, and conveyances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, and assuring of the said manors, messuages, farms, lands, tenements, hereditaments, and premises, with their and every of their appurtenances, to and for the uses, estates, interests, intents, and purposes, and under the trusts, and subject to the charges and provisoes hereinbefore contained concerning the same, be it by fine or fines, recovery or recoveries, or otherwise howsoever, as by the counsel learned in the law of the said Richard Lord Lumley and Nevile Ridley, their heirs, executors, administrators, or assigns, shall be reasonably devised, advised, or required, so as such further assurance or assurances contain in them no covenant or warranty than only against the person and persons required to make such further assurances, his and their heirs and
*28] assigns, his and their acts and *deeds, and so as the person and persons required to make such assurance be not compelled or hereby compellable to travel further than from the cities of London and Westminster for the doing thereof: And the said William Lord Bishop of Salisbury and Charles Talbot, for themselves, their heirs, executors, and administrators, do covenant, promise, and grant to and with the said Richard Lord Viscount Fitzwilliam and George Pitt, their executors, administrators, and assigns, that, in case the said marriage shall take effect, and the said Mary Fitzwilliam, the intended wife of the said George Talbot, shall him survive, that then and in such case she the said Mary Fitzwilliam and her assigns shall and may from time to time during her natural life have, hold, receive, and enjoy the said annual sum of 1500*l.* to her limited and granted for her life as aforesaid without any the lawful let, suit, interruption, or disturbance of or by the said William Lord Bishop of Salisbury or Charles Talbot, or any claiming or to claim by, from, or under them, or by their or either or any of their assent, consent, means, privity, or procurement: And whereas, after the respective deaths of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their respective bodies, the title, honour, and dignity of Earl of Shrewsbury will by virtue of letters patents of creation of the said earldom made and granted by King Henry the VI. to John first Earl of Shrewsbury, and the heirs male of his body, by course of descent, and per formam doni, descend and come to the said William Lord Bishop of Salisbury, and the heirs male of his body; and the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, in consideration thereof, and for the better support of the said honour, title, and dignity of Earl of Shrewsbury, and of the said

Lord Bishop of Salisbury and Charles Talbot joining in this present settlement, have agreed to *consent to and use their utmost endeavour to procure a private act of parliament,—a draft whereof is [*29 prepared and signed by the said Gilbert Earl of Shrewsbury, George Talbot, Mary Fitzwilliam, William Lord Bishop of Salisbury, and Charles Talbot,—for confirming this present settlement, and all and every the uses, trusts, estates, powers, and limitations hereinbefore contained, and for annexing all and every the said manors, messuages, advowsons, tithes, lands, tenements, and hereditaments in and by these presents granted (except all lands, tenements, and hereditaments in the county of Middlesex, and the manor of Cooksey, and other the lands, tenements, and hereditaments in and by these presents excepted), to the said earldom, by extending the limitation thereof immediately after the respective deaths of the said George Talbot and John Talbot, and failure of issue male of their respective bodies, subject to the jointures and other charges as shall be thereon by virtue of any the powers or limitations in this present settlement contained, to the said William Lord Bishop of Salisbury and the issue male of his body; and, for want of such issue, to the right heirs of Charles Earl and Duke of Shrewsbury, in such manner, and with such powers and limitations as in the said draft of the said intended act of parliament is expressed, if the same can be obtained: Now this indenture further witnesseth, that it is covenanted, concluded, and fully agreed upon by and between all the said parties to these presents, and the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, do hereby, for themselves and their heirs, mutually covenant and agree, so soon as conveniently may be, to make their humble application for obtaining a private act of parliament in the form and for the purposes aforesaid, and to use their utmost endeavours to obtain the same and give their consent thereunto; which said intended act *is to be [*30 prepared and carried on at the proper costs and charges of the said William Lord Bishop of Salisbury. In witness whereof, the parties first above named have to these present indentures interchangeably set their hands and seals the day and year first above written."

The principal acts relating to disabilities of Roman Catholics, are the following:—

1 James 1, c. 4. An act for the due execution of the statutes against Jesuits, seminary priests, &c.

3 James 1, c. 5. An act to prevent and avoid dangers which grow by popish recusants.

3 Charles 1, c. 2(3). An act to restrain the passing or sending of any to be popishly bred beyond the seas.

30 Charles 2, stat. 2, c. 1. An act for more effectual preserving the King's person and government, by disabling papists from sitting in either House of Parliament.

1 William & Mary, c. 8. An act for abrogating of the oaths of supremacy and allegiance, and appointing other oaths.

1 William & Mary, c. 9. An act for the amoving papists and reputed papists from the cities of London and Westminster and ten miles distance from the same.

1 William & Mary, c. 15. An act for the better securing the government by disarming papists and reputed papists.

1 William & Mary, c. 17. An act for rectifying a mistake in the act 1 William & Mary, c. 9.

11 & 12 William 3, c. 4. An act for the further preventing the growth of popery.

1 George 1, c. 55. An act to oblige papists to register their names and real estates.

3 George 1, c. 18. An act for explaining an act of 1 Geo. 1, c. 55, and for enlarging the time for such registering, and for securing purchases made by Protestants.

*31] *11 George 2, c. 17. An act for securing the estates of papists conforming to the protestant religion against the disabilities created by several acts of parliament relating to papists, and for rendering more effectual the several acts of parliament made for vesting in the two Universities in that part of Great Britain called England the presentations of benefices belonging to papists.

18 George 3, c. 60. An act for relieving His Majesty's subjects professing the popish religion from certain penalties and disabilities imposed on them by the act 11 & 12 William 3, c. 4.

31 George 3, c. 32. An act to relieve, upon conditions and under restrictions, the persons therein described, from certain penalties and disabilities to which papists or persons professing the popish religion are by law subject.

43 George 3, c. 30. An act to entitle Roman Catholics taking and subscribing the declaration and oath contained in the act 31 Geo. 3, c. 32, to the benefits given by an act of the 18 Geo. 3, c. 60.

10 George 4, c. 7. An act for the relief of His Majesty's Roman Catholic subjects.

9 & 10 Victoria, c. 59. An act to relieve Her Majesty's subjects from certain penalties and disabilities in regard to religious opinions.

The defendants offered in evidence the following documents,—which were admitted in evidence by the Lord Chief Justice, subject to the opinion of the court as to the admissibility of any of them: and it was agreed that the opinion of the court upon the points reserved should be given upon consideration of such only of the evidence offered on the part of the defendants as the court should deem admissible,—

The settlement of 1700 [post, p. 34].

The will of the Duke of Shrewsbury, dated the 19th of July, 1712 [post, p. 48].

*32] *The petition of Gilbert Earl of Shrewsbury and others for the bill which terminated in the act of 6 G. 1, c. 29 [post, p. 58].

The original bill of 1719, showing the parts added and the parts omitted respectively in committee.

The report of the judges upon the bill [post, p. 61].

The petition of Lord Fitzwilliam and George Pitt, trustees under the settlement of 1718, against the bill [post, p. 64].

The proceeding in the House of Lords relative to the bill, and the proceedings in committee, for which see post, 78.

The proceedings in the House of Commons relative to the bill.

[All the above documents were either received without objection, or the objection to them was subsequently waived.]

A grant and release of Francis Earl of Shrewsbury (the father of the Duke) to Mr. Carill, Mr. Weld, and Mr. Rushworth, dated the 6th of

January, 1658, of the third parts of Bolterstone, Hansworth, Alton, and Bampton.

One part of the settlement made upon the marriage between Francis Earl of Shrewsbury and the Lady Anna Maria Brudenell, of his Lordship's lands in Staffordshire, Oxfordshire, and Yorkshire, dated the 8th of January, 1658.

One part of the declaration of the Earl of Shrewsbury and his trustees for settling Alton, in the county of Stafford, on the Earl and his lady, and his third part of Bolsterstone, in the county of York, on Sir George Savile, and his third part of Hansworth, in the county of York, on Mr. Henry Howard, of Norfolk, dated the 4th of June, 1663.

The settlement of Francis Earl of Shrewsbury of the third part of Alton purchased from Sir George *Savile, upon his son, Charles Lord Talbot, dated the 3d of August, 1663. [*33

A deed (of 18th October, 1706) to make a tenant to the præcipe, the deed to declare the uses of the recovery (of the 19th October, 1706), and the exemplification of the recovery suffered in pursuance thereof (28th November, 1706, 5 Anne), touching lands, &c., at Alton, in the county of Stafford.

A disentailing deed by Bertram Earl of Shrewsbury, dated the 31st of May, 1856 [post, p. 106].

Evidence as to the date of the birth and death of Earl Gilbert, the priest.

A pedigree of the Talbot family, dated 1752, extracted from a book in the muniment-room of the late Bertram Arthur Earl of Shrewsbury.

Probate of the will of Gilbert Earl of Shrewsbury, dated 4th July, 1743.

Sir William Russell's grant of Batchcoate, dated 23d August, 1667.

The award of Mr. Anthony Windsor in the differences between the Duke of Shrewsbury and Mr. Gilbert Talbot of the one part, and the Lady Wintour of the other part, dated the 6th of June, in the 4 Jac. 2, 1688.

Extracts from documents produced from the Jesuits' College at Stoneyhurst, for the purpose of showing that Earl Gilbert was a member of that society.

The will of Sir George Wintour, dated the 13th March, 1657.

The evidence taken under a commission for the examination of witnesses at Rome for the purpose of proving that Gilbert Earl of Shrewsbury was from 1696 to 1744 a member of the Society of Jesus, where he appeared to have been known by the name of Gilbertus Gray, or Gilbertus Talbot, and described as having been born in 1673.

*Extracts from a book (referred to in the evidence taken under the commission) intituled "Catalogus tertius rerum provinciæ Anglicanæ Soc. Jesu, An. 1696." [*34

Copies of Latin letters from the archives of the College of Jesus at Rome.

Extracts from a book intituled "Constitutiones Societatis Jesu," 1606.

Extracts from a book intituled "Regulæ Societatis Jesu," 1590.

Extracts from a book intituled "Constitutiones Societatis Jesu," 1583.

Two catalogues of the Society of Jesus, dated 1730, in which appeared

the name of "Gray, Gilbert, Missionarius in Anglia, verè Talbot, comes de Shrewsbury."

Evidence was also given of documents from the State-Paper Office, showing that Gilbert Earl of Shrewsbury was known by the name of Gray.

A certified copy of an administration bond, dated the 7th of July, 1743, entered into by Gilbert Earl of Shrewsbury, George Talbot, and Charles Talbot, as to the goods, chattels, and credits of John Talbot of Longford.

An extract from the register of burials of St. Pancras, Middlesex, showing the burial on the 13th of July, 1743, of "Gilbert Gray."

The settlement of the Duke of Shrewsbury was as follows:—

"This indenture tripartite, made the 31st day of October, 1700, between the most noble lord Charles Earl and Duke of Shrewsbury, one of the lords of His Majesty's most Honourable Privy Council, and Knight of the most noble Order of the Garter, of the first part, The Right Honourable Sydney Lord Godolphin, and William Walsh, of Abberley, in the county of Worcester, Esq., of the second part, and Dr. William Talbot, *35] *now Lord Bishop of Oxford, the Honourable Sir John Talbot, of Laycocke, in the county of Wilts, Knight, and John Arden, of Upton Warren, in the county of Worcester, gentleman, of the third part, Witnesseth, that, for the settling and establishing of the manors, messuages, lands, tenements, and hereditaments hereinafter mentioned, to continue in the name and blood of the said duke so long as it shall please Almighty God, and to the end the said manors, messuages, lands, tenements, and hereditaments may likewise be settled and assured to and for the uses, intents, and purposes, and upon and under the trusts, provisoes, and agreements hereinafter limited, declared, and expressed, and for paying, satisfying, and discharging all the just debts of the said duke, now owing, or which he shall owe at the time of his decease, and which the personal estate of the said duke shall not be sufficient to satisfy, and for divers other good causes and considerations him hereunto especially moving, he the said Charles Duke of Shrewsbury hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said Sydney Lord Godolphin and William Walsh, and their heirs (in their actual possession now being by virtue of an indenture of bargain and sale to them thereof made, bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession), all and every the manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, and hereditaments whatsoever, of him the said Charles Duke of Shrewsbury, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdoms of England or Ireland, whereof or wherein the said duke, or any other person or persons in trust for *36] him, now have or *hath any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances; and the reversion and reversions, remainder and remainders, rents reserved, yearly and other rents, services, issues, and profits thereof or thereunto belonging, or reputed so to do, and also all the estate, right, title, interest, property, benefit, trust, claim, and

demand whatsoever of him the said Charles Duke of Shrewsbury, out of, in, and to the same premises, and every or any part or parcel thereof, To have and to hold the said manors, messuages, farms, advowsons, rectories, lands, tithes, tenements, hereditaments, and all and singular other the premises hereby granted or mentioned to be granted, with their and every of their appurtenances, unto the said Sydney Lord Godolphin and William Walsh, their heirs and assigns, for ever, to and for the several uses, intents, and purposes, and subject to the trusts, provisoes, and agreements hereinafter mentioned, limited, and declared concerning the same, that is to say, As to, for, and concerning such of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as are situate, lying, and being in the said several counties of Worcester, Salop, and Berks, any or either of them, with their appurtenances, to the use and behoof of the said Charles Duke of Shrewsbury and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Lord Godolphin and William Walsh, and their heirs, during the natural life of the said duke, upon trust only for preserving the contingent uses and estates hereinafter limited from being defeated or destroyed, and to make entries for that purpose if need shall *require, but nevertheless to permit and suffer the said duke and his assigns to receive and take the rents, issues, and profits thereof [*37 during the term of his natural life; and, from and after the decease of the said Charles Duke of Shrewsbury, to the use and behoof of the first son of the body of the said Charles Duke of Shrewsbury lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Charles Duke of Shrewsbury lawfully to be begotten, and of the several and respective heirs males of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs males of his body issuing being always preferred to take before the younger and the heirs male of his and their bodies issuing; and, in case the said Charles Duke of Shrewsbury shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next immediate freehold or reversion of the premises shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use of such after-born son and sons severally and successively one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, *being always preferred to take [*38 before the younger of them and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of George Talbot, Esq., third son of Gilbert Talbot, of Batchcoate, in the county of Worces-

ter, Esq. (uncle of the said Charles Duke of Shrewsbury), for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said George Talbot, in trust for preserving the contingent uses hereinafter limited from being destroyed and discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said George Talbot to receive and take the rents, issues, and profits of the said premises during the term of his natural life; and, from and after the decease of the said George Talbot, to the use and behoof of the first son of the body of the said George Talbot lawfully begotten, and the heirs males of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said George Talbot lawfully begotten, and of the several and respective heirs males of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said George Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh and their heirs, until such wife shall be delivered of such child *39] *or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of John Talbot, Esq., eldest son and heir of Thomas Talbot, Esq., late of Longford, in the county of Salop, deceased, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate, to the use and behoof of Sidney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said John Talbot, in trust for preserving the contingent uses hereinafter limited from being destroyed or discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said John Talbot to receive the rents and profits of the said premises during the term of his natural life; and from and after the decease of the said John Talbot, to the use and behoof of the first son of the body of the said John Talbot lawfully begotten, and of the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said John Talbot lawfully begotten, and of

the several *and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall [*40 be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said John Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh and their heirs until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of the said Sir John Talbot, for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said Sir John Talbot, upon trust only to preserve the contingent uses and estates hereinafter limited from being destroyed or discontinued, and to make entries for that *purpose if it shall be needful, but to permit and suffer the said [*41 Sir John Talbot to receive the rents, issues, and profits of the said premises during the term of his natural life; and, from and after the decease of the said Sir John Talbot, to the use and behoof of the first son of the body of the said Sir John Talbot lawfully begotten, and the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Sir John Talbot lawfully begotten, and of the several and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body issuing being always preferred to take before the younger and the heirs male of their bodies issuing; and, in case the said Sir John Talbot shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next or immediate freehold or reversion of the premises shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son and sons severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of

all and every such after-born son or sons issuing, the elder of such after-born son or sons and the heirs male of his body issuing being
*42] always preferred to take before the younger and *the heirs male of their bodies issuing; and, for default of such issue, to the use and behoof of the said Charles Duke of Shrewsbury, and of his heirs and assigns forever: And as touching and concerning all and every the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, with their appurtenances, within the said several counties of Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdom of England or Ireland, whereof no use is hereinbefore limited, to the use and behoof of the said Charles Duke of Shrewsbury for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after his decease, to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, during the natural life of the said duke, upon trust only to preserve the contingent uses of the estates hereinafter limited of and in the last-mentioned premises from being destroyed or discontinued, and to make entries for that purpose if it shall be needful, but nevertheless to permit and suffer the said Charles Duke of Shrewsbury to receive the rents, issues, and profits thereof during the term of his natural life; and, from and after the decease of the said Charles Duke of Shrewsbury, to the use and behoof of the first son of the body of the said Charles Duke of Shrewsbury lawfully begotten, and of the heirs male of the body of such first son issuing; and, for default of such issue, to the use and behoof of the second and all and every other son and sons of the body of the said Charles Duke of Shrewsbury lawfully begotten, and of the several and respective heirs male of the body and bodies of such son and sons issuing, severally and successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body issuing being always preferred to
*43] *take before the younger and the heirs male of their bodies issuing: and, in case the said Charles Duke of Shrewsbury shall have no issue male of his body lawfully begotten, and shall die leaving his wife enciente of a child or children, then to the use and behoof of the said Sydney Lord Godolphin and William Walsh, and their heirs, until such wife shall be delivered of such child or children, or die, which shall first happen, in trust nevertheless to be accountable for the profits of the premises to such person or persons to whom the next and immediate freehold or reversion thereof shall for the time being belong or appertain; and, if such after-born child or children shall be a son or sons, then to the use and behoof of such after-born son or sons, severally and successively, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such after-born son and sons issuing, the elder of such after-born sons, and the heirs male of his body issuing, being always preferred to take before the younger and the heirs male of his body issuing; and, for default of such issue, to the use and behoof of the said Dr. William Talbot, Sir John Talbot, and John Arden, and their heirs and assigns for ever, nevertheless upon the trusts, and to and for the intents and purposes hereinafter mentioned, declared, and expressed concerning the same, that is to say, upon trust that they

the said Dr. William Talbot, Sir John Talbot, and John Arden, and the survivors and survivor of them, and the heirs and assigns of such survivor, shall and do, by and out of the rents, issues, and profits of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises last mentioned, or by leasing, mortgaging, or sale thereof, or of any part or parts thereof, or otherwise, as to them shall seem *meet, raise and levy such sum and sums of money as [*44 shall be sufficient to pay, satisfy, and discharge, and therewith to pay, satisfy, and discharge all such just debts as are or shall be owing from the said duke, which his personal estate shall not be sufficient to pay and discharge, and also to pay and satisfy all and singular annuities and other sum and sums of money which the said duke shall give or appoint to be raised and paid by any deed or writing, or by his last will and testament in writing by him subscribed and sealed in the presence of two or more credible witnesses, or which shall be mentioned in any schedule annexed to such deed or writing or to such last will and testament in writing, to such person and persons, and in such manner and form, and with such remedy for the same as in such deed or writing, or last will and testament in writing, or any schedule annexed to such deed or writing or last will and testament in writing shall be expressed: and, from and after payment, discharge, and satisfaction of such debts as are or shall be justly owing to the said duke, and sums of money by the said duke given and appointed as aforesaid to be raised, together with all such charges and expenses as the said Dr. William Talbot, Sir John Talbot, and John Arden, or any of them, their or any of their heirs or assigns, shall have sustained, expended, or been put unto in or about the execution of the trust hereby in them reposed, then upon trust that they the said Dr. William Talbot, Sir John Talbot, and John Arden, or the survivors or survivor of them, or the heirs or assigns of the survivor of them, shall and do convey, assure, and settle such of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as shall remain unsold and undisposed of (charged, nevertheless, with such annuities and remedy for the same as shall be given and *appointed by the said duke as aforesaid), unto and to [*45 the use of such person and persons, and for such estate and estates, and subject to such powers, provisoes, limitations, and agreements, and in such manner and form, or as near the same as may be, mutatis mutandis, as are herein mentioned for and concerning the aforesaid manors, lands, tenements, hereditaments, and premises in the said several counties of Worcester, Salop, and Berks, any or either of them: Provided always, and it is declared, concluded, and agreed by and between all and every the parties to these presents, that it shall and may be lawful to and for the said Charles Duke of Shrewsbury, by any deed or writing to be signed by him in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, messuages, farms, lands, tenements, hereditaments, and other the premises hereinbefore mentioned to be hereby granted, or any part or parcel thereof, to any person or persons, for any term or number of years in possession or reversion, upon such considerations, to and for such ends, intents, and purposes, and at and under such yearly rents and reservations, as to the said duke shall seem meet and convenient: Provided also that it shall and may be lawful to and for the said George Talbot,

John Talbot, and Sir John Talbot, or any of them, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors and premises whereof they or any of them shall actually be possessed, to any person or persons, in possession and not in reversion, for the term of three lives, or one and twenty years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable *yearly during the continuance thereof, the usual and accustomed yearly rent and rents for the same, and so that in every such lease there be contained a condition of re-entry for non-payment of the rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases, anything herein contained to the contrary thereof notwithstanding: Provided also, and it is further concluded, declared, and agreed by and between all and every the said parties to these presents, that it shall and may be lawful to and for the said Charles Duke of Shrewsbury, by any deed or writing by him signed and executed in the presence of two or more credible witnesses, to grant, limit, and appoint all or any part or parts of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby granted, or mentioned to be granted, to or for the jointure of any wife or wives whom he shall marry, for the life or lives of such wife or wives: Provided also, that it shall and may be lawful to and for the said George Talbot, John Talbot, and Sir John Talbot, or any of them, as they and every of them shall respectively come and be in the actual possession of the freehold of the manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby to them respectively limited, or hereafter to be conveyed to them as aforesaid, by any deed or deeds, writing or writings, to be by them or any of them respectively signed, sealed, and executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises, as shall not exceed the yearly rent or sum of 2000*l.* per annum, to and for the *jointure of his or their wife or wives respectively, for the live or lives of such wife or wives, anything herein contained to the contrary notwithstanding: Provided also, and it is further declared, concluded, and agreed by and between all and every the said parties to these presents, and these presents are upon this express condition, that, in case the said Charles Duke of Shrewsbury shall be minded to revoke, make void, alter, or change all or any the use or uses, estate or estates, trust or trusts, hereinbefore limited or declared of or concerning all or any of the said manors, messuages, farms, advowsons, rectories, tithes, lands, tenements, hereditaments, and premises hereby granted, or mentioned to be granted, or any part or parcel or parts or parcels thereof, and such his mind and intention shall signify and declare by any deed or writing by him signed and subscribed of his own proper handwriting in the presence of two or more credible witnesses, that then and in such case it shall and may be lawful to and for the said duke, from time to time, by any deed or deeds, writing or writings, by him personally signed and subscribed of his own

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proper handwriting as aforesaid, to revoke, make void, alter, or change all and every or any of the use or uses, estate or estates, trust or trusts hereinbefore limited or declared of or concerning all or any of the said manors, messuages, farms, advowsons, rectories, tithes, hereditaments, and premises, or any part or parcel, parts or parcels thereof, and by the same, or by any other writing or writings under the hand and seal of the said Charles Duke of Shrewsbury, attested as aforesaid, any new or other use or uses, estate or estates, trust or trusts of the said manors and premises, or any part or parcel, parts or parcels thereof, whereof or concerning which such revocation shall be made, and with, under, and subject to the like power of revocation and *new limitation as in these presents is contained, or any other or others, or without such [*48 power of revocation, or otherwise, to declare, limit, or appoint, anything herein contained to the contrary notwithstanding. In witness whereof, the parties first above named have hereunto set their hands and seals the day and year first above written."

The will of the Duke of Shrewsbury, dated the 19th of July, 1712, was as follows:—

"In the name of God, Amen. I, Charles, Earle and Duke of Shrewsbury, knight of the most noble order of the garter, one of Her Majesty's most honourable privy council, and lord chamberlain of Her Majesty's household, being, praised be God, in perfect health, yet considering the frailty of human nature, and the certainty of death, do resigne my soul unto my merciful Creator, hoping for pardon and salvation through the alone merits of Christ Jesus, my Saviour, and being minded to settle and dispose of my worldly substance for payment of my just debts, and other purposes, do make this my last will and testament in manner and forme following: Imprimis, I give and bequeath unto my beloved wife, the Lady Adelaida Duchess of Shrewsbury, all that my capital messuage or mansion-house called and known by the name of Warwick House, and all out-houses, gardens, yard, and stables, with the appurtenances thereunto belonging, and therewith now used and enjoyed by me, situate, lying, and being in the parish of Saint Martin-in-the-Fields, in the county of Middlesex, and Saint James, Westminster, or in one of them, in part of which premises I am interested for several terms of years, and have the inheritance of the rest, To have and to hold the said capital messuage or mansion-house, out-houses, gardens, yard, stables, and premises, to the said lady Duchess of Shrewsbury, my wife, immediately after *my decease, for and during so many years of the respective termes which I have or may have at the time of my [*49 decease in the premises, as she the said lady Duchess of Shrewsbury shall happen to live, and to have and to hold so much of the premises as I have the inheritance to her the said lady Duchess of Shrewsbury for the term of her natural life. Item, I give to the said Adelaida Duchess of Shrewsbury all the household goods and furniture of what nature and kind soever (plate only excepted) that shall at the time of my decease be in or about the said capital-house or out-houses, all which goods and furniture my will and meaning is she the said lady Duchess shall have at her own disposal: And, immediately from and after the said lady Duchess of Shrewsbury, and from and after my decease, if I survive her, I give and bequeath all the rest, residue, and remainder of the respective terms then to come, and all my estate, title, and interest in and to the said

capital messuage, out-houses, gardens, yard, stable, and premises, with the appurtenances thereunto belonging, unto my executors hereinafter named, upon the same trusts and for the same purposes as my personal estate is hereinafter given to them. Item, I give to the said lady Duchess of Shrewsbury, my wife, all the jewels she usually wears and makes use of by way of ornament; and I further give and bequeath unto the said lady Duchess of Shrewsbury 2000 oz. of my plate, such as she shall make choice of; and I also give unto the said lady Duchess of Shrewsbury the sum of 5000*l.* of good and lawful money of Great Brittaine. Item, I give to my kinsman Talbot Touchett, sqn of my late cozen, John Talbot, deceased, the summe of 2000*l.* of good and lawful money of Great Brittaine. Item, I give to my kinswoman, Mrs. Mary Touchett, sister of the said Talbot Touchett, the sum of 2000*l.* of like
*50] lawfull money of *Great Brittaine. Item, I give to my neice, Mrs. Ann Bodenham, wife of Charles Bodenham, of Rotheras, in the county of Hereford, Esq., the summe of 1000*l.* of like lawfull money. Item, I give to my kinsman, Edward Talbot, the second son of Dr. William Talbot, Bishop of Oxford, the summe of 1000*l.* of like lawfull money. Item, I give to my kinswoman Penelope Plowden, the eldest daughter of my late neice Mary Plowden, deceased, the summe of 500*l.* of like lawfull money. Item, I give to Mrs. Frances Bathurst, daughter of Villars Bathurst, Esq., deceased, late judge advocate, the summe of 1000*l.* of like lawfull money of Great Britain. Item, I give to my true and faithful servant John Arden the summe of 500*l.* of like lawful money. Item, I give and bequeath to the Right Hon. George Earle of Cardigan, Dr. William Talbot, Lord Bishop of Oxford, Sir John Stanley, Knt., and the aforesaid John Arden, and the survivours and survivour of them, and the executors and administrators of the survivour of them, all my ready money, plate, jewells, furniture, and household stuff (excepting such part of my jewells, plate, household stuff, and furniture as is before bequeathed unto the said lady Duchess of Shrewsbury), debts, credits, and all other my moveables, and other my personal estate whatsoever, and of what nature, kind, and quality soever; nevertheless, upon the trusts, and to and for the ends and purposes hereinafter declared and expressed concerning the same, that is to say, upon trust and confidence that they the said George Earle of Cardigan, Dr. William Talbot, Lord Bishop of Oxford, Sir John Stanley, and John Arden, and the survivors and survivor of them, and the executors and administrators of the survivour of them, shall and do with and out of the premises, and by sale thereof, and by the money arising by such sale, as far as the same will extend and go, satisfye and
*51] *pay all my just debts which shall be owing at the time of my decease to any person or persons whatsoever, and my funeral charges, and also shall pay and discharge the several legacies and sums of money by me before particularly devised and given, and all such other legacies and summes of money as I have in this my will, or shall by any codicil or writing hereafter to be made, give, direct, and appoint the same to be paid: and my will and meaning is, that the summe of 1000*l.*, part of the summe or legacye of 5000*l.* before by me given to the Lady Duchess of Shrewsbury, my wife, shall be paid to her within six months next after my decease, and the summe of 4000*l.* the remaining part of her said legacy of 5000*l.*, and all other the legacyes herein-

before given, and which I shall hereafter give, direct, and appoint, shall be paid within the space of two years next after my decease, without interest: But my further will and meaning is, that the aforesaid Talbot Touchett and Mary Touchett shall have interest after the rate of 5 per cent. per annum for their respective legacyes from the time of my decease till such time as their respective legacyes shall be paid. Item, I do give and bequeath unto every such person and persons as shall be a servant or servants unto me at the time of my decease, one year's wages over and above what shall be then due to them respectively for their wages, to be paid by my aforesaid trustees within one year after my decease. Item, I give and bequeath the summe of 1000*l.* of lawful money of Great Brittaine to be disposed of to and for the charitable uses and in such manner as the Archbishop of Canterbury for the time being, the aforesaid Dr. William Talbot, Lord Bishopp of Oxford, and the Lord Willoughby de Brooke, and Dr. Smaldridge, Deane of Carlisle, and the survivours and survivour of them, shall think best, nevertheless, with and under this *recommendation to them, that the said summe of 1000*l.* may not be laid out or disposed of in the building or repairing of any church, or in the endowing of any college or schools (it being my opinion that there are too many scholars in the nation already), but rather that the same may be employed and applyed in relieving some aged persons who are truly necessitous, or in education and bringing up of youth in such labourious trades and callings as may make them useful to their country. And my will and meaning is, that the said sum of 1000*l.* be payable and paid to the said Archbishop of Canterbury, Bishopp of Oxford, Lord Willoughby, and Deane of Carlisle, or the survivours or survivour of them, for the purposes aforesaid, within two years next after my decease. Item, I do hereby give, ratifye, and confirm all my mannores, messuages, lands, tenements, and hereditaments to the several trustees named, in and for the uses, intents, and purposes, and upon the trusts, provisoes, and agreements limited, declared, and expressed in and by the settlement or indenture tripartite bearing date the 31st day of October which was in the twelfth year of the reign of our late Sovereign Lord King William the Third, made by me of the first part, the Right Hon. Sydney Lord Godolphin, and William Walch of Aberly, in the county of Worcester, Esq., since deceased, of the second part, and the aforesaid Dr. William Talbott, Lord Bishop of Oxford, the Hon. Sir John Talbott, of Laycock, in the county of Wilts, Knt, and John Arden, of Upton Warren, in the county of Worcester, gent., of the third part: And whereas, since the making of the before-mentioned indenture tripartite, I have purchased the mannors and lordshipps of Dunthropp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, *villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, and have likewise purchased a tenement or farme called or known by the name of Broadstone Farme, lyeing and being in the town and field of Dunthropp, Chalford, Lidstone, and Broadstone, in the said county of Oxford, which I hold by lease from and under the principal and scholares of King's Hall College, of Brasenose, in the University of Oxford, and am minded and desirous that the said freehold and leasehold premises so by me purchased should be

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settled, limited, and enjoyed to the same uses and by the same person and persons as my manors, messuages, lands, and hereditaments mentioned and comprised in the before-mentioned indenture tripartite are settled and limited unto and upon; and I do therefore give and devise all my aforesaid mannors, messuages, lands, tenements, and freehold hereditaments by me purchased as aforesaid, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the said county of Oxford, unto the aforesaid Dr. William Talbott, Lord Bishop of Oxford, Sir John Talbott, Knt., and John Arden, and their heirs, to the use and uses of the person and persons, and subject to the same limitations, powers, provisoes, and restrictions as the mannors, lands, and hereditaments mentioned and comprized in the aforesaid indenture tripartite are limited and settled. And I do give and devise all my estate, right, title, and interest, and terme of years in and unto the aforesaid messuage, lands, and tenements, called Broadstone Farme, unto the said Dr. William Talbott, Lord Bishop of Oxford, Sir John Talbott, Knt., and John Arden, and the survivours and survivour of them, and the executors and administrators of the survivour of them, upon trust and
*54] confidence that they *shall from time to time and at all times permit and suffer such person or persons as shall by virtue of the aforesaid devise be entitled to hold and enjoy the aforesaid freehold premises, to receive and take and enjoy the rents, issues, and profits of the said farme. And, whereas, pursuant to a power to me reserved in and by the before-mentioned tripartite indenture, I have, by deed-poll, bearing date the 16th day of August, which was in the year of our Lord 1708, appointed and directed part of my real estate as therein mentioned to the Lady Adelaida Duchess of Shrewsbury, my wife, for her jointure, subject to such provisoe as in the said deed-poll is mentioned and expressed, and have by the said deed-poll raised a term of ninety-nine years of other of my manors, lands, tenements, and hereditaments, I do hereby ratifye and confirme the joynture of the said lady Duchess, and the said terme for the trusts and purposes contained in the said deed-poll. And whereas, by the aforesaid indenture tripartite, all my mannors, lands, tenements, and hereditaments, in the countyes of Chester, Stafford, Oxford, and Wilts, or elsewhere in the kingdom of England or Ireland, whereof no use is thereinbefore limited, are and do stand charged, after my decease, and after failure of issue male of my body, with the payment of such debts as then shall be owing by me, and which my personal estate shall not be sufficient to pay, and of all and singular the annuityes and other somme and sommes of money which I should give or appoint to be raised or paid by any deed or writing, or by my last will and testament in writing subscribed and sealed by me in the presence of two credible witnesses, or which should be mentioned in any schedule annexed to such deed or writing or to such last will or testament, and to such person and persons, and in such manner and forme, and with such remedy for the same
*55] *as in such deed or writing or last will and testament should be expressed. Now, in pursuance and by virtue of the power to me reserved in and by the said indenture tripartite, and of all and every other power, right, interest, or authority in me vested, I doe, by this my last will and testament, give, bequeath, and appoint unto my afore-

said servant John Arden and his assigns one annuity or yearly summe of 100*l.* for and during the term of his natural life. Item, I give, bequeath, and appoint unto my servant Charles Goodere, and his assigns, one annuity or yearly somme of 40*l.* for and during the terme of his natural life. Item, I give and bequeath to Mr. James Morgan, who was formerly my governour, one annuity or yearly sum of 30*l.*, to have to him and his assigns for the terme of his natural life. Item, I give and bequeath unto my servant Joseph Chancery and his assigns one annuity or yearly somme of 30*l.* for the terme of his natural life. Item, I give and bequeath unto my page Thomas Power and his assigns one annuity or yearly sum of 10*l.* for the term of his natural life. Item, I give and bequeath unto Thomas Burford, my groom of the chambers, and his assigns, one annuity or yearly sum of 10*l.* for the term of his natural life. Item, I give and bequeath to Charles Venables and Thomas Venables, the sons of my late butler, deceased, to each of them one annuity or yearly somme of 10*l.* for their respective natural lives. Item, I give to Mrs. Mary Bathurst, widow of the aforesaid Villars Bathurst, Esq., late judge advocate, and to her assigns, one annuity or yearly summe of 50*l.* during the terme of her natural life. Item, I give and bequeath unto the several person and persons the several annuities or yearly summe or summes of money which I shall hereafter by writing, schedule, or codicil under my hand and seal attested by three credible witnesses, name, mention, and express. And I declare my will and *meaning to be, that all the said annuityes and annual summe and sums before particularly given, and such as I shall [*56 hereafter give, shall be charges upon and issuing out of all my manors, lands, tenements, and hereditaments in the aforesaid countyes of Chester, Stafford, Oxford, Wilts, and such other my lands and hereditaments as I have power to charge with and make subject to the payment of the same, and shall be paid by the person or persons that shall enjoy my said mannors, lands, and tenements, by equal quarterly payments, at the four most usual feasts or days of payment in the year, that is to say, the birth of our Lord God, the Annunciation of the Blessed Virgin Mary, the Nativity of Saint John Baptist, and the feast of St. Michael the Archangel, the first payment thereof to begin and to be made at such of the said feasts as shall first happen after my decease. And, if default shall be made in payment of the aforesaid several annual summes, or any of them, or of any part of them or of any of them, by the space of forty days after any of the said feasts or days of payment when the same shall become payable as aforesaid, that then it shall and may be lawful to or for the person or persons, his, her, or their assignee or assigns, to whom such payment or payments ought to have been made, to enter and distreigne for the same, and all arrearages thereof, in and upon all such of my said mannors, lands, tenements, and hereditaments in the countyes of Chester, Stafford, Oxford, and Wilts, or any of them, and such other of my lands as aforesaid which shall not be sold or mortgaged by my trustees in the said recited indenture tripartite named for payment of my debts or for the portions and provisions I have by the aforesaid deed-poll directed and appointed to be raised and payd to and for such daughter or daughters which I shall happen to have by the aforesaid lady Duchess *of Shrewsbury. [*57 And my further will and meaning is, and I do hereby will and

direct, that, in case my personal estate shall not be sufficient for the payment of my funeral expenses and such legacyes and summes of money as I have before given and bequeathed, and shall direct and appoint to be paid in and by such writing, schedule, or codicil as is before mentioned, that then my said trustees the said George Earl of Cardigan, the said Dr. William Talbott, Lord Bishop of Oxford, and John Arden, their heirs and assigns, shall, out of my mannors, lands, tenements, and hereditaments in the said countys of Chester, Stafford, Oxford, and Wilts, raise and levy so much money as my said personal estate shall be deficient, and apply the same for discharging and paying of so much of the said legacyes and summes of money as my personal estate shall not extend to pay and satisfye. Item, I give and bequeathe to each of them the said George Earl of Cardigan, and the said Dr. William Talbott, Lord Bishopp of Oxford, the summe of 100*l.* of lawfull money of Great Brittaine; and I do make and constitute them, and the aforesaid Sir John Stanley, to whom I likewise give the summe of 100*l.* of like lawfull money, and the aforesaid John Arden, executors of this my last will and testament, hereby revoking and making void all or any former will or wills by me made, and do make and publish this to be my last will and testament. And, in testimony thereof, I have hereunto subscribed my name and set my seale this 19th day of July, in the 11th year of the reign of our gracious sovereigne Lady Anne, Queen of Great Brittaine, France, and Ireland, Defender of the Faith, et annoq. Domini 1712."

The petition of Gilbert Earl of Shrewsbury and others in favour of the bill which terminated in the act of 6 G. 1, c. 29, was as follows:—

*58] * "To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

"The humble petition of the Right Honourable Gilbert Earl of Shrewsbury, the Honourable George Talbot, only brother of the said Gilbert Earl of Shrewsbury, the Honourable Mary Talbot, wife of the said George Talbot, John Talbot of Longford, in the county of Salop, Esq., the Right Rev. William Lord Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, Archdeacon of Berks, and Sherington Talbot, Esq., sons of the said William Lord Bishop of Salisbury,—

"Sheweth,—That the Most Noble Charles late Duke and Earl of Shrewsbury, by his settlement, made on the 30th and 31st of October, 1700, and by his last will, made the 19th of July, 1712, conveyed or limited, or directed to be conveyed, all the manors, messuages, advowsons, tithes, lands, tenements, and hereditaments of the said duke, in the several counties of Worcester, Salop, Berks, Chester, Stafford, Oxford, Wilts, and Derby, or elsewhere in the kingdoms of England and Ireland, subject to the charges therein mentioned, in failure of issue male of the said duke, to your petitioner, George Talbot, for his life, with remainders to the first and other sons of your said petitioner in taile-male; and, for default of such issue, to your petitioner John Talbot, for his life, with like remainders to his first and other sons in taile-male; and, for default of such issue, and after other uses, since determined, to the heirs of the said Charles late Duke and Earl of Shrewsbury; with such powers for your petitioners George Talbot and John Talbot to

make jointures not exceeding 2000*l.* per annum, and to make leases, as therein are mentioned:

"That the said duke died without issue on the 1st of February, 1717: and your petitioner Gilbert Earl of *Shrewsbury, his heir-at-law, [*59 *having resolved not to marry*, hath married your petitioner George Talbot to your petitioner Mary Talbot; and, being willing to pay a due observation to the intentions of the said duke, hath, by indentures of lease and release, severally bearing date the 3d and 4th of March, 1718, conveyed the said manors, messuages, advowsons, tithes, lands, tenements, and hereditaments of the said late duke, except as therein is excepted, subject to the charges created by the said duke, to your petitioner George Talbot for his life, with remainders to the first and other sons of your said petitioner [George Talbot] by your petitioner Mary Talbot, or by any after-taken wife, in taile-male; and, for default of such issue, to your petitioner John Talbot for his life, with like remainders to his first and other sons in tail-male; and hath thereby charged the said estates with a yearly rent of 1500*l.* for the jointure of your petitioner Mary Talbot, and with the sum of 20,000*l.* for the portions of the daughters of your petitioner George Talbot by your petitioner Mary Talbot, in failure of issue male of your said petitioners; in which your petitioners, William Lord Bishop of Salisbury, and Charles Talbot, his eldest son, from a just regard to the intention of the said duke, and at the request of your petitioners Gilbert Earl of Shrewsbury and George Talbot, Esq., have joined; and in consideration thereof, and for the better support of the honour, title, and dignity of Earl of Shrewsbury, your petitioners Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, have in and by the said indenture of release covenanted and agreed to make their humble application for obtaining a private act of parliament for confirming the said settlement last recited, and for annexing all the said manors, messuages, advowsons, tithes, *lands, [*60 tenements, and hereditaments of the said duke, except a small part thereof lying in the county of Middlesex, to the said earldom, by extending the limitations thereof after the deaths of your petitioners George Talbot and John Talbot, and failure of issue male of their respective bodies, subject to the jointures and other charges thereon by virtue of any of the powers or limitations in the said settlement contained, to your petitioner William Lord Bishop of Salisbury and the issue male of his body, to whom after the respective deaths of your petitioners Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, on failure of issue male of their respective bodies, the said honour, title, and dignity of Earl of Shrewsbury will descend and come, and, for want of such issue, to the heirs male of the body of John first Earl of Shrewsbury, and, for want of such issue, to the heirs of the said Charles Duke and Earl of Shrewsbury, in such manner and with such powers and limitations as in a draught of the said intended oct of parliament, signed by your petitioners Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, by the name of Mary Fitzwilliam, William Lord Bishop of Salisbury, and Charles Talbot, is expressed:

"Wherefore your petitioners humbly pray leave to bring in a bill to confirm the said settlement made by your petitioner Gilbert Earl of

Shrewsbury, and to annex the said estates to the said earldom, by extending the limitations in the manner before mentioned:

"And your petitioners, as in duty bound, shall ever pray, &c

"SHREWSBURY,
"G. TALBOT,
"M. TALBOT,
"W. SARUM,
"CHARLES TALBOT,
"JOHN TALBOT."

*61] *The judges' report upon the bill was as follows:—

"In obedience to your lordships' order of the 14th of this present January, hereunto annexed, we have considered of the petition of the Right Hon. Gilbert Earl of Shrewsbury, the Hon. George Talbot, only brother of the said earl, the Hon. Mary Talbot, wife of the said George Talbot, John Talbot of Longford, in the county of Salop, Esq., the Right Hon. William Lord Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, Archdeacon of Berks, and Sherington Talbot, Esq., sons of the said William Lord Bishop of Salisbury, to us thereby referred, and hereunto also annexed, and do find,—

"That the Most Noble Charles late Duke and Earl of Shrewsbury, by indentures of lease and release, dated the 30th and 31st of October, 1700, and by his last will, dated the 19th of July, 1712, conveyed and limited all his freehold estates in the several counties of Worcester, Salop, Berks, Chester, Stafford, Oxford, Wilts, and Derby, or elsewhere in the kingdoms of England and Ireland, after failure of issue male of his body, and subject to the charges therein mentioned, to the said George Talbot for his life, with remainder to his first and other sons in tail-male, and, for default of such issue, to the said John Talbot for life, with like remainders to his first and other sons in tail-male, and, for default of such issue, and after other uses since determined, to the heirs of the said Charles late Duke and Earl of Shrewsbury, with powers for the said George Talbot and John Talbot to make such jointures and leases as are therein mentioned:

"And we humbly certify to your lordships, that it hath been proved before us that the said late duke died without issue the 1st of February, 1717, and that the said Gilbert, now Earl of Shrewsbury, is his heir-at-
*62] law, and hath resolved not to marry, *and persuaded the said George Talbot to marry the said Mary Talbot, sister to Richard Lord Fitzwilliam; that the same Earl Gilbert, being willing to observe the late duke's intentions in the said settlement and will expressed, hath by indentures of lease and release dated the 3d and 4th of March, 1718, conveyed the said freehold estates (except as is therein excepted), subject as aforesaid, to the said George Talbot for life, with remainder to his first and other sons by the said Mary Talbot, or any after-taken wife in tail-male, and, for default of such issue, to the said John Talbot for his life, and to his first and other sons in tail-male; and hath thereby charged part of the said freehold estates with the payment of 400*l.* per annum during the joint lives of the said George and Mary, for her separate maintenance; and after charged all the said freehold estates (except as aforesaid) with the payment of 1500*l.* per annum to the said Mary for her life for her jointure, and, subject thereto, such

part thereof as is therein for that purpose mentioned, with 20,000*l.* for the portions of the daughters of the said George and Mary Talbot, on failure of their issue male; and by the said indenture of the 4th of March, 1718, the said late duke's said leasehold estate is pursuant to his said will assigned to trustees, to permit such persons as by virtue of the said limitations are to hold the said freehold estates to enjoy the said leasehold estate: And we further certify to your lordships, that the said Lord Bishop, and Charles Talbot, his eldest son, from a just regard they have to the said late duke's intention as before expressed, and at the request of the present Earl of Shrewsbury and the said George Talbot, have joined in the said settlement; and, in consideration thereof, and for the better support of the said earldom, the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, Lord Bishop, and Charles *Talbot, did thereby covenant to make application to [*63 obtain an act of parliament for confirming the said settlement made on the marriage of the said George Talbot, and for annexing the said late duke's said estate (except a small part thereof in the county of Middlesex) to the said earldom, by extending the limitations thereof after the deaths of the said George and John Talbot without issue male, subject to the charges thereon by virtue of the said settlement, to the said Lord Bishop and his issue male, to whom on the respective deaths of the said Gilbert Earl of Shrewsbury, George and John Talbot, without issue male, the said earldom will descend, and, for want of such issue, to the heirs male of the body of John first Earl of Shrewsbury, and, for want of such issue, to the heirs of the said late duke.

"And we also certify to your lordships, that the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, are all the persons that appeared to us to be concerned in the consequences of the said bill; and that it hath been proved to us, upon the oath of two witnesses sworn at your lordships' Bar, that the said Gilbert Earl of Shrewsbury, George Talbot, Mary Talbot, and John Talbot have signed the said petition, and signified their consent (as the rest of the said parties have done in person appearing before us) to the said bill, which bill confirms the said settlement made by the said Gilbert Earl of Shrewsbury, and the limitations therein expressed, and also annexes the said lands and estates to the said earldom, by extending the limitations thereof in the manner before mentioned: Wherefore we conceive the bill annexed, which we have signed, is proper for the purposes aforesaid, and reasonable to pass into a law, if your lordships shall think fit."

*The petition of Lord Fitzwilliam against the bill was as follows:—(*a*) [*64

(*a*) The act,—which is intituled an "Act for annexing the late Duke of Shrewsbury's estate to the Earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned,"—contained the following provisions:—

"Whereas the Most Noble Charles Earle and Duke of Shrewsbury, by indentures of lease and release, bearing date respectively the 30th and 31st of October, 1700, and the release being tripartite, and made or mentioned to be made between the said Duke of the first part, the Right Hon. Sidney Lord Godolphin and William Walsh (both since deceased) of the second part, and the Rev. Dr. William Talbot, then Bishop of Oxford, and now Bishop of Salisbury, and Sir John Talbot, and John Arden (both since deceased), of the third part, after failure of issue male of his

"The humble petition of the Right Hon. Richard Lord Viscount Fitzwilliam, of the kingdom of Ireland, brother of Mary Talbot, wife
*65] of the Hon. George *Talbot, George Pitt, Esq., uncle of the said Mary Talbot, and executor of her late father's will, and trustees

body, and other uses since determined, did settle all and every the mannors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments whatsoever of the said Charles Duke of Shrewsbury, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdom of England or Ireland, whereof or wherein the said Duke, or any other person or persons in trust for him, had any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances, to the uses following, that is to say, to the use and behoof of George Talbot, Esq., third son of Gilbert Talbot, of Batchcoate, in the county of Worcester, Esq., uncle of the said Charles Duke of Shrewsbury, for and during the term of his natural life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said George Talbot in tail-male; and, for want of issue, to the use and behoof of John Talbot, Esq., eldest son and heir of Thomas Talbot, Esq., late of Longford, in the county of Salop, deceased, for and during the term of his natural life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said John Talbot, successively, in tail-male; and, for want of such issue, to the use of the said Sir John Talbot, party to the said indenture, for life, with remainder to his first and other sons successively in tail-male; and, for want of such issue, to the use of Charles Duke of Shrewsbury, his heirs and assignes for ever, with power to make jointures and leases as therein mentioned: And whereas the said Charles Duke of Shrewsbury, in and by his last will and testament in writing, bearing date on or about the 19th of July, 1712,—reciting, that, since the making the said recited settlement, he had purchased the manors or lordships of Dunthropp, alias Dunthorpe, and Showell, alias Sowell, and divers freehold messuages, granges, lands, tenements, and hereditaments, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, and likewise had purchased a tenement or farm called Broadstone farm, lying and being in the town and fields of Dunthropp, Chalford, Lidston, and Broadstone, in the said county of Oxford, which was held by lease from the principal and scholars of King's Hall College and of Brazen Nose, in the University of Oxford, which he was desirous should be settled, limited, and enjoyed to the same uses and by the same person and persons as his manors, messuages, lands, and hereditaments, mentioned and comprised in the said recited indenture tripartite are settled and limited unto and upon, did thereby give and devise all his aforesaid manors, messuages, lands, tenements, and freehold hereditaments by him purchased as aforesaid, lying and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, and elsewhere in the county of Oxford, to the said William Talbot Lord Bishop of Oxford, Sir John Talbot, John Arden, and their heirs, to the use of the person and persons, and subject to the same limitations, powers, provisoes, and restrictions as the manors, lands, and hereditaments mentioned and comprised in the aforesaid indenture tripartite are limited and settled; and thereby did give and devise all his estate, right, title, interest, and term of years of, in, and unto certain messuages, lands, and tenements called Broadstone farm, to the said trustees, their executors and administrators, upon trust that they should from time to time and at all times permit and suffer such person and persons as should by virtue of the aforesaid devise be entitled to hold and enjoy the aforesaid freehold premises, to receive, take, and enjoy the rents, issues, and profits of the said farm; and further reciting, that, by the aforesaid indenture tripartite, all his manors, lands, tenements, and hereditaments in the counties of Chester, Stafford, Oxford, and Wilts, and elsewhere in the kingdoms of England and Ireland, whereof no use is thereinbefore limited, stood charged, after his decease, and failure of issue male of his body, with the payment of such just debts as then should be owing by him, and which his personal estate should not be sufficient to pay, and all annuities and other sums of money he should give or appoint to be raised by deed or will, attested by two or more credible witnesses,—he the said duke did bequeath to his servants and others several annuities for their respective lives: And whereas the said Charles Duke of Shrewsbury, on or

for her and her children in her marriage-settlement, and next friends to and for and on the behalf of George Talbot (an infant of very tender years), son and heir *apparent of the said George Talbot, husband of the said Mary, by the said Mary, late Mary Fitzwilliam: [*66

about the 1st of February, 1717, departed this life without leaving any issue, whereby the honour, title, and dignity of Earl of Shrewsbury, and the reversion and inheritance of the settled manors, lands, tenements, hereditaments, and premises descended and came to the Right Hon. Gilbert now Earl of Shrewsbury, eldest son and heir of the said Gilbert Talbot of Batchcoate aforesaid, Esq., uncle of the said duke: And whereas the personal assets of the said duke are sufficient to pay the said duke's debts, funerals, and legacies, with a very great overplus, so that the manors, lands, tenements, and hereditaments by the said recited indenture tripartite of settlement, and last will and testament, subject to the payment of the said annuities thereon charged, ought to be enjoyed by the said George Talbot, and such persons, and in such manner, as the same are thereby settled: And whereas the said Sir John Talbot dyed without issue male, in the lifetime of the said Duke of Shrewsbury: And whereas the said Gilbert Earl of Shrewsbury is resolved not to marry; and, being desirous to pay a due observance to the intentions of the said duke, expressed in the said settlement and will, hath persuaded the said George Talbot, his younger brother, to marry the Honorable Mary Fitz-William, sister to the Right Hon. Richard Lord Viscount Fitz-William of Merwin, in the kingdom of Ireland, and, by indentures of lease and release, bearing date respectively the 3d and 4th of March, 1718, and the release being quinquipartite, and made or mentioned to be made between the said Gilbert Earl of Shrewsbury and George Talbot of the first part, the said Richard Lord Viscount Fitz-William and Mary Fitz-William of the second part, the Right Hon. George Earl of Cardigan, William Lord Bishop of Salisbury, Sir John Stanley, Knt., and Charles Talbot, Esq. (eldest son and heir apparent to the said William Lord Bishop of Salisbury), of the third part, the Right Hon. Lord Lumley and the said John Talbot of the fourth part, Sir John Webb, Bart., George Pitt, Esq., and Nevile Ridley, Esq., of the fifth part,—reciting the settlement and will made by the said Charles Duke of Shrewsbury,—in consideration of a marriage then intended between the said George Talbot and Mary Fitz-William, and 13,000*l.* portion, they the said Gilbert Earl of Shrewsbury, George Earl of Cardigan, William Lord Bishop of Salisbury, and Sir John Stanley, according to their respective estates and interests, did grant and convey unto the said Richard Lord Lumley, Nevile Ridley, and their heirs, all those the said manors of Dunthropp alias Dunthorpe, and Showell, alias Sowell, in the county of Oxon and all the said freehold messuages, granges, lands, tenements, and hereditaments, situate, lying, and being in the parishes, villages, fields, and hamlets of Heathropp, Swarford, Great Tewe, and Little Tewe, in the said county of Oxford, and also all and every the said manors, freehold messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, and Wilts, or elsewhere in the kingdoms of Great Britain or Ireland (except all manors, lands, tenements, and hereditaments in the county of Middlesex, and except the said leasehold farm called Broadstone Farm, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowes, closes, coppices, wood grounds, boilaries of salt water or salt-fatts, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, Esq., deceased, late father of the said Gilbert Earl of Shrewsbury and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elmbridge, Piershall Green, Timber Hanger, Broomsgrove, Dodderhill, and Droitwich, and elsewhere in the said county of Worcester, and other the manors, lands, tenements, and hereditaments which were the estate and inheritance of Gilbert Talbot, late of Batchcoate, in the said county of Worcester, Esq., deceased, father of the said Gilbert Earl of Shrewsbury and George Talbot, To hold (except as before excepted) to the said Richard Lord Lumley and Nevile Ridley, and their heirs, to the uses following, that is to say, immediately after the solemnization of the said marriage, then, as for, touching, and concerning the said manors, lands, tenements, and hereditaments in the said counties of Salop, Worcester, and Berks, to the use of the said Richard Lord Viscount Fitz-William and George Pitt, their executors, administrators, and assigns, for the term of ninety-nine years, if the said George Talbot and Mary Fitz-William shall jointly so long live, upon trust to raise the annual sum of 400*l.* tax free, for the said Mary, during the said term, for her sepa-

"Sheweth,—that the most noble Charles, late Duke and Earl of Shrewsbury, by deed of settlement, and by his last will, conveyed, limited, and directed *to be conveyed several manors, lands, and *67] hereditaments in the said settlement and will mentioned, in failure

rate use; and upon further trust to permit and suffer the said George Talbot to receive the residue of the rents and profits during the said term; and as for, touching, and concerning the said manors, lands, tenements, and hereditaments limited in use to the said Richard Lord Viscount Fitz-William and George Pitt for ninety-nine years, determinable as aforesaid, and as for and concerning all and every other the said manors, lands, tenements, hereditaments, and premises by the said indenture bargained and sold (except as therein is excepted), to the use of the said George Talbot for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and, after his decease, to the use, intent, and purpose, that the said Mary Fitz-William should have and receive out of all the said manors, lands, tenements, hereditaments, and premises, the annual sum of 1500*l.*, tax free, for her life, for her jointure, with power of distress for non-payment thereof, and, charged and chargeable therewith, to the use of the said Richard Lord Viscount Fitz-William and George Pitt, their executors, administrators, and assigns, for two hundred years, without impeachment of waste, for the better raising the said rent-charge of 1500*l.*, and securing the same; and, after the expiration or other sooner determination of the said term of two hundred years, to the use of the first and other sons of the said George Talbot on the body of the said Mary Fitz-William to be begotten, in tail-male, successively; and, for want of such issue, as to the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, to the use of the said Richard Lord Viscount Fitz-William, Sir John Webb, and George Pitt, their executors, administrators, and assigns, for five hundred years, without impeachment of waste, upon trust for raising 20,000*l.*, and [as] maintenance for the daughters of the said George Talbot on the body of the said Mary Fitz-William to be begotten, in case they shall have no issue male; and, as to the said manors, lands, tenements, and hereditaments in the said counties of Worcester, Salop, and Berks, from and after the determination of the said term of five hundred years, and all other the said manors, lands, tenements, and hereditaments, from and after the several determinations of the several estates thereinbefore limited, to the use of the first and all other the sons of the said George Talbot on the body of any after-taken wife to be begotten, in tail-male, successively; and, for want of such issue, to the use of the said John Talbot of Longford, for and during the term of his natural life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said John Talbot in tail-male, successively: in which said indenture of release there is comprised a power to the said George Talbot, and also to the said John Talbot, when he shall be in the actual possession of the said manors and premises, to make jointures to any women they should marry, not exceeding the yearly value or sum of 2000*l.* a year; with power also to lease the said manors, lands, tenements, and hereditaments (except as therein is excepted) for twenty-one years or three lives; and, by the said indenture, the said William Lord Bishop of Salisbury did assign the said lease of Broadstone farm to the said Lord Lumley and Nevile Ridley, upon trust that they should permit and suffer such persons as by virtue of the aforesaid limitations hold and enjoy the freehold premises thereby granted, to receive and take the rents, issues, and profits of the said farm: And, reciting in the said indenture of release, that, after the deaths of Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their respective bodies, the title, honour, and dignity of Earl of Shrewsbury will, by virtue of letters patents of creation of the said earldom, made and granted by King Henry VI. to John first Earl of Shrewsbury, and the heirs male of his body, by course of descent, and per formamdoni, come to the said William Lord Bishop of Salisbury, and the heirs male of his body, it was by the said indenture agreed that the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot, should use their humble application for obtaining a private act of parliament, and give their consent thereunto, for settling the said manors, lands, tenements, hereditaments, and premises on the said William Lord Bishop of Salisbury and the issue male of his body, after the death of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male of their bodies, in such manner as should be advised,—as in and by the said indenture, relation being thereunto had, may more fully and at large appear: And whereas the said Gilbert Earl of Shrewsbury is desirous that the said settlement

of issue male of the said duke, to the said George Talbot, the father, for life, with remainder to his first and other sons in tail-male, and, for default of such issue, with other remainders over.

*"That, the said duke being dead without issue male, a treaty of marriage was had between the said George Talbot the father [*68

should be further extended, in such manner as is hereinafter mentioned, and that the said manors, lands, tenements, and hereditaments should be annexed to and go along with the said honour, title, name, and dignity of Earl of Shrewsbury in such manner as is hereafter expressed, for the better and more honourable support of the said name, dignity, and title, which cannot be done without an act of parliament: Wherefore, may it please your most Excellent Majesty, at the humble petition of the said Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Talbot Lord Bishop of Salisbury, and Charles Talbot, son and heir apparent of the said Bishop of Salisbury, Edward, Sherington, and Henry Talbot, younger sons of the said William Lord Bishop of Salisbury, that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that the said recited indentures of lease and release bearing date the said 3d and 4th of March, 1718, being the settlement made on the marriage of the said George Talbot with the said Mary Fitz-William, and all and every the uses, trusts, and estates therein mentioned, limited, and declared, is, are, and shall be hereby ratified and confirmed; and that the said George Talbot and his first and other sons, and the heirs male of their bodies respectively, and the said Mary his wife, and the said John Talbot of Longford, and his first and other sons, and the heirs male of their bodies respectively, and all and every other person or persons to whom any use, trust, estate, rent, remedy for the same, or other power or interest, is by the said recited marriage settlement granted or limited, shall be enabled to take, hold, and enjoy, and shall and may have, hold, and enjoy, the said manors, lands, tenements, hereditaments, and premises respectively, according to the true intent and meaning of the said marriage settlement, any law or statute to the contrary thereof notwithstanding; subject, nevertheless, to the jointure of the most noble Adelaida Duchess of Shrewsbury for her life, and to the several annuities charged on some of the said manors by the said last will and testament of the said Duke of Shrewsbury, and to the remedies thereby given for recovering the same.

"II. And be it further enacted by the authority aforesaid, that, after the decease of the said George Talbot and John Talbot, and failure of issue male of their respective bodies, all and every the manors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments whatsoever of the said duke, situate, lying, and being in the several counties of Salop, Worcester, Berks, Chester, Stafford, Oxford, Wilts, and Derby, any or either of them, or elsewhere in the kingdoms of Great Britain or Ireland, whereof or wherein the said duke at the time of his decease, or any other person or persons in trust for him, had any estate of inheritance in possession, reversion, remainder, or expectancy, together with all and singular their and every of their rights, royalties, franchises, privileges, members, and appurtenances (except all lands, tenements, and hereditaments in the county of Middlesex, and also except the manor of Cooksey, and all and every the messuages, cottages, mills, lands, tenements, meadows, leasowes, closes, coppices, woods, wood-grounds, boilaries of salt-water, or salt-fatts, walling rents, and hereditaments whatsoever, which were late the estate of the Hon. Gilbert Talbot, Esq., deceased, late father of the said Gilbert Earl of Shrewsbury and George Talbot, situate, lying, and being in Cooksey, Upton Warren, Elmbridge, Piershall, Green, Timber Hanger, Broomsgrove, Dodderhill, and Droitwich, or elsewhere in the said county of Worcester), charged, nevertheless, and chargeable with the said rent-charges of 1200*l.* a year and 1500*l.* a year to the said Duchess of Shrewsbury, and Mary Talbot, wife of the said George Talbot, and subject to the said annuities given by the said duke, and to the respective remedies for recovering the same respectively, and to such joyntures, leases, rent-charges, and other charges and estates as shall by virtue of the powers in the said recited indenture quinquipartite of release dated 4th of March, 1718, or in this present act, contained, be granted, made, or charged thereon, or on any part thereof, shall be and remain to the use and behoof of the said Gilbert Earl of Shrewsbury for and during the term of his natural life, without impeachment of or for any manner of waste; and, from and after the determination of that estate, to the use and behoof of the said Richard Lord Lumley and his heirs, during the natural life of the said Gilbert Earl

and the said Mary his now wife; and it was agreed on, that, in consideration of 13,000*l.*, the marriage portion of the said Mary, and in
*69] consideration of the said marriage, the said manors and *premises should be settled on the said George Talbot, the father, for life,

of Shrewsbury, upon trust only to preserve the contingent uses and estates hereinafter mentioned from being destroyed or discontinued, but, nevertheless, in trust to permit and suffer the said Gilbert Earl of Shrewsbury to receive the rents, issues, and profits of the premises during his natural life; and, from and after his decease, to the use and behoof of the first son of the body of the said Gilbert Earl of Shrewsbury lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every son and sons of the body of the said Gilbert Earl of Shrewsbury lawfully to be begotten, severally and successively, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body or bodies of all and every such son and sons issuing, the elder of such son and the heirs male of his body issuing being always preferred and to take before the younger of such sons and the heirs male of his or their bodies issuing; and, for default of such issue, to the use and behoof of all and every person and persons, being issue male of the body of the said John first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury shall after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters patents of creation of the said earldom, descend and come, severally and successively, one after another, as they and every of them shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same.

"III. And be it further enacted by the authority aforesaid, that the said Gilbert Earl of Shrewsbury, and the heirs male of his body, George Talbot, and John Talbot, any or either, shall not, by him or themselves, or together with any other person or persons whatsoever, alien, grant, or convey away any of the said manors, messuages, farms, advowsons, rectories, tythes, lands, tenements, and hereditaments hereby settled, or any part thereof, nor do any other act or deed whatsoever which shall or may be to the prejudice or disinherison of any person or persons to whom any remainder or estate in the premises is limited, confirmed, or appointed to descend or come by this present act of parliament after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot; and that all and every alienation, fine, recovery, and conveyance, and every act whatsoever to be, made, levied, suffered, or done by the said Gilbert Earl of Shrewsbury, or the heirs male of his body, George Talbot, and John Talbot, any or either of them, by him or themselves, or together with any other person or persons whatsoever, shall be and are hereby declared to be null and void as against every person or persons to whom any remainder or estate in the premises is hereby limited, confirmed, or appointed to descend or come after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot.

"IV. Provided always, and be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the said George Talbot, son of Gilbert Talbot of Batchcoate, in case he shall have issue by the said Mary his now wife, or any after-taken wife, a son, and also younger child or children, sons or daughters, at any time during his natural life, by any writing under his hand and seal, to be attested by two or more credible witnesses, or by his last will and testament in writing, to be attested as aforesaid, to grant, lease, limit, devise, or appoint all or any of the said manors, lands, tenements, and hereditaments, or any part thereof (except the said manors, lands, tenements, and hereditaments in the county of Oxford), to any person or persons for the term of ninety-nine years, to commence from the decease of the said George Talbot, upon trust only for raising any sum of money not exceeding in the whole the sum of 15,000*l.* for the portion of the daughter or daughters of the said George Talbot (subject, nevertheless, to the jointure of the said Adelaida Duchess of Shrewsbury and of the said Mary Talbot, and to the said annuities, and to such leases, joyntures, charges, and estates as shall happen to be thereof made by virtue of any the powers in the said recited settlement or in this present act contained), the same to be paid to such daughter or daughters respectively when and if such daughter or daughters shall respectively attain the age of twenty-one years, or be married, and

with remainder to his first and other sons by the said Mary in tail-male, with remainders over.

"That, by indentures of lease and release, bearing *date the 3d and 4th days of March, 1718, the said manors and premises [*70

not otherwise, and in such proportions, and with such maintenance not exceeding 5*l.* per centum per annum, till payment, as the said George Talbot shall by any writing, attested by two or more credible witnesses, direct or appoint; and also to charge the said premises (except before excepted) with annuities or rent-charges for the younger sons respectively, during their respective lives only, so as no one annuity to any younger son exceed the sum of 200*l.* a year, and so as no such annuity be prejudicial to the present charges on the said manors and premises.

"V. Provided always, and be it further enacted, that, if the said Mary, now wife of the said George Talbot, shall die in the lifetime of the said George Talbot, son of Gilbert Talbot, of Batchcoate, without any issue, and he shall marry again, and shall have no issue male, and one or more daughter or daughters, that then and in such case it shall and may be lawful to and for the said George Talbot, by any writing under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, to grant, lease, limit, devise, or appoint all or any the said manors, lands, tenements, hereditaments, and premises (except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford) to any person or persons, for the term of four hundred years, to commence from and after the decease of the said George Talbot and of the said John Talbot, and failure of issue male of their respective bodies, and subject to the joyntures and annuities aforesaid, and to such other leases and charges as shall be thereon by virtue of any the powers in the said recited settlements or this present act contained, upon trust only for raising any sum or sums, not exceeding in the whole the sum of 20,000*l.* of lawful money, for the portion or portions of such daughter or daughters, the same to be raised and paid to them respectively at their respective ages of twenty-one years or days of marriage, which shall first happen after the commencement of the said term of four hundred years; and, in case such daughter or daughters shall attain the said age of twenty-one years, or be married, before the commencement of the said term, then within six months after the commencement thereof, with maintenance till payment, not exceeding the interest of the portion or portions: provided, that, if any such daughter or daughters shall happen to die unmarried before she or they shall respectively attain the age of twenty-one years, the portion or portions of the daughter or daughters so dying shall not be raised.

"VI. Provided also, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the said George Talbot (son of the said Gilbert Talbot of Batchcoate) from time to time during his natural life, by any indenture or other writing or writings under his hand and seal, testified in the presence of two or more credible witnesses, to make or grant any lease or leases, estate or estates, of the said manors, lands, tenements, hereditaments, and premises, or any part thereof (except the said manors, lands, tenements, hereditaments, and premises in the said county of Oxford), without prejudice to the said jointures or annuities or any other precedent charges thereon, for the term of three hundred years, to commence from and after the decease of the said George Talbot, and John Talbot of Longford, and failure of issue male of their respective bodies, upon trust, in case the said George Talbot shall die without any issue of his body, male or female, living at his death, or born after his decease, and Anne Talbot and Mary Talbot, daughters of Anne Talbot, late sister of the said George Talbot, or any issue of their bodies, shall happen to be then alive, to raise by sale or mortgage of the premises to be comprised in the said term of three hundred years, or of a competent part thereof, after the commencement of the said term, and not before, such sum or sums of money not exceeding in the whole the sum of 10,000*l.* for the portions of the said Anne Talbot and Mary Talbot, the daughters, together with such maintenance for their portions not exceeding 5*l.* per cent. per annum, as the said George Talbot, by any deed or writing to be by him signed and sealed in the presence of two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, shall direct or appoint; the same to be paid to such daughter or daughters, or their issue, at her or their age of twenty-one years, or days of marriage, which shall first happen after the commencement of the said term of three hundred years; and, if such daughter or daughters shall attain the said age of twenty-one years or be married before the commencement of the said term, then within six months after

(except as therein is excepted) were conveyed accordingly, and soon after the said marriage was had and solemnized.

*71] "That on or about the 11th day of December last, *the said George Talbot, the father, and Mary his said wife, had issue

the commencement thereof: provided, nevertheless, that, if the said Anne Talbot and Mary Talbot, the daughters, die without issue before she or they attain the age of twenty-one years, and unmarried, then the said portion or portions shall not be raised.

"VII. Provided always, and be it further enacted and declared by the authority aforesaid, that, if the said George Talbot (son of Gilbert Talbot) shall happen to die without any issue of his body, male or female, living at his death, that, then and in such case it shall and may be lawful to and for the said George Talbot (son of Gilbert Talbot), from time to time during his natural life, by any deed or writing under his hand and seal, attested by two or more credible witnesses, to grant, lease, limit, or appoint the said manors, lands, tenements, hereditaments, and premises, or a competent part thereof (except the premises in the county of Oxon), for the term of one hundred years, to commence from the same George Talbot's death without issue, upon trust for raising any sum of money not exceeding 5000*l.* to be applied to such uses as the said George Talbot, son of the said Gilbert Talbot, shall in like manne direct or appoint.

"VIII. And be it further enacted by the authority aforesaid, that neither the first or any other son or sons of the body of the said George Talbot (son of the said Gilbert Talbot), or of the body of the said John Talbot of Longford, nor any the heirs male of the body or bodies of any such son or sons, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, shall alien, give, grant, bargain, sell, or otherwise convey away any of the said manors, messuages, advowsons, tythes, lands, tenements, hereditaments, or any other the premises hereby settled, or any part thereof, nor any other thing do which shall or may be to the disinherison of the heirs inheritable by force of the said recited settlement or this present act of parliament, or of any person or persons to whom any remainder is limited by the said recited settlement or this present act of parliament, or whereby any of them shall be barred or put from entry into the premises; and that all and every alienation, conveyance, fine, money, gift, grant, bargain, and sale, and every other act whatever to be made, suffered, or done by any of the persons respectively to whom the premises are respectively before assured, conveyed, or limited by the said recited settlement or this present act of parliament, shall be for ever after the decease of the alienor utterly void, and shall be so deemed and adjudged in the law: Provided, nevertheless, that neither the first nor any other son or sons of the body of the said George Talbot, or of the body of the said John Talbot, or of the body of the said Gilbert Earl of Shrewsbury, nor any the heirs male of the body or bodies of any such son or sons issuing, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, who shall within six months after he or they shall attain the age of eighteen years take the oaths appointed to be taken instead of the oaths of supremacy and allegiance, by an act of parliament made in the first year of the reign of their late Majesties King William and Queen Mary, intituled 'An act for the abrogating the oaths of supremacy and allegiance, and appointing other oaths,' and also subscribe the declaration set down and expressed in an act of parliament made in the thirtieth year of the reign of King Charles II., intituled 'An Act for the more effectual preserving the King's Person and Government by disabling papists from sitting in either Houses of Parliament,' to be by him or them made, repeated, and subscribed in the courts of Chancery or King's Bench, or the quarter sessions of the county where he or they shall reside, and who shall from thenceforth continue a protestant until he or they shall attain the age of twenty-one years, shall, after he or they shall attain the said age, and while he or they continue protestants, be disabled from aliening, giving, granting, bargaining, selling, or otherwise conveying away the said manors, messuages, advowsons, tythes, lands, tenements, and hereditaments, or any other the premises hereby settled, or any part thereof, but may alien, give, grant, bargain, sell, or otherwise convey away the same premises, or any part thereof, as freely and absolutely as he or they might have done

between them the said George Talbot, the infant, who is now seised of and in the said manors and premises of an estate in tail-male expectant on the death of the said father.

*"That Gilbert Earl of Shrewsbury, the said George Talbot, the father, the said Mary Talbot, John Talbot, William Lord [*72

if this act had never been made: (a) Provided also, that no person or persons shall be disabled to execute all or any the powers expressed in the said recited settlement, or any the powers by this present act of parliament given, and which are hereby or shall be by express words vested in him or them; nor shall any acts to be done pursuant to and in execution of the said powers, or any of them, be rendered or deemed void.

"IX. Provided always, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the first and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons issuing, and to and for the first and all and every the son and sons of the body of the said John Talbot of Longford lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are by this act of parliament limited, successively, as aforesaid, when they shall respectively be in the actual possession of the freehold of the said manors, lands, tenements, hereditaments, and premises, by any deed or deeds, writing or writings, to be by them respectively signed, sealed, and executed in the presence of two or more credible witnesses, to grant, limit, or appoint so much of or out of the said manors, lands, tenements, hereditaments, and premises (other than and except the said manors, lands, tenements, and hereditaments in the said county of Oxon), as shall not exceed the yearly value or sum of 2000*l.*, subject to such jointures, leases, charges, and estates as shall happen to be thereof made by virtue of any the powers contained in the said recited settlement or in this present act contained, unto and to the use of any woman or women which he or they shall marry, for the lives of such women respectively only, for her or their joynture or joyntures, such assignments, limitations, or appointments to be made before or after marriage, and to take effect respectively from and after the death of the said persons who shall make the same, so as every such jointure shall respectively be made and expressed to be, and shall be accepted by such woman or women respectively, in full recompense, lieu, and satisfaction of her and their dower and thirds at common law, which she or they might otherwise have, claim, challenge, or demand, of, in, to, or out of all or any the said manors, lands, tenements, hereditaments, and premises.

"X. Provided also, and be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the first and all and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and all and every other son and sons of the body of the said John Talbot of Longford lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are limited by this present act of parliament, successively, as aforesaid, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, lands, tenements, hereditaments, and premises whereof the person making such lease shall be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons, in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there

(a) This proviso is repealed by the 32d section of the Shrewsbury Estate Act, 6 & 7 Vict. c. 28.

Bishop of Salisbury, Charles Talbot, Esq., Edward Talbot, clerk, and Sherington Talbot, sons of the said William Lord Bishop of Salisbury,
*73] *have petitioned your lordships for leave to bring in a bill to confirm the said settlement made on the said marriage, and to annex

be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases.

"XI. Provided also, and be it further enacted and declared by the authority aforesaid, that, if the said George Talbot, son of the said Gilbert Talbot, shall happen to die without any issue male of his body living at his death, and if the said John Talbot of Longford shall also die without any issue male of his body living at his decease, then, from and after the decease of the survivor of them the said George Talbot and John Talbot, such other person and persons who for the time being shall be entitled to the freehold of the said manors and premises in the county of Oxford by virtue of this present act of parliament, shall successively receive the rents, issues, and profits of the said farm called Broadstone Farm, and of all other the premises held by the said lease made by the said principal and scholars of King's Hall College of Brazen Nose, in the University of Oxford, during the continuance of the same lease, and of any future lease or leases thereof hereafter to be obtained from the said college, pursuant to the trust hereinbefore contained concerning the renewing the same.

"XII. Provided always, and be it further enacted and declared by the authority aforesaid, that nothing in this act contained shall anyways extend or be construed to extend to settle, entail, or anywise affect the manor of Neston, with its rights, members, and appurtenances, in the county palatine of Chester, or any other the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot of Longford, in Neston, or elsewhere in the said county of Chester, or the several manors of Longford, Church Aston, alias Little Aston, alias Aston Parva, Edgmond, alias Edgmondon, Longueville; alias Longfield, alias Cheyneis Longueville, the advowson of the church of Longford, the moiety of the manor of Newport, with their respective rights, royalties, members, and appurtenances, in the county of Salop, or any the lands, tenements, or hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Longford, Brocton, Chershall, alias Cheshall, Church Aston, alias Little Aston, alias Aston Parva, Edgmond, alias Edgmondon, Chetwyne, Whitchurch, Longueville, alias Longfield, alias Cheyneis Longueville, and Newport, or any or either of them, or elsewhere in the county of Salop, or the manor or castle of Pembridge, and Newton, alias Welsh Newton, in the county of Hereford, or any the lands, tenements, or hereditaments of the said John Talbot, son of Thomas Talbot, aforesaid, in Pembridge, Newton, alias Welsh Newton, Garway, St. Waynards, Longarren, Whitchurch, and Gannerew, or elsewhere in the county of Hereford, or the manor of Bittisby, alias Bittesby, in the counties of Warwick and Leicester, or any the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Bittisby, alias Bittesby, and Claybrooke, or elsewhere in the counties of Warwick and Leicester, or either of them, or the divided moiety of the manor of Wiggold, in the county of Gloucester, or any the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Wiggold and Cirencester, or elsewhere in the county of Gloucester, or the manor of Burward Scott, alias Boreward Scott, alias Buscott, Philpott's Court, alias Philpote's Court, and the third part of the advowson of Buscott, in the county of Berks, or any the lands, tenements, and hereditaments of the said John Talbot, son of Thomas Talbot aforesaid, in Boreward Scott, alias Buscott, or elsewhere in the county of Berks, or any other the manors, lands, tenements, or hereditaments whereof or wherein the said John Talbot, son of Thomas Talbot of Longford, or any other person or persons in trust for him, is or are seised, in possession, reversion, remainder, or expectancy (except the manors, lands, tenements, and hereditaments mentioned and comprised in the said indenture tripartite of settlement dated the 31st of October, 1700, and in the said last will and testament of the said Earl and Duke of Shrewsbury),—the manors, lands, tenements, and hereditaments of the said earl and duke comprised in the said settlement and will (except all lands, tenements, and hereditaments in the county of Middlesex hereinbefore excepted), and no other, being intended to be entailed and settled by virtue of this present act, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

"XIII. Saving to the most noble lady Adelaida, now Duchess of Shrewsbury, all

the said estates to the said earldom, by extending the limitations thereof to the said Lord Bishop of Salisbury, and the issue male of his body.

*"That a bill is brought in accordingly, whereby the said infant (in case he should come to the possession of the said manors and premises) is restrained from barring any remainder limited in and by the said settlements made by the said duke and on the said *marriage of his said father and mother, and which by law when he shall attain the age of twenty-one years he hath a power to do. [*74 [*75

"That your petitioners have been informed that Gilbert, present Earl of Shrewsbury, the said George *Talbot, the father, and Mary his wife, and John Talbot, have consented to the said bill: but your petitioners humbly conceive, and are advised, that their consent cannot bar the son and children of the said marriage. And your petitioners crave leave humbly to *inform your lordships that such consent has been unduly gained from them. All which your petitioners humbly hope, to prove if your lordships shall be pleased to hear your petitioners touching the same. [*76 [*77

"Wherefore your petitioners humbly pray that they *may be heard by their counsel against the said bill at the Bar of your lordships' House. [*78

"And your petitioners shall pray. "FITZWILLIAM.
"G. PITT."

*The following are the minutes of proceedings of the committee of the House of Lords on the bill which terminated in the act 6 G. 1, c. 29:— [*79

Die Lunæ, 8 *Feb.* 1719.

The judges' report read. The parties called. The bill read entire.

*The petition of the Lord Fitzwilliam and Mr. Pitt to be heard against the bill, which was referred to the committee, was read. [*80

A lord of the committee proposed that certain witnesses may be summoned before any further proceeding be had on the bill.

*The Lord Fitzwilliam and Mr. Pitt being present desired to be heard by their counsel, and that the necessary witnesses might be summoned, and acquainted the committee that certain writings for [*81

such estate, right, title, and interest as she has or claims for her life in and to the said annual sum of 1200*l.*, or the manors, lands, tenements, and hereditaments charged with the payment thereof, as fully as if this present act had never been made.

"XIV. Saving also to Charles Goodere, James Morgan, Joseph Chancey, Thomas Power, Thomas Burford, Charles Venables, and Thomas Venables, their several annuities to them respectively devised for their respective lives by the said recited will of the said Charles Duke of Shrewsbury, together with the remedies by the said will provided for recovering the said respective annuities, as fully as if this act had never been made.

"XV. Saving also and reserving to our Sovereign Lord the King, his heirs and successors, and to all and every person and persons, bodies politick and corporate, their heirs, successors, administrators and assigns (other than and except the said Gilbert Earl of Shrewsbury and his heirs and assigns, the said George Talbot, brother of the said Earl of Shrewsbury, and the issue male of his body, and the said John Talbot of Longford, and the issue male of his body), all such right, title, claim, or demand whatsoever, as they, every or any of them, might, could, or ought to have had, claimed, held, or enjoyed, in case this act had never been made, anything hereinbefore contained to the contrary notwithstanding."

which there might be occasion were as far off as Worcestershire, and therefore desired a week's time.

*82] *Die Martis*, 16 *Februarij*, 1719.

The minutes of the committee at the last sitting read. The committee being informed counsel and the parties attended, they were called in. The petition of the Lord Fitzwilliam and Mr. Pitt against the bill read.

*83] *Mr. Peer Williams on behalf of the petitioners was heard, and states the case of George Talbot, an infant, son and heir of George Talbot, who has an expectancy in remainder by the late Duke of Shrewsbury's settlement dated 30 and 31 days of October, 1700,

*84] and will *dated the 19th July, 1712, and insists that though the father of the infant has consented to the bill, yet, he being but tenant for life, that consent cannot bar the infant, and mentions a seeming surprise that the Bishop of Sarum, who is a trustee in the settle-

*85] ment, should *desire a bill to alter the uses limited by it: observes that lands are inseparably annexed to the two great offices of Lord Great Chamberlain and Earl Marshall, which seems highly reasonable; but takes notice, that, in this case, there seems no manner of occasion for annexing lands to the earldom of Shrewsbury, and concludes with hoping the bill shan't pass.

Mr. Bootle heard also for the petitioners against the bill, and explains at large the effect of the late Duke of Shrewsbury's settlement: he mentions an estate purchased by his late grace in Oxfordshire since making the said settlement, which occasioned a mistake in their instructions: he also insists that any thing done by the father of the infant cannot bar him, though at the same time acknowledges the trustees might before his birth have done an act which in law might have been a bar to him: says Harry 6th created by letters patent the first Earl of Shrewsbury: he mentions a covenant made by the father of the infant in his prejudice, and acquaints the committee they have witnesses to prove in what manner the same was obtained: observes, that, as the Bishop of Sarum was frequently with the late duke, if his grace had intended the estate should have been limited as by the bill, he would

*86] have done it so by the settlement: also *observes, that, though there are divers papists of this family, yet the infant is no papist; and, if the estate should be taken from him, the motive to his being bred a protestant will be removed, the inconvenience whereof he leaves to the consideration of the committee.

Mr. Peer Williams says he supposes the settlement will be admitted.

Mr. Mead allows the settlement is as opened, excepting that Mr. Peer Williams mentioned it to be a trust, which was a mistake.

Mr. Peer Williams says they have witnesses to prove the obtaining the father's consent, &c., but they are not sworn. Whereupon it was proposed to adjourn to Thursday, that, though there seemed an affected delay, yet there might be no room for any complaint or hardship.

Die Jovis, 18 *Februarij*, 1719.

The petitioners' counsel acquaint the committee that the infant on whose account the petition was presented was born 11th of December last. Admitted by the counsel for the bill.

Joseph Cox produced as a witness, and asked what he knew of any negotiation between the trustees and the Bishop of Salisbury as to exe-

cuting the late Duke of Shrewsbury's settlement, and whether there was any refusal, and upon what account: he desires to be excused giving any evidence.

Mr. Peer Williams on behalf of the petitioners insisting he should deliver his knowledge of this matter,

Mr. Cox proceeds, and says he was wrote to when in Worcestershire to bring up writings, and he did so, and Mr. Pigott seemed satisfied with the title: he went down again, but was sent to a second time about difficulties, and came up again, and the Bishop of Sarum complained he was left out of the settlement: my Lord *Harcourt interposed, [*87 and was several times with the parties, and the consultation was chiefly as to the settlement. It was apprehended the bishop was unwilling to execute the trust; but he cannot say he absolutely refused it, but declared his willingness to join, provided he might have an act of parliament to settle the estate with the honour; that Mr. Pigott said there was a discourse that Nich. [sic.] Earl of Shrewsbury was a priest, and it was an ill way to come to an estate through the blood of the family; but no mention was made of the bishop on this account: that it was hoped all things would be compromised.

He is asked who is in possession of the estate, and says George Talbot, who has not been interrupted; that he is his agent, and has no directions from him to oppose the bill, being advised it was necessary.

Asked if the Lord Fitzwilliam was concerned, and says he knows not, never being with his lordship about it, but heard he would oppose it; and says Mr. George Talbot thinks it a good bill, but the Earl of Shrewsbury does not concern himself one way or other.

Asked if Mr. George Talbot is a reputed papist, but desires to be excused answering that question in respect of the laws against papists, and says he never was at mass with him.

Lord Fitzwilliam asked as to the above-mentioned negotiation, and says Mr. George Talbot designing to propose a marriage with his sister, he received a letter from Mr. Pigott signifying he had an authority to propose it, and Mr. Pitt appointed a meeting at his lordship's house: it was thought reasonable, and agreed upon soon after. Mr. G. Talbot was admitted to court his sister, and two or three months after the Bishop of Salisbury made difficulties in joyning in the settlement, and thereupon he desired one Mr. Webber to wait on the bishop about it.

*Mr. Webber asked as to the message he was sent with to the [*88 bishop, and says he went to him before the marriage, but does not remember the time, and his lordship said he had difficulties, and would not joyn without further consideration.

Lord Fitzwilliam says, a good while before the marriage he went to the bishop, who said Mr. George Talbot was of such a religion as to be disabled to take anything from his brother; that he had been with the king, and would not comply without the matter was settled as now proposed.

The Lord Fitzwilliam asked whether he was privy to the settlement and bill, and says he knew of both, and was desired to sign, but positively refused it. Mr. Pitt also refused, and, being displeased, his lordship was not at the marriage.

'Twas admitted Mr. George Talbot's consent was signed at the time of the settlement. The time mentioned was also admitted.

Asked if the settlement and draught of the bill was prepared by Mr. Pigott: says Mr. Pigott told his lordship last night that the bishop's son reduced it into form, who himself being present, acquainted the committee that the form was Mr. Pigott's, that he did make some additions to it: and, it being mentioned it was copyed from Mr. Talbot the bishop's son's hand, he denyed he ever wrote the bill.

Mr. Pigott's letters to my Lord Harcourt, and his lordship's answers produced. Mr. Pigott's hand was proved by his clerk, who believed it all of his handwriting. The Lord Harcourt's hand to the answers to the said letter was admitted.

Sir John Stanley was produced as an evidence, and asked as to the custody and possession of the late duke's settlement; and says he received a message to put it into the hands of Mr. G. Talbot's counsel, which
*89] *he acquainted the bishop with, and he said care should be taken of it: it was taken out of the box to be perused before both parties, and delivered into the bishop's hands, and, when done with all, to be returned to the executors: owns it was now here: all the executors had the custody of it formerly, and knows not of any directions of the late duke for keeping it: there was but one key to the box, but that each executor had a seal.

He was asked if he joyned as a trustee, and says he signed the writings; and the motive was, that he was obliged, he believed, by the trust, to do it.

Mr. Cox acquainted the committee that the settlement lay some time with Mr. Pigott to prepare the marriage-settlement; but he knows not how long.

Charles Goodyere was asked as to the duke's pedigree, and what his grace had declared as to the bishop's being related to him, and says the duke before he fell ill directed him to look into the pedigrees to see if the bishop had any right, but says he, not being skilled in pedigrees, could find nothing: he thinks his grace mentioned he had one or two pedigrees from the bishop.

Mr. Peer Williams mentioning the covenant in the marriage-settlement obtaining the consent of Mr. George Talbot to the bill, that part of the covenant was read; and the Lord Fitzwilliam being asked if his sister was of age when she was married, says she was.

Mr. Peer Williams, having spoke against the whole bill, concludes with submitting it upon the evidence and face of the bill.

Sir John Stanley was asked if the bishop's son was a trustee, and says he believes not.

Mr. Bootle, counsel for the petitioners, speaks likewise against the bill, from the restraint therein which prohibits the infant from alienating the estate, and that they appear only in his vindication, and in order to the performance of the trusts.

*90] *Mr. Mead heard for the bill, and says, as to allegations of the petitions touching the means used to obtain the consent of Mr. G. Talbot, it is to be observed the settlement was made at the marriage, and hopes no undue means was used, it being of great weight, in his opinion, that not one of the parties objects against the settlement.

The present Earl of Shrewsbury does not complain, and Mr. G. Talbot had not given any directions to oppose the bill, and no suspicion of unfair means as to the bishop's making a difficulty: says it is only

proved he declined, till something was done, which he thought reasonable: that an account will be given the bishop had nothing in his thoughts of getting the estate through the blood of the family, his son also declaring the same: observes he need not take notice of what was said of the pedigree; but, if they insist, they are prepared to shew that the bishop's name is mentioned in that brought into the office by the Earl of Shrewsbury, from whom the late duke descended. That this matter ought be considered as it stood at the time of the marriage-settlement, the birth of the infant son not varying the case. It has been admitted the settlement was made on account of the marriage, which had not been obtained without it; and the infant ought to come in with the restrictive power not to alienate. As to the intention of the late duke, has not the right heir disposed of it as he had a power by having the reversion in fee, and desiring to limit it further? is that contrary to his grace's intention? wherefore the argument of his intention being defeated falls to the ground. As to its being unusual that a tenant-in-tail should be restrained, says it may be so, but there is nothing in this than what has and may be done when the reason is so strong, though it can't be done but by act of parliament. Mentions the statute De donis was *with a view to perpetuate families, that the tenant-in-tail should not alienate. Insists no undue means have been used; that the infant must be considered only as a purchaser under the marriage-settlement, it being owned the bill was a plan of the marriage: and insists the bishop has acted as a fair and just trustee, and hopes the committee will think there is no foundation for opposing the bill. [*91

Mr. Fazakerly, also for the bill, insists there was no opposition, a trustee being by law compellable to execute a trust, and therefore the refusal mentioned of the bishop falls to the ground: thinks the late duke's intention rather confirmed by the settlement than contradicted: for, had his grace designed the estate should have gone to the heirs female, he would then have limited it to the heirs general: insists the bill is necessary in respect of the circumstances of the family. Mentions what an inconvenience it would be if so venerable a title should be stript of the estate; and, in regard he conceives the infant is bound in honour not to alienate, a restraining power can't be thought unjust or unreasonable; and mentions the powers he will have notwithstanding the restraints in the bill, and apprehends, if the infant conducts himself wisely, there is nothing which they can desire more of him. Mentions the case of the annexing an estate to the earldome of Arundell, and that of annexing one to the dukedome of Marlborough, and observes it appeared from what was said by the Lord Fitzwilliam, that the marriage had not proceeded if it had not been for the settlement; and mentions one advantage for the infant, that a doubt which may be started as to his succeeding to the estate will be removed by the bill: observes all are papists between the present earl and the bishop, and therefore thinks it no wonder the bishop desires the bill, and doubts not but it will be passed.

*Mr. Mead offers to prove the blanks left in the bill were filled up with the sums, and appeals to the Lord Harcourt as to the time of the filling up the blanks, whose lordship says it was to the best of his remembrance two or three days before last Christmas. [*92

Mr. Lock, his lordship's servant, being examined concerning this matter, says the blanks were filled up about the 23d of December last.

Mr. Mead then proceeded, and acquaints the committee it was agreed the estate should go with the honour, before the execution of the settlement; and, having liberty, as he says, appeals to the Lord Harcourt as to his lordship's concern in this affair; whereupon the said lord acquaints the committee that Mr. Pigott was a very good, honest, and ingenuous man; that his religion unfortunate; that he came to his lordship's house after the late duke's death, and, his grace being mentioned, his lordship expressed his surprise at the duke's settlement, in regard it was impossible but his intentions must be defeated, the remainder-men being all papists; that the act against popery was made just before the settlement, 29th April, 1700. Mr. Pigott was also surprised at this matter, and thereupon mentioned a private act for annexing an estate to the earldom of Arundel: his lordship further said one of them, or both, and believed both, expressed their wishes that something of that kind might be done, and soon after went to the bishop and mentioned that act, apprehending from the conversation which he had had with Mr. Pigott that there might be a means by agreement to come into a law. The bishop mentioned this to his son; and, after that, Mr. Pigott and the bishop's son conferred together upon it, and Lord Harcourt was informed the Earl of Shrewsbury and George Talbot were willing, and that Mr. Pigott thought it was the only thing that could be done, in
*93] regard they *were papists which were in remainder. His lordship being desired the time of this consultation, said near two years ago, above one he was sure. That some time since Mr. Pigott came to see his lordship, and told him that the Earl of Shrewsbury came to him full of resentment and indignation, as he said became one of the blood of the Talbots, and told him the said Pigott that the Bishop of Salisbury, as he heard, had a design to attaint him the said earl; upon which information of Mr. Pigott, the Lord Harcourt said he would acquaint the bishop with it, and did so: and the bishop thereupon declared his detestation and amazement at such a report, and said if their opinions or characters were not so widely different as to make it improper to go to the earl, he would go himself; and desired the Lord Harcourt to go to Mr. Pigott, which he did, and Mr. Pigott told his lordship afterwards that he had mentioned this matter to the earl, who was satisfied the report was false. The Lord Harcourt further said he has of late been satisfied they were pleased with his services in this case and his good offices, as by Mr. Pigott's letter appears: and his lordship concluded with expressing his belief that he had really served every branch of the family, and declared, if he had forgot anything, he was very willing to supply it.

Mr. Mead acquainted the committee that the settlement remained with the petitioners' counsel until lately it was taken away to be produced on this account, and offers to prove it.

Oliver Marton asked as to the possession of the settlement, and says he is employed as solicitor for the bill; and, being to attend the judges, he was referred to Mr. Pigott to get the settlement produced there, who said he would write in order that it might be delivered, and did afterwards deliver it: and he (Marton) offering to write a note for it, Mr.

Pigott said it was no *matter, he knew him so well: and thereupon he promised to return it, and shall do it as soon as this matter is over. [*94

Mr. Mead desires to prove the Bishop of Salisbury's pedigree, and offers Mr. Anstis for that purpose, who produces a book belonging, as he said, to the corporation of heraulds, which was in the office before he came into it: it was signed in 1675, no officer at that time there being now living; and shews Sir Gilbert Talbot's name at the bottom of the pedigree: he was master of the jewel office. Mr. Anstis then explains the pedigree out of the book, and Sir John Talbot of Laycock was in it, who was grandson of Sherington Talbot, who was grandfather of the bishop.

Mr. Anstis acquainted the committee that he waited on the late Duke of Shrewsbury a little before his death with some ancient deeds, who at that time made this reflection that it was hard so ancient a title should descend without an estate in the family: asked as to the sufficiency of the proof from that book, and thereupon mentions a case in Plowden, where it was allowed, and says he has been told they have been produced as evidence in several courts, and even here: says they have no books of pedigrees attested by the heraulds, and that there have been none of this kind a great while. He then read the title of the book, and acquaints the committee there are several pedigrees of nobility in the book. Asked if he shewed the late duke this book, and says he did not, but shewed him some ancient deeds: never heard a syllable mentioned of the bishop on his occasion, and that he went often to the duke on account of some books of Lord Weymouth's (5 vols.), but knows not whether those books mention the pedigree.

The bishop himself produced a pedigree of the duke, which his lordship said he had out of the family.

*Mr. Anstis was asked if he found George in that pedigree, and answered no; this being Gilbert's line, John of Longford not there; he comes out very high. [*95

Asked if the bishop was the next heir male, failing George and John, and says no, there being several others, if living: it was to be observed this pedigree was from a second brother.

Lord Fitzwilliam acquaints the committee three pedigrees were found in the family, which deduce down to George Talbot, but no mention is made of the bishop.

Mr. Anstis acquaints the committee that it appears by the pedigree the first Earl of Shrewsbury had a son killed: he had two sons, and the title continued in descent to King James the First's time, and then the title went back to Gilbert, there being only daughters; and endeavours to explain the pedigree in a more large and particular manner.

Asked how he came by this book, and says it was in the office as long as he knew it, and found it in the library.

The petitioners' counsel were asked if they controverted the bishop's title, who answered they neither controvert it nor admit.

Proposed to adjourn, and in the mean time that the parties on both sides have access to the pedigrees mentioned, in order for them to make such observations thereon as they shall think proper, and to come prepared to offer any other evidence in respect of this inquiry as they shall think fit; that intimation be given to the petitioners' counsel that they

will at next meeting inform the committee, if they can, whom they conceive has a nearer title to the earldom than the bishop; and that his lordship have liberty to proceed at that meeting to make out his pedigree. Agreed to: and Mr. Anstis was desired to assist and attend.

*96] *Lord Fitzwilliam informs the committee that one of the three pedigrees he mentioned is affixed to some rentals or matters which may not be proper for public inspection, and therefore desires to be excused leaving that with the other, but offers to bring it at the next meeting, and in the meantime give an authentic copy of it. Agreed that a copy of it is of no moment, but that the thing itself be brought at the next meeting to be inspected.

Die Martis, 23 *Februarij*, 1719.

The order of the last committee read. The parties called in. The counsel for the petitioners were asked if they had anything to offer as to the pedigree, and say, as they did before, they had no direction, either to controvert or admit it.

Mr. Mead proceeded in order to make out the Lord Bishop of Salisbury's pedigree; and, as to the book produced by the heraulds, mentions some instances besides that in Plowden taken notice of by Mr. Anstis, particularly a late one in the 7th of King William, in a case of Slaner *v.* The Borough of Droitwich, where the heraulds' books were admitted as to pedigrees to be as good evidence as parish books of births and burials. He mentions another case, King *v.* Forster, in King Charles the Second's time, where a chart and pedigree was produced, but was objected to as evidence, though the heraulds attested their belief upon oath that it agreed with their books; afterwards, the books themselves, being produced, were allowed by the court as evidence; and therefore insists the book signed by Sir Gilbert Talbot is very strong and authentic evidence when produced by the heraulds, being such as the nature of the thing will admit or require. Mentions another case in Jones's Reports, Car. 2, where there was a pretender to the earldom of Northland, and Dugdale's Baronies was produced as evidence, but not

*97] *admitted, and very justly, the same not being of equal force with the heraulds' books, but yet that was thought of such weight as to be offered in a court of law. That, in looking into this matter, finds that Francis Earl of Shrewsbury, in 1657, by will, appoints the father of the bishop guardian and trustee of his children: the late duke in his will calls the second son of the bishop (to whom he gives a legacy) his kinsman. The present earl, by declaration under his hand and seal, has owned the bishop is so related to the family that the honour will descend to him upon failure of issue male of George and John Talbot: takes notice of the limitations in the late duke's settlement, and acquaints the committee he has leave to mention the Earl of Sussex, and the Bishop of Exeter, who married the Bishop of Salisbury's sister, will declare the notion the duke had of the relation the bishop had to the honour, and what was reputed on that account.

Mr. Fazakerly heard also to the same matter, and hopes allowances will be made as to the nature of the case; that, if the heralds' book be admitted, it will make out the bishop is truly descended: argues as to what will be thought evidence in Westminster Hall from the reason of the thing, and mentions the cases above cited: desires that Mr. Le Neve may give an account concerning the book, which being shewed to him,

he acquaints the committee that he has known it several years, that he has been in the heralds' office ever since the year 1690, that the book was then in the office, and takes it to be as authentic as other books of visitation: the reason of making that book was from a commission under the great seal, which he believes is now in a dark closet at the office: the commission was in King Charles the Second's time, for building the office, which was burnt by the great fire, though only one book was then lost: asked how it appears the *persons who contributed to that book made any search, or who did, and says he cannot [*98 speak of his own knowledge, but has heard great endeavours were used in searching, that the noble persons came themselves to the office, saw the pedigrees, and signed them: asked how came them not to be attested by the heralds, and says they never do attest them, but where they give copies; when a visitation is made, they sign them: asked whether, if a pedigree is above the grandfather, then there must be more proof, but afterwards they take the person's word: asked whether the pedigree in the book was ever shewed to the Earl of Shrewsbury, and whether it is part of his pedigree, and says it is signed only by Gilbert Talbot, but has always been looked upon as the pedigree of the ancient family as well as Sir Gilbert's: asked whether Sir Gilbert's signing it affects the pedigree of the earl, and says it affects it as far as it shews: he then mentioned something of antiquity, though he could not call it a record, which was done by a person of curiosity, and delivered into the heralds' office: that it came to the hands of Mr. Wood, another antiquary; it was prepared by an indifferent person, and deduces the pedigree down to the bishop's father, and is now in Mr. Anstis's hands: asked whether Sir Gilbert was a descendant from the Talbots of Grafton, and says he was: he also acquainted the committee that he produced a book of like nature for the pedigree of the baron of Hunsdon, and it was allowed; but knows not whether ever this was so produced.

Mr. Bootle acquaints the committee he has been informed the pedigree delivered in by the bishop and the book disagrees.

Mr. Anstis was desired to give an account of the pedigree as mentioned in the book, and accordingly endeavours to explain it.

Objection being made to the method of proceeding, they were directed to withdraw.

*It was offered to the consideration of the committee, whether the words in the bill ought not to be general, that the estate should go as the title would do, without particularizing the bishop. [*99

Another proposition was made, that the judges who had the bill under consideration might be directed to draw a clause that the estate should be annexed to the honour, instead of the particular limitations of it; and to lay the same before the committee at the next meeting.

Proposed, that the Earl of Sussex and the Lord Bishop of Exeter be now heard as to the reputation of the Bishop of Salisbury's being so related to the earldom of Shrewsbury as is insisted on.

Accordingly, the said earl declared it was the late duke's notion that the bishop was the immediate heir next after John Talbot of Longford.

The Bishop of Exeter likewise acquainted the committee that he had known the family for near fifty years; that it is thirty-five years since he married the Bishop of Salisbury's sister; that, upon the occasion of the Earl of Shrewsbury's disinclination to marriage, it was often the

discourse of the family and other persons of quality of their acquaintance, who would succeed to the honour if the Earl of Shrewsbury should die without issue; that the current and unanimous opinion of them was, that, after the several popish branches without issue male, the honour would descend to Sir John Talbot and his issue male, after them to Sir Gilbert and his issue male, that failing, to William Talbot (the father of the Bishop of Salisbury) and his issue male; and that he never heard this opinion contradicted or doubted of by any body until very lately, within these twelve months.

Proposed that the counsel should be called in and acquainted that the committee are of opinion to make *no further enquiry at this time touching the pedigree, in regard the bill may be so framed as to make any such enquiry unnecessary; and that, therefore, if the counsel for the bill have anything further to offer in answer to what was advanced by the petitioners' counsel, they should now proceed.

*100]

Accordingly, the counsel were called in, and the lord in the chair acquainted them as above, whereupon

Mr. Mead proceeded, and informed the committee that it was admitted that the consent to the bill formerly mentioned was signed, and no force or undue means was, he said, used to obtain it; that the birth of the infant made no alteration; and, having repeated some things before mentioned, hoped the committee would agree to the bill.

Mr. Fazakerly speaks much to the same purpose, and expresses his surprise, that, since they insisted on the consent being obtained by undue means, they came so unprepared to make it out, though they had sufficient time and notice: and insists the bill will be of advantage to the infant.

Proposed, that some words in the last covenant in the settlement be read, whereupon the clause expressing the consent, and that the charges of obtaining the bill should be defrayed by the bishop, was read.

Mr. Peer Williams, by way of reply, hopes that, notwithstanding what has been said, the bill shall not have the consent of the committee: then argued in defence of the persons in remainder, and insists the point of law is for them, notwithstanding their religion. The statutes in relation to popery cannot affect the infant who is but lately born: he may conform till eighteen. If the bill passes, it may offer a temptation to go on in the errors of the family: a motive being taken away for his becoming a protestant. Repeats the *arguments used before as to the father's consent to be of no moment to the infant; he claims part of the estate by the settlement of the late duke, by way of use, therefore in that he has a legal estate: endeavours to answer what was said by the other counsel, of the bishop's being compellable to execute the trust: speaks likewise as to the objection that the marriage had not otherwise taken effect: mentions the infant's interest to be at present above twenty years' purchase, but says if the bill passes it will not be worth above ten or eleven: as to the statute De donis, mentions divers inconveniences from that law, in respect of the non-payment of creditors and otherwise. That now common recoveries are in use, and divers estates depend upon them: insists there never was an act to make a perpetuity, without the consent of all parties concerned, and then with difficulty; wherefore, the infant being next in remainder after his father,

*101]

and the next friends of the infant opposing the bill, he hopes it shall not pass.

The Earl of Cardigan acquaints the committee that he had no consideration whatsoever in resigning his trust.

Sir John Stanley asked as to his resigning, and says his trust was only as to a small term, and the reason of his surrender was in respect of the marriage settlement.

Mr. Bootle heard on the reply, and mentions the old estate in the family is not above 3000*l.* per annum; the rest is the acquisition of the late duke; and, as to what the father does, says that cannot affect the infant, by reason he claims from the late duke: acquaints the committee, that, if he was rightly instructed, there are thirty nearer the estate than the bishop, who is but of the half blood: speaks likewise as to the stat. De donis, and says what was mentioned in arraigning recoveries, in which most if not all the estates of the nobility are concerned: mentions his supposition that what was mentioned by [*102 the counsel for the bill as to the persons in remainder being papists, was without the bishop's permission, because the trustees were protestants, in whom, until the infant was born, the estate was executed, and, when he was born, it was executed in the infant: that the bill occasions less incouragement for him to become a protestant: aggravates the disadvantage he will sustain if the bill passes, and concludes with hoping the same will not receive the approbation of the committee.

Die Jovis, 25 *Februarij*, 1719.

The lord in the chair acquainted the committee, that, the counsel at the last meeting having been fully heard, it was then proposed to proceed on the bill; but, it being late, the committee adjourned till this time. Whereupon it was agreed now to proceed on the bill accordingly.

The title was read, and postponed. The preamble begun to be read, and the deeds and will which were recited were perused, and found to agree.

The latter part of the preamble, reciting that part of the deed which mentions, that, after the deaths of Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, and failure of issue male, the title, &c., of Earl of Shrewsbury will by letters patents of King Henry 6th descend to the Bishop of Salisbury and his heirs, was read, as also the next recital, of the agreement made to obtain a private act for settling the estate on the said bishop and his issue male, after the present Earl George and John Talbot and their issue male, as likewise the next, being the last recital in the said preamble.

Whereupon it was agreed that all the preamble to those recitals should stand part of the bill; but those recitals to be postponed.

*Then the 1st enacting clause was read and agreed to.

The 2d enacting clause read, which particularly limits the [*103 estate.

And, it being proposed to leave out those limitations, it was agreed to leave out from the word (remain) in the 6th line of the 8th sheet to the word (provided) in the 15th line of the 13th sheet.

Proposed, that the judges do prepare proper words to be inserted in the room of the limitations agreed to be left out, to limit the estate, after the uses already agreed to, to the present Earl of Shrewsbury and the heirs male of his body, and, for default of such issue, to the heirs

male of the body of John, first Earl of Shrewsbury, so as to make the last limitation to the heirs male of John, first Earl of Shrewsbury effectual so as to restrain George Talbot, John Talbot of Longford, and Gilbert Earl of Shrewsbury, from barring any remainder after their decease. Agreed to, and ordered that the two judges who had the bill formerly under consideration, together with Mr. Justice Blencowe and Mr. Justice Eyre, do prepare the same accordingly.

Die Lunæ, 29 *Februarij*, 1719.

The order for the judges to prepare proper words to be inserted in the room of those agreed to be left out at the last sitting, read.

Whereupon Mr. Justice Blencowe presented the same to the committee, which being twice read, the settlement made on Mr. Talbot's marriage was perused, to see who were the trustees named therein to support contingent remainders; and, it appearing to be Richard Lord Lumley and Nevile Ridley, the committee were informed Mr. Ridley was dead.

Then it was agreed to fill the blank with the Lord Lumley's name only, which being done the clause was read entire, and agreed to: 8th sheet, 6th line, agreed *to leave out from (remain) to (provided), in the 15th line of the 13th sheet.

*104]

Proposed to agree to the clause as amended; but, the same being objected to, the question was put whether the said clause as amended shall stand part of the bill. It was resolved in the affirmative.

The next enacting clause read and agreed to, as also the several enacting clauses following, to the clause which restrains the heirs male of George Talbot from aliening the estate, read.

Moved to reject the clause.

Proposed to alter it so that the infant son of the said George, or any other after his decease, or the decease of John Talbot, may alien the estate after they come of age, if will conform to the act against popery.

Ordered, that the judges who had the bill formerly under their consideration, together with Mr. Justice Blencowe, Mr. Justice Tracy, and Mr. Justice Eyre, do amend the above-mentioned clause, or prepare another in the room thereof, to enact that the said infant, or any other person after the decease of the said George and John Talbot, may as soon as he or they shall attain the age of one and twenty years alien the estate, provided he or they shall conform according to the act to prevent the growth of popery, and continue a Protestant until such alienation.

Ordered also, that the same judges do consider whether, as the bill is now penned, the said George and John Talbot and the heirs male of their bodies, if papists, will be enabled to enjoy the estate notwithstanding the act to prevent the growth of popery, or whether the general saving will preserve the right of the next Protestant of kin to the estate by that act, and deliver their opinions thereupon to the committee.

Die Jovis, 3 *Martij*, 1719.

The order made last sitting for the judges to prepare *a clause and deliver their opinions on a question proposed to them, read.

*105]

The committee were informed that Mr. Justice Tracy had sent the clause, and would have come himself, but was assisting the Lord Chancellor in the hearing of a cause; and thereupon it was directed the said judge should come to the committee with all convenient speed.

Then the clause in the bill where the committee last left off was again read, as was the clause drawn by the judges, and both agreed to

The several clauses remaining, to the general saving, read and agreed to, with direction to leave out the Bishop of Salisbury's name.

The general saving read, and, Mr. Justice Tracy not being come, the same was postponed.

The postponed clauses in the preamble read, and with leaving out the Bishop of Salisbury's name the same were agreed to.

Mr. Justice Tracy being come, the general saving was again read. And he was asked whether, as the bill now stood, the persons in remainder would enjoy the estate in respect of their religion; and answered that he was doubtful whether it would be sufficient to enable them to enjoy it or not, but he had considered of an amendment or two, which, if their lordships thought proper, would make it clear. Accordingly, he proposed to insert after the word (limited), (shall be enabled to take, hold, and enjoy, and), and, in the same clause, after (settlement), to insert (any law or statute to the contrary thereof notwithstanding).

And the said amendments were agreed to.

Then the judge was asked if the saving would preserve the right which the next Protestant of kin might claim, and said it would not.

The general saving read again, and agreed to.

*The title, which was postponed, read and agreed to.

Ordered, that the bill be reported with the amendments. [*106

The disentailing deed executed by Bertram Arthur Earl of Shrewsbury, was as follows:—

"This indenture, made the 31st day of May, 1856, Between the Right Hon. Bertram Arthur Earl of Shrewsbury and Waterford of the one part, and James Robert Hope Scott, of, &c., of the other part, Witnesseth, that, in order to bar and defeat all estates in tail-male, or in tail, or quasi estates in tail-male, or in tail, or interests in the nature of estates in tail-male, or in tail, of the said earl in the hereditaments and effects hereinafter described, and all reversions, remainders, estates, interests, powers, charges, liens, and encumbrances at law or in equity, to take effect after the determination or in defeasance thereof, and for limiting and assuring the same hereditaments and effects in fee-simple absolute, to the uses hereinafter limited, the said earl doth by these presents, intended to be duly enrolled in Her Majesty's High Court of Chancery, grant and dispose of unto the said James Robert Hope Scott, his heirs and assigns for ever, All the manors, messuages, lands, tenements, and hereditaments whatsoever which by or under or by virtue of an indenture of settlement dated the 31st of October, 1700, between the most noble Lord Charles then Earl and Duke of Shrewsbury of the first part, the Right Hon. Sydney then Lord Godolphin and William Walsh of the second part, and Dr. William Talbot, then Lord Bishop of Oxford, the Right Hon. Sir John Talbot, and John Arden, of the third part,—and the last will and testament in writing of the said Charles Earl and Duke of Shrewsbury, dated the 10th of July, 1814,—and an indenture of settlement dated the 4th of March, 1718, between the Right Hon. Gilbert then Earl of *Shrewsbury and the Hon. George Talbot of the first part, the Right Hon. Richard then Lord Viscount Fitzwilliam [*107 and the Hon. Mary Fitzwilliam of the second part, the Right Hon

George then Earl of Cardigan, the Right Rev. Father in God William then Lord Bishop of Salisbury, Sir John Stanley, and Charles Talbot, of the third part, the Right Hon. Richard then Lord Lumley and John Talbot of Longford of the fourth part, and Sir John Webb, Bart., George Pitt, and Neville Ridley, of the fifth part,—an act of the sixth year of George the First, intituled 'An act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned,'—and an act of the Forty-third year of George the Third, c. 40, intituled 'An act for vesting part of the settled estates of the Right Hon. Charles Earl of Shrewsbury, in the counties of Salop, Chester, Wilts, Berks, and Oxford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments, to be settled in lieu thereof to the same uses and subject to the same restrictions,'—and an act of the session of the sixth and seven years of Her present Majesty, c. 28, intituled 'An act for vesting part of the settled estates of the Right Hon. John Earl of Shrewsbury, in the counties of Oxford, Chester, Salop, Worcester, and Stafford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other hereditaments to be settled in lieu thereof to the same uses and subject to the same restrictions, and for other purposes therein mentioned,'—and any allotments, exchanges, assurances, acts, deeds, and things whatsoever, were or are in any way settled, ratified, confirmed, or assured, either at law or in equity, to any uses or upon any trusts under or by *virtue of which the said
*108] Bertram Arthur Earl of Shrewsbury and Waterford has now therein any estate in tail-male, or in tail, or any quasi estate in tail-male, or in tail, or any interest in the nature of an estate in tail-male, or in tail; and also all moneys, stocks, and funds, and real or other securities which, or the produce of which, are or is subject to any trust to be invested in the purchase of any lands or hereditaments to be settled to any of the limitations of the same manors, messuages, lands, tenements, and hereditaments, or any of them, with the appurtenances, And the inheritance in fee-simple absolute, and the absolute interest respectively of and in the same, with their and every of their respective rights, royalties, members, and appurtenances, To have and to hold all and singular the said hereditaments and premises hereinbefore described, and hereby granted and disposed of, and every part thereof, with the appurtenances, unto the said James Robert Hope Scott, his heirs and assigns for ever, freed and discharged from all estates in tail-male or in tail, or quasi estates in tail-male or in tail, or interests in the nature of estates in tail-male or in tail, of the said Bertram Arthur Earl of Shrewsbury and Waterford, and all reversions, remainders, estates, interests, powers, charges, liens, and encumbrances, at law or in equity, to take effect after the determination or in defeasance thereof, Nevertheless, to the use of the said Bertram Arthur Earl of Shrewsbury and Waterford, his heirs and assigns for ever. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

"SHREWSBURY and WATERFORD."

The Lord Chief Justice, without expressing any opinion, directed a verdict to be entered for the plaintiff; reserving leave to the defendants

to enter a *verdict for them upon certain points of law depending upon the construction and effect of the various documents and acts of parliament referred to. [*109

Shee, Serjt., in Hilary Term last, obtained a rule, pursuant to the leave reserved to him at the trial, to set aside the verdict entered for the plaintiff, and instead thereof to enter a verdict for the defendants, on the following grounds,—

1. That Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1700, or under that settlement and the will of the Duke of Shrewsbury; and, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute.

2. That, if Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1718, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section.

3. That, having regard to the state of the law affecting Roman Catholics at the time of the passing of the statute 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, Bertram Arthur Earl of Shrewsbury was not restrained by the 8th section of the statute 6 G. 1 from executing a disentailing assurance, and thereby acquiring an estate in fee-simple absolute; and this whether his estate-tail was acquired in one of the several ways above mentioned or otherwise, and whether he was or was not within the terms of the 8th section of that statute.

*4. That Earl Gilbert was, at the death of the Duke and Earl of Shrewsbury, in 1717, incapable of taking, or, if capable of taking, was, at the date of the settlement in 1718, and also at the time of the passing of the act of the 6 G. 1, c. 29, incapable of making a valid conveyance or settlement of the reversion in fee expectant on the failure of the limitations under which an estate-tail became vested in Bertram Arthur Earl of Shrewsbury, and therefore that such reversion was not by the statute 6 G. 1, c. 29, effectually limited to the use of the person and persons being issue male of John first Earl of Shrewsbury, to whom the earldom of Shrewsbury should descend and come, as in such statute mentioned. [*110

5. That the evidence offered on the part of the defendants was properly received, and that the verdict ought to be entered for the defendants.(*a*)

6. That the evidence offered by the plaintiff of the proceedings in the House of Lords and House of Commons on the bill which terminated in the act of 6 & 7 Vict. c. 28, was not legally admissible.(*b*)

Upon moving for the rule, the learned Serjeant's contention was in substance as follows:—The plaintiff's title rests entirely on an act of 6 G. 1, c. 29, by which a remainder expectant on the determination of the estates-tail granted by a marriage-settlement to the issue male of

(*a*) This objection was not much pressed.

(*b*) This ground of objection was removed by the plaintiff's consenting to withdraw from the consideration of the court the documents upon which it was founded.

George Talbot, John Talbot, and Gilbert Talbot, was limited to the heir male of the first Earl of Shrewsbury. The issue male of George Talbot, John Talbot, and Gilbert Talbot having failed on the death of Bertram Arthur, the late earl, and, it being admitted for the purposes
*111] of this cause, that the *plaintiff is heir male of the first Earl of Shrewsbury, his title to recover is complete, unless,—first, Bertram Arthur, the late earl, and issue male of George Talbot, held his estate-tail under some other settlement than the one confirmed by the act of parliament,—or, secondly, he (Bertram Arthur) had power to bar his estate-tail (under whatsoever title it was held) by a disentailing deed,—or, thirdly, the parliamentary remainder limited to the heir male of the first Earl of Shrewsbury was not well created, and void. The plaintiff is admitted, for the purposes of this cause, to be descended from a younger brother by the half-blood of an ancestor of the late earl who lived in the reign of Henry the Eighth. He could by no possibility have inherited the Shrewsbury estates: he is an entire stranger to the family settlements. He rests his claim on the remainder limited to him by the act of parliament, and on the alleged incapacity of the late earl to disentail. The late earl (Bertram Arthur) was grandson of Francis, the fifth son of George Talbot, third son of Gilbert of Batchcoate, the uncle of Charles twelfth Earl and Duke of Shrewsbury. He was, by descent to him of the remainder in tail which vested in his grandfather, Francis, who died as late as 1820, tenant-in-tail in possession of that portion of the Shrewsbury estates which is situate in the counties of Worcester, Salop, and Berks, under the settlement of 1700 (antè, p. 34) and the will of the Duke of Shrewsbury of 1712 (antè, p. 48). He held the estate of Alton Towers and other estates of the duke in Chester, Stafford, Oxford, Wilts, and Derby, under the conveyance, by direction of the duke, of a trustee (William Talbot, Bishop of Salisbury, ancestor of the plaintiff), to the uses to which the estates in Worcester, Salop, and Berks were limited. These uses are thus recited in the 6 G. 1, c.
*112] 29, antè, 65 n.,—"After failure of issue male of the *Duke, to George Talbot, third son of Gilbert Talbot of Batchcoate, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of George Talbot successively in tail-male; remainder to trustees to preserve contingent remainders; remainder to John Talbot of Longford for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail-male; remainder to Sir John Talbot of Laycock for life; remainder to his first and other sons successively in tail-male; remainder to the Duke, his heirs and assigns for ever." He was thus tenant-in-tail under the settlement and the will of the duke and the conveyance by the duke's direction (the trust being a mere trust to raise money and to pay debts, funeral expenses, and legacies, to discharge which the duke left a large amount of personal property, appointing the bishop executor), when he executed the disentailing deed, which barred (if it ever existed) the plaintiff's parliamentary remainder. And, subject, therefore, to the validity of the plaintiff's remainder, the question is, whether Bertram Arthur, the late earl, had power, like any other tenant-in-tail, to disentail his estate. The plaintiff admits, that, but for the passing of a private estate-act, 6 & 7 Vict. c. 28, obtained by John, the sixteenth earl, in 1843, he would have had power to do so, had he

abjured his religion (the Roman Catholic), and become a protestant; but he says, that, upon the passing of that act, the estates became inalienably annexed to the earldom. Before stating the grounds of defence to the action, it may be convenient to explain, by reference to the 6 G. 1, c. 29, the plaintiff's case. That act is intituled "an act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other *purposes." It begins by reciting the settlement [*113 of the duke in 1700, and his will in 1712, and that, on his death, the reversion and inheritance of the settled estates descended and came to his heir-at-law, Gilbert, now Earl of Shrewsbury, eldest son of Gilbert Talbot of Batchcoate. It then recites, that, the personal property being sufficient, with a large surplus, to satisfy the duke's debts, funeral expenses, and legacies, "the settled estates ought to be enjoyed by the said George Talbot and the other persons to whom by the said settlement and will they were limited;" that disputes had arisen respecting the said settlement and will, but that Gilbert Earl of Shrewsbury, being resolved not to marry, had agreed to confirm them, and to marry his brother George to Mary Fitzwilliam, and to make for that purpose such further provision as was usual. It next recites the marriage settlement of George Talbot with Mary Fitzwilliam, to which Earl Gilbert, George Talbot; Mary Fitzwilliam, her trustees, Lord Fitzwilliam and Mr. Pitt, the Bishop of Salisbury as trustee of the duke, and his eldest son, Charles Talbot, are parties, and by which the estates are settled (subject to certain terms for securing jointures for wives and portions for younger children) to the same uses as those of the duke's settlement and will,—that is, to George Talbot for life, &c., remainder to his sons successively in tail-male, remainder to John Talbot for life and to his sons successively in tail-male. It then sets out an agreement between Earl Gilbert, George Talbot, the bishop and his son Charles Talbot (afterwards Lord Chancellor, and then Attorney-General to the Prince of Wales), by which,—after a recital that, after failure of the issue male of George, John, and Earl Gilbert, the bishop was next in succession to the earldom,—Earl Gilbert, George Talbot, and John Talbot, in consideration thereof, and of the bishop's signature to the marriage-settlement, *covenanted to make their humble application with him to par- [*114 liament to obtain a private act, a draft of which was already prepared, to be promoted at the cost and charge of the bishop, for limiting the settled estates to the bishop and his eldest and other sons (by name) successively in tail-male, and, on failure of their issue, to the heirs male of the first Earl of Shrewsbury. After these recitals, and in the same section, comes the first enactment,—"that the said indenture of 1718, being the marriage-settlement of the said George Talbot and Mary Fitzwilliam, and all the uses, trusts, and estates therein limited and declared, are hereby ratified and confirmed; and that the said George Talbot and his first and other sons, and the heirs male of their bodies respectively, and the said Mary his wife, and the said John Talbot of Longford and his first and other sons and the heirs male of their bodies respectively, and all and every other person and persons and to whom any estate or interest is by the said recited marriage-settlement, granted or limited, shall be enabled to take, hold, and enjoy, and shall and may have, hold, and enjoy the said manors, lands, &c.,

according to the true intent and meaning of the said marriage-settlement, any law or statute to the contrary thereof notwithstanding." This is plainly an enabling section,—enabling persons to whom by the marriage-settlement estates and interests are granted or limited, to take, hold, and enjoy "the said manors, lands," &c., "any law or statute to the contrary thereof notwithstanding." On reference to other parts of the act, it is clear that the "law or statute" notwithstanding which the persons to whom estates and interests were limited by the marriage-settlement were enabled to hold and enjoy the said manors, lands, &c., was, the "act to prevent the further growth of popery," the 11 & 12 W. 3, c. 4. By the 2d section of the 6 *G. 1, c. 29, after failure of
*115] George and John and their issue male, an estate for life is limited, after the estate-tail limited in the marriage-settlement, to Gilbert Earl of Shrewsbury, and the heirs male of his body, with remainders,—not to the bishop and his sons, as agreed in the marriage-settlement,—but "to the issue male of John, first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury shall, after the decease of the said Gilbert, Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of letters patent of creation of the said earldom descend and come, severally and successively, one after another, as they and every of them shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons." It is under this remainder that the plaintiff claims.

The 3d section enacts that the persons entitled under the marriage-settlement and the act to life-estates,—that is, George, John, and Gilbert,—should not have power to alien either by themselves or with any other person: that is, that they should not join their eldest sons in disentailing the estates. The 4th, 5th, 6th, and 7th sections are parliamentary sanctions of the jointure for a second wife and of the portions for younger children, as arranged in the marriage-settlement. Then comes the 8th and most important section,—"that neither the first nor any other son or sons of the body of the said George Talbot, son of the said Gilbert Talbot, or of the body of the said John Talbot of Longford, nor any of the heirs male of the bodies of any such son or sons, nor any other person or persons, his or their heirs male of his or their body or bodies, to whom any estate of inheritance of or in the premises, or any
*116] part thereof, shall hereafter *come, descend, or accrue by force or means of this present act of parliament, shall alien, give, grant, bargain, sell, or otherwise convey away any of the said lands, &c., nor any other thing do which shall or may be to the disherison of the heirs inheritable by force of the said recited settlement or this present act of parliament, or of any person or persons to whom any remainder is limited by the said recited settlement or this present act of parliament, or whereby any of them shall be barred or put from entry into the premises; and that all and every alienation, conveyance, fine, &c., and every other act whatever to be made, suffered, or done by any of the persons respectively to whom the premises are respectively before assured, conveyed, or limited by the said recited settlement or this present act of parliament, shall be for ever after the decease of the alienor utterly void, and shall be so deemed and adjudged in the law: Provided,

nevertheless, that neither the first or any other son or sons of the body of the said George Talbot, or of the body of the said John Talbot, or of the body of the said Gilbert Earl of Shrewsbury, nor any the heirs male of the body or bodies of any such son or sons issuing, nor any other person or persons, his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, shall hereafter come, descend, or accrue by force or means of this present act of parliament, who shall within six months after he or they shall attain the age of eighteen years take the oaths appointed to be taken instead of the oaths of supremacy and allegiance, 1 W. & M. c. 8, and also subscribe the declaration [against transubstantiation and the invocation of saints] set down and expressed in the 30 Car. 2, stat. 2, c. 1, to be by him or them made, repeated, &c., and who shall from thenceforth continue a Protestant until he or they shall *attain the age of twenty-one years, shall, after he or they shall [*117 attain the said age, and while he or they continue Protestants, be disabled from aliening, giving, granting, &c., or otherwise conveying away the said manors, messuages, &c., or any other the premises hereby settled, or any part thereof, but may alien, give, grant, &c., or otherwise convey away the same premises, or any part thereof, as freely and absolutely as he or they might have done if this act had never been made."

The plaintiff's case is, that Bertram Arthur, the last earl, being a Roman Catholic, and not having taken the oath or subscribed the declaration mentioned in the proviso to that section, had not power to execute a disentailing deed, and that therefore the estates in question belong to him (the plaintiff) under the parliamentary remainder, as heir male of the first Earl of Shrewsbury.

1. The answer to the case so set up by the plaintiff, is,—first, "that Bertram Arthur Earl of Shrewsbury was tenant-in-tail under the settlement of 1700, or under that settlement and the will of the Duke of Shrewsbury; and, regard being had to the state of the laws affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute."

That Bertram Arthur Earl of Shrewsbury took under the settlement (of 1700) and will of the duke (1712) the estate-tail which vested, in the lifetime of his great-grandfather George Talbot, in his grandfather Francis Talbot, is clear from the pedigree and from the limitations of the duke's settlement. It follows, then, as a necessary consequence, that his estate had all the essential incidents of an estate-tail, and, among them, the incident that the tenant-in-tail is complete master *of the inheritance; the remainders being of no account, unless, [*118 —first, his estate-tail was qualified by the special provisions of the 6 G. 1, c. 29,—or, secondly, by the state of the law affecting Roman Catholics at the time of the passing of that act. That it was not qualified by the special provisions of the 6 G. 1, c. 29, will be clear after reference to its title, recitals, and enacting clauses, all of which limit its operation to the marriage-settlement of 1718. It is intituled,—not that much reliance can be placed on the wording of the title of an act of parliament,—"an act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of

Shrewsbury's settlement (that is, the marriage-settlement) in relation thereto, and for other purposes." It recites the duke's settlement, without one word detracting from its continuing efficacy; that disputes had arisen touching it, but that Gilbert Earl of Shrewsbury had resolved not to marry, and agreed to confirm it; that the estates settled by the duke's settlement and will ought to be enjoyed by the said George Talbot and such persons and in such manner as the same are thereby settled. It then recites the marriage-settlement of 1718, carefully confining to it the recital and the purposes of the act and its enacting clauses; that Gilbert Earl of Shrewsbury is "desirous" (and his desire must be taken to be limited to the interest which he had, and which was only a reversion defeasible by the tenants-in-tail under the duke's settlement) "that the said settlement should be further extended" (that is, confirmed and extended) "in the manner hereinafter mentioned, and the said manors, lands, &c., should be annexed to and go along with the honour and dignity of Earl of Shrewsbury, for the better and more honourable support of the said dignity and title, which cannot be done without an act of parliament." It then *enacts (s. 1) "that the said indenture of 1718, being the marriage-settlement of the said George Talbot with Mary Fitzwilliam, and all the uses and trusts thereof thereby limited and declared, shall be hereby ratified and confirmed; that all persons to whom any estate or interest, use, or trust is by the said marriage-settlement granted or limited, shall be enabled to take, hold, and enjoy the said manors, lands, &c., according to the true intent and meaning of the said marriage-settlement:" That (s. 3) neither George, John, nor Gilbert "shall alien the said manors, messuages, farms, &c., *hereby settled*, by themselves or with any other persons:" "That (s. 8) no person or persons to whom any estate of inheritance shall come, descend, or accrue by force or means of this present act of parliament shall alien, &c., or any other thing do which shall or may be to the dishersion of the heirs inheritable by force of the said recited settlements, or this present act of parliament." Not a word, from the first line of the act to the last, in which the duke's settlement is mentioned but to confirm it. The estates-tail, therefore, granted and limited by it were not qualified by the 6 G. 1, c. 29. Nor were they qualified by the state of the law affecting Roman Catholics at the time of the passing of that act. The statute in force against Roman Catholics, as respects their property, at that time, was the 11 & 12 W. 3, c. 4, which passed in the year 1700, a few months before the date of the duke's settlement. Its provisions and its language are most peculiar, and furnish, when properly understood, the key to the whole controversy between these parties. It enacts, "that, from and after the 20th of September, 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he, she, or they shall attain the age of eighteen years, take the oaths of allegiance and supremacy, and also subscribe the *declaration set down and expressed in the 30 Car. 2, stat. 2, c. 1, to be by him or her made, repeated, and subscribed, &c., every such person shall, in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments within the kingdom of England, &c.; and that, during

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the life of such person, or until he or she do take the said oaths, and make, repeat, and subscribe the said declaration in manner as aforesaid, the next of his or her kindred which shall be a Protestant shall have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof as aforesaid, but, in case of any wilful waste committed on the said lands, tenements, or hereditaments by the person so having or enjoying the same, or any other by his or her license or authority, the party disabled, his or her executors and administrators, shall and may recover treble damages for the same against the person committing such waste, his or her executors or administrators, by action of debt, &c.; and that, from and after the 10th of April, 1700, every papist or person making profession of the popish religion shall be disabled, and is hereby made incapable to purchase, either in his or her own name or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, &c., within the kingdom of England, &c., and that all and singular estates, &c., or profits whatsoever out of lands, from and after the said 10th of April, to be made, suffered, or done to or for the use or behoof of any such person or persons, or upon any trust or confidence mediately or immediately to or for the benefit or relief of any such person or persons, shall be utterly void and of *none effect, to all intents, constructions, and purposes whatsoever." If the estate-tail was qualified by any law at the time [*121 the 6 G. 1, c. 29, was passed, so as to deprive it of its descendible qualities, it was by that act. It is difficult to discover from its language the meaning of the act. It is submitted that the act did not qualify the estates-tail of Roman Catholics, but only imposed personal incapacities on Roman Catholics to enjoy them. The descendible qualities of estates tail limited to them were saved by the express words of the statute,—"*in respect of him or herself only, but not in respect of any of his or her heirs or posterity.*" Their own legal right to enjoy the estates on conformity was saved by the words "*and during the life of such person, and until he or she take the said oaths, and make, repeat, and subscribe the said declaration, the next of his or her kindred which shall be a Protestant shall have and enjoy the said lands, tenements,*" &c. Their permanent legal resumable interest in their estates was saved by the words giving them a right of action in case of wilful waste against the Protestant next of kin. The estates-tail, so long as they were in contingency, and until they became vested remainders on the birth of each successive son of the tenant for life during his lifetime, were preserved by the trusts of the settlement, and descended, like other hereditaments, to the heir of such son. The person in whom the remainder in tail so vested, and the person to whom it came from him by descent, took an estate-tail, with all the incidents which the duke had attached to it by the very form of his gift. The personal incapacities imposed by the 11 & 12 W. 3, c. 4, did not in the least impair them. When, therefore, the statutes affecting Roman Catholics which passed subsequently to the 6 G. 1, c. 29, viz. the 18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, 10 G. 4, c. 7, and 9 & 10 Vict. c. 59, removed all the personal *incapacities which the 11 & 12 W. 3, c. 4, had imposed, all the [*122 conditions which were attached by it to the "inheriting and taking by descent, devise, or limitation," and to the "purchasing" of

lands by Roman Catholics ceased. Earl Bertram Arthur, who was the first tenant in tail after the total repeal (though the 18 G. 3, c. 60, probably, and the 10 G. 4, c. 7, certainly, would have sufficed for the argument) of the 11 & 12 W. 3, c. 4, by the 9 & 10 Vict. c. 59, took by descent from his grandfather, Francis Talbot, the estate tail in remainder which had first vested in Francis during the life of his father, George. On the death of John, the 16th earl, that estate tail in remainder became an estate tail in possession,—perfect, as respects the estate tail itself, in all the incidents of an estate tail, and free, as respects the tenant in tail, from all personal incapacities. It was an estate tail, like all other estates tail, which gave him, as tenant in tail, entire dominion over the fee. A condition not to alien an estate tail, would, according to Lord Coke, be repugnant and void. Bertram Arthur took his estate under the settlement of the duke, not under the marriage-settlement, to which alone the 6 G. 1, c. 29, applied, and which was founded on a reversion which he as tenant in tail under a superior title could at any time have destroyed. He was not, therefore, what he would have been had the penal laws remained in force, a person enabled by the 6 G. 1, c. 29, to take, hold, and enjoy an estate tail limited by the marriage-settlement, "any law or statute to the contrary notwithstanding,"—not a person "enabled to hold and enjoy" (s. 1),—not a person "to whom an estate of inheritance had come, descended, or accrued by force or means of that act of parliament;"—not, therefore, within the 8th section of it. That the estates tail created by the duke's settlement,—whatever may have been the vague notions of unlearned persons—*were deemed by all competent to form an opinion, and those members of the profession who were the advisers of the Talbot family, to be valid and subsisting limitations, notwithstanding the 6 G. 1, c. 29, and the popery laws, is plain from the provisions of the Shrewsbury estate acts, 43 G. 3, c. 40, s. 1, and 6 & 7 Vict. c. 28, s. 20, by which it is enacted that the settled estates authorized by those acts to be sold, should be conveyed to the purchasers, "freed, acquitted, exonerated, and discharged from all the uses, trusts, estates, entails, remainders, charges, powers, provisions, limitations, and agreements in and by the said indentures of the 30th and 31st of October, 1700, and the will of the said Charles Duke of Shrewsbury."

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2. The second answer to the plaintiff's case, is this,—"that, if Bertram Arthur, Earl of Shrewsbury, was tenant in tail under the settlement of 1718, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and to the statutes affecting Roman Catholics passed subsequently to that statute, he was not within the terms of the 8th section of that statute." It is not intended to be admitted that Bertram Arthur was tenant in tail under the settlement of 1718; which he could not be, if he took his estate tail under the older and better title of the settlement of 1700, with power as tenant in tail to defeat the reversion of Earl Gilbert, out of which, if the settlement of 1718 really created any estates tail, they were carved. But, assuming him, for the sake of argument, to have taken an estate tail under the settlement of 1718, as he would have done if the first settlement (of 1700) had from any cause been void,—it is submitted that the 8th section of the 6 G. 1, c. 29, must be read

together with the 1st section, the enabling provisions of which it qualified and restrained. Were it not for the 3d and the 8th sections, *the 1st section would secure to all persons to whom estates of any [*124 kind were limited by the marriage-settlement the full enjoyment of and dominion over the said manors, lands, &c. The 8th section qualified, as to estates of inheritance, the generality of that enabling clause, and the two therefore must be read together. So read, it will be manifest that the 8th section restrained none from aliening the said manors, lands, &c., but those whom the 1st section enabled to take, hold, and enjoy the estates tail granted and limited to them by the marriage-settlement; and that the 1st section enabled none to take, hold, and enjoy such manors, lands, &c., but those who were or should be when their estates tail fell to them disabled by some other law or statute (the 11 & 12 W. 3, c. 4) to take, hold, and enjoy the said manors, lands, &c. The operation of the 1st section as to estates of inheritance, and of the 8th section, which dealt with none but estates of inheritance, was prospective. It was also contingent,—contingent on the uncertain event of the infant son of George Talbot, in whom an estate tail in remainder had already vested, and on the unborn issue male of George Talbot and John Talbot, being disabled by a popish education to enjoy their estates tail when those estates tail fell to them; and, if that should happen before they attained the age of eighteen and a half, on their not having conformed, before they exceeded that age, to protestantism, by taking the oaths and making the declaration. If such issue male, when their estates fell to them, should, by having been educated as Protestants, or by conforming, obtain the full enjoyment of their estates, or by the repeal of the laws requiring conformity to protestantism, be under no disability, there would be no restraint. The statutable restraint was to cease when the statutable ability ceased; and the statutable ability was to cease when (and all those *popery laws were [*125 laws of temporary expediency only) it had no longer a disability on which to operate. This statute, like the 11 & 12 W. 3, c. 4, does not qualify the estate tail; but merely, the disability of the tenant in tail under the 11 & 12 W. 3, c. 4, to enjoy it. To attribute any other operation to it would be to attach by construction a condition to an estate tail, which, in an ordinary conveyance, would destroy its essential and most valuable incident, and render it repugnant and void. [COCKBURN, C. J.—The uses of the two settlements being the same as respects the estate tail, what was the object of repeating them in the marriage-settlement?] The objects of the 6 G. 1, c. 29, may be ranged in three classes,—first, the objects of the family,—secondly, those of their trustee, the bishop, and of his son, the future Chancellor,—and thirdly, those of the legislature arbitrating between them and with reference to the public statute law. The object of the family was, to remedy any defect, by reason of the 11 & 12 W. 3, c. 4, in George Talbot, to whom a power of jointuring had been given by the duke's settlement, to exercise that power and secure a settlement to his wife. The difficulty arising from the repetition of the uses of the duke's settlement in the marriage-settlement, occurred to Lord Cranworth when the plaintiff's claim to the earldom was before the committee of privileges in the House of Lords, and was thus dealt with by Lord St. Leonards,—"My noble friend says that he does not understand the

settlement of 1718, because there is a limitation of the old uses. But my noble and learned friend will recollect that the settlement (of 1718) states that disputes had arisen, and that Gilbert, who was the heir-at-law, and therefore could take advantage of those disputes, had agreed to confirm the settlement; and, consequently, that was a very good
*126] reason for repeating in *the settlement of 1718 the limitations which were contained in the deed of 1700. Accordingly they are repeated, that is, by donation from Gilbert." Another object was, to protect the persons entitled to life-estates, who probably did not need protection (though there was a serious doubt about it then and for some years after), and their issue, from the cupidity of their Protestant next of kin. A third was, to induce the bishop to obey,—and that without too much delay, for, the marriage could not take place until the settlement was arranged,—the duke's direction to divest himself of his legal trust-estate in the Chester, Stafford, Oxford, Wilts, and Derby estates, and convey them to the uses to which the estates in Worcester, Salop, and Berks were limited. The objects of the bishop and his son will be found in the extraordinary recital and covenant at the end of the marriage-settlement,—to which effect was attempted to be given in the bill promoted at the bishop's charge, but which the legislature refused to sanction. The bishop's motives were spoken of by Lord St. Leonards, in the House of Lords, as follows:—"It was said of the bishop, that he had made use of the power which he possessed, first, as the Protestant heir" (that is a mistake; he was neither a Protestant heir nor Protestant next of kin), "and, next, as trustee of the legal estate, to compel in fact the acknowledgment of his title to the peerage, and to enforce a settlement of the estate upon himself. This, which was very strongly put at the Bar, is no doubt an impeachment of the honour and reputation of the Bishop of Salisbury. Now, the real truth appears to be this, so far as I can make it out, after a very attentive consideration of the evidence; and, in giving this opinion, I speak without any doubt in my own mind about the fact. The further settlement of the estate was
*127] what the bishop desired: the bishop did not *simply desire a recognition of his title to the peerage, which nobody could have given him, but he desired the substantiality of the settlement of the estate. He wanted the estate: and the question was, how he was to obtain the estate. He had no right whatever to it: he had no claim to it except that he might, or his issue male might, become Earl of Shrewsbury: but he had no right to the estate, and no possible claim to it. How, then, was he to obtain it? There is no ground for saying that he acted fraudulently, in a bad sense: such a statement is not at all justifiable; there is nothing to warrant it. But, to say that he acted as a man of the world, taking advantage of the position in which he stood, for his own interests, is to speak the truth. There is no question or doubt about it,—that, knowing that he was the Protestant heir,—knowing that he had the legal interest (that is, as trustee to convey to the uses of the duke's settlement) in a portion of the property,—knowing that the Roman Catholic branch could not take, and certainly could not annex the estates to the peerage, so as to make them certain,—he took advantage, no doubt, of the position in which he stood. And the evidence shows, that, on being applied to, he said it could not be as they wished. When they talked of the settlement, he said that George,

being a papist, could not take the estates, and that he had had an interview with the King with reference to the annexation of the estates, and that it could not take place. But it is perfectly clear that there was no difficulty in its taking place, provided the bishop and his issue male were introduced into the settlement, and gave their consent. And it is clear, that, at that time, it was considered between the parties, that, if the estates were, *contrary to law*, secured to the Roman Catholic branches of the family, it was to be conceded, as a sort of set-off, that they should be *ultimately secured to the Protestant branches. Now, that certainly could never be any violation of any wish or intention [*128 of the Duke of Shrewsbury, who died a Protestant. The Duke of Shrewsbury had provided in his settlement for Sir John of Laycock, who was a Protestant. The Duke of Shrewsbury, therefore, if the bishop was rightly placed in the pedigree, would have been the very man who would have made the provision for the bishop which the bishop claimed for himself. Therefore, to represent that the conduct of the bishop in desiring that settlement, was in contravention of the wishes of the duke, appears to me to be entirely without foundation." Lord Wensleydale, adhering more closely to the matter in hand, viz. Lord Talbot's right to the earldom of Shrewsbury, is rather less indulgent to the memory of the prelate. "What effect," he asks, "are we to attribute to this agreement (the agreement at the end of the marriage-settlement) "to which the bishop was a party in 1718? It is the statement of persons well acquainted with the state of the family, and with all the persons who were nearly related to them: and they all give a clear opinion that they know of no one who stood in the descent in a nearer relation than the bishop. That opinion of theirs, if an honest one, must be correct in point of fact. Now, is there anything in these proceedings to satisfy any reasonable man that they stated what they did not believe to be true, either from some pressure upon them, or for the sake of some advantage which they expected? Now, I cannot go so far as to say that there is anything of that sort to be found in these proceedings. I do not, indeed, consider the bishop as perfectly immaculate in what he did in this case. I think that there is a part of his conduct which is open to objection. I think, in the first place, he may have had a conscientious scruple *against being a party to an act of parliament which [*129 invested a papist with a right which he had not under the popery laws. He may have thought, that, as a Protestant, he ought not to consent to a bill which would repeal the 11 & 12 W. 3, prohibiting any Roman Catholic from holding an estate unless he took the oath of allegiance (and of supremacy, and the declaration against transubstantiation): and he may possibly have consulted the King upon the propriety of assenting to an act of parliament of this nature. But I certainly should have been better satisfied, if he had not made any bargain for himself. I do not think it reflects any credit upon him, that he afterwards made a bargain for himself for settling the estates. I do not approve of his conduct in that respect: but, am I to conclude from that, that the whole of this statement is a fraudulent and false statement? Am I to suppose that his son, afterwards the Lord Chancellor, was a concurring party to that act? Am I to suppose that the bishop himself made a statement that he knew to be untrue, and that Gilbert and John of Longford were parties to the same act? My Lords, I think it is quite

out of the question." Supposing, then, Earl Bertram was tenant in tail under the settlement of 1718, still he was not within the 8th section of the 6 G. 1, c. 29,—that provision being contingent upon the persons entitled to the estates being, when the estates fell to them, disabled by the public law: he, not being enabled by the 6 G. 1, was not restrained by it.

3. The next point is, "that, regard being had to the state of the law affecting Roman Catholics at the time of the passing of the 6 G. 1, c. 29, and to the acts affecting Roman Catholics passed subsequently to that statute, Bertram Arthur Earl of Shrewsbury was not restrained by the 8th section of that act from executing a disentailing assurance, and *130] thereby acquiring an *estate in fee simple absolute; and this whether his estate was acquired in one of the several ways above mentioned or otherwise, and whether he was or was not within the terms of that section." Assuming, as the plaintiff asserts, that no heir male of the body of any son of George Talbot could after the passing of the 6 G. 1, c. 29, disentail his estates without taking the oath and subscribing the declaration mentioned in the proviso to the 8th section,—the policy and the letter of the law have been so altered by the statutes since passed to relieve Roman Catholics from the penalties and oppressions under which they laboured at that time, that that disability has been entirely removed. [The learned Serjeant here referred to and commented upon the 3 Jac. 1, c. 5, 30 Car. 2, stat. 2, c. 1, 1 W. & M. c. 8, 1 W. & M. c. 9, 11 & 12 W. 3, c. 4, 1 G. 1, c. 12, and 1 G. 1, c. 55.] Now, the 6 G. 1, c. 29, although in part a private act, is in part also a public act. It dealt with matters of the highest public concern. It established an exception, in favour of the members of a powerful popish family, out of the provisions of the 11 & 12 W. 3, c. 4, giving them a capacity to hold and enjoy what no other papists could hold or enjoy. The 18 G. 3, c. 60, relieved Roman Catholics from certain of the penalties and disabilities imposed on them by the 11 & 12 W. 3, c. 4,—amongst others, from the disability to inherit or take by descent, devise, or limitation in possession, reversion, or remainder, any lands," &c.; and substituted a new oath of supremacy for that provided by the 1 Eliz. c. 1. Further relief was afforded to Roman Catholics by the 31 G. 3, c. 32, and the 43 G. 3, c. 20. Then came the Roman Catholic Emancipation Act, 10 G. 4, c. 7, by the 1st section of which it is enacted that it shall not be necessary to take the declaration against transubstantiation as a qualification for the exercise and enjoyment by any of *131] Her Majesty's subjects of any *civil right; and by s. 23, that no oath shall be tendered or required to be taken by his Majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may be by law tendered to and required to be taken by His Majesty's other subjects. Some doubts having been suggested as to whether that statute wholly repealed the 11 & 12 W. 3, c. 4, those doubts were set at rest by the 9 & 10 Vict. c. 59. [COCKBURN, C. J.—Your contention is, that a Roman Catholic under disability by the virtue of the 11 & 12 W. 3, c. 4, could always, by taking the necessary oath and making the necessary declaration, relieve himself from that disability; and that, before the execution by Bertram Arthur of the disentailing deed, the possibility of doing that whereby he might have relieved himself from all disability

had ceased.] And the necessity also. In a word, the 6 G. 1, c. 29, was an exception of the Talbot family out of the 11 & 12 W. 3, c. 4; and, that statute being wholly repealed, the exception went with it, and all the restraints attached to the exception. It will be insisted, on the other side, that the effect of the repeal by the 32d section of the Shrewsbury Estate Act, 6 & 7 Vict. c. 28, of the proviso in the 8th section of the 6 G. 1, c. 29 (antè, p. 80), was, to restore the disability created by the 11 & 12 W. 3, c. 4. But, the disability being once gone by force of the 10 G. 4, c. 7, it was gone for ever, and could not be revived in this way. [WILLIAMS, J.—At the time of the passing of the 6 G. 1, c. 29, I do not find that there was any general enactment disabling papists from aliening their lands.] It was at that time a grave question whether the 11 & 12 W. 3, c. 4, had that effect: the subject was under discussion in Ratcliffe's Case, 1 Stra. 267, 9 Mod. 172. It arose out of the attainder of the Earl of *Derwentwater. That unfortunate nobleman was tenant in tail under the marriage settlement of his father; and, being a papist, and before he committed high treason, he disentailed the settled estate: and, upon his conviction and execution for high treason, a question arose before the commissioners of forfeited estates, whether Lord Derwentwater, being a papist, was not disabled by the 11 & 12 W. 3, c. 4, from disentailing his estate. If he was so disabled, then the estate was forfeited under the then recent statute of treasons, 1 G. 1, c. 50, which, in the case of a tenant in tail, created a forfeiture not only of the estate tail, but also of the fee. If, on the other hand, it was competent to him, notwithstanding the 11 & 12 W. 3, to disentail the estate, then his son, Mr. Ratcliffe, took a vested estate tail. The commissioners (whilst the 6 G. 1, c. 29 was in progress) finally decided that Lord Derwentwater was incapable of disentailing, and consequently that the whole estate was forfeited. But afterwards it was decided, on appeal to the judges, that the converting of an estate tail into a fee simple absolute was not a "purchase" within the 11 & 12 W. 3, c. 4, that it was not a new estate acquired by the earl, and consequently that the disentailing deed was valid. [COCKBURN, C. J.—The 11 & 12 W. 3, c. 4, is, as you observe, a strangely drawn act: it provides that a person not taking the oaths and making the declaration required shall be incapable of inheriting or taking by descent, &c.; it does not, however, provide that the estate shall go to anybody else, but simply that the next of kin may enjoy. Suppose the next of kin to be a man of high and generous principle, and to decline to take advantage of his position?] It is to that high and generous principle that the Roman Catholics of that day owed the enjoyment of their estates,—there being few instances upon record of the Protestant next of kin taking advantage of this oppressive law. [*132

*4. The next point is, "that Earl Gilbert was, at the death of the Duke and Earl of Shrewsbury in 1717, incapable of taking, or, if capable of taking, was at the date of the settlement of 1718, and also at the time of the passing of the 6 G. 1, c. 29, incapable of making a valid conveyance or settlement of the reversion in fee expectant on the failure of the limitations under which an estate tail became vested in Bertram Arthur Earl of Shrewsbury, and therefore that such reversion was not by the statute 6 G. 1, c. 29, effectually limited to the use of the person and persons being issue male of John first Earl of Shrewsbury, [*133

to whom the earldom of Shrewsbury should descend and come, as in such statute mentioned. The remainder under which the plaintiff claims was not well created, because the reversion out of which it was carved had no legal existence. The 6 G. 1, c. 29, though, as regards some of its provisions, a public act, is, so far as it relates to the Talbot family and their estates, a private act, and as such must be construed as any other private conveyance. The recitals show what the intention of the promoters of the act was. That the reversion was not in Earl Gilbert, or, if it was in him, that he was incapable of dealing with it, is clear when the statute 1 Jac. 1, c. 4,(*a*) and the evidence respecting Earl Gilbert, are looked at.

*134] *The learned Serjeant then proceeded to urge that the documents offered in evidence on the part of the defendants (referred to, antè, p. 31) were admissible, for the purpose of elucidating the meaning of the 6 G. 1, c. 29, and showing which of the two inconsistent constructions of which that act was susceptible ought to be adopted, and also for the purpose of showing that Earl Gilbert was a Jesuit priest and so subject to the pains and penalties of the 1 Jac. 1, c. 4, s. 6. But the course which the case ultimately took renders it unnecessary more particularly to notice this part of the argument.

Cause was shown against this rule in Trinity Term, by the Attorney-General (Sir *Fitzroy Kelly*), *Rolt*, Q. C., *Manisty*, Q. C., *Ellis*, and *Hannen:* and *Shee*, Serjt., Sir *Richard Bethell*, *C. Hall*, *Badeley*, and *Archibald*, were heard in support of it.

The following is a short, and necessarily very imperfect, summary of the points urged on the one side and on the other, and the statutes and authorities referred to.

Argument for the plaintiff. The estates in question are inseparably *135] annexed to the earldom of *Shrewsbury by the 6 G. 1, c. 29; and the plaintiff, having by the judgment of the House of Peers succeeded to the title, became entitled to the estates. The grounds upon which it is sought to impeach his right are in substance three,—first, that Earl Bertram Arthur (the late earl) was seised of an estate tail, not under, but by a title paramount to, and independent of, the 6 G. 1, c. 29, and so not bound by the clause (s. 8) against alienation, and therefore entitled to disentail,—secondly, that, regard being had to the state of the laws affecting Roman Catholics at the time of the passing of that act, and to the acts subsequently passed for their relief, even supposing Earl Bertram Arthur to have been within the operation of the 6 G. 1,

(*a*) The 6th section of which enacts "that all and every person and persons under the King's obedience, which at any time after the end of this session of parliament shall pass or go, or shall send or cause to be sent any child or other person under his or any of their government, into any of the parts beyond the seas out of the King's obedience, to the intent to enter into or to be resident in any college, seminary, or house of Jesuit priests, or any other popish order, profession, or calling whatsoever, or repair in or to any the same to be instructed, persuaded, or strengthened in the popish religion, or in any sort to profess the same, every such person so sending or causing to be sent any child or other person beyond the seas to any such purport or intent, shall for every such offence forfeit to his Majesty, his heirs and successors, the sum of 100*l.*; and every such person so passing or being sent beyond the seas to any such intent or purpose as is aforesaid, shall, by authority of this present act, as in respect of him or herself only, and not to or in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy, any manors, lands, tenements, annuities, profits, commodities, hereditaments, goods, chattels, debts, duties, legacies, or sums of money within this realm of England, or any other his Majesty's dominions."

c. 29, s. 8, the prohibition against alienation therein contained is repealed and abrogated,—thirdly, that Earl Gilbert, who was a party to the settlement of 1718, which that act confirmed, had, by reason of the then-existing law against papists, no estate in reversion out of which the remainder under which the plaintiff claims was carved, and so the limitation to the heirs male of the first Earl of Shrewsbury was inoperative.

The legal effect of the statutes in existence with reference to Roman Catholics at the date of the settlement of 1718, and of the statute 6 G. 1, c. 29, was, not to restrain them from alienating the inheritance, but merely to prevent them from enjoying estates which might devolve upon them by descent or become theirs by purchase, unless or until they should have taken certain oaths and made and subscribed certain declarations required by those statutes. That this is so, is clear from the cases of Thornby *v.* Fleetwood, 1 Stra. 318, and Ratcliffe's Case, 1 Stra. 267, 9 Mod. 172. George, the first taker under the settlement of 1700, being of mature age at the time of the death of the duke, and being a Roman Catholic, and having only *an estate for life, the first tenancy under the settlement could not take effect at all. The settlement [*136 of 1718, and the act of 6 G. 1, c. 29, to which all the then-existing members of this family were assenting parties, substantially repeated the settlement of 1700. The main question is, whether that act was ab initio inoperative and void, or is now repealed. Assuming it to be a subsisting act, it conclusively shows that Bertram Arthur, the late earl, did hold these estates under the parliamentary title thereby created, and not merely under the settlement of 1700: the act recites the two settlements and the will of the Duke of Shrewsbury; and it expressly and in terms ratifies and confirms the settlement of 1718, "and all and every the uses, trusts, and estates therein mentioned, limited, and declared,"—amongst others, the limitation to the heirs male of the body of George Talbot, who took the first estate for life: it therefore expressly comprises Earl Bertram Arthur, who took the estates as heir male of the body of George Talbot. It enables all the heirs male of the body of George Talbot to take, hold, and enjoy the said lands, &c., according to the true intent and meaning of the settlement, "any law or statute to the contrary notwithstanding,"—that is, notwithstanding the operation of the penal laws under which, if Roman Catholics, they might otherwise have been deprived at least of the use and enjoyment of these estates during their lives. And this is confirmed by the language of the 12th section. The 2d section, under which the plaintiff claims, is clear and express in its terms: it enacts, that, after the decease of George Talbot and John Talbot, and failure of issue male of their respective bodies, Gilbert being deceased, and having no issue, the estates shall be "to the use and behoof of all and every the person and persons being issue male of John first Earl of Shrewsbury to *whom the title should after the decease of Gilbert, George, and John, without issue male of their respective bodies, by virtue of [*137 the letters patent of creation descend and come, severally and successively, as they shall succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same." The intent and policy of the act was, to secure to the Roman Catholic earls of

this family the enjoyment of these estates, notwithstanding the possible operation of the penal laws in force against those professing that faith: but it was also to annex (for the benefit alike of Protestant and of Roman Catholic) the estates inalienably to the earldom; which object could not be effected without an express clause restraining and prohibiting alienation. Accordingly, the 8th section (antè, p. 78) imposes an absolute restraint and incapacity to alien, in terms as clear as language can express. The proviso which follows in that section was repealed (by the 6 & 7 Vict. c. 28) at the date of the disentailing deed, but, for the purpose of this case, the act must be construed as it would have been construed at the time of its passing. The fallacy which pervades the whole argument for the defendants upon this part of the case, is, that this 8th section was intended to operate only in restraint of Roman Catholics. It obviously, however, was intended to deprive all who might succeed to the earldom, Protestants as well as Roman Catholics, of the power of alienating the estates, except upon the condition of their taking, or having taken, the oath, and made the declaration referred to, within six months of their attaining the age of eighteen, and continuing Protestants until twenty-one, and thence to the time of
*138] alienation. The powers, too, to charge the estates *are altogether inconsistent and incompatible with an estate tail in any future tenant in tail under any earlier or paramount title.

1. Bertram Arthur, the late earl, then, was tenant in tail, not under the settlement of 1700, but under the settlement of 1718, and the 6 G. 1, c. 29. Upon any other supposition, the estates tail created by the two settlements are wholly different and inconsistent. Except so far as the provisions of the settlement of 1700 were entirely consistent with those of the settlement of 1718, the former is entirely defeated; and, even where the terms are identical, the estates thereby limited must be taken to be held under the later settlement and the act of parliament. As to five of the counties mentioned,—viz., Chester, Stafford, Oxford, Wilts, and Derby,—the settlement of 1700 gives no legal estates at all, except to the Bishop of Salisbury and his co-trustees, of whom the bishop was ultimately the survivor. The estate tail given to the infant son of George Talbot by the settlement of 1700 was general and uncontrolled by any qualification or condition; that given him by the settlement of 1718 and the statute 6 G. 1, c. 29, s. 1 (antè, pp. 17, 71), is limited to the first son of George "on the body of Mary Fitzwilliam lawfully begotten;" and it is accompanied by many benefits and safeguards against the penal acts affecting Roman Catholics, and subject also to many qualifications and conditions, amongst others to the restraint of the power of alienation already mentioned. Earl Gilbert, George Talbot, and John Talbot are expressly excepted out of the general saving clause (s. 15). Bertram Arthur was not a stranger: he was within the exception in the saving clause; and he was expressly bound by the act, and took under it an estate tail subject to all the qualifications and conditions imposed by s. 8. A private act "is as
*139] powerful and *effective, if duly and properly obtained, as a public one, in transferring the legal estate in lands from one person to another, and in binding all those who are intended to be bound by it, and whose rights are not saved:" see Cruise's Digest, Vol. 5, p. 2, § 29, title "*Private Act.*" That Earl Bertram dealt with the estates

as if he took under the act of parliament of 6 G. 1, c. 29, is evident: for, under the settlement of 1700, he had no power to grant the lease of the 20th of June, 1840, which he appears to have done (antè, p. 4), professing to grant it in pursuance of the powers and authorities vested in him by the estate-act of 6 & 7 Vict. c. 28, and in which lease the subject-matter of the demise is said to be subject to the existing limitation of the 4th of March, 1718, and the statute 6 G. 1, c. 29.

2. There is nothing in any of the statutes whereby the rigour of the penal laws against Roman Catholics was relaxed,—18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, and 10 G. 4, c. 7,—to relieve Earl Bertram Arthur from the disability as to alienation imposed by the 8th section of the 6 G. 1, c. 29, or from the conditions contained in the proviso. The general Emancipation Act, 10 G. 4, c. 7, has no reference whatever to the capacity or incapacity of Roman Catholics to hold or enjoy lands: its object was merely to enable Roman Catholics to exercise certain civil rights without taking the old oaths: see M'Mahon *v.* Lennard, 6 House of Lords Cases 970. [COCKBURN, C. J.—It is a strange circumstance that you find a provision which is intended to apply exclusively to persons educated in the Roman Catholic religion, imported into this private act of parliament.] That does not alter the construction of the act. It is not because the legislature has by a subsequent act relieved the members of this family, along with all Her Majesty's Roman Catholic subjects, from the performance of one of the conditions upon which *the power of alienation was to depend, that they are therefore to be relieved from the performance of the other. The 6 & 7 Vict. c. 28,—the 32d section of which expressly repeals the proviso in the 6 G. 1, c. 29, s. 8, but leaves the clause against alienation subsisting and unrepealed,—conclusively shows that the 10 G. 4, c. 7, was not intended to have the effect of repealing the condition in the 6 G. 1, c. 29, upon which alone a tenant in tail was to be permitted to alien the estates. But, assuming that, from the altered state of the law, the performance of the condition upon which alone a tenant in tail could alienate has become impossible,—whether by the act of God or the act of the legislature,—the only consequence will be that the power to alienate cannot be exercised: Egerton *v.* Earl Brownlow, 4 House of Lords Cases 1, 120. All parties interested were represented before parliament when that act (6 & 7 Vict. c. 28) passed, and all took benefits under it. [COCKBURN, C. J.—The fact of Earl John having in 1843 obtained an act of parliament to sanction his dealing with the estates in a particular way, is not to be taken as a conclusive admission on his part that he could not have dealt with them by virtue of the operation of the 10 G. 4, c. 7, upon the 6 G. 1, c. 29. It might have been thought a safer course to obtain an act of parliament, than to rely upon that which might be subject to very great argument.] The legislature themselves by this act, which passed only fourteen years after the 10 G. 4, c. 7, expressly declare the law to be that Earl John held these estates under the 6 G. 1, c. 29, and subject to the provision in s. 8 restraining him from aliening except upon performance of the conditions therein specified. The act recites, in substance, that the estates were held by Earl John under the 6 G. 1, c. 29, that that act contained certain clauses, and amongst others this clause against

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*141] *alienation (which is set out in extenso, with the proviso in question), and that, by reason of that restrictive clause,—the legal effect of which is declared to be, to operate an exception from the clause restrictive of alienation in favour of any taker of the settled estates who should within six months after he should attain the age of eighteen take the oaths and subscribe the declaration therein referred to,—Earl John could not alienate without the authority of an act of parliament: and the act then proceeds to give that authority. It is not competent to this or any other tribunal to hold the legislature to have erred in this respect. [COCKBURN, C. J.—It must be borne in mind that this is not a declaratory enactment, but merely a recital in a private act of parliament,—a recital of the supposed state of the law. If convinced that that recital is erroneous, may we not give effect to our conviction? Are we bound by the erroneous recital?] As between the parties to the act, at all events, it is submitted that the recital though erroneous is conclusive: and no authority to the contrary can be cited. [COCKBURN, C. J.—Have you any authority for your proposition?] An authority scarcely can be needed for the position that the legislature is not to be assumed to be ignorant of the law. But, be that as it may, if Earl John had the power which Earl Bertram Arthur has claimed to exercise, of disentailing this property, this act was altogether unnecessary. In the face of these recitals and of these enactments, it is impossible to say that the clause against alienation and the proviso in the 6 G. 1, c. 29, s. 8, had already been repealed fourteen years before. Assuming the 10 G. 4, c. 7, to have operated a repeal, this would amount to a re-enactment of the former law. It may be observed that all the acts relating to these estates concur in this error, if error it be: all treat

*142] the property as being subject to the *conditions imposed by the 6 G. 1, c. 29, s. 8: and under these acts property has been sold and other property purchased and settled to the same uses and subject to the same conditions and restrictions, for a long series of years.

3. Then, as to the alleged incapacity of Earl Gilbert to take or to transmit an estate, by reason of the existing penal laws against Roman Catholics. It is submitted that Earl Gilbert was not by any of those laws disqualified from alienating the reversion, or that, at all events, it was well conveyed by the 6 G. 1, c. 29. Though they might in a certain sense have been disqualified from enjoying property, there was no statute in existence at the time which at all interfered with the rights of Roman Catholics, whether priest or layman, to transmit or to alien their estates in favour of Protestants, by any conveyance or act to take effect after their own deaths. The 1 Jac. 1, c. 4, and the 11 & 12 W. 3, c. 4, extended only to the life of the taker, and did not deal with the estate, but merely enabled the Protestant next of kin to take the profits during the life of the recusant tenant in tail: Thornby *v.* Fleetwood, 5 Bro. P. C. 203, 1 Stra. 318; Tredway's Case, Hobart 73; Ratcliffe's Case, 1 Stra. 267; Matlem *v.* Bingloe, Com. R. 570, Willes 75. The 11 & 12 W. 3, c. 4, was dealing with an incapacity to enjoy; the 8th section of the 6 G. 1, c. 29, with an incapacity to alien. [COCKBURN, C. J.—The former incapacity is defeasible by the party coming in and taking the oath and making the declaration prescribed: the latter is absolute.] The capacity cannot be acquired after the age of eighteen and a half in the one case; in the other it can.

4. The answer to the fourth point mentioned in the rule is threefold, —first, that Earl Gilbert is not proved by legal evidence to have passed beyond the seas and *to have been educated as a papist,— [*143 secondly, that, if he were a person educated beyond the seas in the popish religion, still the reversion in fee did not descend upon him, and he was competent to alien,—thirdly, that it is perfectly immaterial whether he had any estate or not, for, the legislature, in passing the 6 G. 1, c. 29, were dealing with the inheritance, as it was perfectly competent to them to do.

The following authorities were also referred to:—Viner's Abridgment, *Condition* (T.), pl. 20, 21, citing Bro. Abr. *Condition*, pl. 67; Ib. pl. 65, citing Creagh *v.* Wilson, 2 Vern. 573; Ib. (G. c.), note to pl. 33; Ib. (I. c.), pl. 19, citing Skidmore's Case, D. 262 a, pl. 30; Comyns's Digest, *Condition* (D. 1); Co. Litt. 206 a, 206 b, 218 a; The Duke of Kingston's Case (Mr. Booth's opinion), 5 Cruise Dig. 9; Biddulph *v.* Biddulph, 5 Cruise Dig. 23; Kinnersley *v.* Stuart, 5 Cruise Dig. 26; Barrington's Case, 8 Co. Rep. 136; The Prior of Castleacre *v.* The Dean of St. Stephens, 8 Co. Rep. 138 a; Westby *v.* Kiernan, 2 Ambler 697; Brett *v.* Beales, M. & M. 421 (E. C. L. R. vol. 22); Doe d. Shelley *v.* Edlin, 4 Ad. & E. 582, 589 (E. C. L. R. vol. 31); Doe d. Cadogan *v.* Ewart, 7 Ad. & E. 636 (E. C. L. R. vol. 34), 3 N. & P. 197.

In conclusion, the learned counsel observed, that these estates having been dealt with and enjoyed by each successive Earl of Shrewsbury under and in accordance with the provisions of the act of 6 G. 1, c. 29, from the time of the passing of that act down to the date of the disentailing deed in 1856, it was not competent to any one to question the limitations created or confirmed by the act, or, after so great a lapse of time, to contend that the legislature was mistaken or imposed upon.

Argument for the defendants:—The statute 6 G. 1, c. 29, was based upon and is to be construed with reference to the then existing penal laws against Roman *Catholics. The 8th section is applicable [*144 to Roman Catholics alone, and the disabilities with regard to the enjoyment and alienation of their estates expressed in that section have been entirely removed by the subsequent general acts for their emancipation. At the time the act passed, the existing laws with reference to the enjoyment of lands by Roman Catholics, were divisible into three classes or branches,—the first consisted of certain penalties and disabilities with regard to the enjoyment of lands consequent simply upon recusancy (23 Eliz. c. 1, s. 3),—the second, more stringent and penal, were addressed to those who either went or were sent abroad for the purposes of a popish education (3 Jac. 1, c. 4, s. 11),—and the third class consisted of penalties and disabilities created by the 11 & 12 W. 3, c. 4, s. 4.

The condition of the parties with whose rights and interests the statute 6 G. 1, c. 29, was dealing, was this:—Earl Gilbert, George Talbot, and John Talbot of Longford, were all Roman Catholics. Now, the 4th section of the 11 & 12 W. 3, c. 4, describes and legislates with respect to four distinct things,—first, with regard to infants who have been educated in the popish religion, who are under the age of eighteen and a half, and who are entitled to any estate by virtue of any descent, devise, or limitation taking effect with regard to such infants before they attain that age; and they are placed under a disability to inherit or take

"by devise, descent, or limitation," any lands, tenements, or hereditaments during the life of such infant, or until he or she do take the oaths and make, repeat, and subscribe the declaration formerly spoken of by the statutes. This was a state of law which in all probability became applicable to the issue of George Talbot and John Talbot of Longford,
*145] should there be any,—because, under the limitations of the *settlement of 1700, the will of the duke, and the settlement of 1718 (to the father, that is, to George for life, remainder to his first and other sons, &c.), the children of George and John Talbot would take as purchasers. A devisee was held to take as a purchaser under that clause: Vane *v.* Fletcher, 1 P. Wms. 352; Hill *v.* Filkin, 2 P. Wms. 6, 9 Mod. 154, 10 Mod. 481, 536; Carrick *v.* Errington, 2 P. Wms. 361; Davers *v.* Dawes, 3 P. Wms. 42; Rooper *v.* Ratcliffe, 5 Bro. P. C. 360; Jones *v.* Meredith, 2 Com. Rep. 661; Fairclaim d. Borlace *v.* Newland, Vin. Abr. (I. 7), pl. 4.

By operation of this section, George and John Talbot, who were adult persons at the time when the settlements and the will would take effect, were incapable of taking any estate whatever under and by virtue of the limitations contained in those instruments. Gilbert Talbot being declared incapable of taking by devise or by purchase, it followed, as a matter of course, that, at the time of the passing of the 6 G. 1, c. 29, George Talbot and John Talbot were by force of that enactment incapable of joining for the purpose of alienation in any common recovery, which alone would be the form of alienation which could bar remainders or reversions expectant upon the estates tail limited to their children.

In Ratcliffe's Case, 1 Stra. 267, the tenancy in tail was created under and by virtue of an indenture of lease and release dated in March, 1687 (anterior, therefore, to the day mentioned in the 11 & 12 W. 3, c. 4, the 10th of April, 1700), and therefore exempted from the operation of the subsequent part of s. 4. In Pye *v.* George, cited by Sir E. Northey, in the argument of Thornby *v.* Fleetwood, 1 Stra. 318, 364, it is said that "the subsequent words controlled the former, so that they carried away no more than a pernancy of the profits, and the legal estate descended notwithstanding."

*146] *The severity of the penal laws against Roman Catholics was relaxed by various acts,—11 G. 2, c. 17, 18 G. 3, c. 60, 31 G. 3, c. 32, 43 G. 3, c. 30, and 10 G. 4, c. 7,—the 18 G. 3, c. 60, operating a conditional repeal in favour of Roman Catholics of the 11 & 12 W. 3, c. 4, provided they took the oaths prescribed by that statute; and the general Emancipation Act, 10 G. 4, c. 7, abolishing the oaths of Roman Catholics, and providing that persons of that persuasion shall have a general liberty to hold and enjoy lands.

The following authorities were also referred to:—Sir Anthony Mildmay's Case, 3 Co. Rep. 41 a; Grotius, Book 2, ch. 6, § 1; Corley's Statutes against Papists; Bacon's Abridgment, *Condition, Statute;* Dwarris on Statutes 269; Pelham *v.* Fletcher, 6 Bac. Abr. 130; Chance *v.* Adams, Hardres 324 Hervey *v.* Aston, Willes 83; Vane *v.* Fletcher, 2 P. Wms. 352; Woolmore *v.* Burrows, 1 Sim. 512; Dore *v.* Gray, 2 T. R. 358; Woodward *v.* Cotton, 1 C. M. & R. 44;† The Churchwardens, &c., of Deptford *v.* Sketchley, 8 Q. B. 394 (E. C. L. R. vol. 55); Russell *v.* Ledsam, 14 M. & W. 574.†

COCKBURN, C. J.—This case has occupied the court so long a time,

and has had so much light thrown upon it by the elaborate argumente of which the court has had the assistance, and we have had such full and abundant opportunity and materials for the consideration of the great questions involved in it, that we have been enabled to come to a clear and decided opinion, and I think, therefore, that we ought not, merely on account of the magnitude of the interests involved, to delay pronouncing our judgment, or, by any apparent hesitation, to seem to give countenance to the supposition that any doubt exists in our minds, when, in point of fact, none whatever does exist. We feel, therefore, that we ought at once to pronounce our judgment.

*The great question in the case is, whether Bertram Arthur, the late Earl of Shrewsbury, being tenant in tail in possession of [*147 the estates in question, was competent, by executing a disentailing deed, to put himself in a position to aliene these estates as he might think proper. This question will depend ultimately upon the construction to be put upon the provisions of the Shrewsbury Estate Act of the 6 G. 1, c. 29. The plaintiff contends, that, by force of that act, aided by the repeal of the qualifying provision of the 8th section of the more recent Estate Act of the 6 & 7 Vict., inalienability was, by legislative enactment, annexed to the estate tail. The defendants join issue with the plaintiff upon that question. But, before they come to this great battle-ground, the defendants take two positions, their success in either of which would altogether preclude the necessity of entering into the consideration of the effect of the statute 6 G. 1. It becomes, therefore, necessary to deal with this part of the controversy in the outset.

In the first place, the defendants affirm that Earl Bertram Arthur was seised of these estates under and by virtue of the prior settlement of the Duke of Shrewsbury of the year 1700, which they allege to have been a co-existing and co-ordinate settlement; and they contend, that, although it may be true, that, so long as they were under the necessity of resorting in the then state of the law to the posterior settlement of 1718, and the act of parliament which confirmed it,—which, taken together (as it is a form of expression which appears to me both compendious and convenient), I shall, throughout the observations I am about to make, call "the parliamentary settlement,"—for protection and immunity from the existing law, they were not in a condition to alienate; yet, when by the alteration of the law affecting Roman *Catholics it was no longer necessary to seek protection under [*148 that parliamentary settlement, then, as the other remained in independent and unimpaired force and vigour, and as the late earl was tenant in tail under it, without any incapacity as to alienation attaching to him, it was competent to him to bar the entail and dispose of the estate. This position is met by an antagonistic one on the part of the plaintiff, that the settlement of 1700 was entirely abrogated, superseded, and set aside by the posterior parliamentary settlement. And, if this contention of the plaintiff is right, no doubt it follows, as a matter of course, that, if the effect of the 6 G. 1 was to prevent alienation, unless that provision has been done away with by any subsequent alteration of the law, the late earl was not competent to alienate. It becomes, therefore, a preliminary question of very great importance how far the settlement of 1700 continued in force.

On the part of the defendants, we are told with truth that there is

not in the 6 G. 1, c. 29, any express repeal or annulling of the settlement of 1700. It is observed, and truly, that, in the settlement of 1718, Earl Gilbert, who had succeeded the duke in the dignity of the earldom of Shrewsbury, declares his desire to confirm the settlement of 1700; and, further, that, in the act of the 6 G. 1, the settlement of 1700 is referred to as one the provisions of which it was the intention of Gilbert Earl of Shrewsbury to carry into effect. And we are further told, with truth, that, in the subsequent Shrewsbury Estate Acts, the settlement of 1700 is referred to as a still-subsisting settlement. On the other hand, it is pointed out to us that the provisions of the two settlements are irreconcilably at variance; and that it cannot, therefore, be conceived that those who were parties to the later settlement could have intended that the first should continue to be in force.

*149] *And it is observed, with equal truth, that, in the later Shrewsbury Estate Acts, the prevailing power of the parliamentary settlement is assumed; and that power is taken by these acts to alienate portions of the estates, on the assumption that the restraint on alienation contained in the 6 G. 1 was still subsisting and operative, and binding on the tenant in tail.

Various instances of discrepancy between the two settlements were brought to our attention by the counsel for the plaintiff. I pass over the minor points of difference, and direct my attention particularly to those which are more immediately material and important to the present inquiry; and I find two so remarkable and important, that upon them I found my opinion that it is quite impossible that the first of these two settlements can, at least in its integrity, be considered as subsisting. The first point of difference is the very important one that there is introduced between the estate tail and the estate in reversion a new limitation to a new set of tenants in tail. Now, suppose for a moment that that which might have happened within a very few years from the date of the later settlement had in point of fact then taken place, instead of having happened, as it has done, after an interval of a century and a half,—suppose that the intermediate estates had been determined by failure of issue; that George and John, the tenants for life, had died having had no issue, or that their issue had died; and that then the heirs of the body of the first Earl of Shrewsbury, who had been introduced between the former tenants in tail and the reversionary estate in fee, had claimed, under the later settlement, possession of the estates; while, on the other hand, the heirs of the Duke of Shrewsbury, who were entitled to the reversion under the settlement of 1700, had come forward to assert their claim, on the ground that the settlement of 1700

*150] *was still a subsisting settlement,—you would here have had conflicting claims which could not by any possibility have been reconciled. But there is, as regards the present inquiry, a still more striking discrepancy between the two settlements. I assume, for the purpose of this part of the inquiry, that the effect of the parliamentary settlement is to render the estate inalienable by the tenant in tail. I assume this, at present, only for the purpose of this part of the inquiry; it is a matter which I shall have to consider hereafter; but, assuming that this new condition was introduced by the parliamentary settlement, the two settlements become wholly inconsistent and irreconcilable. By the first, the tenant in tail would have had, as every tenant in tail has

by law, as incidental to his estate, the power of barring the entail by suffering a recovery, and so disposing of the estate; whereas, by the new settlement, he was deprived of this most important right.

What, then, is the conclusion to be arrived at? I do not think it necessary to adopt either of the two antagonistic propositions of the plaintiff and defendants to the full extent to which those propositions have been sought to be carried: it is enough, for the present purpose, to say, that, even assuming the settlement of 1700 to have been left as a subsisting settlement, so far as its provisions were reconcilable with those of the later settlement, it is impossible, looking at these manifest and striking inconsistencies, or, I should rather say, irreconcilable contradictions, not at least to go the length of saying, that, if the two settlements are to be considered as co-existing and co-ordinate, the later one, where it alters or qualifies the first, must be considered as the dominant settlement,—as over-riding the earlier one, and making it subordinate to the terms of the later. An analogy to this will *be found in the well-known common case where an act of parliament, though not expressly repealed by a subsequent act, is, by being brought into contradiction with it, virtually repealed either in the whole or in part. We all know, that, where a later act of parliament contains provisions inconsistent with those of a former act, the effect is a virtual repeal, so far as the inconsistency goes. So, here, if these two settlements cannot be reconciled with one another, then, assuming them to have a concurrent existence, the later must prevail over the earlier, where their provisions are inconsistent. This is quite enough for the present purpose: because, if here the later settlement has imposed the condition of inalienability upon the estate of the tenant in tail, even granting that the settlement of 1700 is still in existence, it must be taken to be in existence, subject to the conditions which the later settlement has introduced. And I have the less hesitation in adopting this view, because it seems to me to be perfectly consistent with what I find to have been the course pursued in the later legislation with regard to these same estates: and, as the successive possessors of this title and these estates no doubt had recourse to and had the advantage of the best legal assistance that the profession afforded, when we find that in all the subsequent legislation two things have been assumed,—a concurrent existence of both the settlements, but also the dominant power of the later one over the earlier,—so that, although the settlement of 1700 might be in existence, and it might be necessary to refer to it in the subsequent Estate Acts, yet it was always assumed that the later settlement imposed the condition of inalienability on the estates; and, when we find that the legislature has upon all occasions adopted this view in the Estate Acts which have since been passed, I think all this goes a very long way to confirm the view I am *now taking and propose to act upon, namely, that, without deciding whether the one settlement superseded and abrogated the other (though I am bound to say, that, if it were necessary to decide that question, the inconsistency between the two appears to be so irreconcilable that I should be prepared to go the length of saying that the later did supersede and abrogate the former), yet, assuming with the counsel for the defendants that the settlement of 1700 is still subsisting, it must be taken to be controlled and limited by the subsequent settlement, and therefore, if,

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according to the latter, these estates cannot be alienated, it follows that this provision operates upon the settlement of 1700, and renders alienation under it impossible. This disposes of the first point made by the defendants, and brings us to the second.

The second ground the defendants take, is, that, assuming that the parliamentary settlement would, if valid, have the effect of rendering the tenant in tail incompetent to disentail the estate and aliene it, yet the settlement of 1700 is not affected by the parliamentary settlement, because the latter was altogether invalid. This is put on two grounds: and I think the best form in which I can put the argument for the defendants is to put it in the shape of this alternative proposition,—the estates created by the parliamentary settlement must be taken either to have been carved out of the reversionary estate in fee, or to have been created at the expense of the estate tail, or to have been formed out of both. If they were carved out of the reversionary estate in fee, then, say the counsel for the defendants, the parliamentary settlement fails, because, the reversion being to the right heir of the Duke, and Earl Gilbert being such right heir, Earl Gilbert was incapacitated by the then existing state of the law from taking any such reversionary estate,
*153] and, *therefore, he being the granting party, and the act having been obtained at his instance, he could not grant or be a party to the granting of that which was not in him. And if, on the other hand, the estate was either created at the expense of the estate tail, or was created out of the estate tail and the reversionary estate in fee, then, as the tenant in tail was an infant, and was not a party to this act, and the act was a private Estate Act, it would be inoperative to affect his rights, and consequently as against him was of no effect. This I understand to be the alternative proposition contended for on the part of the defendants. The first point depends upon the question of fact whether Earl Gilbert, in whom the reversion in fee would otherwise have been at the time of the parliamentary settlement, was a Jesuit priest, and had resorted to an establishment or college of Jesuits abroad for the purpose of being instructed in the Roman Catholic religion and becoming a Jesuit, so as to be within the disabling statute of 1 James 1, c. 4. That depends upon certain evidence tendered by the defendants in this cause, and admitted subject to any exception which might be taken in this court. In the view I take of the case, it is not necessary to determine the question of the admissibility of this evidence. Any court which should be prepared to give effect to the position taken by the defendants would necessarily have to determine the question of the admissibility of the evidence; but, prepared as I am to hold, on the grounds I am about to state, that the fact of Earl Gilbert having been within the 1 James 1, c. 4, would not affect the question now before us, I think it unnecessary to determine the question of the admissibility of the evidence; and I shall therefore assume, for the purpose of the observations which I am about to make, that Earl Gilbert was at the
*154] time of the settlement of 1718, and of *the act of parliament of the 6 G. 1, c. 29, within the incapacitating provisions of the statute of 1 James 1, c. 4.

Assuming this, the first question which arises, is, whether that statute would have the effect of incapacitating Earl Gilbert from taking a reversion in fee, so as to be a party to carving a further estate out of it.

Then comes a question of a different nature, but not of less importance, namely, whether the estate with which we are now dealing was in point of fact carved out of the residuary estate in fee of Earl Gilbert.

As regards the first branch of the question, I am of opinion that the effect of the statute was not to incapacitate Earl Gilbert from being a party to this settlement and the act of parliament which establishes it. I abstain, however, for the present, from stating the grounds of my opinion on this point, as I shall have to enter at large, at a later stage of my judgment, into the question of the effect of this and other statutes on the capacity of Catholics to aliene their estates.

As regards the second branch of the question, though it is true, as was observed by my Lord St. Leonards in the House of Lords, that, as regards the estate in remainder introduced for the first time by the parliamentary settlement in favour of the heirs male of the body of the first Lord Shrewsbury, an estate was created at the expense of the reversionary estate in fee, and that estate was in fact carved out of the estate of Earl Gilbert, who was the reversioner in fee; yet as regards the estate with which we have now immediately to deal, it appears to me plain that the estate was not one taken out of the reversion, but one created at the expense of, or at all events substituted for, the estate tail created by the settlement of 1700. The settlement of 1700 gave an estate tail to the eldest son of George. So does this parliamentary settlement; but with this difference, that, whereas the settlement of *1700 gave an estate tail with the ordinary incident of such an estate, the capacity to alienate upon suffering a recovery, the [*155 parliamentary settlement either created a new estate tail, taking from it that incident, or, if the settlement of 1700 was kept alive, and the two are to be taken together, it took away that incident of the former estate tail, and annexed to that estate the condition of its being for the future inalienable. It appears to me, therefore, a fallacy to say that the estate which we are now dealing with, namely, the estate tail in the heirs male of the body of George, and afterwards in those of John, created by the parliamentary settlement, was an estate carved out of the reversionary estate in fee of Earl Gilbert. But it is the prior estate tail, not the estate tail in remainder carved out of the reversionary estate, of which Earl Bertram Arthur has taken upon himself to dispose.

But, even if the defendants' contention were right, and this estate was an estate taken out of the reversion of Earl Gilbert, and even if Earl Gilbert was incapacitated by the effect of the statute of James 1, as contended for on the part of the defendants, I should still say that that would not avail the defendants as a ground why this act of parliament should be held to be inoperative; and for this reason,—wherever the reversionary estate was, and it must have been somewhere, parliament took upon itself to deal with it, and in the plenitude of its legislative power disposed of it; and, if parliament thought fit to deal with this estate as the estate of a man who was capable of disposing of it, it is not for a court of law to entertain the question whether or not, if the reversionary estate had come into possession, some one might have asserted a right against the party in whom the reversionary estate was assumed by parliament to be, on the ground of his incapacity to take.

*And it should be observed that this objection is not taken by any one whose rights have been affected by parliament treating [*156

the reversionary estate as in Earl Gilbert, and disposing of it. It is no representative of Earl Gilbert who upon the present occasion asserts a right; it is no representative of the Duke of Shrewsbury who now holds these estates against the plaintiff; but persons deriving title from the tenants in tail, whose estate was anterior to the reversionary estate, and whose rights, except so far as they are established by the act, are expressly excepted from the saving clause.

This brings me to the other head of objection. It is said, that, assuming that these were estates taken from the estate of the tenant in tail, the tenant in tail was not a party to the act. Now, in one sense, he certainly was not a party to the act; for, far from being a concurring party to it, he opposed it by his prochein ami. His uncle, Lord Fitzwilliam, appeared as his next friend, before the committee of the Lords. Objections were taken on his behalf to the proposed parliamentary settlement, upon the ground that he was tenant in tail under the settlement of 1700, and that, as such tenant in tail, he would have a right to bar the entail and aliene the estate, and that this right was about to be taken away from him by the bill. On the other hand, not only was the whole question gone into before the committee, and the rights of the infant fully understood there, but the matter had previously been referred to two judges, who, according to the practice which then prevailed in these matters, took all the evidence, had the settlement before them, and were made perfectly acquainted with the infant's rights. They reported upon the bill to the Lords, before whose committee the whole matter was again gone into and the evidence taken anew; so that the
*157] committee were *in full possession of all the facts,—of the existence of the infant heir, of the rights which he had under the settlement of 1700, and of the manner and extent to which those rights were about to be affected by this bill. After which, parliament, with a full knowledge of all the circumstances, deliberately and advisedly passed an act which contained a provision that the rights of that infant as to alienation should be for ever extinguished, except upon a certain condition. Nay, more, it introduced this latter condition for the special protection of his rights, so far as it thought fit to preserve them; and, having thus established and limited his rights as it thought fit in its discretion, it specially excluded him from the operation of the saving clause. It seems impossible to contend that the act of parliament is not binding and conclusive as to the rights of a party so circumstanced.

We have been reminded, indeed, that a private act of parliament has been said upon high authority to be little more, if anything, than a private conveyance between those who are parties to it; and, to a certain extent, I agree in that proposition. Recitals in a private act of parliament could never be held to bind persons who were not parties to the act. Provisions, however general in their terms, could not be held to affect the rights of parties who were not before parliament, and whose rights were never intended to be affected, more especially where there is a saving clause which preserves the rights of all parties save those excepted from it. Thus, if a tenant for life should obtain power to convey an estate in fee, no court would hold that it could have been the intention of the legislature to bind a remainder-man who was not a party to the act, or named in it, or excepted from the saving clause. But, if

an act of parliament in positive and express terms professes to affect and does affect the rights of *parties named in it and excepted from the saving clause, it is quite impossible, as it seems to me, to maintain that a court of law is not bound to give effect to the provisions of such an act, although such parties may not have concurred in passing it. [*158

This distinction in point of principle is illustrated by Barrington's Case, 8 Co. Rep. 136, and by the cases of Westby *v.* Kiernan, 2 Ambl. 697, and The Provost of Eton College *v.* The Bishop of Winchester, 3 Wils. 483. The effect of Barrington's Case is stated in Cruise's Digest, Vol. 5, title "*Private Act*," § 31, in these terms:—"In a case where the question was whether the act of the 22d of Edw. 4, c. 7, which under certain circumstances authorizes the proprietors of grounds in forests, after a felling, to enclose them without the King's license, for seven years, to preserve the springing wood, should be construed so as to exclude persons having right of common; Lord Coke upon this point reports that the judges of the Court of Common Pleas were of opinion that the commoners were not bound by the statute, for the following reasons. It appears by the preamble between what persons, and for and against what persons, this act was made; and the parties to this great contract by act of parliament are the subjects having woods, &c., within forests, chases, and purlieus, of the one part, and the King and the other owners of the forests, chases, and purlieus, of the other part; so that the commoners are not any of the parties between whom this act was made." Therefore, in that case, the act was held not to extend to dispossess the commoners of their rights of common: but, if it had appeared by the preamble, or by the enactment of the legislature, that the commoners had been persons whose rights the statute had been intended to affect, and did affect, however prejudicially, a court of law could not have held itself warranted in limiting the operation of the *clear and positive enactments of the statute, although it was a private act of parliament. The matter receives further elucidation from the case of The Edinburgh Railway Company *v.* Wauchope, 8 Clark & F. 723. Lord Campbell there says: "I think it right to say a word or two upon the point that has been raised with regard to an act of parliament being held inoperative by a court of justice because the forms prescribed by the two Houses to be observed on the passing of a bill have not been exactly followed. There seems great reason to believe that an idea to that effect has prevailed to some extent in Scotland, for it is brought forward in these papers as a substantive ground of objection to the applicability of the later act of parliament, the objection being, that, this act being a private act, it is inoperative as to the pursuer, because he had not proper notice of the intention to apply to parliament to pass such an act. The defence was entered into in the court below, and the fact of want of notice was made the subject of inquiry; and the Lord Ordinary in the note appended to his interlocutor gave great weight to this objection. He said, 'he is by no means satisfied that due parliamentary notice was given to the pursuer previous to the introduction of this last act; undoubtedly, no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, [*159

he should be strongly inclined to hold, in conformity with the principles of Donald (27th of November, 1832), that rights previously established could not be taken away by a private act of which due notice was not given to the party meant to be injured.' His Lordship seems, therefore, to have been of opinion, that, if this act did receive the construc-
*160] tion that it would clearly take *away from Mr. Wauchope the right to this tonnage, it would have had that effect only if due notice had been given to him of the introduction of the bill into the House of Commons; but, that notice not having been given to him, it could not have such effect, but became wholly inoperative. I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a court of justice can do, is, to look to the parliamentary Roll; if from that it should appear that a bill had passed both Houses, and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into parliament, nor into what was done previous to its introduction, or what passed in parliament during its progress in its various stages through both Houses."

These observations illustrate the question which is now before us, and make it clear, that, if an act of parliament, by plain, unambiguous, positive enactment, affects the rights even of parties who were not before the House (those parties being clearly pointed out by the bill, and expressly excepted from the saving clause), it is not for a court of law to consider whether the forms of parliament have been pursued,—whether those provisions which the wisdom of either House of parliament has provided for the prevention of any deception on itself, or of injury to the rights of absent parties, have been followed: it is enough for us if the provisions of the act are clear, express, and positive: if they are, we have only to carry the act into effect. It seems to me, therefore, that, as on this occasion the infant tenant in tail was represented before parliament, and the true state of the settlement and the rights of the parties taking interests and estates under it were brought to the attention and knowledge of the committee and of the legislature,
*161] and then the estate of the *infant tenant in tail taken under the former settlement was dealt with by this act, and the rights of the infant excepted from the saving clause, he and those who come after him as his representatives must be bound by the act.

This, then, brings us to that which is in fact the great question between these parties,—namely, the effect of what I have termed the parliamentary settlement. The question is, whether by the act of parliament the tenant in tail is prevented from disentailing the estate and alienating it as the late Earl has done. Now, if we had simply to deal with the clause of the act of parliament upon which this question arises (the 8th section of the 6 G. 1, c. 29), the matter would be much more free from difficulty than it perhaps now is. But we are told that we must not construe and give effect to the clause by reference solely to its terms. We are asked to interpret and give effect to it, looking at it not merely as an enactment specially intended to affect these estates alone, but as a provision of the general public law affecting the rights or disabilities of Catholics, introduced into this private act of parliament to keep it in harmony with the general law. It is said, that, whereas the persons who were to take estates under the settlement were Catholics,

and therefore, by the law of the land, as it then stood, incapacitated from taking these estates, and the 2d section had been introduced to relieve them from that disability, and to give them an exemption from the then state of the law, the 8th section was added for the purpose of preventing the boon and privilege thus conceded from operating to the extent of enabling them to alienate the estate contrary to the existing law, by which the power of alienation was taken from Roman Catholics. The importance of this contention of the defendants is this: they say, that, this having been the *reason why this clause was introduced into this act of parliament, so soon as, by the alteration of the general law of the land, the disabilities of the Catholics were removed, the clause fell to the ground by the effect of the general legislation, and the tenant in tail held the estate relieved from the clog or encumbrance which had before been imposed upon it. [*162

Now, this argument would be a very much more cogent one if it were the fact, that, by the then-existing laws relating to Roman Catholics, the power of alienating their estates had been taken away. But, upon carefully looking into the acts of parliament at that time affecting the rights of Catholics with reference to property, I cannot find that there is anything that either directly or indirectly prohibited them from aliening their estates. And it would have been strange if it had been so; for, the very policy and object of the law being to prevent the real property of the country from accumulating in the hands of the Catholics, whereby they might obtain power and influence, it would have been contrary to that policy to enact, that, if an estate once got into a Catholic, he should not be capable to pass it away and get rid of it. I am not, surprised, therefore, that, when one turns to the statutes, one finds in them nothing in the shape of a prohibition against alienation. Difficulty, no doubt, sometimes arose as to alienation; but it arose entirely from the law saying that a Catholic should not acquire real property,—that he should not inherit, take, hold, or enjoy it; from this inability to take, it came in some instances to be contended that there was an inability to convey and transfer.

It will be expedient to pass briefly in review the statutes which imposed incapacity. The 1 Jac. 1, c. 4, an act directed against Jesuits, seminary priests, and recusants, in s. 6 provides "that any person going or *sending any child or other person beyond the seas, to enter any college, seminary, or house of any Jesuits, priests, or any other popish order, to be instructed in or profess the popish religion, shall, in respect of himself only, and not in respect of his heirs or posterity, be incapable to inherit, purchase, take, have, or enjoy any manors, lands, tenements," &c. The 3 Jac. 1, c. 5, one of the acts directed against recusancy, by s. 16, enacts that children sent beyond the seas to prevent their good education in England "shall take no benefit by any gift, conveyance, descent, devise, or otherwise," until, being of the age of eighteen years, or above, they take a certain oath prescribed by another of the statutes against recusancy. In the mean time, the next of kin, not being popish recusants, are to have and enjoy the lands, &c., until the party otherwise entitled shall conform, after which the next of kin is to account for the profits. Next follows the 3 Car. 2, c. 2, which subjected any person going, or sending any child or other person, beyond the seas, to enter, reside, or be trained up in any popish religious or [*163

scholastic establishment, or in any popish family, to be instructed, persuaded, or strengthened in the popish religion, or to profess the same, on conviction thereof on any information, presentment, or indictment, to forfeiture of lands, tenements, estates, and goods. We come lastly to the 11 & 12 W. 3, c. 4, an "act for the further preventing the growth of popery." The 4th section contains an enactment which relates to the subject under consideration. It is divisible into two parts. The first part relates to persons under the age of eighteen years, educated in or professing the popish religion; and enacts, that, if any such person "shall not, within six months after attaining that age, take the oaths of allegiance and supremacy, and subscribe the declaration set down in the 30 Car. 2, c. 2, such person shall, in *respect of him or herself only, and not to or in respect of his heirs or posterity, be disabled and made incapable to take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments;" with a further provision, that, until these conditions be complied with, the Protestant next of kin shall have and enjoy the lands, &c., without being accountable otherwise than for wilful waste. The second part of the section makes all papists, or persons professing the popish religion, in general, disabled and incapable to purchase any real estate,—the term "purchase" being here to be taken in its technical and not its popular sense,—and makes any such estate void and of no effect.

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Now, in none of these statutes is there any prohibition against alienation. Difficulty arose only when a Catholic, disabled by any of these statutes from taking, but who had nevertheless in fact taken and acquired possession, proceeded to aliene. The question is one of considerable nicety; but the effect of the authorities seems to be, that, though incapacitated from taking for the purpose of personal enjoyment, the Catholic was not incapacitated from taking for the purpose of disposing of the estate. The matter early became the subject of legal consideration. In Tredway's Case, Hobart 73, the effect of the statute of the 3 Jac. 1, c. 5, came under consideration. There, one Edward Tredway having died leaving two sisters his heirs, and one of them having "departed the realm without license, to prevent (?) her religious education, and being and remaining a nun professed at Douai," it was said that she came within the statute, and that her lands were forfeited, and went to her sister Elizabeth. But Hobart says, "My Lord Chief Justice Montague and I agreed clearly that the moiety of Lettice" (who was the sister in question), "as to the state of the land, was not *forfeited nor settled in Elizabeth" (the other sister), "for the statute is, that she shall take no benefit by descent, not that she should not take by descent. And it then proceeds to show the meaning thereof, that the said profits during her unconformity shall be received by the next of kin, and they also shall be answerable unto her after her conformity." And further on he says, "Suppose that such an heir beyond sea shall bargain and sell his land to a stranger, which he may do, since his estate remains (as aforesaid), I hold that the bargain in such cases shall prevent the next of kin, and also take the land out of his hand if he entered, as in the common cases."

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Afterwards came the case (which has been so much discussed at the bar) of Thornby v. Fleetwood, 1 Stra. 318, which raised the question whether a tenant in tail who was within the terms of the 1 Jac. 1, c. 4,

could suffer a recovery, and so disentail the estate, and dispose of it. Upon looking carefully into the reports of that case, it seems to me that there was at all events a decision of this court that the tenant in tail, although within the terms of the 1 Jac. 1, c. 4, was not prevented from suffering a recovery and aliening the estates. It is true, there was a second point in the case in favour of the defendant, namely, that, as there was a second tenant in tail in remainder living, although the latter was equally within the statute, the lessor of the plaintiff in ejectment, who claimed as right heir of the original settlor, on the failure of the estate tail, could not recover while he lived: but the ground upon which the decision of the Court of Common Pleas proceeded, so far as appears from the language of the court, was, that the exception or reservation in favour of heirs in the statute qualified and limited the incapacity to take which otherwise would have been absolute, and that it was still competent for the Catholic to take, though *not for the purpose [*166 of immediate enjoyment, yet for the purpose of conveying away the estate. I own if the matter were res integra, individually, I should be very much disposed to think that the two judges of the Court of Queen's Bench, Lord Chief Justice Parker and Mr. Justice Fortescue, who were for overruling the decision of the Court of Common Pleas, were upon principle and reason right, and that, where by the provisions of an act of parliament a person is incapacitated from taking for the purpose of present enjoyment, such incapacity must incidentally carry with it an inability to alienate, as otherwise, by selling the property and taking the proceeds for his own use and benefit, a man would have a present benefit and enjoyment of a very substantial kind; and that all, therefore, that was meant by the reservation in favour of heirs in the act of James and other similar acts, was, to enable the party to transmit the estate to those whose rights were reserved, independently of the technical requisite of the seisin of the estate in the person through whom it is to pass. The matter is, however, I think, res judicata in this court, not reversed by the decision of the House of Lords: for, although the case was not decided in favour of the defendant upon the same ground upon which it had been decided in this court, yet there was no reversal of the decision of the Court of Common Pleas; and that decision has since received the sanction of very high authorities. In the case of Matlem *v.* Bingloe, 2 Comyns 570, where the question was, whether a papist who was within the terms of the 11 & 12 W. 3, could devise property which had come to him by descent, the court held that such a devise was good; and the Chief Justice Willes gave the reason for the judgment, in these terms:—"Though George Bedell was under eighteen at the time of the making of the statute of the 11th & 12th William 3, yet, after *professing himself a papist, and not taking the oaths, he is dis- [*167 qualified as well as other papists; yet the disability incurred by this statute is very near the words in the statute 1 Jac. (1, c. 4), which do not prevent his having or being seised of the estate, and consequently he may dispose of it; he may take any personal legacy or gift,—so cannot be resembled to a monk. He may bring waste,—nay, he may take a real estate sub modo; he takes for the benefit of his Protestant heir till he conforms, and for the benefit of himself when he conforms. The inheritance must be in somebody: it cannot be in the King, for it is given to another; it cannot be to the next of kin, for he hath but the

rents and profits; it cannot be in his heir, for nemo est hæres viventis. Thornby v. Fleetwood, under the statute of 1 James I., and the case in Hobart upon the 3 James I., show that those who were papists were seised, notwithstanding those statutes; and the clauses which give papists an action of debt and waste strengthen this construction. Besides, it seems most agreeable to the intent of the legislators, which was to encourage the bringing papists' estates into the hands of Protestants, which is best done if they may devise or convey to them." So, again, in the case of Jones v. Meredith, 2 Comyns 661, the question arose whether a papist who had not at the age of eighteen, or within six months of it, taken the necessary oaths, could mortgage. The main question indeed was, whether such a mortgage might be redeemed by the Protestant next of kin, so as to oust the mortgagee; as to which the court held that the Protestant next of kin might do so; but the power of the papist to mortgage came incidentally into question, and upon that Chief Baron Comyns says—"It is true, the words of the statute being that every person educated in the popish religion, or professing it, shall, *168] in respect of himself only, *and not in respect of his heirs or posterity, be disabled to take, the seisin of the estate has been construed to remain still in him; for, otherwise, it would be difficult to say how his heir could have the estate consistently with the known rules of law. So it was holden in Tredway's Case upon the 1st James I, which is penned in the same manner; and therefore a papist tenant in tail may make a tenant to the præcipe, and suffer a common recovery, as was resolved in Thornby v. Fleetwood, 12th Anne, and in Lord Derwentwater's Case, 6th George I. So, he may devise the estate to a Protestant. Resolved in Common Bench, in Matlem and Bingloe, and in the case of Maribod and Darrell, H. 8th George 2, in B. R." And in the case of O'Fallon v. Dillon, an Irish case before Lord Chancellor Redesdale, 2 Sch. & Lef. 13, where a papist thus circumstanced had confessed judgments to a trustee in trust for the use of a settlement made on the marriage of his nephew, and afterwards suffered a recovery, it was held that the judgments were not a fraud on the disabling statutes, and that the recovery was good. The Lord Chancellor says, "The objection that the recovery suffered by Bryan did not bar the entail, seems to me ill founded. The statute of the 8th of Anne avoids recoveries to bar a Protestant in remainder, or to defeat the gavelling clause in the 2d of Anne, but cannot I think be construed to extend to a recovery, which has no such operation. Otherwise, the entail of estates vested in Roman Catholics must be perpetual, if the heirs of entail continued to profess that religion; and their estates would never be subject to judgment debts. The policy of these acts, on the contrary, tended to encourage alienation and to let in debts." There is also Ratcliffe's Case, which is reported in 1 Strange 267, which arose upon the recovery suffered by Lord Derwentwater, then tenant in tail of those estates; and *169] *although in that case, as was pointed out by Sir *Richard Bethell*, the estate tail had been created prior to the passing of the 11 & 12 W. 3, the case is still an authority for this, that, independently of the impediments to taking and acquiring estates by Catholics, there was nothing in that statute, or in any other, to prevent a Catholic from aliening an estate, if he once got possession of it.

These being the statutes directly affecting the capacity of Roman

Catholics as regards property, and these the authorities as to their construction, Sir *Richard Bethell*, in his most able and luminous argument, sought to find in certain other statutes indirect parliamentary authority, by implication, for the proposition that Catholics could not aliene their estates; and he first called our attention to two statutes of Elizabeth relating to popish recusants. He said, that, inasmuch as by those statutes it was provided that the estates of recusants should not be alienated, this showed that it was the intention of the legislature that Catholics in general should not alienate their estates. But, when these statutes come to be looked at more carefully, it will be found that they have not any application to this question. In both there is not any prohibition against alienation, except upon conviction of recusancy; and, even then, there is no prohibition of alienation, if the recusant convict pays the fine which the statutes imposed upon those who did not conform to the Protestant worship. It was simply a measure to guard against persons who had incurred such fines getting rid of their estates after conviction, so as to prevent the Crown from realizing the penalties. Therefore, the act says to a man thus circumstanced, "You shall not aliene your estate unless you pay the fine; if you pay the fine, you may; if you do not pay the fine, you shall not." This does not show that there *was any general disability to prevent Catholics alienating, [*170
but quite the contrary. It is true, these statutes were passed before those upon which the questions have arisen which we are now considering; it is true that they cannot control the effect of the later statutes; but it is equally clear that they afford no aid to the argument of the defendants. Then Sir *Richard Bethell* had recourse to the act of the 3 G. 1, c. 18, which protects bonâ fide sales for valuable consideration against the doubts which had arisen upon the operation of the statutes of the 11 & 12 W. 3, and the 1 G. 1, c. 55. Now, it is plain that the 3 G. 1, c. 18, was intended to apply especially to the statute of the 1 G. 1, c. 55, though it had escaped Sir *Richard Bethell's* attention that it was so. When one turns to the statute of the 1 G. 1, c. 55, one sees plainly how the statute of the 3 G. 1, c. 18, came to be passed. This latter statute purports in its title to be a statute to explain the 1 G. 1, c. 55. What was the 1 G. 1, c. 55? Nothing that imposed any disability on a Catholic to aliene. It simply required that all Catholic estates should be registered; and, in case of non-compliance with the provisions of the act, it rendered such estates liable to be forfeited, upon action brought by any Protestant plaintiff. The effect of a plaintiff recovering in such an action, was, to give two-thirds of the estate to the Crown and one-third to the person who brought the action. Now, as in many instances it might happen, either that the estate was not registered at all, or that the registration was not attended with the formalities prescribed by the act, doubts would arise under such circumstances as to whether, the estate having become liable to forfeiture, a good title could be made against any person who might afterwards bring an action to recover it for himself and for the Crown under the provisions of the statute. So, again, with *regard to the 11 & 12 W. 3, to which [*171
also the statute of the 3 G. 1, c. 18, has reference. By the last clause of that statute, Roman Catholics were prohibited from acquiring by purchase any estates whatsoever: yet no doubt it happened, and frequently happened, that persons to whom estates tail in remainder had

been settled, or who had acquired estates by other means, so as to be, in the technical signification of the term, "purchasers," came into possession, and were not interfered with or molested by any one, owing to the generous spirit of forbearance which seems to have prevailed in those times on the part of those who might have taken advantage of these disabilities. Catholics thus in possession of estates might be desirous of selling them, perhaps proceeded to sell them; and then doubts arose as to their being able to make a good title in consequence of the original inherent defect of their own title, in consequence of the disability to take as purchasers imposed by the statute. To provide against such cases, the act was passed; and, although it does not cover all cases, but simply extends the statutory protection to the cases of bonâ fide sales for valuable consideration, it leaves the former law just where it found it, entirely untouched: and we are thus brought back again to the question, whether in the 11 & 12 W. 3 there is anything which prohibits alienation when once the estate has got into a Catholic. It appears to me plain and clear that there is nothing of the kind. Therefore, it seems to me, that, if we look to the general law, it is impossible to say that this restraint on alienation by Catholics, which was foreign to the general law, can be considered as having been introduced into this private act of special legislation as a leaf taken from the public statute book. But, besides this, if we look at the true history of the passing
*172] of this private act, the whole of this very ingenious *edifice crumbles to pieces and falls to the ground: and, although I quite concur with Sir *Richard Bethell* that we ought to construe and must construe this act with reference to its own contents, and its own contents alone, yet, when we are asked to travel out of the act, and to apply to it, with a view to its construction, the general existing law relating to Catholics, on the ground that the clause in question was introduced as a part of the general existing law, then, for the purpose of ascertaining whether such a representation is correct, and for that purpose only, it becomes essential to inquire what were the facts attending this piece of private legislation, or, to speak more correctly, of legislation for private purposes.

We have the history of the case before us. Evidence of the facts was tendered by the defendants, and was admitted, all objection to its reception being waived, as I think most judiciously and politicly, by the counsel for the plaintiff. Now, the history of the case is this:—On the death of the Duke of Shrewsbury, in 1717, the settlement of 1700, which he had effected, of course came into operation; but, unfortunately, as regards their temporal interests,—in that sense of the word only do I use the word unfortunately,—those who were entitled to take were Roman Catholics, and affected by the Roman Catholic disability acts. It appears that Lord Harcourt, who took an interest in the affairs of this family, had an interview, shortly after the duke's death, with a gentleman named Pigott, a conveyancer and eminent practitioner in his day, who was a Roman Catholic, and no doubt was in the confidence of the Roman Catholic families, and consulted by them on matters relating to their estates. Lord Harcourt pointed out to Mr. Pigott the disability under which those who were to take under the duke's settlement laboured,
*173] observing that it was a great pity,—*I think that was the expression,—that the provisions of the settlement were such as they

were, because those who were to take under it were Roman Catholics, and therefore disabled. Upon this Mr. Pigott suggested that there should be an estate bill, as there had been in the Arundel Case, for the purpose of annexing the estates to the title, and getting over the difficulty of the incapacity of those who were to take the estates and enjoy them. Lord Harcourt saw the Bishop of Salisbury upon it; the bishop consulted his son, who was at that time, I think, attorney-general to the Prince of Wales; and, after this consultation with his son, it appears a conference took place between the bishop and Mr. Pigott. The Bishop of Salisbury had no objection to assist in securing those who were entitled to the present estate against the possible contingency of the Protestant next of kin seeking to invade their estates; but he stipulated for and insisted on a condition, that whereas, in the event of the issue of George and John, who were next in succession to the earldom, failing, the earldom would necessarily come to him, the estates of the late Duke of Shrewsbury, and which were now to be enjoyed by these persons, should be annexed to the earldom, so that they should come to him and his heirs. And I think we may safely conclude that his purpose was that they should be inseparably annexed to the earldom,—because it must have been palpable to so sagacious a man as the bishop, that, in the state of religious animosity which then prevailed between Catholics and Protestants, a Catholic tenant in tail, upon the probability of a failure of issue, would prefer to aliene the estates, rather than that they should come to so remote a kinsman, and that kinsman a Protestant ecclesiastic. One readily understands, therefore, why the bishop should stipulate that the estates should be inseparably annexed to *the earldom. The condition has been denounced as a hard one; [*174 perhaps it was so; but with that we have nothing to do. Some repugnance seems to have been entertained to the proposal; and we find that more than one conference took place between the bishop and Mr. Pigott, and a Mr. Webber, who was employed as a go-between; but the bishop stood to his condition, and said that he had seen the King, and would not assent on any other terms; and the result was, that his terms were agreed to. Thereupon, the indenture of 1718, which was partly a settlement of the estates, and partly an agreement between the parties concerned that the bishop should go to parliament to obtain a private act to carry out the common purpose, was executed; and accordingly a bill was afterwards introduced, on the petition of Earl Gilbert and the bishop, but in point of fact promoted and prosecuted on the part of the bishop himself.

While the matter was pending before the committee, a petition was presented by Lord Fitzwilliam, the uncle of the infant heir of George,—for, in the interval between the indenture of 1718 and the bringing in the bill before parliament, the marriage, upon the contemplation of which the settlement of 1718 was executed, had taken place, and a child had been born of that marriage,—a boy, and consequently heir in tail under the settlement of 1700, as well as under the settlement of 1718, if the latter should receive the sanction of the legislature by the proposed act of parliament. Lord Fitzwilliam presented a petition on behalf of the infant heir, pointing out that his rights would be interfered with, and therefore opposing the bill, which went to take away the power of alienation. In the course of the argument before the committee, Mr.

Peere Williams, who was counsel for the petitioners against the bill, *175] urged the rights of the infant, and pressed upon the *committee that they should not, by taking away from him the power of alienating the estates, remove the strong inducement which there would be to bring up the heir to these great estates as a Protestant. And then was introduced this proviso upon the enactment prohibiting alienation, viz., that the tenants in tail should have,—of course they did not put it simply that this boy should have, but that any person in the same position should have,—the power of aliening the estates, if they would take the oaths which in those days were the test of adherence to the Protestant faith. Now, all this clearly shows, to my mind at least, that this was a matter not of general but of special legislation. I quite agree with my learned Brother *Shee* and Sir *Richard Bethell*, that the proviso was intended to apply to Catholics,—not, as it seems to me, with reference to the general law of the land, because, as I have already pointed out, by the general law Catholics were under no incapacity to alienate except such as arose from the disability to take,—but, as matter of special legislation, adapted to the particular case of the Catholic tenants in tail of these estates, prompted, perhaps, by the desire not altogether to supersede and set at nought the rights of this infant tenant in tail, thus prominently brought under the attention and consideration of the committee, yet at the same time to clog them with a condition which should render the power of alienation practically impossible. The original intention of the bill, as we know, was, that the restraint on alienation should be absolute. For, the bishop, who was the promoter of this bill, apprehended, that, if the estate tail remained in the hands of a Catholic without a restraint upon alienation, it would, in all human probability, in the event of failure of issue, be alienated so that it should never come to the Protestant line. But, when the rights *176] of the infant *tenant in tail were strongly urged, and Mr. Peere Williams suggested that the reservation of the right of alienation might be made an inducement to bring up the heir as a Protestant, the bishop was probably not unwilling to solve the difficulty, by getting a condition annexed, which he knew would never be satisfied. All this, it is true, is, more or less, matter of surmise and speculation; but it is plain that it was with reference specially to this infant that this proviso was introduced. I cannot, therefore, looking at the history of the case, any more than I can, looking at what was then the state of the general law, come to the conclusion that the restraint on alienation in this estate act was introduced for the purpose of making the act, reference being had to the prior enabling clause, conformable to the general law relating to Catholics.

But there is a further consideration which appears to me conclusive on this point. Although I agree that the proviso was introduced to meet the case of Catholics, because the party whose right of alienation it was the object to take away happened to be a Catholic, yet the provision as it stands is general, without any distinction of Catholic and Protestant. Though framed on the model of the 4th section of the 11 & 12 W. 3, it contains no reference to education in or profession of the popish religion, such as occurs in the act of William. The section begins with a general prohibition of alienation, but then goes on to provide that any parties who will take certain oaths and make a certain

declaration shall be relieved from the disability. Suppose that any one of these Catholic tenants had been converted to Protestantism, and had brought up his son a Protestant, can it be denied, that, if such Protestant, on attaining the age of eighteen, had taken the oaths and made the declaration, he would have been able to aliene? But, if the proviso would have been available *to Protestant as well as to Catholic, it cannot have been introduced as part of the general law directed [*177 solely against Catholics.

But, if the case does not come within the general law, the 10 G. 4, c. 7, can have no operation upon it. If either it formed no part of the general law that Catholics should not alienate, or if it be clear, looking at the history of this legislation, that this proviso was not introduced as part of the general law, but was a condition imposed by way of special legislation in this particular case, then it seems to me plain that the 10 G. 4, c. 7, cannot affect the question: for, I take it to be quite clear that all that the 10 G. 4 was intended to effect, when it repealed the acts which required certain oaths and declarations as the condition of the exercise of civil rights, and provided that no oaths should be required of Catholics to enable them to hold property, other than were required from the rest of the King's subjects, was, to remove disabilities imposed by the general law. It never was intended to have, and cannot be held to have, the effect of getting rid of that which was a special provision in a settlement. There can be no difference in this respect between a settlement by a private act and an ordinary settlement by deed. Now, suppose a man had settled or devised his estates upon certain limitations, but had made it a condition precedent to the taking of the estates, that any person who was to take should profess the Protestant faith, and evidence that faith by certain specified acts and observances; I apprehend it to be perfectly clear that a general enactment removing disabilities created by the general law of the land never could be taken to apply to a disability thus specially created by will or settlement. A condition annexed to the enjoyment of an estate cannot be affected by an act of the legislature, unless the legislation is directed to the *condition thus specially created, and not merely to disabilities [*178 created by the general law. A man has a right to annex, by what I may call his private enactment, the terms and conditions upon which that which it is of his own free will to grant or withhold shall be taken: and you cannot get rid of such conditions, unless by legislative enactment specially directed to the particular case, or some particular class of cases to which it belongs. Considering, therefore, the 8th section of this private estate act as a matter of special, and not of public legislation, I am clearly of opinion that its effect cannot be got rid of by that which was applicable only to the disability imposed on Catholics by the general law.

It is urged, however, as an argument in favour of the defendants, that, by the effect of the 10 G. 4, c. 7, the performance of the condition has become impossible. Assuming this for a moment, it seems to me to follow, as a necessary consequence in point of law, that alienation has become impossible. There is here a condition precedent upon alienation, and it is elementary knowledge that a condition precedent is a thing which cannot be got over. The law is stated by Blackstone in his usual lucid manner. He says, "Express conditions, if they be impossible at

the time of their creation, or afterwards become impossible by the act of God or by the act of the grantor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a grant be made to a man in fee-simple, on condition, that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the grantor marries her himself); or unless he kills *another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here, the condition is void, and the estate made absolute in the feoffee. For, he has by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But, if the condition be precedent, or to be performed before the estate vests; as, a grant to a man, if he kills another, or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for, he has no estate until the condition be performed." In the recent case of Egerton v. The Earl of Brownlow, 4 House of Lords Cases 1, 120, Mr. Baron Parke fully confirms this doctrine. Speaking of a condition, he says, "Supposing it to be illegal, if it be a contingency or condition precedent, and the event does not happen, or if it be impossible, and therefore cannot happen, the party never obtains the estate: if it be a condition subsequent, he never loses what he has got." This I take to be the true rule of law upon this subject.

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Now, here we have an estate tail from which the incident of alienability is taken away by positive enactment, but to which alienability may be restored upon the performance of a condition precedent. If the performance of the condition precedent is prevented, no matter how, and the condition does not take effect, that which was conditioned upon it cannot possibly take effect either. It cannot, therefore, avail the defendants to say that the condition has become impossible. But I think it would be going a great way to say that it had become impossible. Though by the general law it had been rendered wholly unnecessary that any oath should be taken or any declaration be *made by Catholics as a condition either of taking estates or of aliening them, all that was done was to dispense with oaths and declarations; there was nothing to make them illegal. If taking the estate was conditioned upon taking these oaths, and making this declaration, I do not see anything to prohibit a party from taking the oaths and making the declaration in order to entitle himself to alienate by the performance of the condition. But, however this may be, if impossibility of performance of the condition has supervened, it seems to me that in point of law the power to alienate is gone.

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It was, however, perhaps unnecessary to advert to this head of argument; for, if the case does not fall under the general law, and the 8th section of the 6 G. 1 is not affected by the 10 G. 4, c. 7, the case of the defendants falls entirely to the ground. For, subsequently to the passing of the 10 G. 4, c. 7, a private estate act of the 6 & 7 Vict. c. 28, was obtained by John the sixteenth Earl, the then tenant in tail in possession of the estates, whereby the proviso of the 8th section of the 6 G. 1, c.

29, which qualifies what would otherwise be an absolute restraint on alienation, was in terms repealed. I quite go along with the argument of the learned counsel for the defendants, that, if the effect of the 10 G. 4, c. 7, had been to get rid altogether of the restraint on alienation imposed by section 8 of the 6 G. 1, c. 29, the mere enactment of a private estate act professing to repeal a portion of that clause, upon a mistaken assumption that the whole continued to be the law, would not have the effect of restoring so much of the clause as it professed to leave untouched. I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private act of parliament,—nay, I may say, upon the authority of the case to which Mr. *Grant, as Amicus Curiæ, was good enough to direct our attention yesterday,(a) even in a public act,—and legislation founded on [*181 such mistake, would not have the effect of making that the law which the legislature had erroneously assumed to be so. If, therefore, the 8th section and the restraint imposed by it had been removed by the general legislation of the 10 G. 4, I agree that the clause of the private act of the 6 & 7 Vict. would not have the effect of renewing the disability. But, if I am right in the conclusion at which I have arrived on the grounds I have explained, and the 8th section of the 6 G. 1 was not affected by the 10 G. 4, then, the private estate act of the 6 & 7 Vict. having repealed the qualifying part of the clause, and having left the positive enactment against alienation unqualified and without any modification, the power to alienate upon the performance of the specified condition is at an end, and the possibility of alienation under any circumstances whatever is for ever done away with.

It seems to me, therefore, upon these grounds, that we must decide in favour of the plaintiff, and discharge this rule: and I have the less reluctance in doing so, because I feel satisfied that this decision is in conformity with the justice and equity of the case. I will not say that there was a family compact, if that expression is objected to: but I think it clear, upon all the facts, that there was a parliamentary compact in this case. The Catholic tenants, whether for life or in tail, under the settlement of 1700, found themselves in a position in which the enjoyment of their estates might at any moment be invaded and interfered with by the Protestant next of kin. They desired to enjoy immunity from this unhappy state of things. At that time of day, when men had not learned the great and salutary lesson that they may worship the same God side by side according to their respective faiths *and forms of worship, in amity and peace, people did not foresee that a time would come when these penal laws,—which the [*182 animosity of religious warfare, and the struggle, as it were, of life and death, for the existence of the one religion or the other, if they did not render necessary, at all events excused,—would in process of time become unnecessary, and would be repealed. At that time, when every one looked forward to the continuance of those laws, it was a matter of the greatest possible moment and importance to these Roman Catholic proprietors to receive protection and immunity against the operation of the then existing law, which disabled them from enjoying their estates. They obtained that protection through the intervention and influence of one who was interested in a particular settlement of these estates:

(a) Ex parte Lloyd, 1 Sim. N. R. 248.

they obtained it through the special legislation of parliament at his instance and procurement. They obtained it, however, as I read the act of parliament, on the condition that the estates should be inalienable, except on a contingency at that time most improbable, viz., the conversion at an early age of the successors of those to whom the estates stood limited from the Catholic to the Protestant faith. Under this private and special legislation, the Roman Catholic proprietors enjoyed these estates during a long series of years, when, but for it, their enjoyment and possession might at any moment have interfered with it in a manner most prejudicial and disastrous to themselves.

I cannot regret, then, that the conclusion which I arrive at, and which I trust I have arrived at independently of any other considerations than those which, sitting here to interpret the law, are the only ones which should influence my mind, should carry with it the consequence that
*183] those who have had the *benefit shall pay the price, that those who have had the uninterrupted enjoyment of these estates shall abide by the condition on which that enjoyment was secured to them.

WILLIAMS, J.—I am also of opinion that this rule ought to be discharged.

I entirely agree with my Lord, that, notwithstanding the great importance of this cause to the parties concerned, notwithstanding the extraordinary extent of time and the extraordinary amount of ability and industry which have been bestowed upon the argument, yet as in the result we feel no doubt whatever in our minds, we ought to take the usual course of forthwith pronouncing our judgment upon the questions submitted to us.

Now, the first objection that has been raised in this case to the title of the plaintiff, is, that Earl Bertram was not within the 8th section of the 6 G. 1, c. 29, because he was tenant in tail under the settlement of 1700, or under that settlement and will of the Duke, and not under the statute or the settlement of 1718. I am of opinion that he was tenant in tail under the statute. It appears to me quite plain that the legislature meant to deal with the whole estate, and to enact, that, for the future, it should for ever be enjoyed according to and under the limitations defined, and subject to the restrictions and qualifications prescribed, by the act in conformity with the settlement of 1718. The legislature had surely the power to enact this by a private act just as much as by a public act, if they really intended so to do: and, that they did so intend, is to my mind quite manifest, both from the language of the statute and from the nature of the enactments. The first section not only enables the persons to whom the estates were limited by the settle-
*184] ment of 1718, to *take, hold, and enjoy them accordingly, any law or statute to the contrary notwithstanding; but it proceeds to enact that they shal. and may have and hold the said manors, lands, &c.; and then the 12th section declares and enacts that the estates comprised in the settlement of 1700 and in the Duke's will, and no other, are intended to be "*entailed and settled by virtue of the present act.*" And, as it is assumed by the counsel on both sides, that one of the main purposes of the act was to protect the estates from the penal consequences of the statutes against papists, I cannot see how that object could be carried into effect by its enactments, unless the papist takers

under the succession limitations were to be regarded as holding under the act, and not under the settlement. The 11th section, respecting Broadstone Farm, is certainly a strong illustration of the intention; for, as to that portion of the estates to be dealt with, it is conceded by the counsel for the defendants that the course of limitations is at variance with that which the settlement would create.

I will next deal with the point raised by the defendants, that Earl Gilbert had been a member of a Jesuit College, and subject on that account to certain statutory disabilities, including an incapacity to take or to transmit the reversion, or to make a valid conveyance or settlement of it,—the reversion expectant, I mean, on the failure of the limitations under which an estate tail became vested in Earl Bertram. It was, therefore, argued that the estates subsequently acquired, limited by the statute, were not effectually limited, and thus the plaintiff's title failed.

Now, as to this, I take the law to be clear, that the legislature have the power to bind by a private act just as completely and stringently as by a public act, all those estates and persons whom it plainly intends to *bind. And, looking to the various provisions of the act, I think it clear that it did intend to bind all persons mentioned in the [*185 recital, and all estates which were or could be vested in them, or which had arisen or could arise by reason of the recited limitations, including, therefore, the Earl Gilbert, and all the estates vested or derived or derivable through all the recited limitations to him, and subject to all those interests in the successive limitations created by the act. It was assumed by some of the learned counsel that the act would fail to effect this, if, by reason of Earl Gilbert's disability, there was some one entitled to the estate who was not before the legislature when the act was in progress through parliament. But there is no foundation whatever for this assumption; and Lord Campbell has with great accuracy laid down the law in the passage in The Edinburgh Railway Company *v.* Wauchope, 8 Clarke & F. 723, which has been cited by my Lord Chief Justice; and it will be found that Lord Cottenham and Lord Brougham in that case expressed their views in substance to the same effect.

Now, it becomes unnecessary, in this view of the case, to consider whether there is any legal evidence of Earl Gilbert's incapacity, or to enter into a discussion as to the consequences of that incapacity, supposing it to have existed.

There remains, then, to consider whether the 8th section of this statute of the 6 G. 1 has been repealed by the acts passed for the relief of Roman Catholics. In support of this proposition, the great contention has been, that the restraint against alienation which was imposed by the 8th section of the act, applies only to persons who should happen to be Roman Catholics. But I am of opinion there is no foundation for this argument. The section is general in its terms of prohibition, and, if read in its ordinary and natural sense, *it applies to Protestants as well as to papists; and it appears to me that the [*186 general design and intent of the act requires that it should so apply.

The act is intituled "An act for annexing the late Duke of Shrewsbury's estates to the earldom of Shrewsbury, and confirming Earl Gilbert's settlement in order thereto, and for other purposes therein mentioned." Now, without going into the question how far it is right

to refer to the title of an act in aid of its construction, I would only say that in this instance the title appears to me to be an exact description of the intentions of the statute, apparent on the face of its enactments themselves. Without at all referring to the minutes of the proceedings before the committee of the House of Lords, it does seem to me quite impossible to read the recitals of the act, the recital of the Duke's settlement, the recital of the marriage-settlement of George Talbot, and the agreement contained therein, and the recital of the wish of Earl Gilbert that the estate should be annexed and go along with the earldom, for the better and more honourable support of the dignity,—with the acknowledged fact that those who were entitled under the limitations of the two settlements were papists, and on that account disabled from enjoying the estates,—without coming to the conclusion that two great objects were intended to be attained by the act,—the one, that persons to whom the estates were successively limited under Earl Gilbert's settlement should, though they were papists, enjoy the same, any statute to the contrary notwithstanding,—and the other, that the estates should be annexed to the earldom.

The annexation could only be effected by limiting the estates to the same persons to whom the earldom was limited, viz., the issue male of the body of the first earl. It is true that the act in one respect aban-
*187] dons *this principle; for, until the death and failure of the issue of Earl Gilbert, the estate certainly would not go with the earldom. But this was necessary, in order to fulfil the other object of the act,—I mean the confirmation of Earl Gilbert's settlement, which he had entered into with an express desire to pay due observance to the intentions expressed in the settlement and will of the duke, by which he, Earl Gilbert, had been passed over. And it is obvious that the principle of the act was in effect very slightly departed from; because, if he were a Romish priest, his having been thus passed over by the duke, and his own declaration of his resolution not to marry (announced in the settlement which he made on the occasion of the marriage of his brother, induced by his own persuasion), is fully explained, and the formal limitation of the estate, which it was thought right to introduce,—to him and his first and other sons in tail,—after limitations to those persons whom the duke had preferred to Earl Gilbert, was in fact nothing more than a limitation to him for his life.

But another thing was requisite in order to make the annexation to the earldom effectual, viz., that the successive tenants in tail should not have the power to alien.

It would be idle and illusory to call it an annexation to the earldom if it were in the power of any one of those tenants in tail to defeat the annexation at his pleasure; and it was requisite that such a restraint should be imposed on the tenant in tail in possession, whether he were Roman Catholic or whether he were Protestant. It seems to me plain, that, if, by the early death of George and John Talbot and of Earl Gilbert without issue, the bishop, under the limitations of the statute, had come into possession of these estates, the statute clearly meant that he should not have the power of alienating.

*188] *Therefore, the argument which has been so much pressed on us, that the disability could only have been intended to apply to

those upon whom the capacity to enjoy had been conferred by the early part of the act, seems to me to fail altogether.

But then it was argued that there prevailed, at the time the act passed, the doctrine that a papist could not alien, and that this 8th clause was merely a re-enactment of that restraint upon papists.

No doubt, the enactment with regard to a papist purchasing was of necessity an enactment of incapacity to alien the estate which he could not take, because what was never vested in him could not pass out of him. But, beyond this, I think there is no authority whatever to show that there was any restraint upon papists to alien those lands which had vested in them, by reason of their having been purchased before the statute of William 3, or by reason of their having devolved on them by any means after that statute had come into operation.

Then, it was further argued that the proviso in the 8th section shows that the whole of the enactment was directed against papists only, because it was said that the proviso corresponds exactly with the enactment as to conformity in the statute of William 3. It was argued that the object of the statute of George was, as to these estates, to put papists, as far as respected their power of aliening, on the same footing on which they were put as to the enjoyment of lands generally by the statute of William 3.

But, in the first place, it must be observed that the 8th section wholly omits that mention of the popish religion which is to be found in the statute of William 3. It may be further observed, that the enabling clause does not correspond. By the earlier statute, an infant may retrieve his capacity by conforming at any *period during his life; whereas, in the statute of George, if he does not take the [*189 steps prescribed before he is eighteen and a half, he has lost the power of aliening irretrievably. But then, it was asked, Why was the proviso introduced at all, unless the clause itself was applicable to papists? Why should the taking of steps which amount to conformity in a papist, give them a right to alien, unless the restraint on alienation was meant to be applied to non-conforming papists, and non-conforming papists only? I think it is not at all difficult to imagine that the legislature were aware, that, probably for some generations, the heads of the Talbot Family would be papists, and might think it right, in order to induce their conversion from popery to Protestantism, to confer a relief from the restraint of alienation on any one entitled to the earldom, who should, before he attained eighteen years and six months, and before, as Lord King expressed it in Hill *v.* Filkin, 10 Mod. 530, "he had fixed and riveted in his mind his religious principles," abjure what the legislature then regarded as errors most pernicious to the state and to the nation. This could only be done with propriety by giving a general relief from restraint to all tenants in tail who, within the age specified, should conform to the prescribed course. The legislature might well resolve to sacrifice so far the intent of the annexation of the estates to the dignity, for the sake of holding out an inducement which might produce so important a result as reclaiming this great house from popery. On this point, I will only add, that there appears no little difficulty in suggesting the terms which, as it was contended, ought to be considered by implication as inserted at the commencement of the 8th section of the statute of George, so as to make it conform to the statute of William.

*190] According to the main argument, the 8th section *ought to be read as if it were thereby enacted that neither the first nor any other son of the body, &c., nor any person to whom any estate of inheritance shall come, shall alien, *if he be a papist or a person professing the popish religion;* but, in the 4th section of the statute of William, the enactment is extended to any person *educated in the Roman Catholic religion, or professing the same.*

As to the argument brought before us, that the saving clause of the 6 G. 1 does not except the Bishop of Salisbury or his family, but only those who were known to be papists, and that, therefore, it ought to be inferred that the 8th section was not meant to bind Protestants, and only intended to bind papists; I will observe that it would have been idle to except the bishop and those claiming through him from the saving clause, because they plainly took nothing in the estate but what was given them by the act itself.

For these reasons, I am of opinion that the restraint of alienation contained in the 8th section is a restraint binding upon all the successive owners of estates of inheritance, and not peculiarly those tenants in tail of the estate who should happen to be Roman Catholics; and that, consequently, the restraint was in no way affected by the acts which were passed for their relief.

It is unnecessary, therefore, to consider what would have been the state of the case, if, according to the true construction of the act, the alienation had become restricted to the case of papists only.

But I think, that, even if that were so, the defendants would find great difficulty in answering the argument that the relief acts were only intended to remove the restraints to which Roman Catholics generally were subjected by the existing law, and not the restraints imposed on individual holders of estates, under special and peculiar statutes, as the conditions upon which the estates are to be holden.

*191] *For these reasons, I am of opinion that the rule ought to be discharged.

I think it is a very clear case. If I am wrong, at all events I have the consolation of knowing that I take the same view as was most deliberately taken by Earl John and his legal advisers, and all who had to consider and approve and sanction the statute of the 6 & 7 Vict. c. 28.

WILLES, J.—I am of the same opinion, on both points. The first question is, whether the estate limited to those persons being heirs male of the first earl upon whom the title might devolve, was a valid estate when created. It is admitted, for the purpose of this case, that the present Earl of Shrewsbury answers that description; and the only question, therefore, is, whether the 6 G. 1, c. 29, the private act so often referred to, did effectually create that estate. No doubt, for the purpose of an ordinary conveyance containing a similar limitation, in order to make it valid, it would have been necessary that Earl Gilbert, in whom, unless he was disabled by the effect of the 1 Jac. 1, c. 4, and the 11 & 12 W. 3, the reversion in fee was vested at the time, should join in such conveyance, and that the remainder so limited should be carved out of the reversion in fee then existing in him; and, accordingly, the objection taken to the operation and effect of the private act, is, that, by reason of the position of Earl Gilbert, he being a Jesuit,

educated abroad, and within the operation of the 1 Jac. 1, c. 4, or by the operation of the 11 & 12 W. 3, he being a Roman Catholic,—or by the operation of certain other statutes which have been referred to, not affecting merely persons so educated abroad or professing the Roman Catholic religion or educated therein, or being Roman Catholics, although not professing it, if any such persons there *were, but directed against persons so situated who brought themselves into a state [*192 of recusancy by virtue of the provisions in those other statutes,—(it was argued that by the effect of some one or more of those statutes), the estate which otherwise would have been vested in Earl Gilbert was forfeited, or was, for the purpose of conveyance by him, a nullity. That was the objection taken to the sufficiency of the limitation under which the plaintiff claims. It appears to me that the objection fails; and I shall first of all exclude from consideration, by one observation, all those statutes under which it may be supposed that a case of forfeiture to the Crown accrued. That observation is this:—We are dealing with a case in which no proceedings were taken by the Crown to take advantage of any forfeiture,—a case in which neither the Crown nor any other person has set up these statutes adversely, but in which they are set up for the purpose of showing simply that the estate was not in Earl Gilbert at the time. That excludes altogether all cases of forfeiture. It is familiar knowledge that a title cannot vest in the Crown except of record; and, for the purpose of divesting any estate which may have been forfeited by Earl Gilbert under a statute other than the 1 Jac. 1, and the 11 & 12 W. 3, it would have been necessary that there should have been an office found: and there was no office found. The authorities on that subject are referred to in Doe *v.* Pritchard, 5 B. & Ad. 765 (E. C. L. R. vol. 31), in which the effect of a conveyance by an attainted felon was considered, and in which it was held that there might be a recovery in ejectment on the demise of a person in that position, there having been no office found: and an expression in Coke upon Littleton, which had been misapprehended, and explained. For that reason, I confine my observations to the effect of the 1 Jac. 1, and the 11 & 12 W. 3.

*In dealing with these statutes, I must first observe that they [*193 are repealed, in common with all the penal acts to which reference has been made in the course of the argument, and many others, by the statute 9 & 10 Vict. c. 56; and it is a question in my mind, whether, since the repeal of those acts, the present question is capable of argument. I say it is a question in my mind, but I give no opinion upon it, because no doubt the learned counsel who have so ably argued this case on the part of the plaintiff, if there were anything in it which they could have taken advantage of, would have urged it upon us. I do not wish to pass by the point, because my mind is not quite clear upon it. I rather doubt whether this question can properly be raised since that repealing act. It is an act which saves certain cases within which the present does not fall. However, I give no opinion upon it, because the matter has not been argued, and I assume therefore, for this purpose, that the 1 Jac. 1, c. 4, and the 11 & 12 W. 3, are to have their full operation.

Now, I am satisfied, with reference to the construction of those statutes, to rest upon the series of authorities to which the Lord Chief Justice has already sufficiently directed attention, beginning with Tred-

way's Case, Hobart 73, upon the 3 Jac. 1, a case upon which it may be observed that the language of the statute was not the same as that of the 1 Jac. 1 and the 11 & 12 W. 3, because, whilst the 1 Jac. 1 says that a person in the position of Earl Gilbert shall not, so far as regards himself, &c., inherit, the 3 Jac. 1 says that a person within its provisions shall not take the benefit of any descent. It may be a verbal difference; but I am not at all sure that at the time some importance was not imputed to it. The 3 Jac. 1 seems to have been a statute under which the next of kin might have come in; under the 1 Jac. 1 a
*194] doubt might arise, possession *being vacant,—there being no person to enjoy the profits of the land,—whether it was not the Crown that was intended to come in. If it was, the remark that I have made, that there was no office found, would here apply, and would exclude the operation of the 1 Jac. 1. But I am rather disposed, looking at the concurrence of authorities upon the construction of the 1 Jac. 1 and 11 & 12 W. 3, to think, that, at a later period, it was supposed that the 3 Jac. 1 only expressed that which was intended by the different words of the 1 Jac. 1, and that, when the 1 Jac. 1 says that a person, as to himself only, and not so far as regards his heirs and posterity, shall not inherit, &c., that that means that he shall not take any benefit of the inheritance,—that that means, to use the expression of Chief Baron Comyns in the case of Jones *v.* Meredith, 2 Com. R. 661, to deal with the pernancy of profits, and not with the seisin in the land; and, founding my opinion upon Tredway's Case, and Thornby *v.* Fleetwood, upon Ratcliffe's Case, 1 Stra. 267, and Matlem *v.* Bingloe, reported in Comyns 370, and more at large in Willes 575, and Jones *v.* Meredith, and Lord Redesdale's opinion in the case referred to from the 2d Schoales & Lefroy 13, and upon the strong expression of opinion thrown out by Lord St. Leonards in the discussion of this case in the House of Lords, evidently upon a full consideration of the statutes in question, I can entertain no doubt that that is the true construction, that the pernancy of the profits only was affected, and that the seisin in law, as distinguished from seisin in fact,—a distinction formerly familiar,—did descend, notwithstanding either the statute of 1 Jac. 1, or the statute of the 11 & 12 W. 3. I would here observe, that I think the effect of the act of Jac. 1, and that of the act of W. 3, was precisely similar, because, although the act of W. 3, as has been sufficiently
*195] pointed out in the argument, *does, in giving the enjoyment of the profits to the Protestant next of kin, and giving the power of bringing an action of waste, differ from the provisions in the 1st of Jac. 1, there is a proviso in the 7th section of the former statute which appears to me to sustain the argument upon which it was held that the 11 & 12 W. 3 was intended to interfere with the pernancy of profits only, and not with seisin. That is a proviso, that, if a person falling within the description of the 6th section,—because the proviso does not simply refer to persons to whose case the 7th section is more immediately directed, it applies to all classes of persons dealt with by section 6 and section 7,—shall "after become conformable and obedient unto the laws and ordinances of the Church of England, and shall repair to the church, and there remain and be as is aforesaid, and continue in such conformity according to the true intent and meaning of the said statutes and ordinances, that in every such case every such person and child,

for and during such time as he or she shall so continue in such conformity and obedience, shall be freed and discharged of all and every such disability and incapacity as is before mentioned." Therefore, it is easier to reconcile the position of the person who, in respect of himself only, and not in respect of his heirs and posterity, is disabled from taking, but who may at any moment by conformity entitle himself to take with the established notions of law, by saying that he was deprived of pernancy of profits until he conformed, than by saying that the inheritance was, as it was contended by the defendants' counsel, in nubibus, or in gremio legis, during the period in which he was not to enjoy the profits of the land; in other words, the seisin in law descended upon him. Then, such a person, I apprehend, was capable of aliening; and for this I refer to the authorities which have been mentioned. Specially, however, it was said that he was incapable of suffering a recovery. [*196 Of course, it was said, and truly, that, in order to suffer a valid recovery, the person who does so must have the immediate freehold, or must have the power of giving it to some other person; and it was said that the intervention of the right either of the Crown or of the Protestant next of kin, whichever it might be, to enjoy the profits until conformity of the person in whom the tenancy in tail was vested, prevented him from having such a freehold as that a recovery could be suffered. That depends, obviously, upon the question whether the estate which has been given away, and given to some other person,—I will take it, for the sake of the argument, given to the Protestant next of kin,—was an estate of freehold; but it is quite obvious, from the reasoning of the Chief Baron Comyns, in the case of Jones *v.* Meredith, 2 Com. R. 661, that it is not a freehold. It is at the utmost a chattel; and it is a chattel which is not vested in the person who has the right, until he takes the means of recovering it. I apprehend, that, before the entry of the Protestant next of kin, there was no interest out of the Roman Catholic at all; it was a right given to them, which they might exercise; and, if they did exercise it, they might exclude the Roman Catholic until conformity, but no longer. It was a chattel interest, which could go to their executors; and I apprehend that the reasoning of Chief Baron Comyns is much sustained by the terms in which an action of waste is given in the 4th section of the 11 & 12 W. 3, namely, against the Protestant next of kin and his personal representative. Now, therefore, you have the case of a man who has a seisin in law, but not a seisin in deed.

The question, therefore, is, whether the person who had the seisin in law without the seisin in deed could make a good tenant to the præcipe,—whether a recovery, either real or common, might take place against such a person? That I find concluded by authorities, [*197 namely, the sections of Littleton, 680 and 681, in which, giving an instance, he takes occasion to lay down,—and that is confirmed in the Commentaries of Lord Coke, and I find the position is adopted in text-books upon the subject of real actions (see Roscoe on Real Actions 8),—that a freehold in law is sufficient, without a freehold in deed, to make a good tenant to the præcipe. Consider the subject with reference to persons who might have occasion to bring real actions. They could not have been intended to be disabled from proceeding, by reason of a disa-

bility of this kind; but, although the pernancy of profits was taken away, a sufficient freehold interest remained to make the individual a good tenant to the præcipe. As I am upon this subject, I intend to conclude what I have to say upon it, because, although it would suffice for the purpose of the present question to show that Earl Gilbert had a sufficient estate in fee in him which he might alien without regard to that which is the peculiar conveyance applicable to the case of a tenant in tail, it may be convenient that I should here conclude what I have to say upon the subject of Roman Catholic disabilities existing at that time. Therefore I will go on to refer to certain arguments which have been advanced on the part of the defendants for the purpose of showing that it was impossible that there could be a right to alien. Unquestionably, those persons who come within the latter branch of the 4th section of the 11 & 12 W. 3, could not alien. That is unquestionable; but it flowed not from any enactment, either general or special, that Roman Catholics should not be at liberty to alien land which was vested in them, but simply from the maxim, if it can be so called, nemo dat
*198] quod non habet. That class of cases is altogether *excluded. The question is, whether they could convey that which did vest in them either absolutely or sub modo with respect to the provisions of these acts of parliament. We really are called upon here to review a series of decisions to which I have already referred. But, putting them aside for the moment, let us consider the arguments which have been advanced as if those decisions had never taken place. It is said that the act of the 3 G. 1, c. 18, enabling Roman Catholics in certain cases and upon certain conditions to alien, or, rather, rendering valid and taking away all doubt as to the validity of their alienations in those cases, shows, that, in other cases, they could not alien. Now, my Lord Chief Justice has exhausted the argument upon that point, with the exception of a reference to one point which I believe he intended to state; and I will supply his argument by mentioning that point. It was said that the statute of the 3 G. 1 applied to cases falling within the 1 Jac. 1 and the act of W. 3, in which persons were disabled from taking, not absolutely, but disabled from taking as far as they themselves were concerned. That was the argument that was advanced. The Lord Chief Justice has pointed to the 1 G. 1, c. 55, to which I will not refer further. I do not agree that the 3 G. 1 meant to deal only with the persons who were affected by the first clause of the 4th section of the 11 & 12 W. 3, and with conveyances made by them. I rather think that the observation which was thrown out by my Brother Williams in the course of the argument, namely, that it might apply even to persons falling within the latter clause of the 4th section, who had been allowed to enter upon and enjoy the lands which they had purchased, notwithstanding they were Roman Catholics, is a well-founded observation; and I find that, at a time very much nearer to the period when the 11 & 12
*199] W. 3 was passed, *at a time before the 18 G. 3, the first act for removing these disabilities, had passed, and when the matter was more considered and probably better understood than it is at present, that view was taken of the effect of the 3 G. 1. I refer to the case of Macarthy v. Hanley, in the Irish Queen's Bench, in Hilary term, 1771, in which a question arose upon the construction of the Irish act of

parliament. Now, no doubt the code existing there was a different code from that adopted in England; in some respects much more stringent; but the enactments were introduced for the same purpose; the general scope was the same, and the object to be attained was the same; and the provisions of these enactments were very much more frequently put in force and considered in courts of law there than they have been here. I refer to a passage in the judgment of Lord Annaly in page 202 of Howard's Popery Cases, where he says, speaking of the 3 G. 1, and of the case of Pelham *v.* Fletcher (stated 6 Bacon's Abridgment 130, 7th edition), to which reference has been made on the part of the defendants, as showing that the 3 G. 1 did not apply to the case of persons falling within the latter clause of the 4th section: "A mortgage was made to a papist, who assigned to a Protestant for full consideration. A subsequent mortgagee brought an ejectment against the Protestant assignee, and he recovered by reason of the disability of the first mortgagee, *as the assignment of the mortgage and the trial was before the 3d George I.* English, which was enacted to make such assignments to Protestants good." Therefore, whether that be or be not a correct view of the operation of the statute, at least in the minds of the lawyers at that time it was a view which might well have been taken, and it was a view which might have led to the passing of the 3 G. 1, and may explain this enactment, without reference to the *supposition that the legislature was under any impression that conveyances by persons falling under the first clause of the 4th section of the 11 & 12 W. 3 were invalid conveyances. That adds to the argument by which my Lord Chief Justice has already sufficiently established that the 3 G. 1 does not affect the question. I would only add upon that, that, having looked into one of the earlier editions of Blackstone's Commentaries, published before the 18 G. 3, therefore whilst this law was in force, I find, that, in the list of disabilities, both to take and to alien, given in the second volume of the Commentaries (the chapter I do not remember), he speaks of the disabilities of various persons to alien, and of others to take, of others to hold, and so on: but, speaking of the disability of Roman Catholics, under this 11 & 12 W. 3, he treats it as a disability to take, not as a disability to alien. That goes also to sustain the argument. I therefore hold as I have already stated; and I am further of opinion, that, if this were not so,—if Gilbert were incapable of aliening by a private conveyance,—that the effect of the act of parliament is to enable him to make the remainder effectual, and it would be going contrary to the intention of the legislature expressed with reference to those persons affected by the 11 & 12 W. 3, that they should take, notwithstanding the law against Roman Catholics, to hold that the subsequent remainders should be void, because they fall within the provisions of another statute in pari materiâ. I will add to the cases which have been cited with reference to private acts of parliament, that of Bullock *v.* Fladgate, 1 Ves. & B. 471, where Sir William Grant held that an act of parliament, enacting that certain trustees should hold in trust lands discharged of the trust, had the effect not merely of discharging the land of the trust, but also the effect of giving the trustees the fee, *although at that time it was outstanding in another person. It appears to me that this act of parliament deals with estates, and changes the property, if necessary; and has the effect

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also of enabling the person in whom it was at the time, if that were necessary.

It appears to me, therefore, that the first proposition is thus established in favour of the plaintiff, namely, that the limitation in the 6 G. 1, c. 29, was valid, notwithstanding any disability of Earl Gilbert at the time: and, if that limitation was effectual, the only remaining question is, whether the remainder in tail was barred by the disentailing assurance of 1856.

With reference to that, it is necessary first of all to look at the private acts, and then to consider the effect of the Roman Catholic Relief Act. First, under the private act, was Earl Bertram a person who was bound by the restriction of alienation in section 8 of the 6 G. 1? Now, the 8th section restrains the persons who are mentioned in it from aliening, notwithstanding the estates which they took under the act of parliament. Much of the argument for the defendants upon this point needs the addition of the proposition that the 8th section is a prohibition to alien the estates taken under the act of parliament; but the 8th section, read according to its plain language, is a restriction to alien, not the estates taken under the act of parliament, but the land affected by the act of parliament: with respect to that land, a common recovery is not to be suffered; and no estate taken under this act of parliament or otherwise could be affected except by suffering a common recovery of the land. Such a mode of assurance is expressly prohibited; and it is expressly prohibited to certain persons who are named and described, and amongst those persons comes Earl Bertram, who executed the disentailing assurance in the year 1856, *which by the act of 3 & 4 W. 4, c. 741, is substituted for a common recovery, and stands on the same footing. It seems that Earl Bertram was issue male of George, who took the first estate for life under the statute; he was issue male of George; and the issue male of George are excepted from the saving clause of the statute, and therefore are bound by its provisions; and whether the act, by reason of the word "other" is to be construed as saying George and his issue male, and John and his issue male, and any other person or persons who take under this act of parliament,—whether, by reason of the word "other," it is to be considered that that section impliedly alleges that George and John and their issue male take under the act of parliament or not, appears to me perfectly immaterial; and I shall assume for argument sake that the section says that George and John and their issue male take estates under the act of parliament; if that be so, it appears to me that that is the strongest proof, that, when the same section talks of estates accruing and coming to the persons who are to be bound, it meant estates which accrued or came by the confirmation effected by the act of parliament. If that be so, it is a legislative declaration that what is meant by accruing or coming, is, coming within the limitations of this act of parliament. Now, supposing it is not so, take the other supposition, and see whether anything more can be made of the case. I apprehend not; because, immediately following, in the same section, are other words describing the persons who are to be bound, thus,—"or any persons respectively to whom the premises are respectively before assured, conveyed, *or* limited,"—clearly showing that the words "come, descend, or accrue" by force of the act of parliament, are used upon the assumption that the act of parliament is effectual and

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does convey the estates. Whether the *act of parliament is effectual, and does convey the estates or not, appears to me, [*203 therefore, to be perfectly immaterial, because the language which is used must be construed similarly throughout. The 9th and 10th sections have been referred to; and it appears to me that they farther clearly show what was the meaning of the 8th section; because there powers are given to all the persons who take under the act of parliament, and those powers are given to persons described in this way,—mentioning George and John and the heirs male of their bodies respectively, "and also to and for all and every other person and persons to whom the said lands, tenements, hereditaments, and premises are by this act *limited* successively as aforesaid." It is quite obvious, construing this as a private conveyance, that the powers were intended to be given equally to George and John, and to their heirs male respectively, as to those persons who take estates carved out of the reversion in fee existing in Gilbert. Taking the whole therefore together, it is sufficiently clear by the fact that Bertram is issue male of George, who is expressly mentioned; and, if that be not sufficient, from the use of the word "limited" in precisely the same sense as the former words of the 8th section, on which a doubt has been raised; and, lastly, by the fact of the persons named in the act being prohibited suffering a common recovery of the lands, and not simply of any estate which they may take under the act of parliament. I must not, however, be understood as expressing the slightest doubt that the construction put on this act of parliament by my Lord and my Brother Williams is a valid construction, and that in that view also Earl Bertram, who executed that disentailing deed of 1856, was at the time restrained from alienation.

Hitherto my observations have applied altogether to the effect of the private act. Now, assuming that Earl *Bertram would have been [*204 bound by the effect of the 8th section of the private act of parliament, but for the Roman Catholic Relief Act, then comes the great, and to my mind only considerable question in the case, namely, whether the effect of the Roman Catholic Relief Act was to do away with that restriction. I should have been clearly of opinion that the Roman Catholic Relief Act did away with the restriction if I had been satisfied that this 8th section had been made out to be part of the general law against Roman Catholics. There could be no doubt, I should think, upon that subject. I should think there could have been no doubt that the 10 G. 4 was intended to sweep away all enactments by which Roman Catholics generally were in a different position, I will not say from the Protestant subjects of the realm, but from any other subjects of the realm; that is the purport of the recital of the 10 G. 4, c. 7. We are bound to give it effect to the utmost.

It appears to me, however, that this 8th section is clearly not applicable to Roman Catholics only, and confined to them; it is a section which is clearly applicable to all persons, of whatever religion they may be, who may become tenants in tail successively of this estate: and I might content myself with putting this question to any person who contended the contrary. Assuming that I am right in saying that it applied to persons of all religions, and assuming that the descendants of Earl George had become Protestants at the time of the passing of the 10 G. 4, c. 7, and that the descendants of the bishop, a

matter not impossible, had become and were Roman Catholics at the time of the passing of the 10 G. 4, how would the matter have stood? A Protestant would have been tenant in tail, and restrained from alienation (assuming him to have been an adult, and not to have taken the oaths within
*205] *the time prescribed by the 6 G. 1), and a Roman Catholic would have been tenant in tail in remainder, and, on failure of issue male of George, he would have been entitled to step in and enjoy the estates. That might have been the position of the parties here, if their religion had been as I have supposed. The effect of the 10 G. 4, c. 7, cannot be to affect a Protestant when it could not affect a Roman Catholic: it must be to put all on an equal footing: but the effect of the "Roman Catholic Relief Act," in the case put, would, according to the defendants' argument, be, that a Protestant tenant in tail would be thereby enabled to bar the remainder in a Roman Catholic, which would be absurd. The same absurdity would have followed if the remainder had taken effect, and the bishop's descendants had come into possession before that act. Then it is only necessary to see whether the 8th section is or is not applicable to Protestants as well as to Catholics. You have only to look at it and to examine the 4th section of the 11 & 12 W. 3, for the purpose of seeing that it is applicable to persons whatever their religion may be; and the 4th section of the 11 & 12 W. 3, as already pointed out by my Brother Williams, related, in the first branch of it, to persons who had been educated as Roman Catholics, or persons who professed the Roman Catholic religion, and, in the latter branch of it, to persons who were Roman Catholics, or who professed the Roman Catholic religion. The distinction is obvious; but I need not wait to discuss it, because it does not affect the present question; it related to persons who had been educated as Roman Catholics, or who professed the Roman Catholic religion. The 8th section of the private act is general. It says that no person shall alien unless he takes the preliminary steps. And I will put a case which will at once show that
*206] those general words in a general *enactment were intended to be construed generally. Suppose that young George, as he has been called, the son of George, had remained a Roman Catholic up to the time when he was of age, and consequently had not taken the oaths between eighteen and eighteen and a half. Suppose he attained twenty-one, and then he had become converted to the established religion, and had conformed, would he have been enabled to bar the estate tail? It is perfectly clear that he would not. According to the contention on the part of the defendants, the act would have applied to him, because he would have been a Roman Catholic at the time during which the oaths were to be taken as a condition of alienation, but, having subsequently changed to Protestantism, the act would still operate upon him. There is a case, therefore, in which a Protestant would be restrained from alienation. Therefore, the general words are not restrained by the operation of the proviso, because there is a case in which the proviso might apply, and in which the general words would be applicable to Protestants as well as to Roman Catholics. If, therefore, that effect could have been produced, the general words are applicable to Protestants as well as to Roman Catholics. It has suggested itself to my mind, that this is only analogous to that which was the decision of the majority of the Court of Exchequer, and the decision of the Court of Exchequer

Chamber, in the case of Miller *v.* Salomons, 7 Exch. 475,† Salomons *v.* Miller, 8 Exch. 778,† and because, although in this particular piece of legislation,—the 11 & 12 W. 3,—these oaths were, as to Roman Catholics, made the condition of enjoying estates, yet, with respect to various other civil rights, it was necessary to take the oaths, whether the person who took them was a Protestant or Roman Catholic. And the effect of one of these various statutes, which upon all *hands was admitted [*207 to be intended to apply, that is, intended in the mind of the legislature to apply to Roman Catholics alone, was, that, when the disabilities of Roman Catholics were taken away by the 10 G. 4, c. 7, by reason of the general words of the enactment, Jews were prevented from sitting in parliament; and it was only last year that that was modified. Therefore, even taking this 8th section with reference to the general state of the law, and construing it with reference to those statutes in which like general words were used, it must be held to be general in its application. Then, that being so, the Roman Catholic Relief Act of the 10 G. 4 is wholly inapplicable.

I should be content, so far as I am concerned, to leave the argument there. But there is another which has occurred to my mind connected with the course of legislation between the 11 & 12 W. 3, and the 10 G. 4, to which, perhaps, I ought to refer. By the 11 & 12 W. 3, the result was, as everybody knows who has attended to the argument. By the 18 G. 3, the effect of that statute of the 11 & 12 W. 3 was taken away, and Roman Catholics were enabled to enjoy, provided they took a certain oath which Roman Catholics could conscientiously take. From the time of the passing of the 18 G. 3, the Roman Catholics who took such oath had equal rights to enjoy, and of course to alien, as their Protestant fellow-subjects. The 18 G. 3, however, required that Roman Catholics should take the oath either within six months after the accruing of the title, or within six months after the passing of the act. Time passed on. The 31 G. 3 was passed, not with reference to the enjoyment of land, but for the purpose of enabling Roman Catholics to hold various offices from which they were disqualified before that act passed. It had no reference to land. Between that time and the 43 G. 3, it was discovered that there were *various persons who, mistaking the effect of the [*208 43 G. 3, supposing they could take the oath prescribed therein at any time, had omitted to take it within six months after the passing of the act or accruing of the title, so that titles which were affected by the 11 & 12 W. 3, at the time of the passing of the act, and with respect to which the oaths were not taken within six months after the passing of the act, and titles with respect to which the oaths were not taken within six months after the accruing of the title, were open to be assailed under the 11 & 12 W. 3. The legislature accordingly passed the 43 G. 3; and that act enabled a Roman Catholic, by taking the unobjectionable oath mentioned in the 18 G. 3, at any rate to put himself in the same position as a Protestant. Therefore, it is not true to say, that, at the time of the passing of the 10 G. 4, there was an incapacity or disability on the part of Roman Catholics to hold and enjoy or alien land. They had the right, upon taking oaths to which they could have no conscientious objection. It would be an abuse of terms to say that the holding or enjoying, or aliening of land, was a civil right which they did not enjoy. It seems to me, therefore, that the 1st section of the 10 G.

4, c. 7, is excluded not only by the consideration of the 8th section, in the view that I have endeavoured to present as affecting persons of all religions, but it also is excluded by the fact that Roman Catholics could before it passed hold and enjoy, and could alien lands by the express provision of the statute to which I have referred.

Accordingly, it appears to me that the only section of the 10 G. 4, c. 7, which can affect the case, is the 23d section. Now, what is the 23d section? The 23d section was passed for the purpose of giving Roman Catholics, without taking any oath at all, the same rights which they *209] enjoyed under the 18 G. 3 and *the 43 G. 3, upon taking the oaths prescribed by the former statute. That explains the whole enactment. That gives something for the 23d section to operate upon, which entirely satisfies its language, without leaving anything to operate upon such provisions as the 8th section of the 6 G. 1, even supposing that it was in its terms applicable to Roman Catholics only. I may here refer to a case which occurred before Lord St. Leonards, when Chancellor of Ireland,—the case of O'Connell v. O'Callaghan, 7 Irish Eq. Rep. 596. There, the effect of the 23d section was fully considered; and it was held by Lord St. Leonards that the effect of it was that which I have already mentioned. That completely explains the section, and without the necessity for disturbing this special provision, which, no doubt, was not in the contemplation of the legislature or the Roman Catholics affected by it at the time, because we find that there afterwards passed the 6 & 7 Vict. c. 28, which has been so often referred to, by which the proviso was taken away, and there remained the absolute restriction against alienation at the time of the deed of 1856, which was therefore a void deed.

I shall make but one further observation on the 8th section: I do not agree that the only object of the oaths mentioned in the 8th section was to test the religion of the individual; the only object was, not to test whether the person was a Protestant, or, rather to speak more correctly, to show that he was not a Roman Catholic; that was not the only object of those oaths; the object of the oaths was further that, the person who should be capable of aliening was a person who was attached to the reigning family; they were not merely to establish that the person was not a Roman Catholic, and therefore, according to the notions of those *210] times, a dangerous person to the state, but to test whether he *was a loyal subject. And, assuming that the oaths of supremacy and the declaration against transubstantiation had been entirely done away with by subsequent statutes, although the former certainly had not; for, we all know what the legislature did last session; still, unquestionably the oath of allegiance remains as it was settled at the revolution, and that is an oath which might be taken; for, unless the law has been altered by some statute of which I am not aware, any person in this kingdom that is of an age to understand it may be called upon to take that oath. In no point of view, therefore, is this 8th section one which comes within the provisions of the 10 G. 4, c. 7.

It appears to me that the estate in respect of which the plaintiff claims was well and effectually created by the 6 G. 1, c. 29, and that the disentailing deed executed by the late Earl Bertram in 1856, for the purpose of barring that estate, was a void deed. The rule, therefore, ought to be discharged.

BYLES, J.—Notwithstanding the ability, research, and industry with which the defendants' case has been both prepared and conducted, I am of opinion, after anxious attention and full consideration, that there is no solid defence to this action.

The whole case has been so fully expounded and illustrated by my Brethren who have preceded me,—especially by my Lord Chief Justice,—that I should, under ordinary circumstances, have thought it unnecessary to add a word; but, for the guidance of the defendants, and for their benefit, I think it is right they should know the grounds upon which the judgment of each member of the court proceeds. I will, therefore, very shortly state the reasons which have induced me to come to the conclusion that the plaintiff is entitled to our judgment.

*The plaintiff contends that the private act, 6 G. 1, c. 29, knits and annexes the estates to the title and dignity of Earl of Shrewsbury, to attend and wait upon the earldom, and that the statute in terms prohibits alienation. He admits that there was once a conditional power to aliene, but shows that that power not only was never exercised, but was repealed and taken away by another statute 6 & 7 Vict. c. 28, s. 32, before any alienation was attempted. [*211

These things being so, the plaintiff alleges that he has only to come into a court of law and prove (what is here admitted) that he is Earl of Shrewsbury, and he thereby proves his title to the estate. This is his position; and at first sight it certainly appears an impregnable one; but it is assailed by the defendants in three ways.

First, the defendants allege that the alienation by Earl Bertram was effectual against the plaintiff, because it is said that Earl Bertram had, under the settlement of the year 1700, an estate tail, with the ordinary incidents of an estate tail, including the power of alienation, which estate tail is anterior and paramount to any estate tail created by the settlement of the year 1718. It is added that the estate tail created by the deed of 1718 is alone made inalienable by the act of parliament.

But the act of parliament, 6 G. 1, after shortly reciting the settlement of 1700, and fully reciting the subsequent settlement of 1718, in terms expressly ratifies and confirms the later settlement, and all the uses, trusts, and estates therein limited. Now, the settlement of 1718, intended, as it was, partly to confirm and partly to vary the provisions of the settlement of 1700, and incorporated as it is in the act of parliament, and sustained by it, must have this effect,—it must necessarily rescind and cancel all those *provisions in the deed of 1700 which are inconsistent with the settlement of 1718, and must obliterate and destroy all those estates and interests created by the settlement of 1700 which are inconsistent with the estates and interests created by the settlement of 1718. [*212

But Earl Bertram enjoyed an estate tail in possession under the parliamentary settlement of 1718; whether he enjoyed under the settlement of 1700 also or not, at all events he enjoyed in possession under the parliamentary settlement of 1718, an estate in special tail male, which, for the purposes of this objection, must be treated as inalienable. How is it possible that he could also enjoy in possession at the same time an estate incompatible with it, that is to say, an estate in tail general, with the ordinary incidents of a power to bar and aliene? And, if it were possible to conceive the estate tail created by the settlement

of 1700 as co-existing with the estate tail created by the settlement of 1718 and by the act of parliament, yet the words of the 8th section would apply to both; for, it provides that "no heirs male of the body of George Talbot, nor any other person to whom any estate of inheritance shall come by force of the act of parliament, shall aliene." What? Not the *estate*, as my Brother Willes has already observed, but "any of the *lands settled*, or any other thing do which may tend to the disherison of the heirs inheritable by force of the settlement of 1718, or the act of parliament, or whereby any of them shall be barred or put from entry into the premises." Now, if, notwithstanding this enactment, the estate tail created by the deed of 1700 could be aliened, so as to interfere with the plaintiff's right of entry and present enjoyment, there would be a violation of the express words of the statute, and that, not to further,

*213] but to frustrate the clear intent of the *legislature, which was to prohibit alienation or any act tending to the prejudice of any taker under the parliamentary settlement of 1718.

The second objection raised by the defendants is this: they say that you must read the restraining clause in section 8 and the proviso together; and they add, that, so reading them, two things are clear,—first, that the restraint imposed on alienation by that clause applied to Roman Catholics only,—and next that it affected them no otherwise than by introducing into the act the mention of the general law of the land, or, in other words, declaring it; that, therefore, when, by the statutes passed for the relief of Roman Catholics, and especially by the act of the 10 G. 4, the Roman Catholic disabilities were removed, this restraining clause was in effect thereby repealed.

Now, in construing the act of parliament, 6 G. 1, I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record; but such discussions (they being by consent of counsel on both sides before us) may legitimately serve as hints for suggesting a point of view from which when the provisions of the act are once regarded those provisions will *of themselves* appear to be harmonious and clear. An act of parliament read from this point of view may at once interpret itself, although to its real history no authority be attributed, and the whole of that history be treated as conjecture,—conjecture not the less useful because it may happen to coincide with the fact.

Making this legitimate use of the history of the act, and no further use, we find that there was a family compact between the persons to whom the estate was limited by the duke's settlement and will, on the

*214] one hand, and the bishop and his issue, on the other. The *donees under the duke's settlement and will laboured under incapacities, and they thus needed legislative relief. The bishop on his part had no possible future right to the estate although he had a possible, future right to the title; he thus needed legislative assistance to annex the estates to the title: the Catholic donees, therefore, on their part agreed to extend the limitation of the estate to the bishop, and he on his part agreed to exert his court and parliamentary influence to free them by act of parliament from any incapacities. But the ultimate limitation to the bishop would have been of little use to him, if the power of alienation had been left to his predecessors in estate. Accordingly,

the bill was originally drawn with an absolute and universal prohibition of alienation by any one: the prohibition of alienation was afterwards partly relaxed by parliament with a view not to take away from the infant son of George Talbot and other infants in the like circumstances the inducement to conform to the established religion; but the proviso in favour of alienation was so framed (probably by those interested in preventing alienation) as that it should be pretty sure never to operate, for, an infant of eighteen is not likely of his own head to renounce the religion of his fathers, and less likely still to be trained in apostacy, that he might aliene the family inheritance. This provision has been justified by the event; for, although nearly one hundred and forty years have elapsed, no attempt has been made to take advantage of the proviso.

Turning now from this brief summary of the history of the act, to the act itself, we may expect to find there what, when our attention is directed to it, we do actually and independently find,—we find a clearly-expressed intention to annex the estates inalienably to the earldom.

*To say nothing of the title of the act (which I apprehend is no part of the act, and ought not in strictness to be referred to, according to the most recent decision on the subject, in the Court of Exchequer, in the case of Salkeld *v.* Johnson, 2 Exch. 283),† this annexation of the estate to the earldom, as a main object of the act, appears, first from the preamble, and next from the express exactment to that effect at the end of section 2, and again from the prohibition of alienation. There is, as I have said, an express and universal prohibition of alienation, with an exception, however, in favour of infants taking certain oaths. The restraining clause is so comprehensive in its terms and has so much light thrown upon it both by the preamble and by the 2d section, that it seems to me clearly to include, and to have been manifestly intended to include, both Protestant and Roman Catholic owners of the estate. You cannot construe it otherwise without doing grievous and arbitrary violence to the language. If so, the first branch of this objection fails. Nor, even if the restraining clause had been confined to Catholics, would such a restriction have been declaratory of the general law of the land, but would have been inconsistent with it. Amongst the *sylva sylvarum* of the repealed laws, in which we have so long wandered, the able counsel for the defendants have been repeatedly requested by the court to point out, if they can, any general statute which prohibits alienation by a papist as such, and makes that alienation absolutely void. None such has been pointed out; and, no wonder; for, the *acquisition* of estates, and not the *alienation* of them, by Roman Catholics was the danger at which the statutes against popery struck. No doubt, there was a disability to aliene in cases where Roman Catholics could not *take*, as in some cases they could not, by purchase, and in *others could not even by descent, for, no one can convey that which he has not. In other cases, there was an inability in Roman Catholics to aliene *to* Roman Catholics; but, in those cases, the inability was common to alienors, both Protestants and Catholics, and arose from the disability, not of the alienor, but of the alienee. There were other cases in which the claim of the next of kin, or heirs, claiming under the statute, would affect the title. But, so far as we can learn or discover, there was no general law prohibiting the alienation of land by Catholics,

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still less one making alienation utterly void after the decease of the alienor, as is done in this private act. How, then, can it be said that the special restriction on alienation, even if it had been confined to such alienors as were Roman Catholics, was but parcel of the general law of the land?

To fortify the conclusion that the 8th section was part of the general law, assistance is sought from the proviso engrafted on the 8th section, which proviso, it is said, is taken from the statute 11 & 12 W. 3, c. 4, s. 4. But, how can that be? Besides other distinctions between the two statutes, which have been pointed out at the bar, there is this grand distinction,—the oath and declaration mentioned in the statute of G. 1 are made a condition precedent to *aliening* an estate, but the oaths and declaration mentioned in the statute 11 & 12 W. 3, c. 4, s. 4, are made a condition precedent to *taking* an estate; the two statutes apply to different persons, the one to the alienor and the other to the alienee. There is this further distinction: the proviso in the statute of G. 1 is general in its terms; but the enactment in the 11 & 12 W. 3, c. 4, is, in terms, expressly confined to persons educated in the Roman Catholic religion, or professing it. An examination, therefore, of the proviso is far from fortifying the suggestion that the enactment of *the 6 G. 1 was a republication or a declaration of the general law.

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The restraint on alienation appears, therefore, from the act itself, compared with public acts, to have been no part of the general law, but a private compact against alienation, binding on successive owners of the estate, for the sake of knitting the estate to the earldom.

If that be so, then the statute 10 G. 4, c. 7, could not repeal the restraint. The preamble of the 10 G. 4, c. 7, is this: "Whereas, by various acts of parliament, certain restraints and disabilities are imposed upon the Roman Catholic subjects of His Majesty, to which other subjects of His Majesty are not liable,"—from which it would seem that this great statute contemplated relief from restraints and disabilities imposed on His Majesty's Roman Catholic subjects generally by the statutes affecting them generally, that is to say, created by public acts of parliament, properly so called, and by statutes *imposing* restraints, that is to say, operating without license and consent in invitos but that it should touch restraints applying to certain individuals, voluntarily adopted and submitted to by them as part of a contract, whether that contract be or be not embodied in an act of parliament, seems foreign to its object. Moreover, if the statute applied to private arrangements between parties of different religions, then, instead of introducing that equality of civil rights between Catholics and Protestants which was the great object of the act, it would introduce a startling inequality. Private restrictions in favour of Protestants would be avoided by the general words of the act, but private restrictions in favour of Catholics would remain valid. For example: a restriction as to a charitable endowment, that it should be enjoyed by a Roman Catholic if and so long as he should be a *Roman Catholic, would be valid: but a restriction in a charitable endowment, that it should be enjoyed by a Protestant if and so long as he should remain a Protestant, or a condition that he should be subject to any test of Protestantism, would be void. In a word, property might on this construction be tied up in

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favour of Roman Catholics as it could not be tied up in favour of Protestants.

For these reasons, I think the general Catholic relief acts do not touch the clause restraining alienation, or affect the condition precedent contained in the proviso.

Rightly, therefore, the Shrewsbury Estate Act, 6 & 7 Vict. c. 28, recites as still subsisting both the restraining clause in the act 6 G. 1 and the proviso. That statute, after reciting the restraining clause, repeals the proviso, and so in effect re-enacts the clause against alienation, and restores to it that universal and inevitable operation which the clause was originally intended to have. It was after this re-enactment of the restraining clause, and while it existed in its integrity and universality, that Earl Bertram affected to alienate.

Then it is alleged, thirdly, that this private estate act (the 6 G. 1, c. 29) is but a contract between the parties to it; that the limitations under which the present plaintiff claims were carved by the act of parliament out of a reversion in fee of Gilbert Earl of Shrewsbury; that Earl Gilbert was a Jesuit priest, resident in a Roman Catholic seminary abroad, and therefore laboured under a special incapacity to inherit, take, or enjoy under the 1 Jac. 1, c. 4, s. 6; and that, as he consequently had nothing, he could give nothing to the plaintiff, and the plaintiff could take nothing from him.

I do not at all agree to this view of the effect of a private act of parliament,—that it is necessarily to be construed as a mere contract. The rule that it is to be *construed as a contract or a conveyance is a mere rule of construction. You are, it is true, so to construe [*219 a private act as to effectuate the intentions of the parties, and bind their interests, and theirs only, as they intended them to be bound, and so as not to prejudice or affect the interests of strangers: but that is only if the act admits of such a construction. The legislature, in passing a private act, is as omnipotent as in passing a public act; and, if the words of the act do clearly and inevitably comprehend the estates or rights of strangers, a court of law must hold those estates or rights of strangers bound. Now, here, the statute treats Earl Gilbert, as having had a reversion in fee in himself; the act not only gives the plaintiff his estate out of that reversion, but expressly excepts Earl Gilbert out of the saving clause. Were the case, therefore, such that not only in law Earl Gilbert cannot be deemed to have consented, but that even in fact he never did consent, and had no estate as to which he could consent, yet he and that reversion are bound. Were the statute a tyrant, yet its decree, being clear, is irresistible.

But, supposing the act to be construed exactly like a mere contract, and to convey no more than such a contract between the parties to the act would convey, yet a statutory contract to which Earl Gilbert was a party would convey all that he had, or might have had, were it not for his personal incapacity; but, surely, when the legislature recognises what he has, and establishes what he does, and incorporates his contract into the statute law of the land, it impliedly, but very clearly, removes all his incapacity.

Lastly, it must not be assumed that Earl Gilbert, or any other in whom the reversion in fee was, would be a necessary party to a compact forming a proper foundation for a private act of parliament binding the fee.

*220] *Whoever had an estate tail in possession could in effect dispose of the reversion in fee by suffering a recovery. The power of the reversioner was nothing, and the value of the reversion in fee nothing. So valueless, indeed, is such a reversion, that it has been held that a reversion in fee expectant on the determination of an estate tail is not even assets for the payment of debts: see Comyns's Digest, *Assets* (B.). The estate tail, at the time of the passing of the 6 G. 1, was in the infant son of George, which infant was duly represented before the House of Lords by his next friend. Assuming Earl Gilbert, therefore, to have been utterly incapable, and not capacitated, or not even to have been a party to the arrangement, still parties were present and represented who were competent to bind the reversion in fee.

Whether, therefore, the evidence adduced to prove that Earl Gilbert was a Jesuit priest, residing in a Roman Catholic seminary abroad, was admissible or not, it becomes unnecessary to inquire. The third and last objection made by the defendants to the plaintiff's title seems to me, therefore, to fail.

The result is, that no solid answer has been given to the plaintiff's claim as Earl of Shrewsbury, to whom, as such, the estates have been given by act of parliament; and the rule must be discharged.

Rule discharged.(*a*)

(*a*) The judgment was pronounced in Trinity Term: but the case being about to be argued before the Exchequer Chamber, on appeal, the reporter thought it convenient to prepare it at once.

*221] *IN THE EXCHEQUER CHAMBER.

THE EARL OF SHREWSBURY *v.* SCOTT and Others. *Feb.* 18, 1860.

THE defendants having appealed against the decision of the Court of Common Pleas, the case was argued before Pollock, C. B., Wightman, J., Bramwell, B., Channell, B., Hill, J., and Blackburn, J., on the 1st, 2d, and 3d instant, by Sir *Richard Bethell*, A. G., for the defendants. The Court, without hearing Sir *Fitzroy Kelly*, for the plaintiff, took time to consider; and now their judgment was delivered by

POLLOCK, C. B.—This was an appeal from the judgment of the Court of Common Pleas on certain points reserved on the trial of the cause before the Lord Chief Justice Cockburn. The case is reported in the 6 C. B. (N. S.) p. 1. It was an action of ejectment brought to recover the mansion of Alton Towers, in the county of Stafford, and certain lands held therewith by the Earls of Shrewsbury.

At the trial, a verdict was directed for the plaintiff, subject to certain points of law arising upon the construction of various documents and acts of parliament referred to. In Hilary Term, 1859, a rule was obtained by *Shee*, Serjt., to enter a verdict for the defendants. Cause was shown against this rule in Trinity Term, by Sir *Fitzroy Kelly* (then Attorney-General), Mr. *Rolt*, Mr. *Manisty*, Mr. *Ellis*, and Mr. *Hannen;* and the rule was supported by *Shee*, Serjt., Sir *Richard Bethell* (the present Attorney-General), Mr. *C. Hall*, Mr. *Badeley*, and Mr. *Archi-*

bald. The hearing of the case occupied eight days. The Court of Common Pleas, by a *unanimous* judgment, delivered seriatim, discharged the rule.

The present Attorney-General has been heard *before us during a portion of three days on the appeal from the judgment of the Common Pleas. He has argued the points in favour of the plaintiff in error more elaborately perhaps than they were argued in the court below: but nothing new has been elicited; nor has any point been presented to our attention, which was not before the court below. While the argument was proceeding, we had an opportunity of considering it from day to day. At the close, we thought it would not be necessary to hear the counsel for the respondent; and, on the fullest consideration, we think it is not; and I have now to deliver the unanimous judgment of this court in favour of the plaintiff,—agreeing, as we do, with the Court of Common Pleas, that the rule to enter the verdict for the defendants ought to be discharged. [*222

It is unnecessary to state the facts of the case at length: they are fully set out in the preambles to the two private acts, 6 G. 1, c. 29, and 6 & 7 Vict. c. 28. From these recitals, it would appear, that, in the year 1700, Charles, Earl and Duke of Shrewsbury, by indentures of lease and release of the 30th and 31st of October, made a settlement of his manors, lands, &c., to the uses therein stated. At that period, by the 11 & 12 W. 3, c. 4, s. 4, persons professing the Roman Catholic religion, from and after the 29th of September, 1700, unless they took certain oaths and subscribed a certain declaration within six months of attaining the age of eighteen years, were (as to *themselves* only) made incapable of inheriting; and the next of kin which should be a Protestant was to have and enjoy the lands, &c., of such Roman Catholic. The branch of the Talbot family descended from John the tenth earl were then Roman Catholics. There was another branch, of whom William Talbot, Bishop of Salisbury, was the head, the members of which appear to have been Protestants.

Earl Gilbert, on the marriage of his younger brother *George, by indentures of the 3d and 4th of March, 1718, made another settlement of the estates; and to this settlement William Lord Bishop of Salisbury (afterwards Bishop of Durham) was a party. That settlement differed in some respects from the settlement of 1700: indeed, to effectuate all the objects of that indenture, it was deemed necessary to have a private act of parliament to confirm it. Accordingly, it was by the settlement of 1718 agreed that Earl Gilbert, George Talbot, John Talbot, William Lord Bishop of Salisbury, and Charles Talbot should endeavour to obtain a private act of parliament, and give their consent thereto, for settling the said manors, lands, &c., on the said William Lord Bishop of Salisbury, and the issue male of his body, after the death of Gilbert, George, and John, and failure of issue male of their bodies,—not according to *either* settlement, but,—"*in such manner as should be advised.*" Accordingly, a private act of parliament was obtained, which, after reciting both settlements, contains a recital that Earl Gilbert was desirous that the settlement should be *further extended* in manner thereinafter mentioned, and that the manors, lands, &c., should be annexed to and go along with the title and dignity of Earl of Shrewsbury. [*222a

With the above recitals, the private act 6 G. 1, c. 29, was passed: and we are of opinion, that, although it was merely a private act, it is, with reference to those persons and those matters with which it professes to deal, and which are within the scope of its enactments, of as much force, and as binding, as any public act of the legislature relating to the most important interests of the community.

Now, by that private act, the 6 G. 1, c. 29, s. 2, it was enacted, that, on failure of the issue male of George and John Talbot and Gilbert Earl of Shrewsbury, respectively, the lands (claimed in this action) shall be and remain to the use and behoof of every person (being issue *male of the body of the first Earl of Shrewsbury) to whom the title of Earl of Shrewsbury shall descend.

*222b]

The issue male of George, John, and Gilbert, respectively, *have* failed. The plaintiff (below) is *issue male* of the first Earl of Shrewsbury to whom the title has descended, and consequently he is entitled to the property in question as tenant in tail, unless something can be shown to disentitle him.

This mode of viewing the case renders it unnecessary to determine whether the settlement of 1700 and the estates thereby created continued in existence, notwithstanding the subsequent settlement of 1718 and the private act of 6 G. 1, or whether it is correct to say (a question rather of words) that they were abrogated, superseded, or set aside by the subsequent settlement and the private act of parliament. Nor is it necessary to determine the effect of the deed of 1718. *The governing instrument is the private act of parliament. It incorporates the two settlements (modifying the first); and they (controlled by the private act) become part of the parliamentary arrangement by the legislature.*

We think this view of the case is an answer to the points first presented to our attention by the learned Attorney-General, as counsel for the appellants, viz. *that Bertram Arthur Earl of Shrewsbury was tenant in tail under the settlement of* 1700, *and had a title paramount which was not affected, and could not be, by the settlement of* 1718, *and therefore not by the private act of* 6 *G.* 1 *which confirmed it, and (as was argued) did not touch the settlement of* 1700.

Settlements and conveyances can affect the estates only which the parties to them possess. It is a legal possibility that Earl Bertram may have had two estates in tail male of the lands in question,—one, under the settlement of 1700,—the other, under the settlement of 1718, carved out of the reversion *undisposed of by the settlement of 1700: and the two would present this singular result,—that the latter he could enjoy, but could not alienate; while the former he could (possibly) alienate, but could not enjoy. But the act of parliament deals with the *lands* themselves, and not merely with the estates (real or imaginary) which may be carved out of the fee-simple: and by the act the lands, manors, &c., are to go to the plaintiff (below).

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It remains to be considered whether anything has been done to disentitle the plaintiff (below) to that which the private act has so clearly given him by the section already cited. There is a particular and express clause, viz. the 8th, against any alienation of *the lands* by the descendants of George (son of Gilbert of Batchcoate), or of John, or of any person to whom any estate of inheritance in the lands shall come: which renders it unnecessary to say what might have been done, but for that

8th section of the private act, 6 G. 1, c. 29. But by that section nothing is to be done which may tend to the disherison of the heirs inheritable by force of the recited settlement of that act; and any such alienation shall, after the death of the alienor, be void, as was observed in the court below. The manors, lands, &c., are not to be aliened, to the disherison of the plaintiff (below). What the tenants may do with their estates is immaterial. It is enough to say they could not effectually do anything to the disherison of the heirs inheritable by force of the said recited settlement or of that present act of parliament,—*of which heirs inheritable the plaintiff (below) is undoubtedly one.*

If, then, the restraint upon alienation in clause 8 had been absolute and unqualified, the title of the plaintiff below would have been clear. But it was not absolute: it was qualified by a proviso, which enabled the tenant in tail,—who should within six months after he attained the age of eighteen years take certain *oaths and subscribe a certain declaration, and thenceforth continue a Protestant until he should attain the age of twenty-one, and, after attaining that age, while he continued to be a Protestant,—to alien the same premises, or any part thereof, as freely as he might have done if that act had never been made. [*222d

Now, it may be observed,—first, that no tenant in tail of the manors, lands, &c., has fulfilled the conditions required by the proviso to enable him to alienate. What effect the act for the relief of Roman Catholics had upon the 8th section and its proviso will be adverted to presently. But,—secondly, it may be observed (and this is far more important) that the proviso in the 8th section is absolutely repealed by the 32d section of the private act of 6 & 7 Vict. c. 28: and the effect of that repeal we apprehend to be, that, for all matters occurring subsequent to the repeal, the private act of 6 G. 1, c. 29, must be read as if there never had been any such proviso: see Kay *v.* Goodwin, 6 Bingh. 576 (E. C. L. R. vol. 19), 4 M. & P. 341. And, as the private act repealing the proviso was passed in the year 1843, and the disentailing deed was not executed till the year 1856, the power of alienation (if any ever existed under any circumstances) was not exercised until thirteen years after the repeal of the proviso to the 8th section, upon which alone it could (apparently) be founded, and was therefore utterly void on the death of Earl Bertram.

We are aware that a large portion of the argument of the counsel of the plaintiff in error was directed to prove that the 8th section of the private act of 6 G. 1, c. 29, was entirely swept away by the Roman Catholic Relief Act, 10 G. 4, c. 7. But, in our judgment, it was not; for, there is no allusion, direct or indirect, to the private act of 6 G. 1, c. 29, in the Roman Catholic Relief Act or in any of the acts at any time passed on the subject. But we are told, that, upon a large *and broad view of the statutes, and looking at the policy of the legislature as displayed and disclosed from time to time, the inevitable conclusion is that the 8th section was repealed and swept away as if it had never existed. We, however, come to a different conclusion: and, as the legislature in the year 1843 recognised the existence of the private act, by reciting it in the preamble of the 6 & 7 Vict. c. 28, and, more than that, dealt with it in the 32d clause, by repealing part of the 8th section, viz. the very proviso that is said to have been swept away by the Roman Catholic Relief Act, it cannot be that a private act of parliament affecting the succession to an inheritance, and which created [*222e

important rights and claims in certain persons designated in the act, is to be deemed merely by implication or inference to have been repealed, when parliament has itself, in language unmistakeable, recognised its continuance as a private act, and has dealt with it by distinctly repealing in terms the important proviso upon the true construction of which so much (no doubt) depended, until its repeal has rendered it unnecessary to construe it at all.

We think nothing can be more plain than that the repeal of the proviso in the 8th section of the 6 G. 1, c. 29, by the 6 & 7 Vict. c. 28, s. 32, was a legislative recognition that the act itself remained unrepealed, and that the 8th section (without the proviso) should from the passing of the 6 & 7 Vict. c. 28, operate absolutely in restraint of alienation. And, even if the private act of 6 & 7 Vict. c. 28 had not passed, we are of opinion that the 6 G. 1, c. 29, s. 8, was not repealed by the Roman Catholic Relief Act, 10 G. 4, c. 7.

It was, indeed, contended, from a comparison of the language of the 11 & 12 W. 3, c. 4, s. 4 (to which our particular attention was directed) with that of the proviso to the 8th section, that the 8th section was *222*f*] merely a part of the general law affecting Roman Catholics, *and was to be construed in conjunction with those statutes which created a general disability; and that, by implication and construction, the 8th section ought to be considered as repealed, when *they* were repealed. But we think we should not be justified in regarding the 8th section as part of the general law against Roman Catholics. The portion of it which resembles the language of the statute of W. 3 is enabling rather than disabling; and, though the 8th section (as a whole) is disabling, there is nothing to show that the 8th section was confined to Roman Catholics. In its terms it applies to all persons who might become tenants in tail by virtue of the private act of parliament.

We think that these considerations dispose of the points argued before us, in a manner to leave no doubt as to the judgment we ought to pronounce, and to render it unnecessary to advert to the cases cited. In our opinion, whether there was under the settlement of 1700 a prior estate, and paramount to the estate which Earl Bertram might (but for the statute) have taken under the settlement of 1718, we think the positive enactments of the statute vest the manors, lands, &c., in the plaintiff as tenant in tail, not under either settlement, but by virtue of the provisions of the act of parliament: and, we think, that, as the 8th section of the 6 G. 1, c. 29, was not repealed by the Roman Catholic Relief Act, but the proviso has been repealed in 1843, by the 6 & 7 Vict. c. 28, s. 32, the disentailing deed executed subsequently, in 1856, cannot prevent the right of the plaintiff (below) from prevailing. We therefore give judgment that the rule be discharged, in affirmance of the decision of the Court of Common Pleas.

I ought to add, that, in this judgment, we are unanimous, but that I alone am responsible for the reasons and the form in which they are presented.

Judgment affirmed.

*SMITH *v.* ROCHE. *April* 27. [*223

The declaration stated that the plaintiff was the mother of two illegitimate children of which the defendant was the father, that the plaintiff, having relinquished all immoral intercourse with the defendant, had at his request undertaken and then had the care and nurture of the said children, and that, in consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children, and to supply them with such things as should be necessary for their use and benefit, he the defendant promised the plaintiff to pay her the sum of 50*l.* a year for and during a time not yet expired:—Held, that the declaration disclosed a sufficient consideration for the defendant's promise.

The third plea stated, that, after the making of the promise and before any part of the money claimed by the plaintiff began to accrue or become due or payable, *one of the said children died*:—Held, no answer to the action.

THIS was an action for the breach of an agreement to pay for the support of the defendant's illegitimate children.

The declaration stated, that the plaintiff, being then sole and unmarried, and having theretofore always conducted herself with chastity and decorum, was seduced by the defendant, who then debauched and carnally knew the plaintiff, she then being so sole and unmarried as aforesaid, and by means of which said seduction and carnal knowledge the said plaintiff then became and was pregnant, and afterwards, and before the making of the promises thereinafter mentioned, was delivered of a bastard child, to wit, a daughter, which said child had been and was begotten by the defendant, and afterwards, and before the making of the promises thereinafter mentioned, was delivered of another bastard child, to wit, a son, which said last-mentioned child had been and was begotten by the said defendant, and is now living: that afterwards, and before the making of the promises thereinafter mentioned, the said plaintiff, being so sole and unmarried as aforesaid, and having wholly relinquished and given up all cohabitation and immoral intercourse with the defendant, had, at the request of the defendant, undertaken and then had the care and nurture of the said children; and thereupon, afterwards, in consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children, and to supply them with such things as should be *necessary for their use and benefit, he the defendant then promised [*224 the plaintiff, she then being so sole and unmarried as aforesaid, that he the defendant should or would pay or cause to be paid to the plaintiff the sum of 50*l.* a year *for and during a term which has not yet expired*,(a) to be paid quarterly, that is to say, on the 1st day of February, the 1st day of May, the 1st day of August, and the first day of November in each and every year during the time aforesaid, the first of such quarterly payments to be due and payable on the 1st day of February, 1853: Averment, that, although the plaintiff had done all things necessary, and all things had occurred and happened, and all conditions had been performed, necessary to entitle the plaintiff to have the defendant to pay to the plaintiff the said sum of 50*l.* a year by the quarterly payments thereinbefore in that behalf mentioned; yet the plaintiff in fact said, that afterwards, and before the commencement of this suit, a large sum of money, to wit, the sum of 62*l.* 10*s.* of the said yearly sum of 50*l.*, for one year and one quarter of another year, which elapsed before the

(a) These words were at the trial substituted for the following,—"during the life of the plaintiff."

commencement of this suit, became and was due and payable from the defendant to the plaintiff under and by virtue of the said promise of the defendant in that behalf, yet the defendant had not at any time paid the same, or any part thereof, to the plaintiff, and the said sum of 62*l.* 10*s.* and every part thereof remained wholly due and unpaid.

Third plea, to the first count,—that, after the making of the promise in that count mentioned, and before any part of the money in that count claimed by the plaintiff began to accrue or become due or payable, *one of the said children died.*

*225] *Demurrer, to the third plea, the ground of demurrer stated in the margin being,—"that the death of the said child does not afford any answer to the defendant's promise to pay the yearly sum for and during the life of the plaintiff." Joinder.

Hannan (with whom was *Petersdorff*, Serjt.), in support of the demurrer.—The declaration discloses a sufficient consideration for the defendant's promise. It will be contended on the part of the defendant that there was no consideration for the defendant's promise to pay the 50*l.* a year, inasmuch as the law cast upon the mother the duty and obligation of supporting her illegitimate offspring. The 71st section of the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, enacted that "every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, *and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen;*' and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: Provided always that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female." And s. 72 enacted, that, "when any child shall hereafter be born a bastard, and shall by reason of the inability of the mother of such child to provide for its maintenance become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry after the father of such child, apply to the next general quarter

*226] sessions of the *peace within the jurisdiction of which such parish or union shall be situate, after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance and support; and the court to which such application shall be made shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as to such court shall appear to be just and reasonable under all the circumstances of the case: Provided always that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction of such court: Provided also that such order shall in no case exceed the actual expense incurred or to be incurred for the maintenance and support of such bastard child while so chargeable, and shall continue in force only until such child shall attain the age of seven years, if he shall so long

live: Provided also that no part of the moneys paid by such putative father in pursuance of such order shall at any time be paid to the mother of such bastard child, nor in any way be applied to the maintenance and support of such mother." The mode of proceeding is somewhat modified by the 7 & 8 Vict. c. 101, ss. 1, 2, 3, and 6. The 2d section provides that "any single woman who may be with child, or who may be delivered of a bastard child after the passing of this act, or who has been delivered of a bastard child within the period of six calendar months before the passing of this act, may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within *the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the [*227 peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child: and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts." [BYLES, J.—The mother is chargeable for sixteen years, "if of sufficient ability;" the putative father for seven years only.] Yes. There have been several comparatively recent decisions upon the construction of contracts of this sort. In Jennings *v.* Brown, 9 M. & W. 496,† the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child and keep secret their connection: and it was held that the maintenance of the child was a sufficient consideration to sustain an assumpsit. The court there said: "The father might have had the child affiliated on him, and the consideration must be understood to be for ordinary provision. We think that a sufficient consideration." In Linnegar *v.* Hodd, 5 C. B. 437 (E. C. L. R. vol. 57), the father of an illegitimate child promised the mother, that, if she would abstain from affiliating the child, he would pay her 2*s.* 6*d.* per week for its maintenance: the mother did so abstain, and suffered the time limited by the statute for obtaining an order of affiliation to expire: and it was held that the promise bound the father, and that indebitatus assumpsit lay, the *consideration having been executed. So, here, it is implied that the mother will not affiliate [*228 the children, but will take upon herself their sole support and maintenance. The next case is Hicks *v.* Gregory, 8 C. B. 378 (E. C. L. R. vol. 65). There, the reputed father of an illegitimate child, upon ceasing to cohabit with the mother, wrote to her as follows,—"As I always promised that you and your child should never want, I will allow you 100*l.* a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you:" and it was held by Wilde, C. J., and Maule, J., that the letter disclosed a sufficient consideration for the promise to pay the annuity, viz. the mother's properly bringing up the child. It is true that Williams, J.,

did not assent to the judgment there; but the doubt which that learned judge entertained does not detract from the case as an authority here.(a) Crowhurst v. Laverack, 8 Exch. 208,† is also to a certain extent an authority for the plaintiff. There, the father and mother of an illegitimate child entered into the following agreement,—"Agreement made between L. of, &c., and S., single woman, respecting the maintenance of a certain illegitimate female child. L. agrees to pay 45*l.* to the child, as follows,—12*l.* to be paid down, and the remaining 33*l.* in four equal payments in four years,—the first of such payments, 8*l.* 5*s.* to be made on the 30th of December, 1836, and every succeeding 30th of December till the period of four years do expire: but, if the child should die
*229] before the four years do expire, the payments to *cease at such decease." The 12*l.* was paid at the time, and the agreement was placed in the hands of the attesting witness. The mother having afterwards heard that the father had got possession of the agreement, obtained against him an affiliation order for payment of a weekly sum, which was duly paid. Subsequently the mother married, and joined with her husband in an action against the father, one count of the declaration being for necessaries supplied to the child by her before her marriage, and another count for necessaries supplied by her and her husband after their marriage: and it was held, that, if the meaning of the agreement was that the father would make the stipulated payments if the mother would support the child, then the agreement was without consideration; but that, if the meaning of it was that the mother would undertake the sole maintenance, without affiliating the child, in which case there would be a good consideration, then the agreement had not been performed. "According to the literal construction of this agreement," said Parke, B., "the defendant undertakes to pay if the female plaintiff will support the child; and, in that case, there is no consideration for the agreement, since she was by law bound to do so. If the meaning is that she will undertake the sole maintenance of the child without affiliating it, in which case there would be a good consideration, then the agreement has not been performed." [WILLES, J.—Suppose the mother and child were out of the kingdom, what would be her legal obligation? Besides, the mother is only bound by law to maintain her illegitimate offspring provided she is of sufficient ability.] If the mother has by the terms of the contract taken upon herself a greater obligation than was already imposed upon her by law, that will be a sufficient consideration for the defendant's promise. Then, as to the
*230] third *plea, which is based on the assumption that the death of one of the children put an end to the contract altogether. It is submitted that it could not in any case afford an answer to any part of the claim. The contract is, that, in consideration that the plaintiff at the defendant's request had undertaken the care and nurture of the children, and that she would at the request of the defendant continue to take charge of the said children and to supply them with such things as should be necessary for their use and benefit, the defendant would pay the plaintiff 50*l.* a year. "Children" is nomen collectivum, embracing any number there might be. Suppose, instead of children, the

(a) The doubt of Williams, J., was, that the father only intended to confer upon the plaintiff (the mother) a bounty, which he might recall at pleasure.

word had been "family," would the fact of the family being reduced to one have made any difference in the construction of the contract?

Lush, Q. C. (with whom was *Tompson Chitty*), contrà.(*a*)—There is no consideration stated in the declaration for the defendant's promise,—the plaintiff's promise to maintain the children being no more than the law had already cast upon her, and there being no obligation legal or otherwise on the defendant. By the 71st section of the 4 & 5 W. 4, c. 76, the liability of the mother in respect of her illegitimate children is, not merely to maintain them, but to maintain them as part of her family. [COCKBURN, C. J.—That provision was not intended to apply to any but such as come within the scope of the poor laws.] The language is general. [COCKBURN, C. J.—The whole scope of the act has reference to the relief of the poor.] The ground of decision in all the cases cited on the other side, was, that there was something more to be done than merely maintaining the child. In Jennings *v.* Brown, part of the consideration was, that the connection should be kept secret; in Linnegar *v.* Hodd, that the mother would abstain from affiliating the child; and in Hicks *v.* Gregory, that she would conduct herself well, and bring up the child properly. Besides, in all these cases, the question arose upon the construction of the contract, and not upon demurrer. So, in Crowhurst *v.* Laverack, part of the consideration was assumed to be, the mother's abstaining from affiliating the child. [CROWDER, J.—Must we not construe this contract as meaning that the children were not to be affiliated?] The declaration should then have alleged that as part of the consideration. [COCKBURN, C. J.—How do you distinguish this case from Hicks *v.* Gregory? The very same argument might have been urged there that you are relying upon here.] Parts of the judgment in that case are very unsatisfactory. The Lord Chief Justice does not at all advert to the liability of the mother to maintain the child. That case was cited in Crowhurst *v.* Laverack, but without producing any impression. The third plea shows that the performance on the plaintiff's part of that which was the consideration *for the defendant's promise had become impossible. [WILLES, J.—Suppose this had been an annuity given by a will in these terms, for the support of the two children, would it cease or abate by the death of one?] The Court of Chancery in that case would probably construe the devise in favour of the survivor. [WILLES, J.—Suppose there be a recognisance of bail for two, and one dies?] That is a totally different question. If a guarantee were given for a thing to be done by two, and one of them died, the guarantee would before the late Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 3, be gone. The whole consideration must be performed. [COCKBURN, C. J.—Why is the payment

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(*a*) The points marked for argument on the part of the defendant were as follows,—

"That the third plea is good in law:

"That the first count of the declaration is bad in substance; that there is no sufficient consideration alleged for the defendant's promise in that count; that the children of the plaintiff being illegitimate, she was bound by law to support and maintain them, and no duty was cast upon the defendant to do so; that the moral obligation of the defendant to support the children was not a sufficient consideration for the defendant's promise:

"That, supposing the promise of the defendant to be founded on a sufficient consideration, then, as the consideration was the plaintiff's continuing to take charge of the said children, and to supply them with necessaries, the defendant was discharged from his liability by its being impossible for the plaintiff, by reason of the death of one of the said children, to perform the consideration for the defendant's promise."

of the 50*l.* a year to be limited to the joint lives of the two children? Is the surviving child to be left destitute?] The contract is indivisible: it is an entire contract for the payment of 50*l.* a year for the use and benefit of the two children.

COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to our judgment upon this demurrer. There are two questions,—first, whether the first count of the declaration discloses a good cause of action,—secondly, whether, assuming that it does, the third plea affords an answer to it. The action is brought to recover certain instalments of an annuity. The declaration, after stating that the plaintiff was the mother of two illegitimate children of which the defendant was the father, goes on to allege that the plaintiff, having relinquished and given up all cohabitation and immoral intercourse with the defendant, had, at the request of the defendant, undertaken and then had the care and nurture of the said children, and that thereupon, in "consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children and to supply them *with such things as should be necessary for their use and benefit, he the defendant then promised the plaintiff, she then being so sole and unmarried as aforesaid, that he the defendant would pay or cause to be paid to the plaintiff the sum of 50*l.* a year for and during a term which has not yet expired." It is contended that there was no consideration for this promise of the defendant, inasmuch as the law had already imposed upon the plaintiff an obligation to do that which is set forth as the consideration, viz., her having undertaken the care and nurture of the children: and, in support of this objection, reference has been made to the statute for the relief of the poor, 4 & 5 W. 4, c. 76, the 71st and 72d sections of which provide that the mother of a bastard child, so long as she remains unmarried or a widow, is bound to maintain it as part of her family until the age of sixteen or marriage, and define the extent of the liability of the putative father. But, when we look into the statutes, we find that this liability of the mother is to be taken with this qualification,—that she is of ability to maintain the child. If she be not of ability, the obligation as respects her becomes ineffectual and inoperative, and the maintenance of the child thus left destitute is cast upon the parish. Besides, the woman has a right to call upon the father to contribute to the support of his illegitimate offspring. Now, this contract would practically have the effect of depriving her of this latter advantage. The 7 & 8 Vict. c. 101, ss. 2, 3, and 6, secure to the mother assistance from the father, provided she is unable to maintain the child herself. She may go before the magistrate for an order upon him for that purpose; but the making of that order is in the discretion of the magistrate, and is to be exercised by him with a due regard to all the circumstances of the case,—one of *which circumstances would be the *ability or non-ability of the mother to support the child herself; another would be, whether or not the father had already made provision for that purpose. It would be monstrous to suppose that the magistrate, when he found that the father had already made a sufficient provision for the maintenance of his illicit offspring, should allow him to be harassed by an order of affiliation. Now, if the general effect of this contract would be to deprive the mother of that means of compelling the father to make

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contribution, it would throw upon her the obligation to maintain the children herself. The general effect of the contract is to cast that burthen upon her. If so, there is, independently of the statutes referred to, a good and sufficient consideration to support the defendant's promise; which may in effect be taken to be this,—"If you, the mother of my two illegitimate children, will continue to take charge of them, and to supply them with such things as may be necessary for their use and benefit, I will pay you 50*l.* a year." Read in that way, I think the declaration is good, and discloses a sufficient consideration for the defendant's promise, even assuming the proposition laid down by the Court of Exchequer in Crowhurst *v.* Laverack, 8 Exch. 208,† to be tenable, viz., that the obligation imposed upon the mother by the poor-law acts prevents her undertaking to maintain the child from enuring as a consideration for the defendant's promise to make the stipulated payments.

Then, as to the third plea, which sets up in answer to the declaration, that, after the making of the promise, and before any part of the money in the declaration claimed began to accrue or become due or payable, *one of the said children died.* The question is, whether, the contract being to pay 50*l.* a year for the maintenance and support of the two children, the death of one of them necessarily puts an end to it. When *we look at the circumstances set forth in the declaration,—that the plaintiff, being the mother of two illegitimate children of which the defendant was the father, had undertaken the charge of them, and, at the defendant's request, had further undertaken to continue to take charge of and to supply them with such things as should be necessary for their support; and that the defendant, in consideration of this, promised to pay the plaintiff 50*l.* a year,—I do not see, that, because one of the children has died, the plaintiff, who has done all in her power to perform the contract on her part, should be deprived of the benefit of it. It is unnecessary to say how long the annuity is to be payable: it may be for the plaintiff's life; but it is enough, for the purpose of the present plea, to say that it is for a term not yet expired. For these reasons, I am of opinion that a sufficient consideration is disclosed upon the face of the declaration, and that the third plea affords no answer to it. [*235

Crowder, J.—I am of the same opinion. Looking at the statement of the contract in the declaration, I think there is ample consideration on the face of it to support the promise. The objection is, that the consideration is insufficient, because the plaintiff has undertaken to do no more than she was already bound to do by the 4 & 5 W. 4, c. 76, s. 71. Now, without giving any opinion as to whether or not that statute has the application to the matter in hand which it is assumed to have, it appears to me, that, taking the argument to the fullest extent,—that, by force of the 71st section, the plaintiff was already bound to maintain the children as part of her family,—the consideration here goes far beyond that, and far beyond any obligation which the law has cast upon her. She undertakes to support the children in all events and for an unlimited time. *Suppose she should become so reduced in circumstances as to absolve her from the obligation imposed on her by the statute, that would not relieve her from this contract, to continue to take charge of the children and to supply them with all things necessary for their use and benefit. The consideration is clearly sufficient. [*236

I also perfectly agree with the Lord Chief Justice that the effect of the contract is that the plaintiff was to continue to support the children so that they should not be a burthen on the defendant: and that is an ample consideration for the defendant's promise, and is quite independent of any question arising upon the poor-law acts. The next question is, whether the third plea affords any answer to the declaration. It seems to me that it does not. Looking at the consideration and the promise alleged in the declaration, I find that the promise is not confined to the maintenance of the children: the way it is alleged is this,—The declaration begins with stating the intercourse resulting in the birth of two children, and that, the intercourse having ceased, the plaintiff had at the request of the defendant undertaken and then had the care and nurture of the children: it then goes on to aver, that, in consideration of the premises, and that the plaintiff would at the request of the defendant continue to take charge of the said children, and to supply them with such things as should be necessary for their use and benefit, he the defendant then promised the plaintiff that he would pay her 50*l.* a year, &c. I see no reason why the defendant should not for that consideration undertake to pay the 50*l.* a year. Then, one of the children having died, can the plaintiff prove that she has performed that which was the consideration for the defendant's promise? She has continued to take charge of the children and to supply them with all things neces-
*237] sary, so as to relieve *the defendant from the burthen of supporting them, until the death of them, and she still continues to support the surviving child. She has, therefore, done all she could do to perform her part of the contract. I therefore think the plea, which alleges that one of the children had died before any of the money claimed by the declaration became payable, affords no answer to the action.

WILLES, J.—I entirely concur in the opinions pronounced by my Lord and my Brother Crowder.

BYLES, J.—I am of opinion that the declaration in this case is perfectly free from objection. The obligation which the law casts upon the mother of an illegitimate child, is, to maintain it provided she be of sufficient ability to do so. The 71st section of the 4 & 5 W. 4, c. 76, which enacts that the mother of every child which shall be born a bastard, shall, so long as she shall be unmarried or a widow, be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen, seems to me to refer to the old statute of 43 Eliz. c. 2, s. 7, which provided "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, *being of sufficient ability*, shall, at their own charges, relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein." Now, an illegitimate child was not within that provision. It seems to me that the object of the
*238] *subsequent statute was, to compel the mother of an illegitimate child to maintain it in the same manner and to the same extent as the obligation was before imposed by law upon the parents of legiti-

mate children, viz., subject to her being of sufficient ability. Here, the obligation which the mother takes upon herself, is, to maintain the children solely and absolutely; and wherever they may be, and wherever she may be: and, further, she is to take charge of them,—such charge as is comprehended in the terms "care and nurture." There is, therefore, in my judgment, abundant consideration for the defendant's promise. As to the plea, it seems to me to afford no answer whatever to the declaration. There is no provision in the contract for the cesser of the annuity on the happening of the death of one of the children. The plaintiff has done all that in her lay to perform her part of the bargain. I should say,—though it is unnecessary to decide that,—that the mother's promise to supply the children with necessaries was to continue so long as either of the children should live; but that the annuity should continue to be payable to her notwithstanding the death of both. It seems to me to be precisely the same as if the defendant had paid a sum in gross. In that case, he clearly could not have maintained an action to recover back any part of the money if one or both the children had died. For these reasons, I am of opinion that our judgment must be for the plaintiff upon both grounds. Judgment for the plaintiff.

*THE HODDESDON GAS AND COKE COMPANY (Limited), App., HASELWOOD, Resp. *April* 29. [*239

There is no obligation upon a gas company registered under the 19 & 20 Vict. c. 47, to continue to supply a customer with gas for any particular period: nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the company being the only one in the neighbourhood, afford any ground for implying a contract to that effect.

THIS was an appeal against a decision of the judge of the Hertford county court on a plaint in which William Haselwood was plaintiff and The Hoddesdon Gas Company were defendants.

The plaintiff was the proprietor of a large school at Hoddesdon, having between sixty and seventy boys. The school had been for several years lighted and heated with gas supplied by meter to the plaintiff by the defendants. The defendants are a company having limited liability under the 19 & 20 Vict. c. 47, and have been in the habit of supplying the town of Hoddesdon with gas since 1849, and have the sole and exclusive supply of gas at that place. The company have no special act.

The plaintiff sought to recover the sum of 30*l.* for loss and damages sustained by him by reason of the defendants' wrongfully cutting off the gas from his school on the 4th of May, 1859, contrary to the contract between him and the company. The cause was tried on the 25th of May last, with a jury, when the following evidence was adduced on the part of the plaintiff:—

William Haselwood, the plaintiff, stated that he lived at Hoddesdon, and kept a school there; that the defendants had supplied his school with gas from the year 1849 up to the 4th of May last; that he was in the habit of paying for the gas quarterly, according to accounts rendered to him by the company, viz. on the 1st of February, the 1st of April, the 1st of August, and the 1st of November; that he also hired of the

*240] company a meter, at 5*s.* a year, but paid for it *quarterly. [The quarterly accounts, and receipts for gas and rent of meter, given by the company to the plaintiff, were put in and read.] That on the 27th of January last, being four days before the end of the current quarter, the secretary to the company called to look at the meter, and remarked that it had not registered so much as in the corresponding quarter in the previous year, which ended on the 1st of February, 1858; that he looked at the meter, and found that it stood at 110,800 feet; that on the 1st of November, 1857, it stood at 105,700, showing the consumption for that quarter, less the four days, as indicated by the meter, to be 5100 feet of gas; that the consumption for the corresponding quarter ending on the 1st of February, 1857, was 17,800 cubic feet; that the secretary said he was not at all satisfied at such a difference, and that he should charge considerably more than the meter indicated; and that he (the plaintiff) received the following letter from the company on the 5th of February, 1858:—

"Hoddesdon Gas and Coke Company (Limited).

"Board Room, 5th February, 1858.

"Sir,—The Secretary having reported the quantity of gas registered by the meter in your school during the last quarter, which to the directors is very unsatisfactory, they have to request you will allow their man to remove it on Saturday morning at 11 a. m. for the purpose of testing its accuracy. "S. WARNER, Chairman."

To this letter the plaintiff sent the following reply, addressed to the chairman:—

"Hoddesdon, February 5th, 1858.

"Sir,—The discrepancy in the quantity of gas consumed, comparing it with the consumption of last year, may be fairly accounted for by the fact of not having occasion to use our gas-stoves the present mild season *241] *until within the last ten days: indeed, Mr. Allen only fixed them last week. I will not permit your man to remove the meter: but I have no objection to Mr. Hunt doing so for the purpose of testing its accuracy, sending it to the maker of the meter for that purpose: and, under any circumstances, I am willing to abide by the quantity consumed in the corresponding quarter of former years prior to the introduction of the stoves. "WILLIAM HASELWOOD."

The plaintiff further stated, that, on the 8th of February, the meter was taken away by Mr. Hunt and Mr. Ship, and a new meter put up on the 15th of February; that he paid into court 8*l.* 18*s.* 9*d.* in a cross-plaint in this court (then standing for trial), for the quantity of gas as indicated by the meter on the 27th of January, and also for 2000 feet in addition from the 27th of January until the 15th of February; that he disputed the difference, 1*l.* 1*s.* 9*d.*, claimed by the company for 2900 feet; that, on the 27th of April, he received a letter from the defendants, and sent a letter to the chairman, dated the 25th of March, 1858, as follows:—

"To the Chairman of the Hoddesdon Gas Company.

"Sir,—Your secretary has charged my gas for the quarter ending February 1st at 10,000, whilst the meter gave 5100. Now, I can find no reason that the latter quantity should not be correct. Your manager

has inspected the meter weekly since the 16th of February, and found the consumption, with two gas-stoves going, 1000 weekly. From the 1st November to our school breaking up on the 16th December, in consequence of the mild season, our stoves were not in operation or fixed, and our consumption then would be about 300 weekly from the 16th December to the 26th January. Our vacation we do not light the school *premises: therefore, taking the consumption from November 1st to December 16th, seven weeks, at 300 would be 2100, [*242 and from January 26th to February 15th, three weeks at 1000, 3000, would make the total 5100. A check for the proper amount may be had by your manager at any time. "W. HASELWOOD."

On the 16th of April, the plaintiff received a letter from the Gas Company as follows:—

"Hoddesdon Gas and Coke Company (Limited),
"16th April, 1858.

"Sir,—I beg to inform you it was resolved at a meeting of the directors held this day, that the gas account as furnished to you from the last meeting, amounting to 7*l.* 13*s.* 9*d.*, bead hered to, the directors feeling fully satisfied it was under the actual consumption. To prevent further unpleasantness, it is requested the amount be paid forthwith.
"S. WARNER, Chairman."

On the 24th of April, the plaintiff enclosed the defendants a check for 5*l.* 17*s.*, which he conceived to be all that was due to them; and, on the 27th, he received a letter from the secretary, as follows:—

"27th April, 1858.

"Sir,—The directors beg to acknowledge your note addressed to their chairman, and to inform you they are fully convinced the charge made for gas from November 1st to 15th February, is less than the actual consumption. Under these circumstances, they will feel obliged by your forwarding the balance. Your failing to do so before the 3d of May will compel them to discontinue the supply of gas from that date."

Some further correspondence took place between the plaintiff and his attorney and the secretary of the *company, which resulted (the plaintiff declining to pay what the company demanded) in the [*243 supply of gas being cut off on the 4th of May, 1858.

Evidence was given by the plaintiff of the cost of putting up the gas-stoves, which, in consequence of the defendants' refusal to supply him (there being no other gas-works in the town), had become useless.

One of the plaintiff's witnesses, a gas-fitter, who was present when the meter was removed on the 8th of February, stated, on cross-examination, that the company's manager on that occasion called his attention to the condition of the connection of the inlet-pipe with the meter; and that he judged, from the general appearance of the meter, that the pipe connecting it with the main had been disconnected from the meter and connected again in a rough and unbusiness-like manner.

On the part of the defendants, it was submitted that there was no obligation on them to continue to supply the plaintiff with gas after the expiration of the notice contained in their letter of the 27th of April;

and the learned judge was pressed to nonsuit the plaintiff; but he declined to do so.

The defendants then proved, by their secretary, that they were a company duly registered under the 19 & 20 Vict. c. 47, and their deed of settlement was produced; and that it was their practice, when the consumer fails to pay for the gas on demand, to give him a week's notice, and then to cut off the supply: and it was proved that this practice also prevailed with the gas companies in London. They also called their manager, who stated, that the appearance presented by the connecting-pipe clearly showed that it had been frequently disconnected from the meter, the worm of the screw being much worn; and that no person has any right to interfere with any pipe-connections with the meter, without a servant of the company being present.

*244] *In leaving the case to the jury, the judge said that there was evidence to go to them of a contract to supply the plaintiff with gas, which could not be determined without proper notice; that, in this case, the gas was cut off after a week's notice, when the amount claimed was in dispute; that it should be remembered that the company had an absolute monopoly in the supply of gas, and the plaintiff could not tell whether they would ever supply him again; and that, if they were of opinion that the defendants were not justified in cutting off the gas, they would find a verdict for the plaintiff. As to the damages, he observed that no offer had been made to restore the supply, and that he must assume that the plaintiff had been put to great expense in fitting up the stoves, and that it would cost a considerable sum to restore the premises to their former state; that they had had evidence of this; and that they must take it into consideration, and give the plaintiff the amount claimed, or such sum as they should think him entitled to for the injury he had sustained.

The jury returned a verdict for the plaintiff, damages 30*l.*

The defendants appealed on the following grounds,—"first, misdirection,—secondly, the reception of evidence which ought to have been rejected,—thirdly, that the verdict was against evidence,—fourthly, that the judge should have nonsuited the plaintiff, or directed the jury to find for the defendants, as there was no evidence to go to the jury in support of the plaintiff's case; and also that the judge was wrong in leaving it to the jury to say whether the defendants acted wrongfully in cutting off the gas from the plaintiff's premises, that being for the court, and not for the jury; and also that the judge erred in telling the jury, that,

*245] in estimating the damages, they might *take into their consideration the amount claimed for the expense the plaintiff had incurred in putting up the stoves and gas-fittings, and also in allowing evidence to be given of the sum so expended, inasmuch as that was not the necessary and natural consequence of the defendants' act.

Lush (with whom was *Cod'l*), for the appellants.(*a*)—The facts are

(*a*) The points marked for argument on the part of the appellants, were as follows:—

"1. That there was no contract proved by which the company were liable to supply gas for any certain time:

"2. That there was no evidence of any contract by the company to supply gas for any specific period, and that the company might have discontinued the supply at any time, without notice:

shortly these:—The defendants, who are traders in gas, not incorporated by any special act of parliament, in the year 1849 agreed to supply the plaintiff's house with gas. The plaintiff, at a cost of about 30*l.*, put up the necessary apparatus and fittings for receiving the gas. The supply was continued down to the month of May, 1858. For the quarter ending the 15th of February in that year, the meter, in the opinion of the defendants, indicated less gas than had been consumed; and, partly by taking into consideration the quantity consumed in the corresponding quarter of the previous year, and partly by guess, they added a certain number of cubic feet to the quantity so indicated, and charged the plaintiff with the number of feet so made up. The plaintiff refused to pay the *full amount so charged, and, while that [*246 matter was in dispute, the defendants cut off the supply. The question is, whether under the circumstances they were justified in so doing. [COCKBURN, C. J.—What contract is there to supply? and for how long? I see none. How does this case differ from that of any other tradesman,—a butcher or a baker, for instance,—who is at liberty at any moment to discontinue the daily supply of a customer?] There can be no difference. [WILLES, J.—It must be remembered that the defendants have the monopoly of the supply of gas to this town.] As there is no contract to supply for any specific time, so neither is there any duty or obligation of any kind cast upon the company to continue the supply. There is no act of parliament. At all events, they could not be bound to continue the supply beyond the period indicated by their notice of the 27th of April. The direction of the judge as to the evidence also was clearly wrong.

Baylis, for the respondent.—The relative position of the parties and the surrounding circumstances must be looked at to see whether there was not an implied contract to continue the supply of gas, at all events, for a reasonable time. Express contract, it must be admitted, there was none. [COCKBURN, C. J.—What are the surrounding circumstances from which you would imply a contract?] The plaintiff has been supplied with gas by the company for several years, and he has been put to considerable expense in erecting stoves and fittings. The supply has hitherto been paid for quarterly; and it is but reasonable, that, like a hiring or a tenancy, it should be determinable only by a reasonable notice: Baxter *v.* Nurse, 6 M. & G. 935 (E. C. L. R. vol. 46), 7 Scott N. R. 801. [COCKBURN, C. J.—Suppose an ordinary tradesman's bill to have been paid quarterly for a long series *of years, could [*247 you infer from that a contract for a quarter's notice before discontinuing the supply? WILLES, J., referred to Huffell *v.* Armistead, 7 C. & P. 56 (E. C. L. R. vol. 32).] In Chitty on Contracts, 5th edit. 21, the rule is thus stated,—"It is clear that a promise to a particular effect may be implied in any given case from the circumstance of the parties having invariably, on former and similar occasions, adopted any particular terms or course of dealing." It is not an immaterial circumstance here that the plaintiff hired the meter by the year. It is

"3. That the company were not bound to supply the gas after the expiration of the notice contained in the letter of the 27th of April, 1858:

"4. That the [evidence of] special damage was not the natural and necessary consequence of the gas being discontinued, and was therefore inadmissible, and that the ruling of the judge was erroneous."

submitted that there was abundant evidence of an implied contract on the part of the company that the supply should not be suddenly stopped. [WILLES, J.—There might be something in your argument, if the supply had been causelessly stopped in the middle of a quarter: but here the plaintiff had notice that his supply would be discontinued at the end of the quarter because he declined to pay the company's demand.] Because the plaintiff would not submit to an extortionate demand. [COCKBURN, C. J.—Could you compel your oil merchant to continue to supply you with oil against his will? What difference is there in this respect between oil and gas?(*a*)] The company call themselves The Hoddesdon Gas-Light and Coke Company; and they have the monopoly of the neighbourhood. This may be assimilated to the case of an ancient mill, where the rights and obligations of the tenants and of the mill-owner are reciprocal. The London gas companies have by their acts of parliament power to cut off the supply.(*b*) [CROWDER, J.—The company have no otherwise a monopoly here but because they happen to be the only manufacturers of the article in the place. Suppose there were a
*248] concern calling itself the Hoddesdon *Brewery Company, could you say, that, because the company so chose to designate itself, it thereby became bound to supply all the Hoddesdon people with beer? Suppose this company chose to discontinue business, would their obligation continue?] That case might fall within the principle of the dictum of Parke, B., in Burton *v.* The Great Northern Railway Company, 9 Exch. 507.†

Codd, in reply, was stopped by the court.

COCKBURN, C. J.—I am of opinion that our judgment must be in favour of the appellants. The learned judge of the county court, it seems, put it to the jury that there was evidence of a contract on the part of the company to supply the respondent with gas, which could not be legally determined without notice. I think that was erroneous. I see no evidence whatever of a contract. It is said that a contract need not be express, but may be implied from the surrounding circumstances. That, no doubt, is so in many cases: but there are no surrounding circumstances here to warrant any such inference as the judge has drawn. What are the facts? The company is formed for the purpose of supplying the town and neighbourhood with gas. The respondent, being desirous of having his premises lighted and warmed with gas, adapts them for its reception by the putting up of stoves and fittings, and hires from the company a meter for the purpose of measuring the quantity consumed. I see nothing that was to bind the respondent to take gas for a single minute longer than he was minded so to do. If there be no implication of a contract on his part to take, so neither could there be any implication of a contract on the part of the company to continue the supply for any definite time. I am fully alive to the arguments of
*249] *inconvenience which have been suggested by Mr. *Baylis;* but the same sort of argument would equally be applicable to an infinite variety of articles besides gas, which the comfort and convenience of life render necessary to the consumer. It is altogether a question of degree. We cannot imply a contract from the accidental circumstance of this company having a monopoly of the supply of gas to this

(*a*) Or between gas and *coke?*

(*b*) See the 16th and 17th sections of the Gasworks Clauses Act, 1847, 10 & 11 Vict. c. 15.

neighbourhood. I see nothing whatever to bind either the one party to take or the other to furnish the supply any longer than their convenience, or their caprice, if you will, may induce them to take or to supply.

CROWDER, J.—I also think that the judge was wrong in telling the jury that there was evidence from which they might imply a contract for the supply of gas until some notice was given to determine it. Where a gas company is incorporated by an act of parliament, there is usually an express obligation imposed upon it to continue the supply until a certain notice is given. But this is not a company so incorporated. It happens that this company are the sole manufacturers of gas in the town in question: and we are called upon thence to infer an obligation or a contract to supply. I see no ground whatever for any such inference. The judge ought to have nonsuited the plaintiff.

WILLES, J.—I am of the same opinion. I cannot see how any contract to continue the supply of gas generally, or until notice, can be inferred from the circumstances stated in this case. If at any point of time a contract could be implied, it would be implied from the fact of the respondent having incurred the expense of putting up the gas-fittings and stoves. I apprehend nobody could doubt that it was perfectly competent to the company to decline to commence to supply the *respondent with gas. Having commenced it, was there any [*250
implied contract to continue it? If there was, for what time was it to endure? If for a quarter of a year or a year, it is manifest that the consumer would not have an equivalent for the expense he had incurred at the outset. The only reasonable contract that could be implied would be, to continue the supply so long as the fittings should last, or until the consumer had had a sufficient enjoyment thereof to repay him for the expense thereof. What a complicated sort of contract that would be to imply for the parties! And yet it is the only one that could be implied. Seeing that there is this difficulty, the only conclusion I can come to is that there is no contract at all, except that the supply is to be determined at the will and pleasure of either party. The circumstance of the meter being hired at a yearly rent, and of the gas-accounts having always been paid quarterly, amounts to nothing. I have already referred to a case (Huffell *v.* Armistead) to show, that, in the case of a tenancy, the mere fact of the payments having been made weekly will not warrant the inference of a contract for a week's notice to quit. If even the respondent was entitled to reasonable notice, he is put out of court by the notice which was served upon him before the end of the quarter.

BYLES, J.—I am of the same opinion. I can add nothing to what has been said by my Lord and my two learned Brothers.

Judgment of nonsuit.

*251] *BERNSTEIN *v.* BAXENDALE and Others. *April* 16.

It is impossible with precise accuracy to define what are "trinkets" within the meaning of the 1st section of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68.

But, *semble*, that the closest approximation is this,—that they must be articles of *mere ornament*, or, if *ornament* and *utility* be combined, the former must be the predominating quality

For instance, *bracelets*, *shirtpins*, *rings*, *brooches*, and *ornamented tortoise-shell* and *pearl port-monnaies*, however small their intrinsic value, are "trinkets."

So, *silk watch-guards* are "silks in a manufactured state," within the act.

Also, *smelling-bottles*, and the like, are "glass," within the act.

THIS was an action against the defendants, who were common carriers trading under the firm of Pickford & Co., to recover the value of certain fancy articles contained in a package or box which had been delivered to them by the plaintiff to be carried from London to Bristol, but which had been lost through the defendants' negligence.

The account of the goods mentioned in the declaration, which was delivered pursuant to a judge's order, was as follows:—

			£	s.	d.
6	doz.	Ivory bracelets	24/-	7	4	0
6	"	Black bracelets	12/-	3	12	0
6	"	Ditto	18/-	5	8	0
6	"	Silk guards	15/-	4	10	0
6	gross	*Dress buttons*	45/-	13	10	0
2	"	*Pearl studs*	15/-	1	10	0
3	doz.	Agate bracelets	60/-	9	0	0
24	"	Ivory bracelets	21/-	25	4	0
12	"	Ivory bracelets	7/-	4	4	0
6	"	Shirt pins	18/-	5	8	0
6	"	Common gilt rings	12/-	3	12	0
12	"	Brooches	15/-	9	0	0
7	"	Bracelets	27/-	9	9	0
15	"	*Leather port-monnaies*	18/-	13	10	0
12	"	*Ditto*	33/-	19	16	0
6	"	*Ditto*	48/-	14	8	0
3	"	Tortoiseshell ditto	72/-	10	16	0
1½	"	Pearl ditto	96/-	7	4	0
7	"	*Ditto*	12/6	4	7	6
2	"	*Patent ditto*	27/-	2	14	0
2	"	*Ditto*	36/-	3	12	0
2	"	*Ditto*	48/-	4	16	0
2	"	*Russia ditto*	72/-	7	4	0
2	"	*Leather cigar cases*	36/-	3	12	0
2	"	*Ditto*	84/-	8	8	0
1	"	*Ditto*	108/-	5	8	0
1½	"	*Ditto*	48/-	3	12	0
3	"	German silver boxes	24/-	3	12	0
2	"	Ditto	33/-	3	6	0
1	"	Ditto	45/-	2	5	0
6	"	Ditto, gilt	9/-	2	14	0
3	"	Smelling bottles	22/-	3	6	0
2	"	Glass flagons	30/-	3	0	0
			£229	1	6	

The defendants paid into court 106*l.* 7*s.* 6*d.* to cover the items in italics in the above account; and, as to the residue, they defended on the ground that the nature and value of the contents of the package were not disclosed, as required by the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1, which enacts that no common carrier for hire shall be liable for the loss of any articles of the description following, inter alia, "jewelry, watches, *trinkets*, gold-plated articles, *glass*, *silks in a manufactured or unmanufactured state*," contained in any parcel or package which shall have been delivered to be carried for hire, when the value of such articles shall exceed 10*l.*,—unless, at the time of the delivery thereof at the office, &c., of such common carrier for the purpose of being carried, the value and nature of such articles shall have been declared by the person sending or delivering the same.

*Byles, J., before whom the cause was tried at the sittings in London after last Trinity Term, was of opinion that the bracelets, [*253 shirt-pins, gilt rings, and brooches, were "trinkets," and the smelling-bottles and glass flagons were "glass," within the meaning of the statute; but that the tortoise-shell and pearl port-monnaies and the German-silver boxes were not "trinkets," nor the silk watch-guards "silks." He, however, thought it more convenient to direct that a verdict should be entered for the plaintiff for the full amount claimed, reserving leave to the defendants to move to enter the verdict for them if the court, upon an inspection of the several articles, should think that all were unprotected by the statute, or to reduce the damages to the amount of the value of such of them as they should think not to be within the act.

Bovill, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.—He referred to the Attorney-General *v.* Harley, 5 Russ. 173, where "ivory fans" and "seals" were held to be "trinkets;" and to Davey *v.* Mason, Carr. & M. 45 (E. C. L. R. vol. 41), where Lord Abinger ruled that an "eye-glass and gold chain" did not come within the description of "trinkets," by reason of their being articles of utility as well as ornament.

Petersdorff, Serjt., and *Quain*, now showed cause.—The recital of the act shows plainly the description of things it was intended to embrace,—"Whereas, by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, wagons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of *great value in small compass*, much valuable property is rendered liable to depredation, and the responsibility of mail-contractors, *stage-coach proprietors, [*254 and common carriers for hire is greatly increased; and whereas, through the frequent omissions by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail-contractors, &c., by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail-contractors, &c., with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses." The first section then proceeds to enact, "that no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following,—that is to say, gold or silver

coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, *trinkets*, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, *glass*, china, *silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials*, furs, lace, or any of them contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at the office, *255] *warehouse, or receiving-house of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter (s. 2) mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." None of the articles in question fall within this enactment. They are not articles of any intrinsic value. The definition of "trinket" in all the Dictionaries carefully excludes articles of utility, such as these bracelets, brooches, and pins, which are mere fastenings for dress. Webster describes it as "a small ornament, as a jewel, a ring, or the like;" Richardson, "any small piece of ornament or decoration, of more ornament than use;" and Dr. Johnson, "ornaments of dress; superfluities of decoration:" and this latter is adopted by Bailey. [COCKBURN, C. J.—Richardson's definition seems to me to be the best,—a thing "of more ornament than use." Can a thing be said to be the less an ornament, because there may be superadded to it the quality of utility?] In Davey *v.* Mason, Carr. & M. 45 (E. C. L. R. vol. 41), Lord Abinger ruled that silk dresses made up for wearing are not "silks," nor an eye-glass with a gold chain attached to it, for the purpose of being hung round the neck of the wearer, "trinkets," within this enactment. [BYLES, J.—Would you say that gold spectacles are not trinkets?] Certainly. [COCKBURN, C. J.—Perhaps spectacles can hardly be an "ornament" independently of their utility.] In Peters *v.* Fleming, 6 M. & W. 42,† a "breast-pin" and a "gold watch-chain" were held to come within the description of necessaries for which an infant might *256] *contract. The silk guards are not "silks" within the statute. "Silks," according to Webster, means "cloths made of silk," not every article into the composition of which silk enters. The word clearly never could have been intended to apply to every article made of silk which a carrier may be called upon to carry. Then, as to the tortoise-shell and pearl port-monnaies, they are clearly articles of use exclusively: the circumstance of their being more or less ornamented cannot change their character. [BYLES, J.—In The Attorney-General *v.* Harley, 5 Russ. 178, a testatrix directed all her jewels to be sold to pay her debts,

except a particular ring set with diamonds, which she gave to a friend, and she then bequeathed the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.: by a subsequent testamentary disposition, she gave all her *trinkets* of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directed her jewels to be sold: afterwards, by a third testamentary instrument, she bequeathed to C. all her *trinkets* and pearls, with various specific articles, among which were some rings set with diamonds. The testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, and of various diamond rings, besides those which were specifically bequeathed: and it was held, that the diamond necklace and cross, and the diamond rings not specifically mentioned, were to be sold, and did not pass to B.; and that the pearl necklaces passed to B., under the gift of "necklaces of every description," and did not pass to C. under the gift of "pearls."] The question there was, what was the *intention* of the testatrix, not what was the proper description of the article per se. The result of the cases seems to be, that, if the articles are purely articles of personal decoration or adornment, they are trinkets; but that, if *they have a use, the mere addition of ornament will not make them trinkets. "Glass," [*257 in the statute, evidently means such articles of glass as would in their transport expose the carrier to risk of breakage. That cannot apply to the smelling-bottles here. [BYLES, J.—Why not? In Owen *v.* Burnett, 2 C. & M. 353, 359,† Bayley, B., says: "*Glass* is mentioned generally; and why is the act not to apply to glass of *every* description, if of the requisite value? It is a commodity which requires particular attention, and in respect of which the carrier is exposed to great risk and hazard from its brittle nature. The word 'glass' is unqualified and unlimited; and I cannot see that we are justified in saying it applies to glass in a small compass only, and not of every description."] The German silver fusee-boxes cannot in any view rank amongst articles of "personal ornament" or "superfluities of decoration." [COCKBURN, C. J.—We are all agreed that these are not trinkets.]

Bovill, Q. C., and *C. Pollock*, in support of the rule.—All these goods, it must be remembered, are sent by a person who describes himself as a dealer in fancy articles. The degree of usefulness of the article cannot determine its character. A "fan" and a "seal" are both useful; and yet they have been considered as trinkets,—The Attorney-General *v.* Harley, 5 Russ. 173. Neither is its adaptability to personal decoration the test. A tooth-pick or a gold pencil-case, it could hardly be contended, would not be a trinket within this act. The port-monnaies are not mere purses, but are highly ornamented, and evidently more for show than use. The silk guards are within the express words "silk in a manufactured state, wrought up with other materials." [COCKBURN, C. J.—We incline to think these two latter articles are within the protection of *the act. But, as to the fusee-boxes, we think they are [*258 not.]

COCKBURN, C. J.—I am of opinion that the rule should be made absolute so far as to reduce the damages to 11*l.* 17*s.*, being the value of the "German-silver boxes," which I am of opinion do not properly fall within the definition of "trinkets," and therefore are not within the protection of the 1st section of the Carriers' Act. As to the other

articles, viz. the bracelets, shirt-pins, rings, brooches, and tortoise-shell and pearl port-monnaies, I think they all fall properly within the description of "trinkets." There is a distinction between some of the articles, which are more especially articles of ornament with reference to dress, and others which, though of a somewhat ornamental character, do not constitute ornaments of dress, but are only occasionally produced. As to the former,—bracelets, shirt-pins, rings, and brooches,—they are clearly articles of personal decoration and adornment, and literally fall within the description of "trinkets." It is said, that, inasmuch as they are also articles of utility, they cease to be trinkets. But I do not agree to that. Their main and principal object plainly is that of ornament. It is true they may also be applied to some useful purpose; yet, inasmuch as they are essentially ornamental, I do not think the fact of their being capable of being turned to some use raises any difficulty. But, even supposing their main object was utility for the purpose of dress, if made part of the ornament of apparel, they equally fall within the strictest definition of "trinkets." The other articles, viz. the port-monnaies and the smelling-bottles, are more difficult to deal with. Still I think, that, though not worn so as to be constantly exhibited to view, and though to a certain extent articles of use, and perhaps of necessity, yet, if an *ornamental character is given to them to such an extent as to make that their main and primary object, I think they may fairly and properly be considered to fall within the description of "trinkets" in the general sense of the word. If that may be taken to be the true definition of trinkets generally, à fortiori ought that sense to be given to the word in this act of parliament, the object of which is to protect the carrier against the risk of having to take charge of packages of great value in small compass. In that respect, there can be no difference in point of risk and danger to the carrier whether the article is designed to be carried in the pocket or exposed on the dress of the party. With regard to the boxes, I do not think they can be said to be "trinkets." They are common and ordinary things. Indeed, it would be difficult to make them more plain. There is nothing at all of an ornamental character about them. I think the plaintiff is entitled to recover in respect of them. The only remaining articles are the "silk guards." These, I think, clearly are within the act. The words used in the statute are, "silks" (in the plural) "in a manufactured or unmanufactured state,"—the largest that could be used. It is said that the word "silks," in the plural, applies not at all to unwrought silk, but to manufactured only. When the statute speaks of silks, would they be the less silks because made up into articles of wearing-apparel? Indeed, the value would be thereby increased; and certainly the danger against which it was the object of the statute to protect the carrier would not be diminished. I therefore think these articles were within the protection of the act, and consequently that the plaintiff is not entitled to recover in respect of them.

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CROWDER, J.—I also am of opinion that the plaintiff is entitled to recover only to the extent of the value of *the German-silver boxes, beyond the amount paid into court. As to the bracelets, shirt-pins, rings, and brooches, I cannot conceive anything that could more appropriately be described as "trinkets" than these. They are all articles of ornament, though, as is ordinarily the case with things

*260]

which are used for ornament, they have some semblance of utility. As to the port-monnaies, I must confess I entertained some doubt at first. But, upon an inspection of them, it is evident that they are mainly for the purpose of show, and therefore must fall within the description of trinkets. With regard to the smelling-bottles and glass flagons, it cannot be denied that they are "glass," though possibly they also might be called trinkets. They are not the less glass because some ornament is superadded. But, as for the "German-silver fusee-boxes," they clearly are not trinkets within the meaning of the act: they are as plain articles as could possibly be conceived. The only remaining question is as to the "silk guards." Looking at the language of the act, I cannot arrive at any other conclusion than that it does embrace articles like these, which are clearly "silks in a manufactured state, wrought up with other materials." There is no reason why the silk should be deprived of the quality there mentioned because it is wrought into articles of this description.

WILLES, J.—I am of the same opinion. As to the boxes made of German-silver and brass, the plaintiff is entitled to recover. They cannot according to any fair definition of the word be called trinkets: obviously their principal object is use, and whatever ornament is put upon them is only so much as is necessary to make them sell. The only other part of the case upon which I wish to add a word, is, as to the silk guards. No doubt, the question involved in this case is a very *important one: and the case of Davey *v.* Mason, Carr. & M. 45, has never been acquiesced in as an authority by persons [*261 interested in the subject, and it was under discussion in Hart *v.* Baxendale, 6 Exch. 769.† The question there arose as to whether "silk hose" were silks within the act. In the course of the argument (though that is not noticed in the report) the court intimated a strong opinion that the ruling of Lord Abinger in Davey *v.* Mason could not be sustained. The only doubt seems to be that raised by the word being "silks," in the plural, which seems rather to point to "cloths made of silk," in which sense, Webster observes "the word [silk] has a plural, *silks*, denoting different sorts and varieties, as, black *silk*, white *silk*, coloured *silks*." If, therefore, there were no other language in the act, I should be inclined to say silks meant cloths made of silk. But I find other words in the act which are inconsistent with holding it to be confined to the plural of silk. The object of the additional words, "in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials." As to the other parts of the case, I entirely concur in what has been said by my Lord and my Brother Crowder, and have nothing to add.

BYLES, J.—I quite concur with the rest of the court in their correction of the impression I entertained at Nisi Prius. I felt myself governed by the case of Davey *v.* Mason, Carr. & M. 45; but I now learn for the first time that the ruling in that case has been reflected upon, and that the matter is to be dealt with as if it were res integra. If so, I agree that the word "silks" in the statute must be held to comprehend silk wrought up into textile fabrics, cords, ribbons, &c. With regard to the port-monnaies, I also agree with the *opinions which have been [*262 expressed: these were certainly more ornamental than useful.

Upon the whole, I think a correct conclusion has been arrived at, and that the verdict must be entered only for the value of the boxes,—11*l.* 17*s.* Rule absolute accordingly.

By the United States Tariff Act of 1846, a duty of 30 per cent. was imposed upon articles included within schedule C., amongst which were "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured by the tailor, sempstress, or manufacturer." By schedule D., a duty of 25 per cent only was imposed on "manufactures of silk or of which silk shall be a component material, not otherwise provided for; and manufactures of worsted or of which worsted is a component part, not otherwise provided for." It was held that shawls whether silk or worsted, or composed of both in connection with other materials or not, fell within schedule C., as wearing apparel, though sometimes used by tailors to be manufactured into vests: Maillard *v.* Lawrence, 16 Howard 251.

ANDREWS *v.* GARRETT. *April* 15.

The plaintiff, a tailor, having furnished goods to the defendant's son (an infant) while at Addiscombe, the defendant, repudiating all liability on his part, on the ground that the goods were not necessaries, wrote to the plaintiff as follows:—"Should you think fit to keep entirely from him, by yourself or agent, and not trust him any further sum, or molest him in any way, and he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, and try to provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper; but, in case you do, I wish to have the account sent to him here per return of post."

The plaintiff sent the account, but did not in terms accept the proposal contained in the above letter, though he did not in fact molest the son: and some months afterwards he caused his attorney to write to the defendant intimating his willingness to accept from him one half his claim, but reserving to himself his rights against the son for the remaining half:—

Held, that these letters did not constitute such an agreement as to entitle the plaintiff to sue the father for the moiety of the account.

THIS was an action upon a special agreement. The first count of the declaration stated, that, before and at the time of the making of the promise of the defendant thereinafter mentioned, one Newson Dunnell Garrett was indebted to the plaintiff in a certain sum of money, to wit, 69*l.* 10*s.* 6*d.*, and thereupon it was agreed between the plaintiff, the defendant, and the said Newson Dunnell Garrett that the defendant should become debtor to the plaintiff in and agree to pay to the plaintiff one moiety of the said sum of money in which the said Newson Dunnell Garrett was so indebted to the plaintiff as aforesaid, and that he should become such debtor in lieu and instead of the said Newson Dunnell Garrett, and that the defendant should with the assent of the said New-
*263] son Dunnell Garrett become such debtor and agree as aforesaid, *and that the plaintiff should accept the defendant's so becoming such debtor and agreeing as aforesaid in full satisfaction and discharge of the said debt so due from the said Newson Dunnell Garrett to the plaintiff as aforesaid, and all the damages, causes, and rights of action in respect thereof; and that thereupon, in consideration of the said agreement, the defendant did become such debtor to the plaintiff, and agree to pay him one moiety of the said sum of money in which the said

Newson Dunnell Garrett was so indebted to the plaintiff as aforesaid, and that he did become such debtor in lieu and instead of the said Newson Dunnell Garrett, and that the defendant did, with the assent of the said Newson Dunnell Garrett, become such debtor and agree as aforesaid; and the plaintiff did then accept and receive the defendant's so becoming such debtor and agreeing as aforesaid in full satisfaction and discharge of the said debt so due from the said Newson Dunnell Garrett to the plaintiff as aforesaid, and all the damages, causes, and rights of action in respect thereof: Breach, that, although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions precedent had happened and been performed necessary to entitle the plaintiff to be paid by the defendant the said moiety of the said debt so due from the said Newson Dunnell Garrett to him the plaintiff as aforesaid, yet the defendant had not paid the same or any part thereof, but had omitted and neglected so to do.

There was also a count for goods bargained and sold and sold and delivered, and for money found due upon accounts stated.

The defendant pleaded, to the first count, that it was not agreed as alleged, that the said Newson Dunnell Garrett was not indebted to the plaintiff as alleged, that he (the defendant) did not become debtor *to the plaintiff or agree to pay him as alleged, and that the plaintiff did not accept or receive the defendant's becoming debtor to the plaintiff as alleged; and, to the residue of the declaration, never indebted. Issue thereon. [*264

The cause was tried before Cockburn, C. J., at the sittings in Middlesex after last term. The facts were as follows:—The plaintiff is a military tailor carrying on business in Cork Street, the defendant a maltster and general merchant residing at Aldburgh, in the county of Suffolk. In 1855, the defendant sent his eldest son, N. D. Garrett, then seventeen years of age, to Addiscombe, with a suitable allowance,—regimentals being provided by the college. Shortly after his arrival there, the plaintiff went down to Addiscombe, and was there introduced to the defendant's son, whom he supplied with clothes to the amount of 69*l.* 10*s.* 6*d.* between the 10th of December, 1855, and the 10th of June, 1856. It appeared, that, between June, 1855, and December, 1856, the youth had obtained goods from three other London tailors to the amount of 155*l.* 18*s.* 3*d.* These supplies were wholly unnecessary, and made without the knowledge of the defendant, who, when he discovered his son's reckless proceedings, wrote to the plaintiff, as follows:—

"26th January, 1857.

"Mr. Andrews,

"Sir,—I have just been informed, and am deeply distressed at the shameful way you and others have been trying to ruin my boy by supplying him with goods, &c., on credit. I now inform you, that, as you have no shadow of excuse, and no authority from me, I do not hold myself liable for one farthing, and am perfectly ready to defend any action for the same. The following is without prejudice on either side:—Should you think fit to keep entirely from him, by *yourself or agent, and not trust him any further sum, or molest him in any way, and he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, and try [*265

and provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper; but, in case you do, I wish to have the account sent to him here per return of post.

"N. GARRETT."

Shortly after the receipt of the above letter, the plaintiff sent the defendant a letter intimating that he enclosed the account, as requested. On the 16th of November, 1857, the plaintiff again wrote as follows:—

"9, Cork Street, 16th Nov. 1857.

"N. Garrett, Esq.

"Sir,—Some months ago, I wrote to you about your son's account; you promising payment of your son's account if I did not annoy him at Addiscombe. I have fulfilled my promise. Your son, I hear, is about to leave for India. I must, therefore, request that you will fulfil yours by sending me a check by the first opportunity.

"GEORGE ANDREWS."

In January, 1858, the defendant's attorney wrote to the plaintiff, as follows:—

"9th January, 1858.

"Mr. Andrews.

"Sir,—I am directed by Mr. Garrett, of Aldboro', Suffolk, to inform you that his son, Mr. N. D. Garrett, will leave England on the 20th instant, and further to inform you, that, if you like to call at my office on or before Friday next at 12 o'clock, the Messrs. Garrett will be prepared to meet any process you may feel disposed to issue against either of them: and, further, without any prejudice to either party, Mr. Garrett, Sen., *is disposed to renew his offer in part made in January last, if you come here and agree to the terms that will be submitted to you; but if you do not do so, he will withdraw the said offer entirely, and defend any action you may bring.

*266]

"G. BASHAM."

On the 19th of January, the defendant's attorney received from the plaintiff's attorneys a letter to the following effect,—

"9, New Square, 19th January, 1858.

"Sir,—Our client is willing to accept from Mr. Garrett, Sen., half the claim upon him, reserving to himself his rights, whatever they may be, against Mr. Garrett, Jun., for the remaining half; or, he will take 60*l.* in discharge of his whole claim against both."

On the part of the defendant it was submitted, that, in the absence of evidence that the plaintiff had accepted the proposal contained in the defendant's letter of the 26th of January, 1857, there was no case to go to the jury. And, his lordship being of that opinion, the plaintiff was nonsuited, with leave to move to enter a verdict for a moiety of the account, if the court should think him entitled to recover.

Powell now moved for a rule nisi.—He submitted that there was abundant evidence of acceptance by the plaintiff of the defendant's proposal. [COCKBURN, C. J.—There are two difficulties in your way. In the first place, you have to show that the plaintiff accepted the offer contained in the defendant's letter of the 26th of January, 1857. In

the next place, assuming that there was a quasi acceptance of that offer, did not the plaintiff abandon that by afterwards authorizing his attorneys to express his willingness to take half his demand, but reserving his right to proceed against the son for the other half? WILLES, J.—Where is the contract by *the plaintiff that he would absolutely [*267 abstain from molesting the defendant's son? That was the consideration for the promise of the defendant to pay a moiety of the debt. There was nothing to prevent the plaintiff from suing the son the next day.] The sending the invoice pursuant to the request contained in the defendant's letter, was as distinct an assent to the terms proposed, as if the plaintiff had said in so many words "I agree to each and every of the terms of your letter."

COCKBURN, C. J.—I am of opinion that there should be no rule in this case. If it had stood entirely upon the defendant's letter of the 26th of January, 1857, and the plaintiff's answer thereto, there might have been some room for doubting whether the plaintiff's letter might not be construed as amounting to an acceptance of the terms offered. It might be capable of that construction: but, at the best, it is very vague, and leaves the matter in ambiguo. The plaintiff's subsequent conduct has very properly been referred to, to show what he meant,—whether he really intended to adopt the proposition of the defendant, which was in substance this, that, if the plaintiff would keep away from his son, and would abstain from giving or facilitating his obtaining further credit, and from in any way molesting him, the defendant would pay the moiety of the plaintiff's demand. Some months afterwards, being informed that the son was about to leave England, the plaintiff causes his attorney to write to the defendant's attorney to signify his willingness to accept from the defendant one-half the amount of his claim, reserving to himself his rights, whatever they might be, against the son for the remaining half,—thus abandoning the terms originally offered, and proposing fresh terms. Another proposition is afterwards made by the plaintiff's *attorneys, still inconsistent with the proposal contained in the [*268 defendant's letter of the 26th of January, 1857. The plaintiff's last letter affords a safe criterion for the construction of the first. He evidently meant to say, that he adopted the proposal as to part,—that he would not supply the young man with further goods, and would accept half the amount from the father, but does not consent to waive his right to have recourse against the son for the balance. I therefore think the consideration fails.

CROWDER, J.—I am of the same opinion. This was an action upon a special agreement by which the defendant agreed to pay to the plaintiff one moiety of a debt due to the plaintiff for goods supplied to the defendant's son: and the only question is whether such an agreement was constituted by the defendant's letter of the 26th of January, 1857, and the plaintiff's answer thereto. It appears to me that the letters do not constitute a complete agreement. The defendant proposes to pay the plaintiff one moiety of his demand, if the plaintiff will consent not to molest the son or to give him any further credit. It is clear that the father meant to stipulate that his son should not be in any way molested for the residue of the debt. What is the plaintiff's answer? All he does is to send the account. It is said that that was virtually an acceptance of all the terms proposed. I cannot accede to that: it rather seems

to me that the plaintiff was studiously endeavouring to evade an acceptance of the terms proposed. The correspondence which took place in January, 1858, seems to show that both parties considered the matter to be then open. I think it is impossible to say that there has been such a clear and distinct agreement as will entitle the plaintiff to maintain this action.

*269] *WILLES, J.—I am of the same opinion: and I think it is unnecessary to add anything to what has fallen from my Lord and my Brother Crowder as to the necessity of a distinct acceptance of the terms offered by the defendant's letter, to bind the latter. M'Iver *v.* Richardson, 1 M. & Selw. 557, and Mozley *v.* Tinkler, 1 C. M. & R. 692,† are authorities to establish that, if any were wanted. Then, as to the terms which were to be accepted by the plaintiff before he could be entitled to call upon the defendant to pay the moiety as proposed,—the first is, that the young man shall not be molested. Now, "terror of suit is a damnification:" Broughton's Case, 5 Co. Rep. 24 a. A threat of proceedings would be a molestation: Gibbons *v.* Vouillon, 8 C. B. 483 (E. C. L. R. vol. 65). The father clearly intended that his son should be free from personal annoyance. If the plaintiff intended to avail himself of the father's promise quoad the moiety, he should have distinctly accepted the terms of the letter. There is another important line in the letter of the 26th of January, 1857, which has not been accepted, viz. that the plaintiff should abstain from leading the son into any further extravagance. To that part of the letter there is no answer whatever. Mr. *Powell* said, and was obliged to say, that the effect of the defendant's letter of the 26th of January, 1857, was, to give the plaintiff a right of action against the defendant for the moiety of the account, if he in fact did abstain from molesting the son or inducing him to get further into debt. But it is clear that no such agreement was ever entered into between the parties.

BYLES, J.—I also think the nonsuit was right. The plaintiff's letter is not an acceptance of the proposal contained in the defendant's letter. If not, there was no contract. The subsequent correspondence clearly

*270] *shows that the decision of the Lord Chief Justice as to the legal construction of the two material letters is quite in accordance with the intention of the parties. Rule refused.

VALENTE *v.* GIBBS and Others. *May* 4.

By a charter-party it was agreed that the ship, then lying at Genoa, should sail "on or before the 30th of July, 1859," to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient despatch to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7*l.* per day; and then came the following provision,—"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation."

The vessel did not leave Genoa until the 8th of September:—

Held, that this was not a detention during the "voyage," within the meaning of the penalty clause.

THIS was an action brought by the plaintiff against the defendants to recover 287*l.*, being the alleged balance of freight due under the charter-party hereinafter mentioned; and by the consent of the parties, and by a judge's order, the following case was stated for the opinion of the court, without pleadings.

The plaintiff is the master and owner of the ship "Palma." The defendants are merchants carrying on business in London.

On the 7th of June, 1856, a charter-party, of which the following is a copy, was entered into between the plaintiff and the defendants:—

"London, 7th June, 1856.

"It is hereby mutually agreed between Captain A. Valente, owner of the 'Palma,' 278 tons register, new measurement, on the one part, and Messrs. Antony Gibbs & Sons, merchants and agents, on the other part, as follows:—

"That the said vessel, now lying at the port of Genoa, shall sail on or before the 30th of July, 1856, *to Monte Video and Lima, and thence proceed with all convenient despatch to the port of Callao, Peru, where the captain shall immediately report his arrival to Messrs. Gibbs & Co., of Lima. [*271

"That the said vessel, being then tight, staunch, strong, and well conditioned for the voyage, Messrs. W. Gibbs & Co. shall, within forty-eight hours after such report being received, send to the captain or his agents orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which shall be given to the captain by the charterers' agents free of expense within twenty-four hours of his application.

"After completing her loading of guano, and having obtained her necessary pass from Pisco, the vessel shall return for her final clearance to Callao, where the captain shall have the liberty of taking in passengers, light goods, and specie on freight for the benefit of the ship. The charterers to have the option of shipping the light goods at current rates.

"The ship shall convey from Callao to the islands any specie that may be required for the payment of the cargo and any tools (sent alongside by the charterers' agents whilst the vessel is at anchor in Callao) free of freight, and shall supply, free of charge, either on board or alongside at the guano ports, any water that may be required by the agents of the charterers, not exceeding eight tons.

"At the Chincha Islands, the vessel to be placed under the Manqueras to load, or, at the option of the charterers, the cargo to be placed in the ship's boats, and in them conveyed on board at ship's expense and shipper's risk.

"Such sacks as shall be supplied by the charterers, at their discretion, shall be filled with guano by the *owner, and the mouths of the sacks sewn up at owner's expense, the charterers providing twine; and the sacks shall be used for lining the vessel. [*272

"The owner to find necessary dunnage, and to be responsible for damage by negligence.

"The owner to be liable for all damage arising from side lights or ports.

"The guano shall be stowed so that a clear space may be left round the vessel under the deck for the purpose of examining the cargo and removing any water which may have been shipped; and every convenient opportunity shall be taken to examine the guano, and means used to prevent and lessen damage.

"The quantity of guano to be shipped shall not exceed one-third above the vessel's register tonnage, new measurement, except with the consent in writing of the charterers' agents at Callao, and which consent the charterers undertake shall be given to all ships which their agents have not fair and reasonable grounds for believing to be overloaded, when such consent may be withheld; and, if any vessel proceed to sea without such written consent, and loss should be sustained by the charterers upon the guano, and whether the same be of the nature of a particular or general average or of charges upon the guano, all such loss, as between the said owner and charterers, shall be deemed to have arisen from the improper loading of the vessel; and the amount of such loss shall be borne and paid by the said owner to the said charterers; but, in case of loss of the nature of particular average, the owner shall only pay such amount as may exceed 3*l.* per cent. upon the net value of the limited cargo of guano hereby agreed to be shipped.

"No guano or other dead weight shall be received on board except from the charterers or their agents.

*273] "Should political or other circumstances prevent *there being sufficient labourers at the loading-places, as many of the crew as shall not be absolutely necessary for the safety of the ship shall be sent on shore to load the cargo, they receiving the usual labourers' daily pay while so employed.

"Ten running days (Sundays excepted) for each one hundred tons, new register measurement, to be allowed the charterers for loading the ship at the islands; nevertheless, in no case shall the charterers have less than thirty nor more than eighty such days in all,—said days to commence from the day the master gives notice in writing of being ready to receive and take on board, and to cease when the charterers' agents give notice that the vessel may leave the islands.

"Thirty days to be allowed the owner for taking in light freight and specie, as above specified, over and above the lay days allowed to the charterers for loading the ship, and the owner for taking in light freight and specie. Each party shall be permitted to detain the vessel for those purposes respectively for thirty days, the charterers paying to the owner, or the owner paying to the charterers, as the case may be, at the rate of 7*l.* per day as agreed compensation for such detention.

"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation.

"The owner of the vessel to pay all port-charges, and the ship to be consigned to Messrs. W. Gibbs & Co., of Lima, to whom the customary agency for doing the ship's business shall be paid by the owner.

"The captain to sign bills of lading at such rate of freight as charterers or their agents may direct, and without prejudice to this charter-party.

"The said vessel shall, after completing her loading *as before [*274
mentioned, proceed to any safe port in the United Kingdom, calling at Cork for orders from Messrs. Antony Gibbs & Sons (and for which she is to remain until return of post from London), unless ordered in writing to proceed direct to any given port by Messrs. W. Gibbs & Co., and there, according to bills of lading and charter-party, deliver the cargo, which is to be discharged and taken from alongside at the rate of not less than thirty-five tons per working day.

"The freight to be paid in manner hereinafter mentioned, at the rate of 4*l.* 10*s.* sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam, subject, however, to a deduction for the water contained in damaged guano.

"The master to be supplied in the Pacific with a sum not exceeding 300*l.*, free of interest and commission; but the cost of insurance to be borne by the owner: and the amount so to be advanced, and the cost of the insurance thereof, shall be in part payment of the freight at the exchange of 50*d.* per dollar currency. And, should the charterers or their agents think fit to advance the master beyond the said sum of 300*l.* any sum for repairs, stores, or other disbursements whatsoever, such sums, with interest, commission, and insurance, shall be in part payment of freight, at the exchange aforesaid. And it is hereby expressly agreed that the receipt of the master for any such sum or sums of money as shall be supplied or advanced to him by the charterers as aforesaid, shall be conclusive and binding upon the owner, and he shall thereby be prevented, as between him and the charterers, from inquiry into the necessity for or the appropriation of the sum of money which in such receipt or receipts shall be acknowledged to have been received: and all contributions to general average losses which (if any) shall become payable in respect of any such advances as aforesaid, shall be borne and paid by the owner.

*"The freight to be paid in manner following, that is to say,— [*275
400*l.* in cash on arrival at the port of discharge, three months' interest, at the rate of 5*l.* per cent. per annum, being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions herein contained, on the true and right delivery of the cargo, by bills upon Messrs. Antony Gibbs & Sons, at three months' date, or in cash less interest at 5*l.* per cent. per annum, at charterers' option.

"The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owner shall become liable to the charterers by virtue of or in any wise in relation to this charter-party; it being the intention of the parties that all claims and demands of whatever nature which shall accrue to the said charterers shall be treated as payments made by the charterers on account of freight.

"The charterers to have the liberty of naming the docks in which the ship is to discharge.

"Penalty for non-performance of this charter-party, the estimated amount of freight.

"The act of God, the Queen's enemies, fire, and all and every dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever during the said voyage, always excepted."

At the time of the making of the charter-party, the vessel mentioned in it was lying in the port of Genoa loading a general cargo for Monte Video and Lima. She completed the loading of such cargo, and, on the 8th of September, 1856, sailed from Genoa to Monte Video and Lima; and after delivering her cargo there, proceeded, in accordance with the terms of the charter-party, to Callao and the Chincha Islands, and was there loaded by the defendants with a cargo of guano;
*276] *and thence sailed, agreeably to the terms of the charter-party, to a safe port in England, where she delivered the guano to the order of the defendants.

The vessel remained at Genoa until the 8th of September in procuring her cargo, and not by reason of being prevented from sailing by any of the perils excepted.

After the delivery of the cargo, the plaintiff applied to the defendants for payment of the freight of the said guano, and received from them the whole of such freight (besides 56*l.* for eight days demurrage at the Chincha Islands), except the sum of 287*l.*, which the defendants claimed to deduct from the freight upon the ground that they were entitled to demurrage or compensation at 7*l.* per day for the days during which the vessel remained at Genoa from the 30th of July, 1856, to the 8th of September following, as above stated. In fact, the plaintiff's account for freight and demurrage was overpaid by the defendants to the extent of 24*l.* 17*s.* 9*d.*, if the defendants were entitled to deduct the said sum of 287*l.*; the payments for freight having been made from time to time during the discharge of the cargo, and before the whole amount to become due was ascertained.

The court was to be at liberty to draw any inferences of fact from the facts already stated which a jury might draw.

The question for the opinion of the court was,—whether, under the circumstances, the clause in the charter-party marked with the letter A. in the margin hereof applied to the period during which the vessel remained at Genoa after the 30th of July and before she set sail on the voyage, and entitled the defendants, without regard to the question whether any actual damage had been sustained in the particular case,
*277] to deduct from the freight the sum of 7*l.* per day *for the time intervening between the 30th of July and the 8th of September, 1856.

If the court should be of opinion that the defendants were not entitled to deduct such sum, then judgment was to be entered up for the plaintiff for 287*l.*, and costs of suit.

If the court should be of opinion that the defendants were entitled to deduct such sum, then judgment of nolle prosequi, with costs of defence, was to be entered up for the defendants.

GIBBS and Others *v.* VALENTE.

THIS was a cross action brought by the defendants in the former action, against the plaintiff in that action, to recover the sum of 24*l.* 17*s.* 9*d.*, which is the amount overpaid by the plaintiffs in this action, if their construction of the charter-party is the correct one.

This case was stated for the opinion of this court, without pleadings. The facts are the same as those stated in the former case, which may

be referred to for all the purposes of this case, with the same power for the court to draw inferences.

The question for the opinion of the court was, whether, under the circumstances, the clause in the charter-party marked A. in the margin of the case in the other action, applied to the period during which the vessel remained at Genoa after the 30th of July and before she set sail, and entitled the plaintiffs in this action to deduct from the freight the sum of 7*l.* per day for the time intervening between the 30th of July and the 8th of September, 1856.

If the court was of opinion that the plaintiffs were so entitled to deduct such sum, the judgment was to be entered up for the plaintiffs for 24*l.* 17*s.* 9*d.*, and *costs of suit. If the court should be of [*278 opinion that the plaintiffs were not so entitled, judgment of nolle prosequi, with costs of suit, was to be entered up for the defendant in this action.

J. Wilde, Q. C. (with whom was *Honyman*), for the plaintiff.(*a*)—The question is as to the meaning of the clause marked A. in the charter-party,—"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation,"—viz. 7*l.* per day. Are the defendants entitled to deduct from the freight payable under the charter-party the 7*l.* per day for the delay which took place here, without regard to whether or not they sustained any actual damage? That clause, it is submitted, was intended to be limited to any delay or detention occurring in the course of the voyage. Now, the voyage contemplated in this charter-party was to commence from one of two periods, viz., the vessel's leaving Genoa, or her sailing from Callao. At any rate it could not commence before the ship's leaving Genoa. To entitle them to succeed, the defendants must show that the voyage commenced on the 30th of July, 1856, although the vessel was then lying in the port of Genoa, where she remained for *nearly six weeks after that day. [COCKBURN, C. J.—The word "voyage" has received a construction in [*279 cases of insurance, where it has been held to be reckoned from the time the vessel breaks ground. I am at a loss to see how this voyage can be said to have commenced on the 30th of July.] In Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), the plaintiff and defendants agreed by charter-party that a ship, then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should at Liverpool receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage,—restraints of princes, &c., "*during the said voyage*," always mutually excepted; and the ship was to be loaded at Liverpool without detention: and the defendants thereby agreed to load the vessel at Liverpool as in the charter-party stated, with the said cargo: on general demurrer to a declaration in assumpsit assigning for breach of

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the stipulation as to the payment to be made in case of the detention of the vessel, does not apply to a detention anterior to the commencement of the voyage:

"2. That the payment therein stipulated for is not to be made, except in cases where the opposite party sustains some damage by reason of the detention:

"3. That, under the circumstances stated in the case, there was no unnecessary detention within the meaning of the stipulation in question."

the above agreement that the defendants did not load the ship at Liverpool without detention, *but detained her at Liverpool an unreasonable time* (not negativing restraints of princes, &c.), it was held, that the exception as to the restraints of princes, &c., was applicable only after the ship quitted Liverpool. Lord Denman said: "The end of the voyage is expressly marked out: the beginning is not; but the voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage; and the breach takes place before it begins." And Patteson, J., said: "'During the said voyage' can apply only to the time after the voyage commences. In a policy of insurance, the word 'at' would be inserted, in order to cover the time while the vessel was in port." Notwithstanding some doubt cast upon that case by the Court of Exchequer in Bruce *v.* Nicolopulo, 11 Exch. 129,† it is submitted that it is good law, and applicable here.

*280] *Then, there is no statement in the case, and nothing from which it can be inferred, that the ship was improperly or unnecessarily detained at Genoa. It was understood at the time of the making of the charter-party that the vessel was lying at the port of Genoa loading a general cargo for Monte Video and Lima. [CROWDER, J.—If there was a warranty to sail on or before the 30th of July, 1856, the delay until the 8th of September, unaccounted for, would be unreasonable.] It might be that the charterers might have been entitled to give up the charter-party on that account, or they might have a claim for damages in respect of any injury they sustained by reason of the delay: but the penalty of 7*l.* a day was to attach only upon an unnecessary detention. [CROWDER, J.—For anything that appears in this case, the detention was unnecessary.] That, it is submitted, is not to be a matter of conjecture or surmise. The onus lay on the defendants, who seek to enforce the penalty, to show that the detention was unnecessary.

Willes, for the defendants.(*a*)—With respect to the point last urged, it is submitted it was not incumbent on the defendants to show that the delay and detention complained of was unnecessary, the matter being peculiarly within the knowledge of the plaintiff. In The King *v.* Turner, 5 M. & Selw. 206, 211, Bayley, J., says: "I have always understood it

*281] to be a general rule, that, if a negative averment be made by one *party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." Besides, here it is sufficiently shown that the delay was unnecessary. The plaintiff engages to sail from Genoa on the 30th of July, and the vessel does not start until the 8th of September. Primâ facie that imports unnecessary delay. The main question is, when did the voyage commence? The voyage contemplated was, a voyage from Genoa to Callao (touching at two intermediate ports), and thence to the United Kingdom. The injury to the charterers from undue delay on the voyage is the same wherever the delay takes place: the penalty clause, therefore, is as applicable to a detention at Genoa as to a detention at any other period. The case of

(*a*) The points marked for argument on the part of the defendants were as follows:—

"That the clause marked A. applies to all detentions which were unnecessary, and which took place subsequently to the time when it was agreed that the vessel should set sail,—that full effect cannot be given to the intention of the parties without so holding,—and that the words used admit such an interpretation."

Bruce *v.* Nicolopulo, 11 Exch. 129,† shows that the word "voyage" has not acquired any definite meaning. The sense in which it is used must be ascertained from the context. The general rule of construction is very clearly stated by Lord Wensleydale, in Grey *v.* Pearson, 6 House of Lords Cases 61, 106:—"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." "When, indeed (p. 108), by any course of decisions words have acquired a particular signification, it may be presumed that the framer of the instrument uses them in the sense so acquired, and it is fitting so to construe them." *[COCKBURN, C. J.—The vessel was carrying a cargo from Genoa to Monte Video and Lima for other persons. It is only when she gets to Callao that she is chartered to the defendants. That is a reason for saying that the voyage the parties are speaking of is the period during which the one party was to have the use of the vessel and the other to pay the hire, and would seem to show that the word voyage is to be taken in the more limited sense contended for by Mr. *Wilde*.] [*282 The parties agree that the start shall take place on or before the 30th of July. That is a condition precedent. [COCKBURN, C. J.—It is a warranty, entitling the charterers to throw up the charter-party, or to sue for damages for a breach. But, will it make that a voyage which is not a voyage?] The question is, whether a sailing from Genoa is a sailing on a voyage. [COCKBURN, C. J.—Was it a sailing on the voyage intended by the charter-party?] The defendants' case does not depend on the voyage commencing on the day named: the simple question is, whether the penalty clause embraces a detention before the starting of the ship. [COCKBURN, C. J.—The delay complained of is, the ship's not being on her way by the time agreed. Your argument in effect seeks to substitute "time" for "voyage."] Regard being had to the object of the contract, and the intention of the parties, the word is fairly capable of that construction. The rule for the construction of contracts laid down by Pothier, Traité des Obligations, Partie 1, ch. 1, art. vii., § 91, is as follows:—"On doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plus que le sens grammatical des termes,"—we must look to the general intention rather than criticize the words.

Wilde, in reply.—The language of the charter-party is entirely free from ambiguity. "Voyage," in its *plain and ordinary sense, means the passage of the ship from one port to another.(*a*) [*283 [BYLES, J.—Could this question arise on a policy of insurance?] Clearly not: even if the ship were warranted to sail on a given day, unless the insurance was "at and from," the risk would not attach until the sailing of the vessel.(*b*) In Roelandts *v.* Harrison, 3 Exch. 444,† where freight was by the charter-party payable on "the final sailing of the vessel from the port of loading," Cardiff, it was held that the words

(*a*) See Gether *v.* Capper, 18 C. B. 866 (E. C. L. R. vol. 86).
(*b*) See Arnould on Insurance, 2d edit. 390.

meant the final departure of the vessel from the port, so as to be out of the limits of the artificial port, and at sea. The only real injury to the charterer is, the detention of the vessel whilst his goods are on board.

COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to judgment. The defendants seek to set off against the plaintiff's claim for freight under the charter-party certain penalties which they allege to have been incurred by the plaintiff by reason of an unnecessary detention of the vessel in the course of the voyage. The question for our determination is, what is the meaning of the term "voyage" in this clause of the charter-party,—the detention having occurred at Genoa, from which the vessel was to have sailed on or before the 30th of July, but from which she did not sail until the 8th of September. The answer set up by the plaintiff is twofold,—first, that the voyage to a detention on which the penalties were to attach, was, the voyage from Callao to Pisco and the Chincha Islands, and thence to a safe port in the United Kingdom,—secondly, that, at all events, the penalties could not attach
*284] to a detention occurring prior to the ship's *sailing from Genoa. The inclination of my opinion is, that the plaintiff is right in his first contention. But it is unnecessary to decide that, because we are all clearly of opinion that he is right upon the second. The term "voyage" has a well-recognised meaning, and has on various occasions received a legal interpretation. Still, no doubt, it is susceptible of a certain degree of flexibility; and, if the context clearly showed that it was intended by the parties to have a larger meaning than that which in common parlance belongs to it, we must so construe it. But, unless we can see beyond all doubt that the word is not used in its ordinary sense, we must give it its generally received signification. I see nothing in this case to justify us in holding that it means more than the transit from the terminus à quo to the terminus ad quem. Mr. *Willes* suggests that the interests of the parties would be as seriously affected by an antecedent delay as by a delay occurring subsequently to the sailing of the vessel. That may be so. But, on the other hand, there is nothing in the context to show that the word voyage was used in any other than its ordinary sense. It is true, the plaintiff has agreed that the vessel shall sail on or before the 30th of April. For a breach of that engagement the defendants, if damnified, may have a remedy. But, when we find that the penalties for the ship's detention are in terms made to apply to the voyage, and not to the time fixed for her departure from Genoa, if we were to put upon the charter-party the construction contended for on the part of the defendants, we should be on a mere surmise straining the meaning of the language which the parties have used, and making a contract for them which they have not made for themselves. The case of Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), is an authority in
*285] point: and, although it seems to have been reflected on by the *Court of Exchequer in Bruce *v.* Nicolopulo, 11 Exch. 29,† it was not necessary on that occasion to overrule it, and I for one am not disposed to dissent from it. Whether, therefore, we construe the word voyage according to the ordinary and popular sense, or in the sense ascribed to it in the case of Crow *v.* Falk, or in that which it bears in marine assurance policies, I think the plaintiff in the first action is entitled to our judgment, and the defendant in the second.

CROWDER, J.—I am of the same opinion. The question turns upon what is to be considered the voyage contemplated by this charter-party. It is insisted on the part of the defendants that the voyage commenced on the 30th of July, because of the stipulation in the charter-party that the vessel should sail from Genoa on or before that day. It is clear that the ship's sailing on the day named was a condition precedent to the charterers' obligation to take to the charter-party; and that the breach of that engagement on the plaintiff's part would give the charterers a right to sue for any damages they might thereby have sustained. But it does not follow that the voyage is to be taken to commence on the 30th of July, so as to make the clause as to detention during the voyage apply at and from that day. It seems to me to be quite clear that there has been no unnecessary detention during the voyage, so as to entitle the defendants to claim the stipulated penalty of 7*l.* per day. To entitle the plaintiff to judgment, it is only necessary to hold that the voyage did not commence until the vessel broke ground. I incline to think that the voyage here agreed on is the voyage which commenced at Callao, as was contended by Mr. *Wilde*. The charterers had no interest in the intermediate voyages. It is, however, unnecessary to decide that; for, I think it is quite clear upon the *language of the charter-party [*286 that the voyage did not in any sense commence before the ship left the port of Genoa; and that is sufficient to entitle the plaintiff to judgment.

WILLES, J.—I am of the same opinion. I see no reason why the word "voyage" in this charter-party should receive an interpretation different from its ordinary acceptation. The charter-party contains a stipulation that the vessel shall sail from Genoa on or before the 30th of July, 1856. When she sails, the voyage commences. Before her departure, no voyage exists to which the penalty could attach. It may be, according to the case of Glaholm *v.* Hays, 2 M. & G. 257 (E. C. L. R. vol. 40), 2 Scott N. R. 471, that, as the vessel did not sail on the day named, the charterers might have declined to employ the ship. Whether the penalty of 7*l.* a day would attach to any detention after the vessel left Genoa and before she arrived at Callao, it is not necessary to determine. It is enough to say that there was no voyage to which it could attach before the vessel sailed from Genoa. The result will be that the plaintiff in the first case is entitled to recover the entire freight, and that, in the second action there will be judgment for the defendant.

BYLES, J.—I am of the same opinion. In construing all written instruments, the words are to be taken in their ordinary grammatical, popular, and natural sense, unless the so taking them would lead to some absurdity, repugnance, or inconsistency with the rest of the document. The defendants here seek to enlarge the natural and ordinary sense of the word voyage. It lies, therefore, on them to show that construing the words used according to their natural and ordinary sense would lead to some absurdity or inconsistency. So far from their being able to show that, I think it is *perfectly clear that the voyage did not [*287 commence at all events until the departure of the vessel from Genoa. I may add that circumstances might have arisen which would have made the construction for which the defendants contend inconvenient to them. Upon the failure of the vessel to set sail on the day

stipulated, the charterers were at liberty to throw up the charter-party, and sue the plaintiff for unliquidated and unlimited damages.

Judgment accordingly.

On an insurance on a vessel for a voyage "from" a particular port, the risk does not commence until the sailing of the vessel: Mey *v.* South Carolina Ins. Co., 3 Brev. Const. R. 329.

But where insurance on cargo is for a voyage "at and from" one port to another, the risk commences on the lading of the cargo, and an unreasonable delay thereafter, at the port of lading, will be a deviation: Augusta Ins. Banking Co. *v.* Abbott, 12 Maryland 378.

Re JANE DENTON. *April* 30.

The court permitted an affidavit verifying the notarial certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be received, notwithstanding an erasure in the jurat,—being satisfied that there had been a substantial compliance with the statute, and the erasure arising from circumstances over which the parties had no control.

A COMMISSION for taking the acknowledgment of a married woman under the 3 & 4 W. 4, c. 74, was addressed to certain persons described as resident at Winconsin, in the territory of Minnesota, in the United States of North America. After the issuing of the commission, but before the swearing of the affidavit verifying the notarial certificate, Minnesota had been constituted one of the states of the Union: and, accordingly, when the affidavit came to be sworn, the word "territory" in the jurat was erased, and the word "state" inserted in lieu of it. In consequence of this erasure, the officer of the court declined to receive the acknowledgment. Application was thereupon made to Byles, J., at Chambers, to direct him to do so; but that learned judge refused to make an order.

W. S. Cross, on a former day in this term, moved for a rule to the same effect.—The rule of Hilary Term, 1853, r. 140, which provides that "no affidavit shall be read or made use of in any matter depending
*288] in *court, in the jurat of which there shall be any interlineation or erasure," applies only to matters depending *in court*. In re Mary Bingle, 15 C. B. 449 (E. C. L. R. vol. 80), the court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. So, in the subsequent case of In re Chandler, 1 C. B. (N. S.) 323 (E. C. L. R. vol. 87), the court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn. [BYLES, J.—Is there any difference between the expression "in court," and "proceeding before the court?"] The statute has been substan-

tially complied with, and the erasure has arisen from circumstances over which the parties had no control.

COCKBURN, C. J.—The rule of Hilary Term, 1853, is apparently positive and general in its terms: we will, however, look into it.

 Cur. adv. vult.

CROWDER, J., now said,—We have considered this matter, and, inasmuch as it is clear that there has been a substantial compliance with the 3 & 4 W. 4, c. 74, we are of opinion, that, under the circumstances, the affidavit may be received, notwithstanding the erasure. Fiat.

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*MOORE and Others *v.* RAWLINS. *May* 5. [*289

A company consisting of more than twenty-five members, was formed under a deed of settlement which contained, inter alia, the following provisions,—2. That *the object and purpose of the company* shall be to enable each member to become the possessor of a freehold, copyhold, or leasehold house, of the estimated value of 150*l.* in respect of every share, &c. 4. That the sum of money necessary for carrying the object of the company into effect shall be raised by means of the monthly subscriptions of the members, and of rents, &c., and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and *by such other ways and means as are hereinafter provided.* 5. That *the business of the company shall be*, to take on lease or to purchase, either for years or in fee, land or ground within the distance of twenty miles from St. Paul's, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild, or to repair, any existing houses or buildings on the land or ground so taken or purchased; and *to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.* 32. That the directors may employ as many servants and *workmen* as the business of the company may require. 34. That the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, *and generally to do all such acts, matters, and things as are usually done by builders.* 36. That the directors may authorize the trustees to enter into and make contracts for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient. 50, 51. The erection of houses, and the number, size, and description thereof, to be in the discretion of the directors. 63. That the company should be finally wound up when all the members have received allotments of houses:—

Held, that, notwithstanding the general words of the 5th and 34th clauses, it being apparent on the whole deed that the powers thereby given to the directors and trustees were only ancillary to the main object and purpose of the association, viz. the enabling each member to become the possessor of a freehold, copyhold, or leasehold house, and not the carrying on the building business "for any purpose of profit,"—the company was not one which required registration under the 7 & 8 Vict. c. 110.

The 45th clause provided, that, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six months, become absolutely forfeited to the company:—Held, that the neglect of a member to pay his subscriptions and fines for six months, operated a forfeiture of his share or shares, *at the option of the directors.*

THE following case was stated for the opinion of this court, by consent, without pleadings:- -

The plaintiffs seek to recover from the defendant upon his covenant with them, as the trustees of a certain company called The Third Equitable Union Building Company, the sums of 5*l.* and 14*s.*, making together the sum of 5*l.* 14*s.*, the said sum of 5*l.* being the amount of ten

months' subscription alleged by the plaintiffs to be due from the defendant in respect of two shares by the plaintiffs alleged to be held by the
*290] *defendant in the said company, and the said sum of 14*s.* being the amount of fines alleged to be due in respect of the non-payment of the said subscriptions.

The company, at the time of its formation, and at all times subsequently, was intended to consist, and has always consisted, of more than twenty-five members; and the capital of the company to be raised in the modes provided by the deed of settlement was the sum of 18,000*l.*

The company was and is constituted and regulated by a deed of settlement made and executed by the parties thereto, and bearing date the 1st of December, 1851. The following are some of the clauses:—

"That the object and purpose of the company shall be to enable each member to become the possessor of a freehold, copyhold, or leasehold house (with or without a shop) of the estimated value of 150*l.* or thereabouts in respect of every share, and so in proportion in respect of every additional half-share which he or she may subscribe for or take up, to be held by such member in the first instance as tenant to the company at an annual rent payable monthly, until its dissolution, and afterwards as absolute owner and proprietor.

"That each person executing these presents, and subscribing 5*s.* per month to the funds of the company, shall, so long as he or she shall continue to pay the same, be deemed a member, and the holder of one share in the company; and every additional 2*s.* 6*d.* per month subscribed and paid by such member shall entitle him or her to an additional half-share: Provided always, that no member shall subscribe for less than one share, or for more than thirty shares, and that the whole number of shares in the company shall not exceed five hundred at any one time.

"That the sum of money necessary for carrying the object of the
*291] company into effect shall be raised by *means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and by such other ways and means as are hereinafter provided.

"That the business of the company shall be to take on lease or to purchase either for years or in fee, land or ground within the distance of twenty miles from St. Paul's Cathedral, London, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild, or to repair any existing houses or buildings on the land or ground so taken or purchased, and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.

"That two special meetings called for the purpose, and held at a distance of not less than fourteen days nor more than thirty-five days from each other, may by the resolution of a majority at each meeting consisting of two-thirds of the number of votes given at such meeting, amend, alter, or repeal, either wholly or in part, all or any of the clauses

or provisions of this deed; and in lieu thereof, or in addition thereto, may make any other regulations or provisions of any nature or kind soever, whether altering, enlarging, or abridging, or otherwise affecting the original constitution of the company, or the purpose for which the same was established, and may increase or diminish the number of shares in such manner and to such extent as they may think proper; and three such special meetings may in like manner dissolve the company.

*"That the directors may appoint such persons as they may think proper to fill the several offices of secretary and solicitor to the company, and may revoke such appointments at their pleasure, and may employ as many servants and workmen as the business of the company may require, and may remove or suspend such servants and workmen, and may appoint others in their place, and may take security from any officer or servant of the company; and such officers, servants, and workmen shall receive such salaries, allowances, wages, or compensation for their respective services as the directors shall think fit. [*292

"That the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, and generally to do all such acts, matters, and things as are usually done by builders; subject, nevertheless, to such restrictions as may from time to time be imposed upon them by the resolutions of any general meeting.

"That the directors may from time to time authorize the trustees to enter into any contract or agreement with any person or persons for the purchase or taking on lease of any freehold, copyhold, or leasehold lands, or other hereditaments, which in the judgment of the directors it may be desirable to purchase or take for the purposes of the company, upon such terms and conditions as to the directors shall seem fit; and to complete or otherwise carry into effect such contract or agreement, or (if they shall consider it expedient so to do) to rescind such contract or agreement, or to vary the terms thereof; it being the true intent and meaning of these presents, that, in all contracts, purchases, and acquisitions which shall be authorized by the directors to be entered into, made, and obtained by the trustees for or on behalf of the company, the *directors shall exercise their uncontrolled discretion in as full and ample a manner as if they were acting on their own account; and that all purchases and acquisitions made and obtained by the order or direction of the directors for or on behalf of the company, shall be as binding and conclusive on all the members thereof as if the same respectively had been entered into, made, and obtained with the full concurrence and approbation of such members. [*293

"That the directors may from time to time authorize the trustees to enter into make, and sign such contracts and agreements with any person or persons, whether members or otherwise (but only according to the respective trades, occupations, or business of such person or persons), for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient; and may order and direct in what manner the several buildings and works shall from time to time be carried on; and may authorize the trustees to lay out and expend in

such manner as they may think advantageous for the company, and best calculated to carry the object thereof into effect, all such moneys as shall from time to time be received or come to their hands on account of the company from any source whatever.

"That the directors may from time to time authorize the trustees to sell and dispose of any houses or land which may not be immediately wanted for the purposes of the company, and to sell any improved ground-rent or rents, and the money to arise from or to be produced by any such sale, after deducting the costs attending the same or incident thereto, shall be applied to the general purposes of the company; and *294] the receipt of the trustees or of any two of them shall *be an effectual discharge for the purchase-money, and shall exonerate the person paying the same from seeing to the application thereof.

"That, at every monthly meeting, every member shall, between the hours of 7 and 10 o'clock in the evening, pay to the secretary, or to some other person appointed by the directors to receive the same, the sum of 5*s.* in respect of every whole share, and the sum of 2*s.* 6*d.* in respect of every half-share, held by such member, together with any fine or fines or other sum or sums of money which may have been incurred or be payable by such member; and, if any member shall from any cause whatever omit to pay his or her monthly subscription on the day on which the same shall be due, he or she shall, at the next monthly meeting, pay as a fine the sum of 3*d.* for every whole share and the sum of 2*d.* for every half-share in respect of which such default shall have been made; and, if such monthly subscription so in arrear and unpaid shall not, together with the fine which shall have accrued in respect thereof, be paid at the next succeeding monthly meeting, the member so making default shall pay the further sum of 3*d.* for every whole share and 2*d.* for every half-share in respect of which such default shall have been made; and, if such monthly subscription so in arrear and unpaid, together with the fines which shall have accrued in respect thereof, shall not be paid at the second monthly meeting next succeeding that on which the same originally became due, the member so making default shall in addition to the fines already incurred by him pay the sum of 1*s.* for every whole share and the sum of 6*d.* for every half-share in respect of which such default shall be made, for each and every subsequent month during which such default shall continue: Provided always, that *295] any money which may be paid by any member, *shall be considered as paid and shall be applied in satisfaction of the fines (if any such there be) which may have been incurred by him or her, and the balance only which shall remain after satisfaction of such fines shall be considered as a payment made in respect of the monthly subscription of such member; and that, where the money paid by any member shall not, after the satisfaction of such fines as aforesaid, be sufficient to pay the whole amount of the monthly subscriptions due by such member, such money shall be applied in payment of the monthly subscriptions which shall have been the longest in arrear.

"That, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for the period of six calendar months after the same shall have become due, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six calendar months, become abso-

lutely forfeited to the company for the benefit of the other members thereof: and, upon any such forfeiture of all the shares held by any member, the person so making default shall cease to be a member of the company, and to have any interest therein or in the property belonging thereto: Provided, nevertheless,—

"That the directors may at any time (if they in their discretion shall think fit so to do, but not otherwise) restore to any member the whole or any portion of the shares which may have been forfeited for non-payment of any monthly subscription, or for any other cause, upon such terms and conditions, and upon payment of such sum or sums of money, as they may think proper to impose or require.

"That the directors may at any time, or from time to time, sell and dispose of any shares which may have become forfeited to the company, in such manner as *they shall think fit, either by private contract or public auction; and, if the purchasers thereof shall in [*296 the opinion of the directors be persons proper to become members of the company, the directors may admit such persons to become the holders of such shares, but, if not, then such shares shall be again offered for sale by private contract or public auction, until the purchasers thereof shall in the opinion of the directors be fit and proper persons to be admitted members of the company.

"That it shall be lawful for the directors (if they shall at any time think it advantageous so to do) to apply any portion of the funds of the company in purchasing at a fair and reasonable price, for the benefit of the company, any share or shares which the holder thereof may be desirous of selling, and may from time to time re-issue the same, or any of them, in such manner as they may think expedient.

"That, when any land or ground shall from time to time be purchased or taken for the purposes of the company, the directors shall with all convenient speed cause to be erected and built thereon such number of houses of such forms and dimensions, and of such class, size, and description, as they shall think fit, or complete and finish any houses which at the time of purchasing or taking such land or ground may have been begun to be erected or built thereon.

"That, in determining the number and the size and description of the houses to be erected and built or completed and finished as aforesaid, the directors shall be guided by the number of members of which the company shall consist, and the number of shares and half-shares held by each member; and they shall cause such a number of houses of the estimated value when completed of 150*l.* each, or as near as may be of that value (such value arising either from size or situation *or other advantage belonging thereto), to be erected as shall at least be equal to the number of members holding single [*297 shares; and such houses shall be called single-share houses: and the directors shall also cause such a number of houses of the estimated value when completed of 225*l.* each, or as near as may be of that value (such value arising as aforesaid), to be erected as shall at least be equal to the number of members holding one share and a half; and such houses shall be called one-and-a-half share houses: and the directors shall also cause such a number of houses of the estimated value when completed of 300*l.* each, or as near as may be of that value (such value also arising as aforesaid), to be erected as shall at least be equal to the

number of members holding two shares; and such houses shall be called two-share houses: and the remaining houses to be erected and built on the land or ground so purchased or taken shall when completed be of such value as the directors shall think proper, so that every remaining member may have a house or houses of such estimated value in the whole as shall be equivalent as near as may be to the number of shares and half-shares held by him, in the proportion of 150*l.* to each share.

"That, when and as often as in the judgment of the directors sufficient progress shall have been made in or towards the erection of any number of houses of any class or description to enable them to make an allotment thereof, they shall cause notice in writing to be given to every member of their intention to allot the same, and of the day when such allotment is so intended to be made; and every member who shall be desirous of having any such houses allotted to him or her, shall, two days at least before the day appointed for such allotment, give notice in writing to the secretary of his desire to stand the allotment.

*298] *"That, whenever any allotment of houses shall have been determined upon, the houses to be allotted shall be arranged in such order as the directors shall think fit, and shall be numbered progressively beginning with No. 1; and the names of all those members having given notice of their desire to stand to such allotment who shall at the time of such allotment being made, but not otherwise, possess the requisite number of shares to entitle them to have such houses allotted to them, shall be written upon certain slips of paper of an equal shape and size in all respects, with the number of the registered share or shares thereon in respect of which each such slip shall be so put in; and all such slips of paper shall be placed in some convenient box or bag to be provided for that purpose, and be well shaken up or mingled together; and some person to be appointed by the members present at the meeting at which such allotment shall be made, shall draw out such slips one by one until a number equal to the number of houses to be allotted shall have been drawn out; and the member whose name shall be written on the slip which shall be first drawn out shall be the person to whom the house numbered 1 shall be considered as allotted, and the person whose name shall be written on the slip secondly drawn out shall be the person to whom the house numbered 2 shall be considered as allotted, and so in like manner until all the said houses shall have been allotted: And every person to whom any house shall be so allotted as aforesaid shall accept and take the same as the house to which he or she shall be entitled by virtue of the share or interest in respect of which such allotment shall have been made; and, in case he or she shall refuse to accept the same, such last-mentioned share or interest shall be absolutely forfeited to the company, and may be disposed of by the

*299] directors as they may think fit: *Provided always, that, if by any accident or design, two or more slips shall be taken out of the box or bag at one time, all the slips so drawn out shall be immediately replaced in the box or bag, which shall be shaken before any other slip shall be drawn out therefrom.

"That any member to whom any house or houses may be allotted, whether voluntarily or compulsorily, shall at or before the third monthly meeting subsequent to such allotment being made to him or her, pay up

all arrears of subscriptions and fines payable by him or her on account of the share or shares in respect whereof such allotment shall have been made to him or her; and, in default thereof, the directors may declare that the house or houses so allotted to such member, and the share or shares held by such member in respect whereof such allotment shall have been made, shall be absolutely forfeited to the company; and the same may thereupon be disposed of by the directors in such manner as they shall think fit.

"That, when every member shall have obtained a house or houses answerable to the share or shares subscribed for by him or her, or shall have obtained other satisfaction in respect of such share or shares, and all subscriptions, rents, fines, and payments shall have been made good on the part of all the members, then and immediately thereupon the accounts of the company shall be finally wound up; and, after such accounts shall have been duly audited, the same shall be printed, and a copy sent to each member, and the company shall terminate; and the trustees, with the advice of the solicitor of the company, shall prepare and execute, at the expense of each member, such deeds or documents as may be requisite or expedient for absolutely vesting in each member, or his or her legal representatives, the house or houses which may have been allotted to him or her; and the conveyance *or assignment [*300
of such house or houses to such member shall operate as an effectual release from him to the directors and trustees and other officers of the company.

"That the trustees in whom any property belonging to the company shall for the time being be vested, shall dispose of the same in such manner as the directors shall from time to time direct; and every such disposition shall be binding upon all the members of the company.

"That every member or other person desirous of disposing of any share, shall give notice thereof in writing to the directors, addressed to the secretary, stating the number of such share, and the name and place of residence of the person to whom the same is intended to be transferred.

"That, whenever the directors shall be satisfied that the person to whom any share is proposed to be transferred is a fit and proper person to become a member, and shall have signified the same, such share may then, but not till then, be transferred to such person.

"That the instrument by which any share shall be transferred shall be in such form as the directors shall prescribe, and shall contain a covenant on the part of the transferee to abide by the rules and regulations of the company, and to indemnify the trustees, and such other covenants as the directors shall require, and shall, when executed, be deposited with the secretary of the company."

[Either party was to be at liberty to refer to any other clauses of the deed.]

The company was established on the 1st of December, 1851, and has since then carried on its affairs under and in conformity with the said deed.

The company has not been certified, registered, or enrolled under any act or acts of parliament.

*The largest number of shares subscribed for is 476; but these [*301
have been reduced by forfeitures for non-payment of subscriptions to 276; and these 276 shares are now held by 124 members.

One Charlotte Ryder was one of the original shareholders in the company. She held two shares in it, that is to say, the shares numbered 334 and 335, and paid all her subscriptions on them from the time of agreeing to take them until she parted with them as hereinafter mentioned.

"On the 25th of September, 1852, the said Charlotte Ryder, by an indenture made between the said Charlotte Ryder, therein called the vendor, of the first part, the now defendant, therein called the purchaser, of the second part, and the now plaintiffs, therein called the trustees, of the third part (a copy of which was annexed to and was to be taken to be part of the case), purported to assign and transfer to the now defendant, his executors, administrators, and assigns, her said shares in the capital or joint stock of the company, and all benefit and advantages and privileges attending the same, To hold the same to him and them, subject to the several covenants, provisoes, and conditions contained in the said indenture of the 1st of December, 1851.

The defendant executed the indenture of the 25th of September, 1852, which contained the following words: "And this indenture further witnesseth, that the said purchaser (meaning the defendant, for himself, his heirs, executors, and administrators, doth hereby covenant with the said trustees (meaning the plaintiffs), and with each and every of them, severally and respectively, and with their and each and every of their respective executors, administrators, and assigns, that he the said purchaser shall and will well and truly perform, fulfil, obey, and keep all and singular the covenants, provisoes, and agreements in the said deed of settlement *contained, which respectively are or ought to be performed, fulfilled, observed, obeyed, and kept by him the said purchaser as a member of the said company, and also all and every the rules and regulations for the time being of the said company made and established in pursuance thereof, as fully and effectually, and in the same or in like manner, to all intents and purposes, as if the said purchaser had been a party to and had signed and sealed the said deed of settlement: And this indenture further witnesseth, that the said purchaser, for himself, his heirs, executors, and administrators, doth hereby further covenant with the said trustees, and with each and every of them severally and respectively, and with their and each and every of their respective executors, administrators, and assigns, that he the said purchaser, his executors and administrators, shall and will, as well in respect of the shares hereby assigned, as in respect of any other share or shares which with the approbation of the directors of the said company the said purchaser may hereafter become the proprietor of, well and truly pay or cause to be paid all such subscriptions, fines, and sum or sums of money, as now are, or shall or may from time to time or at any time hereafter become, due in respect of the said shares hereby assigned, and every such share as aforesaid, and shall and will make all and every such payments at the times and place and in the manner specified by the directors, or otherwise by or in pursuance of the said deed, and without any deduction or abatement whatsoever, according to the true intent and meaning of the same deed: And this indenture further witnesseth, that the said purchaser, for himself, his heirs, executors, and administrators, doth hereby, in proportion to his interest for the time being in the said company (which interest shall be ascertained

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by the number of shares which he may hold *therein as shown [*303
by the books of the company), but not further or otherwise, covenant with the said parties hereto of the first part, and with each and every of them, severally and respectively, and with their and each and every of their respective heirs, executors, administrators, and assigns, that he the said purchaser, his executors and administrators, shall and will, from time to time, and at all times hereafter, well and effectually save, defend, keep harmless, and indemnified, the said parties hereto of the first part, and each and every of them, and their several and respective lands, goods, chattels, and effects, from and against all costs, losses, charges, damages, and expenses which they or any or either of them shall or may pay, incur, or sustain by reason or in consequence of entering into any contract or engagement for or on the behalf of the company, or for or on account of any act, deed, matter, or thing whatsoever, which shall or may be done or executed by them, or any or either of them, in the execution of their office as trustees of the said company, or by the authority of the directors thereof.

The defendant, after the execution of the said indenture of the 25th of September, 1852, paid his subscriptions on the said shares so purported to be assigned and transferred, down to the 1st of July, 1857.

If the said deed of settlement and deed of transfer are valid and binding on the defendant, and if he continued so long to be a member of the company, there were at the commencement of this action on the 18th of May, 1858, due and in arrear from the defendant, ten monthly subscriptions in respect of the said two shares, and also fines in respect of the non-payment of the said subscriptions, of which subscriptions and fines the defendant had from time to time due notice.

In March last, more than six, namely, eight, of the said monthly subscriptions having become due from *the defendant in respect [*304
of the said two shares, if the said deeds were valid and binding on the defendant, and if he had not ceased to be a member, the secretary of the company made a written application to the defendant for payment of subscriptions and fines, stating therein, that, unless the arrears on his shares were paid on or before the next subscription night, the matter would be placed in the solicitor's hands; to which on the 10th of March the defendant wrote and sent to the secretary an answer, as follows:—"I am in receipt of your letter of the 1st March; but, as I ceased altogether to be a member of the Third Equitable Union Building Company some months back, and as I have now no further interest whatever therein, as provided in the 45th clause of the deed of settlement, I presume this circumstance was overlooked when the letter was sent me." This letter was received in due course of post, and laid before the directors; and their secretary, on the 24th of March aforesaid, sent, by their order, an answer to it, in the following words:—"27 Catherine Street, Islington. 24th March, 1858. Mr. Rawlins. Sir,—Your letter was read to the directors at their last meeting, who have directed me to inform you that they have not forfeited your shares, and so request payment of the arrears on the next subscription night, or proceedings will be commenced against you. GEO. BARFIELD, Secretary."

The defendant had been informed by one of the directors previously to the execution of the indenture of September, 1852, that the company

was duly registered; but had discovered, before he refused to pay subscriptions or fines, that it was not so registered.

The defendant contends, that, by reason of the said company not being certified, enrolled, or registered under any statute or statutes, and the other facts stated in this case, the company at all times was and is
*305] *illegal. He also contends, that, by reason of the matters aforesaid, the deed of settlement and the deed of transfer are not binding on him, and that he is not liable for subscriptions or fines, or otherwise, by virtue of the covenants contained in those deeds, or either of them, or otherwise.

He also contends, that, under the circumstances stated, and by virtue of the 45th and other clauses of the deed of settlement, and the facts stated in this case, he ceased to be a shareholder, and his shares became forfeited, and he became discharged from liability for subscriptions and fines accruing after the expiration of six months from the time when any subscription or fine had been in arrear for six months, or, at all events, after the receipt of his letter of the 10th of March, 1858.

Since the commencement of this action, the defendant has paid to the plaintiffs, and they have accepted, the sum of 4*l.* 11*s.*, being the said eight monthly subscriptions on the said two shares, and the fines in respect thereof, being the amount of all subscriptions or fines that became or were alleged to be due before or at the time of the receipt by the company of the said letter of the 10th of March, 1858: and it has been agreed between them that that amount shall be considered as struck out of the claim in the action.

After the receipt of the said letter of the 10th of March, 1858, and before this suit, two further monthly subscriptions, and the fines in respect of the non-payment thereof, amounting in the whole to the sum of 1*l.* 3*s.*, became due and in arrear from the defendant to the plaintiffs, if the deeds were valid and binding on him, and he had not ceased to be such member as aforesaid, and still are unpaid.

*306] The question for the opinion of the court was, *whether the plaintiffs or the defendant were entitled to judgment.

If the court should be of opinion that the plaintiffs were entitled to judgment, it was to be entered for the sum of 1*l.* 3*s.*, being the amount of the said two monthly subscriptions and fines; otherwise, for the defendant: in either case, with costs on the higher scale, unless the court should otherwise order.

David Keane (with whom was *S. Temple*, Q. C.), for the plaintiffs.(*a*)—The defendant has entered into a covenant with the plaintiffs to perform all the covenants contained in the deed of settlement of this company, and the rules and regulations made in pursuance thereof. The answer

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the deed of settlement and deed of transfer are valid, and have always since the execution of the latter of them been binding on the defendant:

"2. That the company is not an illegal association, and that it is not and never was within any statute requiring enrolment or registration:

"3. That the defendant did not cease and has not ceased to be a shareholder, and that the deed gave no option to him to determine his liability by availing himself of his own breach of contract and the indulgence of the directors:

"4. That the defendant, by paying the amount of his subscriptions and fines up to the 10th of March, 1858, has deprived himself of the right, if any, to say that he is not liable for the subscriptions and fines accruing due between that date and the 18th of May, 1858, the day on which this action was commenced."

attempted to be set up, is, that the deed of settlement is void by reason of the non-enrolment of the company. None of the friendly society acts make enrolment a condition to the validity and legal existence of the society: and the 7 & 8 Vict. c. 110, s. 2, is applicable only to joint stock companies which are established "for any commercial purpose, *or for any purpose of profit, or for the purpose of assurance or insurance." The point seems to have been already decided by [*307 the Court of Queen's Bench in a case of The Queen *v.* Whitmarsh, 15 Q. B 600 (E. C. L. R. vol. 69). There, a company called The Chartist Co-operative Land Company was established under a deed which provided, amongst other things, that it should not authorize or require anything to be done contrary to law; that the company's business should be purchasing land and erecting thereon dwellings to be allotted to the members, and raising a fund out of which sums should be paid to or applied for the benefit of the allottees, and raising money for the purposes aforesaid by selling, &c., interests in or charges on the estates to be purchased; that the directors might recommend allotments of land, dividends of profits, and the setting aside money for a reserve fund; that the shareholders from time to time selected by lot from those to whom no allotment had been made should receive allotments of the land purchased; that, before a shareholder should receive his allotment, a dwelling should be erected on it and certain sums laid out in stocking it by the directors; that the allotment should be charged with a rent-charge for the benefit of the company, at the rate of 5*l.* for every 100*l.* expended by them; that the rent-charges might be retained for the benefit of the company, or sold, &c., as the directors should think fit; and that, when the funds of the company should exceed the amount necessary to provide allotments for all the shareholders, a dividend out of the profits should be declared among the shareholders: and it was held that the company appeared by the deed not to be established for any commercial purpose or purpose of profit within the 7 & 8 Vict. c. 110, s. 2, and was therefore not entitled to registration. Lord Campbell, in giving the judgment of the court, says: "With respect *to [*308 the powers conferred upon the directors of selling land that might be purchased, they are not given for any purpose of profit by purchase and re-sale, but as subsidiary only to the governing purpose of providing allotments in respect of which the sale or other transfer of parcels of land might occasionally become convenient. It would be accidental only, if profit arose from the exercise of these powers; and the exercise of them was clearly not the purpose for which the company was established." That was followed and approved in Bear *v.* Bromley, 18 Q. B. 271 (E. C. L. R. vol. 83). The object and purpose of this company are expressly declared by the second clause of the deed of settlement to be, to enable each member to become the possessor of a freehold, copyhold, or leasehold house. The third and fourth clauses provide for the raising the funds necessary for carrying that object into effect. The fifth clause is as follows:—"That the business of the company shall be, to take on lease or purchase, either for years or in fee, land or ground within the distance of twenty miles from St. Paul's Cathedral, London, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which have been begun to be erected on the land so taken or

purchased, and to take down and rebuild, or to repair, any existing houses or buildings on the land or ground so taken or purchased, *and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.*" It will be contended on the part of the defendant, that the introduction of these latter words in the fifth clause makes this a company established for "a commercial purpose" or "a purpose of profit." But that is subsidiary only to the objects mentioned in s. 2, not for the purpose of making profits in the ordinary sense of
*309] *commercial profits. [CROWDER, J.—There was no provision at all like this fifth clause in the deed of settlement in The Queen v. Whitmarsh.] There was not. The directors might have made more bricks or bought more materials than were required for the legitimate purposes of the company: they have power to get rid of the superfluous materials. So, the provisions in the 34th, 35th, 36th, and 38th clauses,—to enable the trustees to make and buy bricks, &c., to contract for the purchase or leasing of land, &c., to contract for the erection of buildings and the supply of materials, &c., and to sell houses or land not immediately wanted,—are all subservient to the special purpose for which the company is established. [WILLES, J.—The 50th and subsequent clause would seem, according to Hickman v. Cox, 3 C. B. (N. S.) 523 (E. C. L. R. vol. 91), to constitute a partnership.] That would not alter the effect of the deed, so far as regards its liability to enrolment. The 63d clause provides for the dissolution of the company when every member shall have obtained a house or houses answerable to the share or shares subscribed for by him or her, or shall have obtained other satisfaction in respect of such share or shares, and all subscriptions, rents, fines, and payments shall have been made good on the part of all the members. The profits to the members here are limited to profits in the shape of houses and land: they are not the usual and ordinary commercial profits. [COCKBURN, C. J.—In the cases you refer to, the business of the company was expressly limited to the erection of houses and fitting them for habitation for its members. But here the company are, in addition, to carry on a business out of which profits may be made. As regards those with whom they deal, they are as much a commercial association as any other company established for the mere purposes of trade. They are (by clause 5) to make and sell bricks, and to purchase and sell all kinds of building
*310] *materials, and to contract for and perform all kinds of work in the building business,—and (clause 34) generally to do all such acts, matters, and things as are usually done by builders,—and (clause 38) they are to sell and dispose of any houses or land which may not be immediately wanted for the purposes of the company, and to apply the proceeds of such sales to the general purposes of the company. Instead of dividing in money the profits thus made, the directors are to invest them in houses and land, and the members are to receive them in another form.] Notwithstanding all these provisions, there is nothing to differ this case from that of The Queen v. Whitmarsh. The object of the association is, the acquisition of freehold houses and land by the several members: all beyond that is merely subsidiary to the general scope of the undertaking.

The second point relied on by the defendant is, that he ceased to be a member of the company when he allowed his subscriptions to be six

months in arrear: and for this he founds himself upon the 45th clause, which provides, "that, if any member shall, from any cause whatever, permit any monthly subscription on any share or shares held by him or her to be in arrear for the period of six calendar months after the same shall have become due, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six calendar months, become absolutely forfeited to the company for the benefit of the other members thereof; and, upon any such forfeiture of all the shares held by any member, the person so making default shall cease to be a member of the company and to have any interest therein or in the property belonging thereto." [BYLES, J.—That is, the non-payment of the subscriptions for six months shall be a forfeiture at the election of the directors.] Like a policy of insurance, which is void for non-payment of premiums, at *the election of the directors; or a lease, which [*311 is to be null and void on failure of the lessee to perform the covenants, at the election of the lessor,—Rede *v.* Farr, 6 M. & Selw. 121; Doe d. Bryan *v.* Bancks, 4 B. & Ald. 401; Armsby *v.* Woodward, 6 B. & C. 519 (E. C. L. R. vol. 13), 9 D. & R. 536 (E. C. L. R. vol. 22). The fact of the defendant having executed the indenture of the 25th of September, 1852, is an answer to the objection that he has not executed the deed of settlement.

Lush, Q. C. (with whom was *Aspland*), for the defendant.(*a*)—The main question is, whether this is not a joint stock company established "for a commercial purpose" or "a purpose of profit," within the 7 & 8 Vict. c. 110, s. 2. These words "for any purpose of profit" have been interpreted to mean, to obtain profits for the company, not profits for the members inter se. In The Queen *v.* Whitmarsh, 15 Q. B. 600 (E. C. L. R. vol. 69), the sole object of the scheme was, to purchase land and erect houses thereon for the members: there was no intention to get profits by dealing or contracting with the public, as there is here. [WILLES, J.—The company, to carry out *its object by means [*312 of the subscriptions, would require 75,000*l.*, and they would be fifty years getting it.] The second clause states the object of the association to be, to enable each member to become the possessor of a freehold, copyhold, or leasehold house of the estimated value of 150*l.*, or thereabouts, in respect of each share which he may subscribe for: not a word is said as to its being by subscriptions only. The 4th clause provides "that the sum of money necessary for carrying the object of the company into effect shall be raised by means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and by such other ways

(*a*) The points marked for argument on the part of the defendant were as follows:—

"That, on the facts stated, he is not liable to any part of the sum claimed, and is entitled to the judgment of the court,—that the company, not being enrolled, certified, or registered, was an illegal company,—that the deed of settlement was illegal,—that, if not illegal, at all events the covenants in the deed of settlement and deed of transfer were not binding on the defendant,—that such was especially the case, as the defendant, who never executed the deed of settlement, executed the deed of transfer after an assurance that the company was duly registered,—and that, if the deeds were ever binding on the defendant, his membership and liability ceased before any of the subscriptions or fines now claimed became due, and he has paid all subscriptions and fines that became due when he was a member."

and means as are hereinafter provided." That clearly is not confined to business between the members. Then comes the 5th clause, which provides that the business of the company, amongst other things, shall be, "to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto." By clause 8, the affairs of the company are to be conducted by a board of fifteen directors, who by clause 32 are empowered "to employ as many servants and *workmen* as the business of the company may require." The 34th clause contains nothing to limit the power of the directors: it provides "that the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, *and generally to do all such acts, matters and things as are usually done by builders.*" By the 36th clause it is provided that "the directors may from time to time authorize the trustees to enter into, make, and sign such *313] *contracts and agreements with any person or persons, whether members or otherwise (but only according to the respective trades, occupations, or businesses of such person or persons), for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient,"—that object manifestly being to carry on a trade for the purpose of raising money to enable each member to become the possessor of a freehold house. By clause 37, the directors are empowered to authorize the trustees to borrow 60,000*l.* The 65th clause provides that "all moneys which shall be received from subscriptions, or *from any other source whatever*, shall from time to time, within two days after the receipt thereof, be paid in to the bankers, to the credit of the trustees." Thus, the deed provides all the powers which the directors want and which are usually vested in the directors of a trading company. It goes, therefore, far beyond those in the cases cited, of The Queen *v.* Whitmarsh, 15 Q. B. 600 (E. C. L. R. vol. 69), and Bear *v.* Bromley, 18 Q. B. 271 (E. C. L. R. vol. 83). [COCKBURN, C. J.—I agree with you, that the undertaking would come within the 7 & 8 Vict. c. 110, if the primary object were the buying and selling of houses and land, and the making and selling of bricks, and the buying and selling of materials. But this power is only thrown in incidentally in the 4th and 5th clauses. What the company primarily had in view was, the erection of houses for the members, the rest was subsidiary and in subordination to the main object and purpose. BYLES, J.—All these provisions in the deed were to eventuate in the division of the purchased land, with the houses erected upon it, among the members. There is to be no division of profits until the whole affairs of the company are wound up.] There *314] is nothing to limit the *general words of the 32d clause to the ulterior objects of the company. The deed contemplates that the directors shall carry on a building trade, the profits of which were to assist them in the ulterior objects of the company. It cannot be successfully contended that the forfeiture for non-payment of the subscriptions for six months is absolute. The 7th section of the 7 & 8 Vict. c. 110, makes the deed illegal. [WILLES, J.—If this is a company within the 2d section, the deed no doubt is illegal and void for want of

enrolment. That was decided in The Agricultural Cattle Insurance Company *v.* Fitzgerald, 16 Q. B. 432 (E. C. L. R. vol. 71).]

Keane, in reply.—Looking at the clauses 34, 35, and 36, it is clear that the directors have no power to do anything except for the purposes mentioned in the 2d clause. [COCKBURN, C. J.—How is the fact?] If the company had carried on business in the way suggested, the fact would doubtless have appeared in the case. Could it be doubted that any member of the company might have had recourse to a court of equity to restrain the directors from acting otherwise than according to the purpose and object indicated by the 2d clause of the deed? The question is, whether the company, as such, are to make profits. In Re The Stanton Iron Company, 21 Beavan 164, the Master of the Rolls held the company not to be within the winding-up acts. Now, a company which is not within the winding-up acts, is not within the 7 & 8 Vict. c. 110,—In re The London and Manchester Direct Independent Railway Company, Ex parte Barber, 1 M'N. & G. 176. [WILLES, J.—That is inconsistent with the decision of this court and of the majority of the Exchequer Chamber in Hickman *v.* Cox, 18 C. B. 617 (E. C. L. R. vol. 86), 3 C. B. (N. S.) 523 (E. C. L. R. vol. 91).] This court held that the deed constituted the parties partners as against third persons.

*COCKBURN, C. J.—Our judgment in this case must be for the plaintiffs. If, indeed, it were clear from the deed of settlement [*315 of this company that it was competent to the directors under the powers contained in the clauses, 2, 3, 4, and 5, to carry on the business of making and selling bricks, and purchasing and selling building materials, and contracting for and performing all kinds of work in the building business,—and so working for other people, independently of the main purpose for which they are constituted, viz., the enabling each member to become the possessor of a freehold, copyhold, or leasehold house,—I should have been of opinion that it was a company within the 7 & 8 Vict. c. 110, and that registration was necessary to enable them to enforce contracts entered into with them; for, although the ultimate object of the association is the erection of buildings for its members only, yet, if the means or part of the means to that end were that the company should carry on business, that immediate and primary purpose would bring it within the act, and it would be immaterial by what means the profits were eventually to be realized for the company. If, for instance, the profits of the business so carried on were to be invested in land upon which houses were to be erected for the members or subscribers, that arrangement for the ultimate disposition of the profits would not take the case out of the operation of the statute. If the 5th clause was intended to enable the company so to carry on business for profit, then I should say that this case was clearly distinguishable from The Queen *v.* Whitmarsh, 15 Q. B. 600 (E. C. L. R. vol. 69), and that the deed of settlement was void and incapable of being enforced. The whole question, therefore, turns upon the construction of the 5th clause. I am strongly inclined to think, that, under that clause, it was part of the intention of the promoters of the company that they should make *and sell bricks, and purchase and sell all kinds of building [*316 materials, and should contract for and perform work in the building business generally, and not merely as subsidiary to the main

object and purpose of the company. At the same time, it must be confessed that the matter is open to considerable difficulty. I cannot say that my doubts are altogether removed; but, as my learned Brothers all think that it would not be competent to the directors under this deed so to carry on business, I do not entertain so strong an opinion as to induce me to differ from them. All that I desire to be understood as laying down, is, that, if it were clear from the language of the deed that the company were to carry on business for profit dehors the main object for which they are associated, that would have brought them within the 7 & 8 Vict. c. 110.

CROWDER, J.—I am of opinion that this is not a company established for the purpose of profit, within the 2d section of the 7 & 8 Vict. c. 110. Looking at the deed of settlement, it seems to me that this case is entirely governed by The Queen *v.* Whitmarsh, 15 Q. B. 600 (E. C. L. R. vol. 69). The main purpose of the deed in both cases was precisely the same,—that each member should become entitled to a freehold, copyhold, or leasehold house, by paying certain monthly subscriptions. It is said, on the part of the defendant, that The Queen *v.* Whitmarsh does not govern the present case, because by the 4th and 5th clauses of this deed of settlement power is given to the directors to enter into the regular trade of builders, and to contract for that purpose with third persons. Looking at those clauses, in conjunction with other clauses in the deed, I am unable to bring myself to that conclusion. The 4th clause provides that the sum of money necessary for carrying the object of the company into effect shall be raised by *317] *means of the monthly subscriptions of the members, and of the rents to be paid by the members for the houses which shall be allotted to them, and by the sale of superfluous houses and land and of houses and land which may not be immediately wanted for the purposes of the company, *and by such other ways and means as are thereinafter provided.* The "other ways and means," it is said, are pointed out by the 5th clause, which is as follows,—"That the business of the company shall be, to take on lease, or to purchase, either for years or in fee, land or ground, &c., of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild or to repair any existing houses or buildings on the land or ground so taken or purchased; and to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto." It is urged on the part of the defendant, that, although the earlier part of this clause is strictly confined to the object of the company, as described in clause 2, yet, when you come to the latter part, that gives the trustees authority to carry on the general business of brick-makers and builders, and that is one of the ways and means of raising money referred to in the 4th clause. These latter words of the 4th clause, I incline to think, refer to the 37th clause, which enables the directors to authorize the trustees to borrow money on mortgage. These moneys when raised are to be applied to the building, &c., of houses for the purpose and object of the association: and that, I think, satisfies the words of the 4th clause. The 5th clause is certainly not free from ambiguity: but still I think it may fairly be con-

fined to such buildings as are *immediately connected with the primary object of the company. Part of the business of the company is, to make and sell bricks, to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto. Suppose they enter into a contract with a builder to erect a house or houses on part of the land purchased or taken by them, the trustees may sell bricks and other materials to the contractors, as fairly incident to the main purpose for which the company was formed. The purchase of building materials would be absolutely necessary. Suppose they have purchased more than they can use, surely they must have authority to dispose of the overplus. As to the latter part of the clause, which enables them to contract for and perform all kinds of work in the building business, and in relation thereto,—though the language is not very precise and definite, the construction I put upon it (taking it in conjunction with the 32d and 36th clauses), is, that the trustees may themselves employ servants and workmen, or may contract with a builder, to do the required works. So viewing it, it seems to me to be a strained construction (there being only three lines in the deed which can be suggested as conferring that power upon them) to say that the trustees were to carry on the business of builders for profit. A reference to subsequent provisions of the deed will confirm this view. Thus, the 50th clause provides, that, when any land or ground shall from time to time be purchased or taken for the purposes of the company, the directors shall with all convenient speed cause to be erected and built thereon such number of houses of such forms and dimensions, and of such class, size, and description as they shall think fit, &c.: and the 51st clause provides, that, in determining the number and the size and description of the houses to be erected *and built or completed and finished as aforesaid, the directors shall be guided by the number of members of which the company shall consist, and the number of shares and half-shares held by each member, and erect houses of corresponding value. If the directors may build houses for anybody, what sensible construction can be given to these two sections? They are plainly inconsistent with a general power to carry on the building business. Then, what is to become of the houses when erected? That is provided for by the 52d, 53d, and 54th clauses. They are to be allotted amongst the members according to the value of their several interests in the company. Then the 63d section provides for the dissolution of the company when the object of its formation has been accomplished. Looking at the whole of the deed, I find no clause showing the meaning of the last three lines of the 5th clause to be as contended for by the defendant. Though not free from ambiguity, I am strongly of opinion that the words of that clause do not enable the directors to carry on business for profit in any way to bring them within the 2d section of the 7 & 8 Vict. c. 110. For these reasons, I am of opinion that the plaintiffs are entitled to judgment.

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WILLES, J.—I concur in giving judgment for the plaintiffs. The view I take of the case is in accordance with that of my Lord Chief Justice. But I am glad to find that the view taken by my Brothers Crowder and Byles of the construction of this deed (and which I adopt as the most wholesome one) enables the court to give judgment for the plaintiffs, notwithstanding the 7 & 8 Vict. c. 110, which would have made the deed

void if the construction contended for by the defendant could have been put upon it. There is no doubt in the minds of any of us as to the law
*320] *applicable to the case. If the 5th and 34th clauses were to be read as giving the directors power generally to enter into building operations, unquestionably the company (though the extent of profit would be limited by the object of its formation) would still be a company established for a purpose of profit within the statute, and consequently would require registration. The only question is, whether, looking to the whole scope of the deed, these clauses are not to be restricted to that which is manifestly the main object and purpose of the company's formation. If the words of the two clauses I have referred to are to be read by themselves, separated and disjointed from the rest of the deed, they would seem to give the directors such a power as would enure to make the deed void: but, for the reasons given by my Brother Crowder, and having regard to the maxim that "general words may be aptly restrained according to the subject-matter or person to which they relate," it seems to me that we ought if possible to put such a construction upon this deed as to make it valid. Generally speaking, a deed ought to be read as if there were no act of parliament affecting it in existence: if, so construing it, it comes within the language of an avoiding statute, it must necessarily be held void. There are many cases where the general rule of construction, that, where the words are ambiguous, they shall be read in a sense which will make the deed consistent and legal, has prevailed. Thus, in Payler *v.* Homersham, 4 M. & Selw. 423, a release contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set opposite to their respective names, and that they had agreed to take of the defendant 15*s.* in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15*s.* in the pound paid to them
*321] before executing the release, each and *every of them did release the defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either of them had against him, *or thereafter could, should, or might have*, by reason of anything from the beginning of the world to the date of release,—was held to release nothing but the respective debts, and all actions and demands touching them; for, the general words of release had reference to the particular recital, and were to be governed by it. A class of cases more immediately applicable here is that which is referred to in the case of The Poulters' Company *v.* Phillips, 6 N. C. 314 (E. C. L. R. vol. 37), 8 Scott 593. The company of poulters comprises all poulters in London and within seven miles thereof, and no one can be of the livery of a company in London, unless he be a freeman of the city: it was held in that case, that a by-law authorizing the company to admit into the livery of the company *any freeman of the company*, was a valid by-law, and must be intended to imply any freeman of the company who was also free of the city. Looking at the professed object of this company, and seeing that it would make the deed illegal and void if the 5th and 34th clauses were to receive the general construction contended for on the part of the defendant, and legal if they receive the more limited construction put upon them by my Brother Crowder, I am inclined to think that the latter is the right construction, and therefore that the plaintiffs are entitled to judgment.

BYLES, J.—I also agree with the opinion pronounced by my Brother Crowder. I entertain a strong opinion, upon the authorities, that our judgment should be for the plaintiffs. This is not a company established for any commercial purpose, or for any purpose of profit, within the 2d section of the 7 & 8 Vict. c. 110. The Queen *v.* Whitmarsh, 15 Q. B. 600 (E. C. L. R. vol. 69), distinctly decides *that, the primary [*322 object of an association being to purchase land and build houses thereon for its members, and not the making of profits from trading, it does not require enrolment. Now, what are the ultimate objects of this company, and the means by which they are to be attained? These sufficiently appear from the 2d and the 63d clauses of the deed of settlement, viz. to enable each member to become the owner of a house of the estimated value of 150*l.* in respect of each share held by him. That is the object to which all the proceedings of the company are to be directed: and, as soon as that object is attained, it is imperative on the company to dissolve itself and wind up its affairs. [His lordship read the 63d clause.] It seems clear, therefore, that the ultimate object of the society was, to furnish each of its members with a freehold, copyhold, or leasehold house of the value of 150*l.*; and that nobody was at liberty to deviate in any degree from the course which was to carry out that purpose. How were they to do this? Their business was (clause 5) to take on lease or to purchase land of freehold, copyhold, or leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and they were to take down and rebuild, or to repair any existing houses or buildings. Where? Not anywhere; but "on the land or ground so taken or purchased." They are also to make and sell bricks, and to purchase and sell all kinds of building materials. In addition to what has fallen from my Brother Crowder, viz. that this might be intended to authorize the directors to sell any surplus materials they might have accumulated, it may be that they might make bricks and sell them together with other building materials to such of their members as might choose to build their own houses. They were also to contract *for and perform all kinds of work in the building busi- [*323 ness and in relation thereto,—but only on the land so taken and purchased. It seems to me that the carrying on the building business in any other way would be entirely beyond the scope and object of the company's formation. If the directors or trustees deviate from the main object of the society, they infringe the deed of settlement; for, it appears by clauses 33 and 34 that everything is to be done under the control and superintendence of the directors. The 34th clause especially gives the directors power in respect of building operations. They may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, and generally do all such other acts, matters, and things as are usually done by builders,—but subject to such restrictions as may from time to time be imposed upon them by the resolutions of any general meeting. Suppose there be any general words in some part of the deed which are not quite susceptible of the meaning given to them by my Brother Crowder, I conceive the directors would be acting contrary to the scope of the deed and to the law of the land, if they took advantage of them to carry on trade in a manner not contemplated by

the deed or the purposes for which the company was formed. For these reasons, I fully concur in the judgment pronounced by my Brother Crowder, and, upon the authority of the case of The Queen v. Whitmarsh, which is not distinguishable from the present, I think the plaintiffs are entitled to judgment. Judgment for the plaintiffs.

*324] *DODD v. PONSFORD. *April* 30.

The plaintiff agreed to supply the defendant with a quantity of bricks, upon the following terms:—"Terms of payment, four months' account, and at the end of four months a settlement shall be made, and eight months longer will be given *on your paying* interest on the amount at the rate of 5 per cent.; and, if a further three months is required, it will be given, *on your paying* the *current* rate of interest on the amount:"—Held, that the payment of the interest was not a condition precedent to the defendant's having the eight months' and three months' further credit.

THIS was an action for goods sold and delivered. The writ was endorsed as follows:—

"November and December, 1857, and January to May, 1858.						
"Goods, viz. bricks	275	18	0			
"Ditto	72	10	0	348	8	0
"January to May, 1858.						
"Goods, viz. bricks	39	16	7			
"Ditto	55	8	2	95	4	9
				£443	12	9"

By a judge's order, dated the 14th of August, 1858, the last items (95*l.* 4*s.* 9*d.*) were struck out of the particulars: and, by agreement of the parties, the following case was stated for the opinion of the court:—

The plaintiff is a brickmaker, and the defendant is a builder. The goods in question were supplied by the plaintiff to the defendant under the following circumstances:—In October, 1857, the defendant contracted to lease to a Mr. Charles Maidlow certain land in Hill Road, for the purpose of building upon, and applied to the plaintiff to supply Maidlow with the requisite bricks. The plaintiff thereupon sent Maidlow a memorandum, of which the following is a copy:—

"Mr. Dodd, City Wharf, New North Road, Hoxton, 12th October, 1857.

"To Mr. Charles Maidlow.

"Stocks . . . . 30*s.*
"½ and ½ . . . . 26*s.*
"Place . . . . 21*s.*

} per thousand, delivered to Hill Road, St. John's Wood.

*325] *"To the amount of 500,000, to be delivered within four months from this date, and give the accommodation of eight months' further credit for that quantity, bearing interest at 5 per cent. per annum: and, should a further three months' credit be required after that period, interest to be paid at the current rate of the time, if Mr. Ponsford will give his note of hand to see me paid as above."

The delivery of this memorandum gave rise to the following correspondence:—

"2, Craven Terrace, Paddington.
"31st October, 1857.

"Sir,—Mr. Charles Maidlow has brought a memorandum from you as to the price of your bricks delivered to Mr. Ponsford's freehold ground: but, there being no name, and the note being addressed to Mr. Maidlow, I will, thank you to write to Mr. James Ponsford stating the lowest price you will supply him with bricks, and at what date bills you will require the payment to be made. The bricks will be delivered on Mr. James Ponsford's account, and be paid for by his acceptance, should your terms be approved.

"For JAMES PONSFORD,
"Mr. DODD." "B. WHEELER."

"31st October, 1857.

"Sir,—I hereby agree to supply you with the following bricks,—stocks 29*s*., grizzles 25*s*., and place 20*s*., delivered on your ground, Hill Road, St. John's Wood. Terms of payment, four months' account from the above date, and, at the end of four months, a settlement shall be made, and eight months longer will be given on your paying interest on the amount at the rate of 5 per cent.; and, if a further three months is required, it will be given, on your paying the current rate of interest on the amount. [*326

"For HENRY DODD,
"J. PONSFORD, Esq." "THOMAS FERGUSON."

"11 & 12 Wharfs, North Side, Paddington Basin.
"10th November, 1857.

"Sir,—Please favour me with a note stating whether you accept the prices and terms named in my letter to you of the 31st ult. as those upon which Mr. Dodd will supply you with bricks delivered to and upon your estate at Hill Road, St. John's Wood; and also say the names of the parties authorized to receive such bricks and sign the receipts for the same. I trouble you with this as I am only acting as an agent in the transaction, and wish to satisfy Mr. Dodd, my principal, that the matter is to be carried out as he supposed and intended.

"For T. FERGUSON,
"J. PONSFORD, Esq." "H. MAY."

"66, Queen's Gardens, Hyde Park.
"14 November, 1857.

"Sir,—Your letter dated the 31st October I have received relative to the bricks you are delivering to Mr. Charles Maidlow for the houses he is building upon my land in Hill Road, St. John's Wood. I have no objection to make to your proposition; I will rely upon your delivering upon my land in Hill Road the whole quantity of bricks for which I send you from time to time a written order; and I will trust upon your procuring Mr. C. Maidlow or his foreman's signature to each delivery note, so that there may be no dispute with him when your account is about to be settled.

"Mr. THOMAS FERGUSON." "JAMES PONSFORD."

The supply of bricks commenced on the 2d of November, 1857. It went on till the 13th of February, 1858, when it amounted to 275*l*. 18*s*.

*327] *An account of the bricks so supplied was on the 27th of February, 1858, delivered by the plaintiff to the defendant, but nothing further was done at the end of four months from the 31st of October, and therefore no settlement was then made (whatever may be the meaning of that expression in the aforesaid letter of the 31st of October, 1857), nor was any settlement subsequently made or requested by either party, unless and in so far as the contrary hereafter appears.

The next supply was on the 9th of March, 1858; and the supplies continued until the 7th of May. On the 31st of March, a second account was delivered by the plaintiff to the defendant, in which the bricks supplied during March were added to the previous account, making an aggregate of 314*l.* 7*s.* In April, the following letter was sent by the defendant's agent to the plaintiff's agent:—

"2, Craven Terrace, Paddington.
"April 14th, 1858.

"Sir,—Mr. Ponsford has instructed me to inform you that Mr. Charles Maidlow will only require bricks to finish the two houses he is now building; and he should prefer settling the whole account of bricks had for Mr. Maidlow's houses at one time. I will shortly ascertain the quantity of bricks that will be required for Hill Road, to finish Mr. Maidlow's houses, and communicate with you thereon.

"Mr. FERGUSON." "B. WHEELER."

On the 19th of April, the plaintiff sent the defendant a detailed account showing the daily supplies of bricks from the 2d of November, 1857, to the 31st of March, 1858, and making the amount of those supplied to be 314*l.* 7*s.* The account was enclosed in a letter, of which the following is a copy:—

*328] *"City Wharf, New North Road, Hoxton.
"19th April, 1858.

"Sir,—Mr. Dodd desires me to present his compliments and furnish your account for bricks of Mr. Maidlow to 31st March last, amount 314*l.* 7*s.* Your private account to same date, 61*l.* 8*s.* 3*d.*, was forwarded to Mr. Wheeler on the 1st inst. Will be obliged by your saying whether you will give a check for the amounts, or whether a bill at short date.

"For HENRY DODD,
"JAMES PONSFORD, Esq." "EVAN DAVIES."

On the 7th of May the supply ceased. On the 11th of May another account was sent by the plaintiff to the defendant, accompanied by a letter, of which the following is a copy:—

"City Wharf, New North Road, Hoxton.
"11th May, 1858.

"Sir,—By the desire of Mr. Dodd, I beg to forward your account to the end of April, amount at your debit in the sum of 434*l.* 18*s.* 6*d.* viz.

bricks delivered to Mr. C. Maidlow in the sum of . . .	341	10	6
and bricks on your private account	93	8	0
	£434	18	6

"For H. DODD,
"JAMES PONSFORD, Esq." "EVAN DAVIES."

Weekly accounts were every week sent by the plaintiff to the defendant of the goods supplied to Maidlow. Also a monthly account, that a sufficient check might be kept on him.

On the 24th of May, another account was sent by the plaintiff's attorney to the defendant, accompanied by a letter of which the following is a copy:—

"7, Staple Inn, 24th May, 1858.

"Yourself and Dodd. [*329

"Dear Sir,—I enclose you a copy of the account, showing that there is 443*l.* 12*s.* 9*d.* due from you to Mr. Dodd; and, as the condition of the arrangement has been avoided on your part, he now requires me to demand payment.

"Permit me to ask, as between him and you (doubtless two honourable men), whether, there being no dispute as to your liability, it is worth while engendering hostility by entering into litigation.

"Will you excuse me for the suggestion: but, looking at the relative position of you and Maidlow, and the influence which that position naturally gives you over him; and also looking that, in this instance, the material for the buildings has been supplied upon your responsibility, whether you cannot easily, as a matter of business and of right, require from him a mortgage of the buildings for the amount which you have to pay to Mr. Dodd, as I have no doubt of Mr. Dodd's right to recover the amount immediately. I trust that you will appreciate my motive in endeavouring to settle the matter amicably. G. A. MACPHAIL."

"J. PONSFORD, Esq."

On the 26th of June, the defendant wrote to the plaintiff's attorney, as follows:—

"66, Queen's Gardens, Hyde Park.

"26th June, 1858.

"Dear Sir,—Your letter of the 24th ultimo I have received, from which I learn that Mr. Dodd is determined not to abide by the agreement which I have made with him through his agent Mr. Ferguson in his sale of the bricks to me. Such being the case, it is my determination to defend any action he may instruct you to *commence [*330 against me; and I shall rest my case upon the agreements there are between us. I again repeat I am ready and willing to carry into effect the agreements there are between us, and with the view to the settlement of the accounts. "JAMES PONSFORD."

"G. A. MACPHAIL, Esq."

On the 5th of July, further accounts were sent by the plaintiff's attorney to the defendant,—one being a detailed account of the supply from the 2d of November, 1857, to the 18th of February, 1858, being all that were supplied during the first four months, and showing the amount 275*l.* 18*s.*,—the other being a similar account of the residue of the supply to the 7th of May, 1858, and showing the amount to be 72*l.* 10*s.* The accounts were accompanied by a letter of the plaintiff's attorney, of which the following is a copy:—

"7, Staple Inn, 5th July, 1858.

"Yourself and Dodd.

"Dear Sir,—Herewith I send you the first and second series of the

account of bricks for the four months respectively; also the first and second series supplied on your account to Maidlow for the like periods. The amount together is 443*l.* 12*s.* 9*d.* I must request a settlement of the amount immediately, and will thank you to send me a check or the name of your solicitor in the course of to-morrow forenoon.

"JAMES PONSFORD, Esq." "G. A. MACPHAIL."

The accounts forwarded in the above letter were duplicates of those sent in the aforesaid letter of the 24th of May. Immediately on receipt of the accounts, the defendant wrote to the plaintiff's attorney a letter, of which the following is a copy:—

*331] *"66, Queen's Gardens, Hyde Park.
"6th July, 1858.

"Dear Sir,—I have received your letter and Mr. Dodd's account. I imagine that you cannot have seen the agreement made by Mr. Ferguson for Mr. Dodd with me on the 31st of October last, or you would not lend yourself to write to me in the manner you do. I again state that I am ready and willing to settle the accounts in accordance with that agreement. "JAMES PONSFORD."

"G. A. MACPHAIL, Esq."

In the afternoon of the same day, viz., the 6th of July, the writ was issued. No interest was ever paid by the defendant, or demanded by the plaintiff.

The court was to be at liberty to reject any portion of the case that they might think not admissible in evidence, and to draw such inferences of fact as they might think proper.

The question for the opinion of the court was, whether at the time of the issuing the writ the money claimed, or any part thereof, had become payable by the defendant to the plaintiff, under the facts above stated. If it had, judgment was to be entered, with costs, for the plaintiff, for 348*l.* 8*s.*, or such part thereof as was then payable. If it had not, judgment for the defendant was to be entered as on nolle prosequi.

Lush, Q. C. (with whom was *Gray*), for the plaintiff.—The question turns upon the meaning of the plaintiff's letter of the 31st of October, 1857, in which the terms of payment proposed are as follows, "Four months' account, and, at the end of four months, a settlement shall be made, and eight months longer will be given *on your paying interest on the amount at the rate of 5 per cent.*, and, if a further three months is *332] required, it will be given on your paying the current *rate of interest on the amount,"—and the defendant's letter of the 14th of November, accepting these terms. The obvious meaning is, that the defendant shall have a current account of four months, and, at the expiration of that time, a credit of eight months upon condition that he pays 5 per cent. interest upon the amount then settled and ascertained; and then a further credit of three months, on paying the current rate of interest. [CROWDER, J.—Is the defendant to pay the eight months' interest in advance?] It is enough for the argument to say that the settlement of the account at the end of the four months was to be a condition precedent. [CROWDER, J.—The parties could hardly have contemplated a pre-payment of the interest.] The words are "on your paying," which is the same thing as "on condition of your paying."

At all events the account must be settled and assented to. [BYLES, J.—When the one party sends an account, and the other says nothing, is not that a settlement of the account?] It is submitted that it is not. The mere absence of objection at the time would not estop the defendant from insisting that the account was wrong, if the plaintiff afterwards sued him for the amount. It must be such an adjustment as would bind both parties. If the construction contended for be not the correct one, then it would follow that all the interest is to accumulate until the end of the last period named. There is nothing in the language of the letter to warrant that: and it is most improbable that the plaintiff contemplated that he was to lie out of his money for fifteen months without receiving any interest in the meantime. It will be embarking in interminable speculation and conjecture, to disregard the plain language of the contract.

Phipson, contrà.—The action is prematurely brought. *The contract must be construed in a reasonable way, regard being had to the position of the contracting parties. The expression "terms of payment" overrides the whole. "On your paying," means no more than "terms of paying." The plaintiff was to get 5 per cent. for eight months' credit. If the 5 per cent. were to be pre-paid, the plaintiff would obtain more than that rate of interest. The last part of the proposal throws some light upon the former part,—"If a further three months is required, it will be given on your paying the current rate of interest on the amount." That is, the current rate of interest *during* the period. The payment of interest cannot be a condition precedent there: and the expression used must be read in the same sense in both parts of the agreement. The plaintiff's letter to Maidlow of the 12th of October explains this. [CROWDER, J.—We are all of opinion that the words "on your paying interest" do not make the payment of interest a condition precedent.] [*333

Lush, in reply.—If the parties had meant current rate of interest in the sense of average, they would have said so.

COCKBURN, C. J.—I am of opinion that our judgment must be for the defendant. The construction I put upon the contract is, that the account is to be delivered at the end of four months; that the account so delivered is to be settled, in the shape of an adjustment, so that both shall be agreed upon the sum which is to constitute the amount, and then a credit of eight months is to be given "on the defendant's paying interest on the amount at the rate of 5 per cent." It is contended, on the part of the plaintiff, that the payment of the interest is a condition precedent to the defendant's having the eight months' credit. It seems to *me that that is not a reasonable construction; but that it means, bearing that rate of interest, to be paid in the ordinary way, principal and interest at the same time. Then, if a further credit of three months is required, the defendant is to have it on paying the current rate of interest,—the rate of interest usually paid during such period. Upon this construction of the contract, the defendant is entitled to judgment, the plaintiff having brought his action too soon. [*334

The rest of the court concurring, Judgment for the defendant.

In the Matter of JOHN THISTLETHWAITE ALLEN. *April* 18

This court has no general jurisdiction to interfere with the list of voters for members of parliament, in cases in which no appeal lies under the 6 & 7 Vict. c. 18.

The name of a voter appeared in the list of voters for a borough, and also in the list for the county. His qualification in respect of the latter being objected to, and he not appearing to support his vote, the revising barrister, intending to strike his name out of the county list, by mistake expunged it from the borough list:—Held, that this court had no power to give him relief, or to make any order under the 6 & 7 Vict. c. 18, s. 67.

THE name of John Thistlethwaite Allen appeared upon the list of voters for the county of Bedford, and also upon the list for the borough of Bedford. Having been served with a notice of objection to his qualification for the county, he did not appear to prove it, and the revising barrister accordingly proceeded to strike out his name; but, instead of striking it out of the county list, to which the objection referred, he by mistake struck it out of the list of borough voters. Upon an affidavit disclosing these facts,

Couch moved for a rule or order to direct the returning officer for the borough of Bedford to restore Mr. Allen's name to the register. He
*335] referred to the 67th *section of the 6 & 7 Vict. c. 18, which enacts, "that, whenever by any judgment or order of the said court [of Common Pleas], any decision or order of any revising barrister shall be reversed or altered, so as to require any alteration or correction of the register of voters for any county, or for any city or borough, notice of the said judgment or order of the said court shall be forthwith given by the said court to the sheriff or returning officer, as the case may be, having the custody of such register, and the said notice shall be in writing under the hand of one of the masters of the said court, and shall specify exactly every alteration or correction to be made in pursuance of the said judgment or order in the said register; and such sheriff or returning officer respectively shall, upon the receipt of the said notice, alter or correct the said register accordingly, and shall sign his name against every such alteration or correction in the said register, and shall safely keep and hand over to his successor every such notice received by him from the said court as aforesaid, together with the said register." [WILLES, J.—That section only applies where an appeal is pending against a decision of the revising barrister.] Here, there could be no appeal: this application, therefore, is to the general jurisdiction of the court. [CROWDER, J.—What general jurisdiction has this court over the register of voters?] Unless the court has power to do this, the voter is without remedy.

CROWDER, J.—It is doubtless a hard case; but I do not see how we can relieve the party. The jurisdiction conferred upon us by the act is a limited one. Beyond the power given us by the 67th section, we have no right to interfere in any way with the lists of voters.

*336] BYLES, J.—I think the House of Commons would be *very much astonished if we usurped such a power as we are here called upon to exercise. Rule refused.

THE WOLVERHAMPTON NEW WATERWORKS COMPANY *v.* HAWKESFORD. *April* 28.

The 21st and subsequent sections of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), do not authorize an action against a "subscriber to the undertaking" for calls.

Whether a party may be a "shareholder," without being on the register,—*quære?*

A count alleged that the defendant *subscribed* a certain sum to the undertaking, and that certain portions thereof were called for, and places and times appointed for the payment thereof, and that the defendant had due notice of the premises, and that the plaintiffs (the company) did all things necessary to entitle them to have the calls paid, but that the defendant made default:—Held, that the count disclosed no cause of action,—inasmuch as it did not show that the defendant was a "shareholder" within the act.

THIS was an action against the defendant, a subscriber to The Wolverhampton New Waterworks Company, for calls. The second count of the declaration stated, that the defendant subscribed 6000*l.* towards the undertaking and works which were by the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), authorized to be executed, and divers portions thereof, amounting to 4500*l.*, were called for by the plaintiffs, being the company constituted by the said act, and the plaintiffs appointed certain places and times for the payment thereof respectively, and the defendant had due notice of the premises, and the said times elapsed, and the plaintiffs did all things necessary to entitle them to have the said sums, amounting to 4500*l.*, paid to them by the defendant; yet the defendant made default in paying the same, contrary to the said act, and the same are still in arrear and unpaid and due from the defendant to the plaintiffs.

The defendant pleaded, sixthly, to the second count, on equitable grounds, that divers other persons subscribed large sums of money respectively towards the said undertaking therein mentioned, which, at the times of the making of the said alleged calls in the *second count mentioned, remained and still were wholly unpaid, and that the plaintiffs did not, nor did any other persons, at any time call for the payment by the said other subscribers, or any of them, equally with the defendant, of the said sums subscribed by them respectively, or any part thereof. [*337

He also demurred to the second count; the ground of demurrer stated in the margin being, "that the second count shows no contract under seal, and no undertaking by the defendant to pay the moneys called for, nor any liability on the defendant to pay the same." Joinder.

The eighth plea, to the second count, stated that the subscription in that count mentioned was and is the execution by the defendant of a certain indenture made and executed, before the passing of the said act, by and between the defendant and the other persons therein and hereinafter mentioned, of the one part, and Thomas Spencer and George Lees Underhill, both respectively hereinafter mentioned, of the other part, and which said indenture was signed, sealed, and delivered by the parties thereto respectively, and was and is to the tenor following, that is to say, "Subscription contract. This indenture, made the 20th of December, 1854, between the several persons whose names and seals are respectively subscribed and affixed to the schedule hereunto annexed,

being subscribers to the undertaking hereinafter mentioned, of the first part, and Thomas Spencer, of, &c., and George Lees Underhill, of, &c., trustees for the purpose of enforcing and giving effect to the covenants hereinafter contained, of the second part, Witnesseth that each of the said several parties hereto of the first part doth hereby for himself and herself, his and her heirs, executors, and administrators, but to the
*338] extent only of the sum or amount of *subscriptions set opposite his or her name in the said schedule, and not further or otherwise, covenant, promise, and agree, to and with the said Thomas Spencer and George Lees Underhill, their executors and administrators, and doth hereby bind himself and herself, and his and her heirs, executors, and administrators, in manner following, that is to say, that each of them the said several persons parties hereto of the first part hath subscribed and doth subscribe the sum set opposite his or her name in the said schedule, to be recoverable by action at law, for the purpose of enabling the company, to be hereafter incorporated by act of parliament under the name of The Wolverhampton New Waterworks Company, to supply with water the town and parish of Wolverhampton, and the parishes of Tettenhall and Codsall, in the county of Stafford, and also the parishes and places following, that is to say, Donington, Albrighton, and Boningale, or Boninghall, in the county of Salop, and for that purpose to take and acquire land and other hereditaments, and to divert streams, brooks, rivulets, and springs, and to appropriate and impound the water thereof; and also to enable the said company to make and maintain the works hereinafter mentioned, that is to say, a reservoir situate in a certain valley between Ruckley Wood Farm and Neachley Hill, extending from within a short distance of the road leading from Albrighton to Ruckley to a dam or embankment near to the Shrewsbury and Birmingham Railway, in the parishes of Donington and Tong, in the said county of Salop, and also a surface or supply reservoir and pumping station situate in a certain place near to the Holyhead Road, to the north side thereof, at or near to King's Wood, in the parish of Tettenhall aforesaid, with all proper works, roads, approaches and conveniences thereto respectively belonging, and from such pumping station
*339] *to make and maintain an aqueduct or aqueducts from the said last-mentioned reservoir to the centre of the town of Wolverhampton, with branches to the said service reservoir and pumping station situate in a certain place in the said parish of Tettenhall aforesaid, and belonging to the Wolverhampton Waterworks Company, and to lay down conduct, main, and other pipes, with all necessary and proper works and conveniences thereto respectively belonging, such works to be constructed in the manner and to the extent defined and shown on certain plans and sections of the said several works which were deposited with the clerks of the peace of the said counties of Salop and Stafford respectively on or before the 30th of November last, with full power and authority to the directors of the said company from time to time to alter and vary the sites or spots at which the several intended works before mentioned shall commence and terminate, and the lines and levels thereof; and also to fix and determine, and from time to time alter and vary, the extent and situation of the said works, and to change the name of the proposed undertaking, and to substitute in lieu thereof such

other name or names as the said directors shall think proper; and to enter into such contracts and agreements with land-owners and others or with any company or companies, for any purposes whatever in any way affecting or connected with the said undertaking; and to make application to parliament for an act or acts, and thereby to take powers to execute all or any of the said works; and also to purchase, take, and hold the works of The Wolverhampton Waterworks Company, and all reservoirs, aqueducts, mains, pipes, and other works and lands, and other the property, estate, and effects of the same, and all powers, rights, and privileges which may have been or may be vested in the *said company under the acts hereinafter mentioned, that is to say, [*340 The Wolverhampton Waterworks Act, 1845 (8 & 9 Vict. c. cxxv.), and The Wolverhampton Waterworks Amendment Act, 1850 (13 & 14 Vict. c. lxxiv.), and for that purpose to repeal either wholly or in part, and to alter and amend the said acts; and also to take powers to enable the Wolverhampton Waterworks Company to sell and transfer to the said intended Wolverhampton New Waterworks Company their said works, lands, and other their said property, estate, and effects, and the rights, powers, and privileges connected with or belonging to the same; and also to take powers to enable the said intended Wolverhampton New Waterworks Company to transfer to and vest in the corporation of the town of Wolverhampton, or some other board of commissioners to be by the said act or acts appointed, the whole undertaking of the said company or companies, and the works, lands, and other the property and estate, rights, and privileges connected with or belonging to the same, and to abandon if they think fit, or defer the application to parliament in respect of, the whole or any part or parts of the said proposed undertaking; and generally to do and perform all such acts, deeds, matters, and things, as they in their discretion shall deem necessary or desirable for the attainment of such objects, or any of them: And this indenture witnesseth, that each of them the said persons parties hereto of the first part doth hereby for himself and herself, his and her executors and administrators, further covenant, promise, and agree to and with the said Thomas Spencer and George Lees Underhill, their executors and administrators, that he and she, and his and her heirs, executors, and administrators, shall and will well and truly pay or cause to be paid the full amount subscribed by him or her, or such part thereof as shall not have *been paid by him or her at the time of his or her execution [*341 of these presents, and at such places and times and in such manner as may be required by any act of parliament which may be passed in the next or any subsequent session of parliament for the purposes aforesaid, or as the directors or others authorized by such act shall lawfully direct or appoint; it being the express meaning and intention of each of them the said parties hereto of the first part, that the amount so subscribed by him or her shall be recoverable from him or her, his or her heirs, executors, and administrators, by the said parties hereby of the second part, or the survivor of them, his executors or administrators, by action at law, in case default should be made in payment thereof. In witness," &c.

THE SCHEDULE REFERRED TO.

Subscriber's name and surname at full length.	Description.	Place of abode.	Signature of subscriber.	Amount of subscription.	Seal.	Amount paid up.	Date of signature.	Witness.
				£		£		
John Williams				6000		600		
George Holyoake				6000		600		
George Edwardes				6000		600		
Thomas Thorneycroft				6000		600		
Charles Corser				6000		600		
Henry Heane				6000		600		
John Hawkesford				6000		600		
Samuel Loveridge				6000		600		
Thomas Thorneycroft Kesteven				6000		600		
Francis Lyttleton Holyoake Goodricke				6000		600		
Joseph Griffin Walker				6000		600		
Frederick Charles Perry				6000		600		
Charles Edward Molineux				6000		600		
Henry Underhill				6000		600		

*342] *ALPHABETICAL LIST OF SUBSCRIBERS.

Names.	Sums subscribed.	Sums paid up.
	£	£
Corser, Charles	6000	600
Edwardes, George	6000	600
Goodricke, Sir Francis L. H., Bart.	6000	600
Hawkesford, John	6000	600
Heane, Henry	6000	600
Holyoake, George	6000	600
Kesteven, Thomas Thorneycroft	6000	600
Loveridge, Samuel	6000	600
Molineux, Charles Edward	6000	600
Perry, Frederick Charles	6000	600
Thorneycroft, Thomas	6000	600
Underhill, Henry	6000	600
Walker, Joseph Griffin	6000	600
Williams, John	6000	600
Total amount of subscription	£84,000	
Total amount of sums paid up		£8,400

Averment that the subscription in the second count mentioned was and is the subscription aforesaid, and not any other or different subscription; and that no places or times for the payment of the amount subscribed by the defendant, as subscriber, by virtue of the said indenture, or any part thereof, in satisfaction of the covenant therein contained, ever was appointed by the plaintiffs, or at all.

The plaintiffs demurred to the sixth plea; the ground of demurrer stated in the margin being, "that the 21st section of the Companies Clauses Consolidation Act, 1845, does not make it imperative to call up

subscriptions pari passu, and that the plea shows no ground entitling the defendant to have them all called up pari passu." Joinder.

*They also demurred to the eighth plea; the ground of demurrer stated in the margin being, "that the eighth plea does [*343 not deny the appointment of time and place absolutely, but merely that no time or place was appointed for payment in satisfaction of the covenant; and the parts sued for of course would not be payable in satisfaction of the covenant." Joinder.

Mellish (with whom were *Bovill*, Q. C., and *Hawkins*, Q. C.), for the plaintiffs.(*a*)—The first question is as to the validity of the second count. By the 7th section of *the Wolverhampton New Waterworks [*344 Company's Act, 18 & 19 Vict. c. cli., the persons named (including the now defendant), and all other persons and corporations who have already subscribed or who shall hereafter subscribe to the undertaking by that act authorized, and their executors, administrators, successors, and assigns respectively, are incorporated, with the usual powers. By s. 17 the qualification for a director is declared to be "the possession in his own right of one hundred shares at least in the undertaking." By s. 19, the now defendant is named as one of the first directors. The 21st section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), enacts that "it shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company." And the 26th section provides, "that, in any action or suit to be brought

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

"The second count is good, according to the Companies Clauses Act, 8 & 9 Vict. c. 16, s. 21, and s. 2 (which explains the word undertaking), and s. 8, which shows that a subscriber, if his name is not on the register, is not a shareholder, and according to the special act, 18 & 19 Vict. c. cli., s. 7, which incorporates all who had subscribed or should subscribe to the undertaking. It is sufficient to say that defendant 'subscribed,' without saying how, and it was so held in The Great Northern Railway Company *v.* Biddulph, 7 M. & W. 243.†

"The 6th plea is bad, for, amongst other reasons,—first, that, if equity would restrain, it would not grant a perpetual injunction, but only restrain till the other subscribers were called upon: but,—secondly, that the plea shows no obligation to call on all pari passu, and the 21st section of the Companies Clauses Consolidation Act does not create such an obligation, and there may be numberless cases imagined why all should not be called upon.

"The 8th plea is bad, because the 21st section, by making the subscriptions payable to the company, gives the company a right of suit, and the plea must be taken to admit, as alleged in the second count, that times and places were appointed for payment, and then to assert that such times and places were not appointed for payment in satisfaction of the covenant, which, whatever it may mean, is not required by the 21st section. The payment of the portions sued for, of course, was not appointed to be made in satisfaction of the whole covenant.

"The only substantial question is, whether the 21st section gives the company a right of suing subscribers who are not shareholders. If the form of subscription gives a right of action to no one, and the 21st section does not give a right of action to the company, the enactment that the subscriptions are to be paid is nugatory.

"It is not necessary for the plaintiffs to contend that the trustees of such a covenant as appears in this case cannot sue. They only have to contend that the company may sue."

*345] by *the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act." The second count follows the words of that section; and it is difficult to see what objection there can be to it. [COCKBURN, C. J.—It will be said that *subscription* must be under seal.] The Great North of England Railway Company *v.* Biddulph, 7 M. & W. 243,† is a distinct authority to show that this is a proper mode of declaring against a subscriber. Parke, B., there says: "It has been suggested that there is a distinction between *proprietors of shares* and *subscribers:* upon that part of the case, however, we give no opinion. The first and second counts allege a liability in the defendant as a subscriber; and it is contended that it ought to have been alleged in those counts that his subscription was by deed. I think the answer given to that argument on the part of the plaintiffs is a satisfactory one. It does not follow that the parliamentary deed should contain the names of all the persons who subscribed; for, the subscription is not confined to the parties named in the deed. But, assuming that the defendant was of necessity a party to it, it is evident that the company need not, and indeed could not, be made a party to such deed; because it is required to be executed before the existence of, and as a preliminary to the formation of, the company. That is a conclusive reason why the company ought not to sue upon the deed." *[COCKBURN, C. J.—A man *346] may be a subscriber, and yet may not take shares.] The company is entitled to register the original subscribers. [COCKBURN, C. J.—There must be a period during which a subscriber is not a shareholder.] If that be so, what construction can be given to the 7th section of the special act? By force of that section the subscriber becomes a shareholder: The London Grand Junction Railway Company *v.* Freeman, 2 M. & G. 606, 638 (E. C. L. R. vol. 40), 2 Scott N. R. 705, 750, per Lord Denman, C. J. In The West London Railway Company *v.* Bernard, 13 Law J., Q. B. 68, a railway act (6 W. 4, c. lxxix.), in addition to the usual general clause giving a short form of declaration in an action for calls against proprietors of shares for the time being, enacted, by s. 129, that the parties who had subscribed or should thereafter subscribe to the undertaking, should pay such sums as should from time to time be called for: and that, in case of default, it should be lawful for the company to sue for and recover the same in any court of law or equity. The defendant had subscribed the parliamentary contract, but was not registered as a proprietor in the share register book or otherwise. By various resolutions of the directors, calls were from time to time made on the proprietors of the company: and it was held that the defendant was liable to a special action against him as a subscriber, under s. 129, for such calls, there being no distinction between subscribers and proprietors. Lord Denman there says: "In the case of The London Grand Junction Railway Company *v.* Freeman, we looked at all the sections of an act of parliament similar to the present, with a view to

the question now raised, and we were of opinion that 'subscribers,' 'proprietors,' and 'owners of shares,' were words indiscriminately used, and all pointing to the same set of persons." [WILLES, J.—The 7 & 8 Vict. c. 110, s. 3, shows what is meant by *"subscribers," viz. [*347
"persons who shall have agreed in writing to take or have taken any shares in a proposed company, or in a company formed, and who shall not have executed the deed of settlement, or a deed referring thereto." That is adopted in the Companies Clauses Consolidation Act, 1845. But any person who has agreed in writing to take shares is assumed by s. 8(*a*) to be a person entitled to shares. If upon the register, he may be sued in the way pointed out by ss. 22—28. If not, he may be sued in debt upon the statute. This is an action of debt upon the statute.]

Then, as to the pleas. The sixth, which is pleaded as an equitable plea, clearly discloses no equitable ground of defence. Both that plea and the eighth, are clearly bad for the reason suggested in the points for argument.

Phipson (with whom was *Milward*), for the defendant.(*b*)—The real question is, whether it is competent *to the company to sue for [*348
calls, unless the persons sued are put upon the register and sued as shareholders in the manner pointed out by the 8 & 9 Vict. c. 16. Assuming that the covenantees in the subscription contract might sue the covenantors, they cannot sue in the name of the company, who are no parties to that deed. The 8th section of the general act defines who are shareholders. In The Newry and Enniskillen Railway Company *v.* Edmunds, 2 Exch. 118, 126,† Parke, B., says: "By the 8th section of the general act, all persons who have subscribed to the company, or have otherwise become entitled to shares in it, are to be deemed shareholders, which the interpretation clause explains to mean, 'shareholders, proprietors, or members of the company.' Then, by the 9th section, the

(*a*) Which enacts that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

(*b*) The points marked for argument on the part of the defendant were as follows:—

As to the demurrer to the second count,—"That the count is bad on the following grounds,—1. That, if it is founded upon the subscription contract, it is bad, because the plaintiffs are not shown to be nor were they parties to it, and therefore cannot sue on it,—2. That, if it is founded on the 8 & 9 Vict. c. 16, s. 21, it is bad, first, because that section, read with the context, is a mere general statement of the liability to calls, properly so called, and is not meant to transfer to the company a right of action which, even if existing, belongs to the persons with whom the covenants in the subscription contract were made, and not to the plaintiffs; and, secondly, because the calls claimed are ordinary calls upon the shareholders, and not any special calls for payment of the sum subscribed, and made upon the subscribers irrespectively of their being shareholders,—3. That the count does not show the contract to be under seal, or any consideration for the defendant's contract."

As to the sixth plea,—"That the sixth plea to the second count of the declaration, on equitable grounds, is good, on the following grounds,—1. That it is the evident intention of the legislature in the Companies Clauses Consolidation Act, 1845, that those who become shareholders should all pay rateably,—2. That a court of equity would not allow the directors so to proceed as partially to call upon some shareholders to pay a deposit and calls, and not call upon the other shareholders,—3. That a court of equity would take care that all the shareholders should be put upon an equal footing with respect to the liability to pay calls."

As to the demurrer to the sixth plea,—"That the second count of the declaration is bad, on the ground above set forth in support of the argument on the demurrer to that count."

As to the demurrer to the eighth plea,—"That the plea is good in substance, and that the second count, to which it is pleaded, is bad, on the grounds above set forth."

*349] *company are required to enter in a book to be called 'The register of shareholders' the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made primâ facie evidence of a party therein named being a shareholder: it is not, however, conclusive; for, he may notwithstanding show that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made,—that is, a shareholder in the sense of the 8th and 9th sections. The result is, that there is no register until after it is sealed; and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. *Probably that is required both in the case of an original subscriber and a transferee of scrip.* It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." The question is, whether the 21st section enables the company to sue in any other way than as thereinafter mentioned, viz., those who are shareholders? In the case of The Great Northern Railway Company *v.* Biddulph, the question arose upon a private act, which contained no such clause as the 8th section of the 8 & 9 Vict. c. 16; and by the 129th section of that act it was enacted "that the several parties who have subscribed or who shall hereafter subscribe for or towards the said undertaking, shall and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said company under and by virtue of the powers of this act, at such times, and *350] at such *places, and to such persons, as shall be directed by the said directors; and, in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same," &c. There is no such provision as that in the Companies Clauses Consolidation Act. It is true there is a declaratory enactment in s. 21, that "the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company:" but that liability is to be enforced only in the manner afterwards pointed out, when they have been registered as shareholders. The cases of The West London Railway Company *v.* Bernard, and The London Grand Junction Railway Company *v.* Freeman, are open to the same observation. The Companies Clauses Consolidation Act does not give the company power to sue subscribers: the power to make calls and to sue is confined to shareholders. [COCKBURN, C. J.—Why is not a subscriber a shareholder? The being registered does not constitute him a shareholder. BYLES, J.—The 3d section of the 8 & 9 Vict. c. 16, defines "shareholder" to mean "shareholder, proprietor, or member of the company."] The 8th section shows what that means,—"Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, *and* whose name shall have been entered on the register of

shareholders hereinafter mentioned, shall be deemed a shareholder of the company." For anything that appears here, the defendant may have sold his scrip, and the vendee may *now be registered as the [*351
owner of the shares in respect of which the defendant is being sued. [WILLES, J.—It does not appear upon this record that any person has been substituted for the defendant upon the register. Until the company have recognised some person to whom he has transferred his scrip, they have a right to hold the defendant. Is it necessary, to bring him within the 21st section of the Companies Clauses Consolidation Act, that his name should appear upon the register?] It is submitted that it is. He is to pay moneys called for in the manner thereinafter mentioned,—that is, when calls are duly made upon *shareholders*. The 9th section is important: it makes it compulsory on the company to keep a register of shareholders. All difficulty would have been avoided if the plaintiffs had declared in the general form prescribed by the 26th section. With regard to the sixth plea, that is based upon the assumption that subscribers may be sued as such under the 21st section: but *all* the subscribers must be called upon pari passu. In Preston *v.* The Grand Collier Dock Company, 2 Railway Cases 335, 358, the Vice-Chancellor says: "This court never would allow the directors of a company so to proceed as partially to call upon some shareholders to pay a deposit and calls, and not call on the others." [BYLES, J.—Is this a case for a perpetual injunction? The plea is, that the plaintiffs are suing prematurely.] The Queen *v.* The Londonderry and Coleraine Railway Company, 13 Q. B. 998 (E. C. L. R. vol. 66), and The Queen *v.* Wing, 17 Q. B. 645 (E. C. L. R. vol. 79), were also referred to.

Mellish, in reply.—In order to make a subscriber liable for calls, it is not necessary that he should be on the register of shareholders: and, if it were so, it must upon this record be assumed that the defendant *was* on the register, for the count contains a general *averment [*352
that the plaintiffs have done all things necessary to entitle them to demand payment of the calls from him. There is no substantial difference between this count and the form given by the statute. A call includes subscribers as well as registered shareholders. In the case of The Newry and Enniskillen Railway Company *v.* Edmunds, 2 Exch. 118, 121,† Parke, B., says: "The sections which empower the company to make calls contain no *express* direction that the same application shall be made to each individual for the same portion of the sum originally subscribed. Probably the directors may be under an obligation to do so, but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If it were so held, the affairs of these companies would be in the greatest confusion; for, suppose a notice by accident mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call, and those who had already paid on individual notices, and who might be supposed to have paid on the faith that the call was made on each equally, would have a right to claim from the directors the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible (putting a reasonable interpretation on the act of parliament), to say that the legislature intended that what they have not

expressly declared, but which is only implied, should amount to a condition precedent."

COCKBURN, C. J.—I am of opinion that our judgment upon this demurrer must be for the defendant, on the ground that the second count of the declaration discloses no cause of action. The liability upon
*353] which this count is framed is entirely the creature of the *statute 8 & 9 Vict. c. 16. Independently of the statutory liability, the action must have been brought by the covenantees in the deed, and could not have been brought by the company, between whom and the defendant there is no privity of contract. It is, however, contended on the part of the plaintiffs that a liability is imposed upon the defendant by the 21st section of the Companies Clauses Consolidation Act, taken in conjunction with the provisions of the special act. But I think the liability does not depend upon that section alone, but also upon the subsequent sections which form the code which regulates the rights and liabilities of persons who have subscribed to the undertaking or have been placed in the position of those who have so originally subscribed. It is true that the 21st section provides that "the several persons who have subscribed any money towards the undertaking, or their legal representatives, respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company." But that section is only one of a series of provisions having reference to the payment of subscriptions: and, when the other sections are taken into consideration, and especially the 22d and 26th, it appears to me to be plain that the persons called upon are not liable as subscribers simply, but as shareholders. I think it is quite unnecessary for the purpose of the present case to decide whether or not the parties, to be liable as shareholders, need be upon the register of shareholders. That may be open to some doubt. But, whether or not the legislature intended that subscribers should be deemed shareholders within the interpretation clause, I think they clearly intended that only holders of shares should be liable to the statutory remedies for calls. The 22d and
*354] 26th sections *speak of shareholders; and the latter, which gives the form of declaration, in terms speaks of shareholders only: it provides, that, "in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued by virtue of this and the special act." Now, the second count here gives the go-by to the question whether the defendant is a holder of shares in the undertaking; it merely states that he *subscribed* a certain sum towards it. The distinction between a subscriber and a shareholder is not an imaginary one, but it is one of a real and substantial character; because the party who had originally subscribed to the undertaking may have ceased to have any interest therein, and may have transferred it to one who has become liable in his stead in respect of the share subscribed for. It is plain, therefore, in point of reason

and justice, that the 21st section of the statute was never intended to be taken alone: and, reading it in conjunction with the sections which follow, it is clear that the liability for calls was meant to be imposed upon the person who is at the time the call is made a holder of shares. I do not think it is enough for the plaintiffs to say that this is a matter which the defendant should have pleaded by way of answer to the action. The plaintiffs should have shown the defendant's liability on the face of the declaration. They rely for this purpose upon the statute; and this, for the reasons I have given, in *my opinion, fails. In the view which I take, it becomes unnecessary to say whether or not the sixth or eighth plea would have been of any avail. [*355

CROWDER, J.—I am of the same opinion. I will merely add a word as to the general averment whence Mr. *Mellish* contended it must be assumed that the defendant was a shareholder. It seems to me that that would be giving far too large a scope to those general words. Besides, assuming that they might be held sufficient to embrace the fact of the defendant's having been placed upon the register of shareholders, I apprehend he might have displaced himself therefrom by a transfer before the making of the calls.

WILLES, J.—I also am of opinion that the second count discloses no liability in the defendant either at common law or by virtue of the provisions of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. In order to establish a liability at common law, it was necessary to show that the subscription-contract was entered into with the company who sue. The count does not and could not so allege. Then it is said that a liability is created by virtue of the 21st section of the 8 & 9 Vict. c. 16. In considering that question, it must be assumed that there is no liability at common law. Consistently with the statement in the count that the defendant subscribed to the undertaking, it must be taken that the defendant entered into a contract with some other persons on behalf of the company, or which was to enure to their benefit when they should be incorporated by a special act of parliament. What is there to show that the defendant covenanted with the company? It is said that that is shown by the 21st section of the Companies Clauses Consolidation Act. *Primâ facie, and read by itself, that section would seem to make out the proposition contended for by the plaintiffs; and I was at first inclined to think that that gave the plaintiffs a right to sue; but, upon consideration, it appears to me that the proposition cannot be sustained. There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must [*356

be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue. If the 21st section had stood alone, stopping at the words "appointed by the company," as at present advised, I think there would have been an action of debt at the suit of the company in respect of calls on the amount subscribed. It has been observed by Mr. *Phipson* that there is nothing in that section to intimate that the payment is to be made to the company. But, looking *to the general scope of the *357] act, it is obvious that it is intended that the payment should be to the company, and not to the parties with whom the contract is made. However, all difficulty on that score is removed by the subsequent words, which show that the 21st section was intended to form one of a series of enactments which at once create the liability and prescribe the form of remedy; for, it goes on to provide as follows,—"and, with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder." Then follows a series of enactments, from s. 22 to s. 28, giving the company a remedy for the recovery of calls against shareholders. Reading the 21st section by the aid of the light thrown upon it by the subsequent sections, it appears to me that the remedy was intended to be enforced only in the particular mode prescribed, against persons who are shareholders. And I incline to think, that, under these provisions, the shareholder against whom this remedy is given must be one whose name appears upon the register of shareholders,—though I agree with my Lord in thinking that it is unnecessary to pronounce any positive opinion upon that. It is enough to say that the particular remedy is given against "shareholders" only; and that a "subscriber" is not liable under the statutory provisions, unless he is also a "shareholder." It appears to me also that Mr. *Mellish's* second argument is not sustainable. The second count commences with stating that the defendant subscribed a certain sum towards the undertaking in question. It then goes on to say that divers portions thereof were called for by the company, and times and places were appointed for the payment thereof, that the defendant had notice, and that the said times elapsed. It then avers that the plaintiffs *358] *did all things necessary to entitle them to have the money paid to them by the defendant, but that he made default. The question is whether the statement that the plaintiffs did all things necessary to entitle them to have the calls paid to them, is sufficient to show that the defendant not only subscribed, but that he was at the time the calls were made in the position of a person liable to pay such calls. It seems to me that it is not. Assuming that registration as a shareholder was necessary, and that the company had placed the defendant upon the register of shareholders, it is quite consistent with this count that the defendant may have transferred his shares so as to have ceased to be a shareholder before the calls in question were made. It is not, therefore, a sufficient statement that the defendant was a shareholder at the time of the making of the calls. I cannot help observing that the departure from the form of declaring prescribed by the statute is a circumstance which is not to be left out of consideration. Upon the whole, the con

clusion at which I arrive, in concurrence with the rest of the court, is, that a "subscriber," as such, is not liable, and that the second count of this declaration does not show that the defendant was more than a subscriber.

BYLES, J.—I am entirely of the same opinion. It seems to me that there is nothing on the face of the second count to show that the defendant ever was a shareholder in this company, but only that he was a subscriber to the undertaking. I entirely agree with my Lord and my two learned Brothers that quâ subscriber he is not a shareholder, and therefore not liable to be sued upon the statute for calls. As to the general averment, it appears to me that nothing that could have been done by the plaintiffs would make the defendant liable if he were not a shareholder; and *that averment seems to refer to matters done after the call and notice. As to whether, to constitute a person a shareholder, it is essential that his name should be upon the register of shareholders, it appears to me to be a matter open to some doubt, and one upon which I desire at present to offer no opinion. [*359

Judgment for the defendant.

Sir G. L. GLYN, Bart., *v.* THE ABERDARE VALLEY RAILWAY COMPANY. *April* 29.

By the 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, it is provided, that, if the party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed shall exceed the sum of 50*l.*, and the party so entitled desire to have such question of compensation settled by a jury, he may give the promoters notice of such his desire, and, unless they be willing to pay the amount so claimed, they shall, *within twenty-one days*, issue their warrant to the sheriff to summon a jury to settle the same: and s. 54 enacts that either party may have the question of compensation tried by *a special jury*, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking *before they have issued their warrant*:—

Held, that the service of a notice under s. 54 is not a waiver of a notice previously given under s. 68, so as to entitle the company to an extension of the period of twenty-one days for issuing their warrant.

THE first count of the declaration stated that the defendants, being a railway company, mentioned in and incorporated by an act of parliament passed in a session of parliament holden in the 18 & 19 Victoria (c. cxx.), intituled "An act for making a railway through part of the Aberdare Valley, in the county of Glamorgan, to join the Vale of Neath Railway," and the paintiff having an interest in certain pieces or parcels of land in the parish of *A*berdare, in the county of Glamorgan, containing by estimation 2 *a.* 3 *r.* 29 *p.* or thereabouts, the said pieces or parcels of land had been taken by the defendants, as and being promoters of the undertaking to make the said railway, for the execution by them of the works of the said railway, *and the plaintiff was entitled to compensation for his interest therein; and the defendants, as such promoters as aforesaid, had not made compensation to the plaintiff for the said pieces or parcels of land so taken as aforesaid under the provisions of the said act or of any act incorporated therewith; and the [*360

compensation claimed by the plaintiff for his interest in the said pieces or parcels of land so taken by the defendants as aforesaid exceeded the sum of 50*l.*; and the plaintiff, being so entitled to compensation as aforesaid, and being desirous to have the question of compensation settled by a jury, gave notice in writing of such his desire, to the defendants, as such promoters as aforesaid, stating in the said notice the nature of his interest in the said pieces or parcels of land so taken as aforesaid, in respect of which he claimed compensation, and the amount of compensation so claimed by him; and the defendants, as such promoters as aforesaid, were not willing to pay the amount of compensation so claimed by the plaintiff, nor did they enter into a written agreement, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff of the said county of Glamorgan to summon a jury for settling the same in manner provided by law: Averment, that, by reason of such default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid, to wit, the sum of 900*l.*; and that, although before this suit, all things had happened and had been done, and although all times had elapsed, necessary to entitle the plaintiff to recover the said amount of compensation so claimed by him of the defendants as aforesaid: yet, that the defendants had not paid the same, or any part thereof.

There was also a count upon an account stated.

*361] *Second plea to the first count, that the said notice was, after the giving thereof, varied and waived by a further notice given to the defendants by the plaintiff, of his desire to have the said question of compensation settled by a special jury; and that the defendants did, within twenty-one days after the delivery to them of the said secondly-mentioned notice, issue their warrant to the said sheriff of the county of Glamorgan, according to the exigency thereof.

Second replication to the second plea,—that the said notice of the plaintiff's desire to have the question of compensation settled by a special jury was given to the defendants before they had issued their said warrant to the said sheriff of the county of Glamorgan.

Demurrer to the second plea. The ground of demurrer stated in the margin, was,—"That it is not necessary to give notice of the desire to have the question of compensation settled by a special jury at the same time as the notice of the desire to have it settled by a jury, and that the twenty-one days mentioned in the 8 & 9 Vict. c. 18 run from the receipt of the notice of the desire to have the question of compensation settled by a jury." Joinder.

The defendants joined issue on the second replication to the second plea, and also demurred thereto,—the ground stated in the margin being, "that the said replication shows no answer to the second plea, which alleges a substituted notice, and a compliance therewith in due time." Joinder.

Coleridge, for the plaintiff.—The second plea, which alleges that the notice given under the 63th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, was varied and waived by the notice subsequently given (under s. 54), of the plaintiff's desire to have a special jury,

*362] affords no answer to the *declaration. The 68th section of that statute enacts, that, "if any party shall be entitled to any com-

pensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of *compensation so claimed, and the same may be recovered by him, [*363 with costs, by action in any of the superior courts." The declaration shows that the company had notice under that section of the nature of the plaintiff's interest and the amount of compensation claimed by him. The answer sought to be set up by the plea is, that that notice was varied and waived by a subsequent notice of the plaintiff's desire to have the question of compensation settled by a special jury, and that the company issued their warrant within twenty-one days after the delivery to them of the last-mentioned notice. The clause which provides for the special jury is the 54th, which enacts, that, "if either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff; and for that purpose the promoters of the undertaking shall, by their warrant to the sheriff, require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such warrant, summon both the parties to appear before him, by themselves or their attorneys, at some convenient time and place appointed by him, for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed the sheriff shall proceed to nominate and strike a special jury in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the superior courts, and the sheriff shall appoint a day, not

later than the eighth day after the striking of such jury, for the parties
*364] or their agents to appear before him to *reduce the number of such jury, and thereof shall give four days' notice to the parties; and, on the day so appointed, the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the superior courts." The words of the 68th section are absolute, and are in no way affected by the provision contained in s. 54. [WILLES, J.—The 68th section entitles the party to have the amount of compensation settled by a jury; and the 54th section entitles him to have a special jury; but I see nothing in the last-mentioned section requiring the notice for the special jury to be served twenty-one days before the company issue their warrant.]

Karslake, for the defendants.—It was competent to the plaintiff to waive his notice, and he has done so; and the company had a further period of twenty-one days for issuing their warrant, from the service of the second notice. If this were not so, the company might be placed in a position of great difficulty and hardship; for, the landowner might always give a notice under s. 68, and then on the 20th day require a special jury, and then the company would be compelled to issue a fresh warrant instanter. [COCKBURN, C. J.—If a special jury be required at the last moment, so that the company are unable to issue their warrant for a special jury within the period limited, that might be a very good answer to a complaint made against them on that score.] The whole tenor of these compensation clauses shows that the delivery of the second notice must necessarily waive and supersede the first notice.

Coleridge, in reply.—The declaration shows that the land has been taken, and therefore the earlier sections do not apply.

*365] *COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to judgment. Construing the 68th section by the 38th, 39th, nd 54th, it seems to me that the company are clearly in the wrong. The twenty-one days are to be computed from the time of the giving of the first notice, under s. 68. The language of that section is plain and precise. It might have been a very reasonable thing for the legislature to have extended the time for issuing the warrant in the case of a second notice being given for a special jury. But they have not done so. The 54th section makes no provision for an extension of the time, but merely says that the question shall be tried before a special jury, "provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking *before they have issued their warrant to the sheriff*." Whatever inconvenience may ensue, we can do no other than construe the words as we find them.

CROWDER, J.—It may be that inconvenience may in some cases result from the construction we put upon the 68th section. But there is nothing in the 54th section to authorize us to say that the company are entitled to the extension of time here claimed. They may always avoid the inconvenience by issuing their warrant promptly.

WILLES, J.—I am of the same opinion. Consistently with the language of this plea, the notice of the plaintiff's desire to have the compensation assessed by a special jury may have been given in abundant time before the expiration of twenty-one days after the service of the first notice, to enable the company to issue their warrant. Mr *Karslake*, therefore, was compelled to rely upon the general proposition,

that the giving a notice for a special jury after a previous notice of assessment by a common jury has the effect of extending the time for the issuing of the warrant to twenty-one days after [*366 service of the second notice. But I find nothing in the act to warrant that. The 68th section enacts, that, if the party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed shall exceed 50*l.*, and the party so entitled desire to have such question of compensation settled by a jury, he may give the promoters notice of such his desire, and, unless they be willing to pay the amount so claimed, they shall within twenty-one days issue their warrant to the sheriff to summon a jury to settle the same; and the 54th section enacts that either party may have the question of compensation tried by a special jury, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant. It may be,—probably it is,—that the notice under s. 54 must be a reasonable notice. But that is all that can be required for the protection of the company against any possible inconvenience that may arise. In practice, we know that companies usually do cause special juries to be summoned. And they may always protect themselves from the inconvenience which Mr. *Karslake* has suggested as likely to arise, by proceeding with reasonable celerity. There are no words in the 54th section to extend the period for issuing the warrant.

BYLES, J.—I am of the same opinion. Whatever inconvenience may be suggested to arise, the language of the 54th section is free from all ambiguity. Judgment for the plaintiff.

*WEEKS *v.* HENRY GOODE and Another. *April* 16. [*367

A lien may be waived by the party's setting up a claim to retain the chattel upon a different ground, and making no mention of the lien.

In trover against A. and B. for a lease, the evidence of conversion was as follows:—A demand having been made upon A., he declined to give up the lease until certain rent due to B. was paid; but he added that it was more B.'s business than his own, and, as he was not in, he (*A.*) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff, receiving neither lease nor letter, issued his writ on the following morning:—Held,—affirming the doctrine of Boardman *v.* Sill, 1 Camp. 410, n.,—that this amounted to an absolute refusal, notwithstanding the defendants had at the time (though it was not mentioned) a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff.

THIS was an action of trover for a lease.

The cause was tried before Crowder, J., at the sittings in London after last term. The evidence of demand and refusal was as follows:—The plaintiff stated that he called upon the defendant Henry Goode, and demanded the lease, but he declined to give it up until the rent due to Phillip Goode was paid; but he added that it was more Phillip Goode's business than his own, and, as he was not in, he (Henry) would either send the lease in the course of the day, or would write the plain-

tiff a letter declining to return it. The plaintiff received neither lease nor letter: and he issued his writ on the following morning.

For the defendants evidence was given of a lien which they had on the lease for business to the extent of between 2*l.* and 3*l.* done for the plaintiff in a county court.

On the part of the plaintiff it was insisted, that, as this claim was never mentioned at the time of the refusal, the alleged lien in respect of it was waived: and for this the case of Boardman *v.* Sill, 1 Campb. 410, n., was cited. That was trover for some brandy which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. It was thereupon contended that the defendant had a lien on the brandy for the warehouse rent, and that, *368] till *this was tendered, trover would not lie. But Lord Ellenborough considered, "that, as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one."

The learned judge thought the conduct of the defendant Henry Goode amounted to an absolute refusal, and he accordingly directed the jury to find for the plaintiff: but, it having been suggested by counsel that Boardman *v.* Sill had been overruled or shaken, he reserved him leave to move.

J. Brown now moved accordingly.—The question is whether the defendants' lien, which they undoubtedly had, was waived by the assertion of a right to detain the chattel upon another ground. The law was undoubtedly so laid down in Boardman *v.* Sill, which seems to have been acted upon by this court in Dirks *v.* Richards, 5 Scott N. R. 534, 4 M. & G. 574 (E. C. L. R. vol. 43), Carr. & M. 626 (E. C. L. R. vol. 41). There, in detinue for a picture, it appeared that it had been intrusted by the plaintiff to one Bye for sale, that Bye deposited it with the defendant, an auctioneer, and that, when the plaintiff demanded it (without tendering anything for warehouse rent), the defendant refused to deliver it up until a debt of 8*l.* due to him from Bye was discharged: and it was held that the repudiation of the plaintiff's title precluded the defendant from afterwards setting up a lien on the picture for warehouse rent. Here, if the plaintiff had waited for an absolute refusal before he brought his action, probably this case could not have been distinguished from Boardman *v.* Sill. But, to waive an existing lien, there must at least be an absolute refusal upon a ground which is inconsistent with it. [COCKBURN, C. J.—Was not the answer of the defendant *369] Henry, coupled with his subsequent conduct, *equivalent to an absolute refusal to give up the lease? The refusal was on the ground of an alleged lien for rent, which could not be sustained, no mention being made of the other claim.] In Trent *v.* Hunt, 9 Exch. 14, 20,† Alderson, B., delivering the judgment of the court, says,—"It is clear that the right of a man to do an act with regard to the property of another, depends upon the authority or right which he really has to do the act, and not upon that which he says he has," citing Crowther *v.* Ramsbottom, 7 T. R. 654. That seems to be inconsistent with the doctrine of Boardman *v.* Sill. In Scarfe *v.* Morgan, 4 M. & W.

270,† the plaintiff sent a mare to the defendant, a farmer, to be covered by a stallion belonging to him. The mare was taken to the defendant's stables, and covered accordingly. The charge for covering not being paid, the defendant detained the mare. A demand of her was afterwards made, but the defendant refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account: and it was held that the defendant was entitled to a specific lien on the mare for the charge for covering her; and that the claim made by the defendant to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum. [WILLES, J.—In that case Parke, B., refers in his judgment to Boardman *v.* Sill. There is a subsequent case in the Exchequer, of Jones *v.* Tarleton, 9 [M. & W.] Exch. 675,† which seems to be more applicable to the present. There, in trover by the owner of certain pigs against a carrier who had detained them under a claim of lien, it was held not to be necessary, in order to entitle the plaintiff to recover, that he should prove an actual tender of the carriage-money, if it appear that he was ready to pay it, but that the defendant refused *to deliver the goods except on payment of an alleged old balance, which the jury found not to be really due.] [*370

COCKBURN, C. J.—Scarfe *v.* Morgan, 4 M. & W. 270,† was a very different case from the present. It however recognises the case of Boardman *v.* Sill, 1 Campb. 410, n., which is expressly applicable here. We therefore think the ruling of my Brother Crowder was right, and therefore there will be no rule.

The rest of the court concurring, Rule refused.

It is generally held in the United States, on the authority of Boardman *v.* Sill, 1 Campbell 410 n., and the other English cases, that where a person having a lien on goods, refuses to deliver them up to the owner, on a distinct ground, and makes no mention of the lien, it is a conversion, and he cannot afterwards set up his lien in an action of trover: Judah *v.* Kemp, 2 Johns. Cas. 411; Everitt *v.* Coffin, 6 Wend. 608; Everitt *v.* Saltus, 15 Wend. 478; affirmed 20 Wend. 268; Spence *v.* M'Mellan, 10 Alab. 583; Hanna *v.* Phelps, 7 Indiana 21; Buckley *v.* Handy, 2 Miles 449. Some of the decisions, indeed, seem to go farther, and hold that an absolute refusal to deliver, without setting up the lien at the time, is of itself a waiver, though no other ground of retention be alleged, at least where the party making the demand is ignorant of the existence of the lien: Dows *v.* Morewood, 10 Barbour 183; Hanna *v.* Phelps, 7 Indiana 24; Spence *v.* McMellan, 10 Alab. 583. But in Everitt *v.* Coffin, 6 Wend. 608, it was held, that the doctrine only applied where there was a refusal to deliver on a ground distinct from the right of lien; and this was recognised in Everitt *v.* Saltus, 15 Wend. 478. In Buckley *v.* Handy, 2 Miles 449, the existence of a claim of lien, by the defendant, was known at the time of the demand, and it was held, that a refusal by him, either to deliver the goods or to specify the amount for which he claimed his lien, was no waiver. Perhaps the cases on this subject may be reconciled by holding, that where there is an absolute and unqualified refusal to deliver, coupled with circumstances which show an assumption of ownership on the part of the defendant, and the right of lien is concealed from the other party, this will amount to a conversion as respects him.

REYNOLDS and Others v. GOODWIN. *April* 15.

An action having been brought in this court for goods sold by the plaintiffs in England, and delivered to the defendant in India, the court refused to stay the proceedings under the 61st section of the Indian Insolvent Debtors Act, 11 & 12 Vict. c. 21, under which act the defendant had duly obtained his discharge; but left him to any remedy the statute gave him, by plea.

THIS was an action for goods sold and delivered, money paid, interest, and money found due on accounts stated.

The defendant was a merchant in India, and the goods in question had been ordered in England and sent by Messrs. Grindley & Co. In the year 1854, the defendant petitioned for his discharge under the 11 & 12 Vict. c. 21, "to consolidate and amend the laws relating to Insolvent Debtors in India," and the debt in question was inserted in his schedule, and notice given to the agents of Grindley & Co. in India, and the defendant duly obtained an order for his discharge.

Holl, upon an affidavit of these facts, moved (after an unsuccessful application to a judge at chambers) to stay the proceedings.—The 5th section of the statute enables persons imprisoned within the respective limits
*371] *of the towns of Calcutta, Madras, and Bombay, for any debt, damages, &c., to petition the supreme court for relief. The 6th section requires a schedule of debts, &c., to be filed. The 7th section enacts, that, "upon the filing of any such petition as aforesaid, it shall be lawful for the said court, and the said court is hereby authorized and required, to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the East India Company or without, except the wearing-apparel, bedding, and other such necessaries of such petitioner and his family, not exceeding in the whole the value of 300 Company's rupees for each petitioner with his family, and all debts due to him, and all the future estate, right, title, interest, and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, and all debts growing due to him before the court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the official assignee for the time being of the said court, and that all books, papers, deeds, and writings in any way relating to such petitioner's estate and effects in his possession, or under his custody or control, shall be deposited with such assignee; and such order shall be entered of record in the said court, and such notice thereof shall be published as the said court shall direct; and such order, when so made, shall by virtue of this act relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects, and debts as aforesaid in the said official assignee, who shall have full powers for the recovery thereof, and shall
*372] hold and stand possessed of the same for the *purposes and in manner hereinafter mentioned: Provided always, that, in case, after the making of any such vesting order, the petition of any such petitioner shall be dismissed by the said court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes," &c., &c. The 43d section provides

and enacts, "that, unless it shall appear to the satisfaction of such court that all the property of the insolvent is situate, *and all the debtors and creditors resident, within the limits of the charter of the East India Company*, then, until the expiration of twelve calendar months from a notice to be published in the London Gazette of the petition or adjudication of or against any insolvent as hereinafter is mentioned, the assignee or assignees shall reserve the full amount of one-third part of all the property of the said insolvent which shall have been got in, and shall make a dividend amongst the creditors of the said insolvent, to the amount of the remaining two-third parts only, which third part so to be reserved as aforesaid shall in the meantime be invested or disposed of in such way as such court shall order, and shall not remain in the hands of such assignee or assignees; and at the expiration of the said term of twelve calendar months it shall be lawful for the assignee or assignees of such insolvent to apply to such court for a return of the said third part so reserved as aforesaid, in order that the same may be so distributed amongst the creditors as to place them all upon an equal footing; and upon such third part so reserved as aforesaid being restored to such assignee or assignees, such assignee or assignees shall forthwith proceed to take an account of the debts of the said insolvent admitted and established in the said court, and of the sum or sums which shall or may have been paid by way of dividend to any of such creditors, and shall distribute the fund then in *the hands of such assignee or assignees, so as to place all the creditors of the said insolvent, [*373 whether Indian or British or foreign, upon a just and equal footing, and so as that every creditor whose debt or claim shall be admitted or established in the said court shall receive a rateable and proportional part of the assets of the said insolvent, according to the amount of his debt, without reference to the time at which such debt shall have been claimed." Then the 61st section enacts, "that, if any such insolvent, his heirs, executors, or administrators, shall, after such order for discharge in the nature of a certificate under this act as aforesaid, be sued or arrested either on mesne or final process, or execution shall issue against his or their property, for any debt, claim, or demand from which the said insolvent shall have been discharged by such order, on his or their application to any court having power to stay such proceedings, or to discharge from such arrest, or to set aside such execution, and, upon proof to the satisfaction of such court of such order, and that the debt or claim for which such proceedings are had is the same from which the said insolvent has been discharged by such order as aforesaid, such proceedings shall be stayed, and he or they shall be discharged from such arrest, and such process of execution shall be set aside, and all further proceedings in the suit in which such arrest or execution was shall also be stayed, and the said court shall have power to award costs to the said insolvent, or his heirs, executors, or administrators as aforesaid, in case the said proceedings shall appear to the said court to have been taken after notice of the said order, and without any reasonable cause for impeaching the same, or to have been otherwise oppressive or vexatious." [BYLES, J.—Was the debt here payable in England?] No doubt it was. [WILLES, J.—You had better look at the case of *Gibbs *v.* Fremont, 9 Exch. 25,† before you admit that.] The [*374 59th section enacts, that, where the estate pays one-third of the

insolvent's debts, or where creditors to that amount consent, the court may grant an order nisi for the final discharge of the insolvent, appoint a time for hearing and direct notices to be given: and then comes a proviso which may give rise to some difficulty,—"Provided always, that such order shall not affect any creditor *without the limits of the charter* of the East India Company, unless notice of the said order nisi shall have been directed to be given in the Gazette in manner aforesaid, and a period of twelve calendar months shall have elapsed between the date of the said order nisi and the date of the said order to make the same absolute." The learned judge at Chambers thought that proviso referred to creditors *residing* without the limits. [WILLES, J.—The 83d section, which is an analogous provision, throws some light upon that proviso. That section says, "that, in case any fiat in bankruptcy, whether under the provisions of this act or otherwise, shall be issued against such insolvent trader as aforesaid, upon which such insolvent shall be declared a bankrupt before such order for discharge in the nature of a certificate as hereinafter mentioned, then and in such case such order shall not operate as a discharge from the debt, claim, and demand of any creditor who shall not have been *resident* within the limits aforesaid at any time between the filing of the insolvent's petition or the adjudication, as the case may be, and the making of such order."] It is submitted that these plaintiffs were creditors in India, though *residing* in England. [BYLES, J.—Why not put this matter upon the record?] It would be a needless expense to plead this, if the court has power to give relief in the summary way pointed out by s. 61. [BYLES, J.—Nobody doubts *375] the power of the *court: the only question is, whether this is a proper case for the exercise of it.]

COCKBURN, C. J.—The impression of the court is decidedly adverse to the application. We should be very reluctant to adopt a course which would preclude the plaintiffs from taking the opinion of a court of error.

WILLES, J.—The expense would not be materially increased by putting this defence (if it is one) upon the record; for, the 74th section of the statute makes certified copies of the proceedings evidence in all courts.

The rest of the court concurring, *Holl* took nothing.

COX v. MUNCEY. *April* 29.

No action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship.

THE first count of the declaration stated, that, by deed dated the 18th of October, 1853, one Kimpton Muncey, being then an infant of the age of sixteen, or thereabouts, by and with the consent of the defendant, his father, did put himself apprentice to the plaintiff, to learn his trade and business, to wit, the trade and business of a stone and marble mason and letter-cutter, and with him after the manner of an apprentice to serve from the 18th of October, 1853, until the 25th of December, 1857, during which time the said apprentice was by the terms of the said deed faithfully to serve the plaintiff, and not to absent himself from the plaintiff's service unlawfully day or night, but in all things as a

*faithful apprentice to behave himself towards the plaintiff and all his during the said term; and for the true performance of the [*376 said deed by the said apprentice on his part, the defendant did by the said deed covenant with the plaintiff; and the plaintiff did by the said deed agree to give the said apprentice 1*s.* per week for the first two years, and 2*s.* 6*d.* per week for the last two years of the said term, and that he the plaintiff his said apprentice the art of a stone and marble mason and stone-cutter, which he then used, by the best means that he could, should teach and instruct, and cause to be taught and instructed, finding unto his said apprentice sufficient meat, drink, pocket-money as aforesaid, lodging, and all other necessaries during the said term: and, by the said deed, it was agreed, that, for the considerations aforesaid, the plaintiff should be paid the sum of 15*l.* on the said 18th of October, and a further sum of 14*l.* 10*s.* at Christmas, 1853; and the plaintiff hath in all things performed the terms and conditions of the said deed on his part, except so far as he was prevented therefrom by the unlawful act and default of the said apprentice hereinafter mentioned: Breach, that the said apprentice did not during the said term faithfully serve the plaintiff, but wrongfully and unlawfully absented himself from the plaintiff's service for divers long spaces of time during the said apprenticeship, whereby the plaintiff lost the benefit, profit, and advantage which he would otherwise have derived from the service of the said apprentice for a long time, to wit, for two years.

The second count stated that, in consideration that the plaintiff would, at the defendant's request, take the said Kimpton Muncey as his apprentice, to learn the trade and business in the first count mentioned, and upon the terms and conditions therein mentioned, he, the defendant, promised the plaintiff that the said *Kimpton Muncey should [*377 faithfully serve the plaintiff during the said term, and as in the said first count mentioned: Breach, that, although the plaintiff did thereupon accordingly take and receive the said Kimpton Muncey as such apprentice as aforesaid, upon the terms as aforesaid, and duly performed the said contract on his part in all things save and except as far as he was by the default of his said apprentice hereinafter mentioned prevented from so doing, yet the said apprentice did not nor would faithfully serve the plaintiff as aforesaid, but, during the said apprenticeship, for divers long spaces of time, wrongfully and unlawfully absented himself from the plaintiff's service, against the will of the plaintiff, whereby the plaintiff was damnified as in the first count mentioned.

The third count stated that the said Kimpton Muncey then being such apprentice to the plaintiff as aforesaid, and before the said term of apprenticeship was expired, the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his aforesaid trade and business, and to deprive him of the service of the said Kimpton Muncey as such apprentice as aforesaid, and of the profits, benefits, and advantages which might and would otherwise have arisen from such service, whilst the said Kimpton Muncey was such apprentice as aforesaid, to wit, on the 24th of December, 1854, unlawfully, wrongfully, and unjustly enticed, persuaded, and procured the said Kimpton Muncey to depart from out such service of the plaintiff, and to enter the service and employment of the defendant: by means of which enticement, persuasion, and procurement, the said Kimpton Muncey,

whilst he was such apprentice as aforesaid, wrongfully and unjustly departed from out of the said service of the plaintiff, and entered into
*378] the *service and employment of the defendant, and had remained and continued, and been wrongfully and wilfully harboured, kept, and detained in the defendant's said service and employment for a long space of time, to wit, from thence hitherto, whereby the plaintiff had, to wit, for the space of two years, lost and been deprived of the service of the said Kimpton Muncey in his aforesaid trade and business, and of the profits, benefits, and advantages which might and would otherwise have arisen and accrued to him from such service, and had been and was otherwise greatly injured in his aforesaid trade and business: averment, that all things necessary to entitle the plaintiff to maintain this action existed and had happened before suit. Claim, 150*l.*

First plea,—as to the first count of the declaration,—that the alleged deed is not the defendant's deed, nor did he the defendant covenant as alleged.

Tenth plea,—as to the second count,—that the said Kimpton Muncey did not become nor was he an apprentice to the plaintiff, nor bound to serve him as such apprentice.

Fifteenth plea,—as to the second count,—that the full sum or sums of money received or given, paid, agreed, or contracted for, with or in relation to the said Kimpton Muncey as such apprentice in the second count mentioned, was not truly inserted or written in words at length, or at all, in any indenture or other writing which contained the covenants, articles, contracts, or agreements relating to the service of the said Kimpton Muncey as such apprentice as in the second count mentioned, or otherwise, contrary to the form of the statute in such case made and provided.

Nineteenth plea,—to the third count,—the same as the fifteenth plea.
*379] The plaintiff joined and took issue upon all the *defendant's pleas. He also demurred to the tenth, fifteenth, and nineteenth pleas, the grounds of demurrer stated in the margin respectively being as follows,—As to the tenth plea, "that it affords no answer to the second count, admitting, as such plea does, that the plaintiff received Kimpton Muncey as an apprentice;" as to the fifteenth plea, "that it affords no answer to the second count, admitting, as such plea does, that the plaintiff received Kimpton Muncey as an apprentice;" and, as to the nineteenth plea, "that it affords no answer to the third count, nothing in that plea appearing to justify the admitted enticement by the defendant to quit the plaintiff's service, and enter his own." Joinder.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when it appeared that the defendant's son, Kimpton Muncey, had been apprenticed to the plaintiff, a stone-mason in the City Road, by an indenture of the 18th of October, 1853; that the consideration money or premium agreed to be paid with the apprentice was 30*l.*, but that, in order to diminish the amount payable for stamp-duty, it was arranged that 29*l.* 10*s.* should be inserted in the indenture as the premium paid, and that sum was accordingly so inserted, but not in words at length. It also appeared that the youth had served the plaintiff under the indenture for a considerable time, and that he had been induced by the persuasions of the defendant to quit his service.

On the part of the defendant it was insisted, that, the indenture of

apprenticeship being void by force of the statute 8 Ann. c. 9, ss. 35, 39,(*a*) for not truly and *in words at length setting forth the consideration or premium paid, the plaintiff was not entitled to maintain this action. [*380

On the other hand, it was submitted, that, assuming the indenture to be void, it was enough, to entitle the plaintiff to recover, that the party enticed away was his apprentice de facto.

The learned judge, not being required to leave anything to the jury, directed a verdict for the defendant on the first and second counts, and for the plaintiff on the third, for the agreed damages of 13*l.*

Hawkins, in Michaelmas Term, obtained a rule nisi to enter a verdict for the defendant on the nineteenth plea to the third count, on the ground that the evidence given by the defendant at the trial proved the plea, and that the verdict on such plea was against the evidence. He cited The King *v.* The Inhabitants of Baildon, 3 B. & Ad. 427 (E. C. L. R. vol. 23), The King *v.* The Inhabitants of Amersham, 4 Ad. & E. 508 (E. C. L. R. vol. 31), 6 N. & M. 12 (E. C. L. R. vol. 36), The King *v.* Low, 3 C. & P. 62 (E. C. L. R. vol. 14), and the statute 55 G. 3, c. 184, Sched. *Apprenticeship.* [*381

The court directed that the rule and the demurrers should come on together for argument.

W. G. Harrison for the plaintiff.(*b*)—The statute 8 Ann. c. 9 was recently under discussion in this court in the case of Westlake *v.* Adams, 5 C. B. N. S. 248. The question now turns entirely upon the third count of the declaration and the nineteenth plea. If that plea means that there was no valid indenture of apprenticeship, it is an immaterial traverse. [BYLES, J.—Can there be an apprentice otherwise than by

(*a*) The 35th section enacts, that "the full sum or sums of money received, or in anywise directly or indirectly given, paid, agreed, or contracted for with or in relation to every apprentice, shall be truly inserted and written, *in words at length* in some indenture or other writing which shall contain the covenants, articles, contracts, or agreements relating to the service of such apprentice, and shall bear date upon the day of the signing, sealing, or other execution of the same; upon pain that every master or mistress to or with whom, or to whose use, any sum of money whatsoever shall be given, paid, secured, or contracted for or in respect of such apprentice as aforesaid which shall not be truly and fully so inserted and specified in some such indenture or other writing, shall, for every such offence, forfeit double the sum so given, paid, secured, or contracted for."

And the 39th section enacts "that all such indentures or writings as aforesaid wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with or in relation to such apprentice as aforesaid, or whereupon the duties payable by this act shall not be duly paid, or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, according to the tenor and true meaning of this act, within the respective times herein for that purpose severally and respectively limited, shall be void and not available in any court or place, or to any purpose whatsoever, and the apprentice whom the same shall concern or relate to shall in such case be utterly incapable of being free of any city, town, corporation, or company, and of following or exercising the intended profession, trade, or employment, any charter, law, or custom to the contrary notwithstanding."

(*b*) The points marked for argument on the part of the plaintiff were as follows:—

"That it is immaterial to the validity of the defendant's contract whether there was a binding contract of apprenticeship or not, and that therefore no good excuse is offered by him for the alleged breach of his contract, nor any justification afforded for the grievances complained of in the last count of the declaration: That the pleas demurred to are founded upon the assumption that the defendant's liability is dependent upon the validity of such contract of apprenticeship, and are therefore bad: And that a sufficient consideration for the defendant's contract arose out of the plaintiff's taking the apprentice at the defendant's instance upon the alleged terms and conditions."

indenture?] An apprenticeship de facto is sufficient for the present purpose. [COCKBURN, C. J.—The apprenticeship being under a void deed, can you rest upon anything but the deed?] The youth was serv-
*382] ing under a *contract which the law would imply. The 35th section merely enacts that the consideration shall be truly set forth in the writing, where the law requires a writing. The defendant has been guilty of an unjustifiable interference with the rights of the plaintiff with regard to his servant. He is a wrongdoer. In Barber v. Dennis, 6 Mod. 69, 1 Salk. 68, the widow of a waterman, who, as was said, by the usage of Waterman's Hall, may take an apprentice, had her apprentice taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover: it was objected that "the supposed apprentice here was no legal apprentice, if the indentures be not enrolled pursuant to the act of parliament of 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title." But Holt, C. J., said, "he would understand him an apprentice or servant de facto, and that would suffice against them, being wrongdoers." [COCKBURN, C. J.—What was the state of the statute law at that time?] The statute of Elizabeth required an apprenticeship by deed, in order to qualify the party to exercise a trade. But that statute was repealed by the 54 G. 3, c. 96. In order to entitle the plaintiff to maintain this action, it is not necessary that the contract should be an absolutely valid and binding contract, as in cases of the seduction of a daughter or servant. The 39th section of the 8 Ann. c. 9 only shows that the legal relation of master and apprentice was not created here. [COCKBURN, C. J.—It is of the violation of that relation that you complain.] In Keane v. Boycott, 2 H. Bl. 125, an infant slave in the West Indies executed an indenture by which he covenanted to serve B. for a certain term of years as his *servant*, and B. covenanted to do certain things on his part: B. then came to England with the slave. In an action against A., who had
*383] *seduced him from the service of B., A. was not permitted to allege that the contract was void, as being made by an infant and a slave, and therefore that the declaration, which stated him to be retained as a servant for a term of years, was not proved; for, the court held that the effect of such a contract might be the manumission of the slave, and consequently that it was for his own benefit, and, being for his own benefit, that it was at most only voidable by the infant himself. [COCKBURN, C. J.—There, the slave was considered as the *servant* of the plaintiff; and the action was for enticing him from his service. But here the plaintiff brings his action on the footing of the youth being an *apprentice*.] There is an apprenticeship of some sort. [COCKBURN, C. J.—An apprentice contracts to serve and the master to teach: we cannot confound that with a mere contract to *serve*.] In the argument in Westerdell v. Dale, 7 T. R. 306, 310, it is said: "The statute 5 Eliz. c. 4 requires the apprentice to be bound for seven years, saying that all other indentures 'are void to all intents and purposes;' and yet it has been holden in cases of settlement-law,—Rex v. St. Nicholas, Ipswich, Burr. S. C. 91,—and in actions for enticing away an apprentice,—Parker v. Smith, C. B. 1785,—that an indenture for a shorter period is not absolutely void, but only voidable, and that at the election of the

parties themselves, for that third parties cannot set up the objection." [WILLES, J.—Keane *v.* Boycott was cited in Sykes *v.* Dixon, 9 Ad. & E. 693 (E. C. L. R. vol. 36), 1 P. & D. 463, and Lord Denman said: "It was argued, on the authority of Keane *v.* Boycott, that the objection" (that the agreement was invalid under the 22 Car. 2, c. 3, s. 4, for want of mutuality) "was not one which a third person could take; and that might be so where the servant was de facto continuing in the service; but not here, where he had quitted his master, and taken his chance *in hiring himself to the defendant." All that the statute of Anne means, is, that, if you defraud the revenue in the [*384 stamp, you shall have no power over your apprentice, and, possibly also, that he shall derive no benefit from the contract: but that is all. Shepherd *v.* Hall, 3 Campb. 180, is a case almost in point. There it was ruled that an indenture of apprenticeship is not void by the 8 Anne, c. 9, although it was originally agreed between the master and apprentice's father that a premium of 20*l.* should be paid, and the master afterwards, to reduce the amount of the duty, agrees to take 19*l.* 19*s.* 6*d.*, which is the sum inserted in the indenture, and actually paid. Lord Ellenborough says: "The sum agreed upon must mean the sum finally agreed upon, which in this instance was 19*l.* 19*s.* 6*d.*; and, the duty being paid upon that sum, the indenture is valid, and the plaintiff has a full consideration for the premium." So, here, the sum inserted was 29*l.* 10*s.*; and that was the sum actually paid. [COCKBURN, C. J.—The sum agreed for was 30*l.*; and it was paid thus,—29*l.* 10*s.* as the consideration for taking the apprentice, and 10*s.* towards the purchase of the stamp. But it was incumbent on the master to find the whole stamp.] In King *v.* Low, 3 C. & P. 620 (E. C. L. R. vol. 14), it was held that the statute of Anne does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty.

Garth, contrà,(*a*) was stopped by the court.

*COCKBURN, C. J.—We all are strongly of opinion that the [*385 count for enticing away the apprentice cannot be sustained. The language of the statute 8 Ann. c. 9 is clear and peremptory. There is no valid contract of apprenticeship. But we incline to think, that, if the action had been brought on the footing of the youth being the *servant* of the plaintiff, the defendant would have been liable, there being evidence of enticement. We are, therefore, much disposed to allow the declaration to be amended, and to send the cause down again, unless the parties will agree to a stet processus, which would be very

(a) The points marked for argument on the part of the defendant were:—"That the tenth plea was good,—first, because the fact of Kimpton Muncey becoming the plaintiff's apprentice was a condition precedent to the defendant's liability as stated in the second count,—secondly, because the tenth plea amounts in substance to a denial of the contract, and of the fulfilment of the conditions of that contract as alleged in the second count: And that the fifteenth and nineteenth pleas are good,—first, because they show, that, under the provisions of the statute 8 Anne, c. 9, the contracts upon which the second and third counts are respectively founded are void and illegal,—secondly, because the existence and validity of a contract or relation of apprenticeship is indispensable to the plaintiff's right of action upon either the second or third count; and the fifteenth and nineteenth pleas show that no such contract or relation existed as alleged in those counts."

desirable, seeing that there could not be a new trial without payment of costs.

A stet processus was ultimately agreed to.

That an action on the case may be maintained against one who seduces away and harbours the servant or apprentice of another, was held or admitted in Boston Glass Manufactory *v.* Binney, 4 Pick. 425; Ferguson *v.* Tucker, 2 Harr. & Gill 182; Jones *v.* Mills, 2 Dev. 540; Dowd *v.* Davis, 4 Id. 61; Seidmore *v.* Smith, 13 Johns. 322; Butterfield *v.* Ashley, 2 Gray 254; Campbell *v.* Cooper, 34 New Hamp. 49; Peters *v.* Lord, 18 Conn. 337; Dubois *v.* Allen, Anthon 94. In Jones *v.* Mills, 2 Dev. 540, it was held, that the defendant in such an action could not take advantage of the alleged invalidity of a bond, required by statute to be given by the master, on the ground that a service *de facto* was sufficient; and a similar decision was made in Dowd *v.* Davis, 4 Dev. 61, where the defence was, that the indenture of apprenticeship was void, by reason of the omission of proper covenants on the part of the master: see however Allison *v.* Norwood, Busbee N. C. 414. Where, however, the servant or apprentice is merely induced to leave, after the expiration of the term for which he is hired or bound; or where, in the case of an apprentice, the indenture is for any reason not binding on him, and he voluntarily leaves his master, and is afterwards harboured, no action will lie: Boston Glass Manufactory *v.* Binney, 4 Pick. 425; Campbell *v.* Cooper, 34 New Hamp. 49; Peters *v.* Lord, 18 Conn. 337.

An action will also lie for the wages of an apprentice or servant, against one who has harboured him, and in the case of an apprentice, whether the defendant knew the fact of the apprenticeship or not: Bones *v.* Tibbetts, 7 Greenl. 457; James *v.* Le Roy, 6 Johns. 274; Minnsey *v.* Goodall, 3 New Hamp. 272.

See also note to Westlake *v.* Adams, 5 Com. Bench 248, 267.

*386] *HOWKINS *v.* BENNET. *April* 28.

A verdict and judgment having been taken for the plaintiff, subject to a special case, to be settled by a barrister, and the referee having settled it, the defendant obtained a rule to set aside the judgment, on the ground that the plaintiff had neglected to take the necessary steps to set the case down for argument. Cause was shown upon an affidavit stating that the delay had arisen partly from the refusal of the defendant to pay a moiety of the referee's fees for settling the special case, and partly from the fact of the plaintiff's attorney having been until within two days of the application for the rule engaged in negotiations for obtaining a loan of money on mortgage for the defendant, to enable him to settle the plaintiff's claim:—The court discharged the rule, with costs.

THE *Common Serjeant*, in Hilary Term last, obtained a rule calling upon the plaintiff to show cause why the judgment signed and entered up by the plaintiff in this cause pursuant to a rule of court should not be set aside, the plaintiff not having taken the necessary steps duly to set down the special case stated between the parties for argument, in compliance with the conditions upon which the judgment was allowed to be so signed and entered up.

The rule was obtained upon affidavits which stated, in substance, that

the judgment had been entered up pursuant to a rule whereby it was ordered that a special case should be stated for the opinion of the court, to be settled by Mr. Couch; that the parties duly attended before the referee for the purpose of getting the case settled; and that that gentleman's clerk, on the 19th of February, 1858, wrote to the plaintiff's attorney informing him that the special case had been settled, and was then ready to be delivered; but that, notwithstanding this intimation, neither the plaintiff nor his attorney had taken up the special case.

Lush, Q. C., now showed cause.—The defendant is not entitled to make this rule absolute, inasmuch as the affidavits upon which he has obtained it suppress two material facts which ought to have been disclosed, and which the plaintiff's affidavits now supply,—first, that the plaintiff's attorney had proposed that each party should pay a moiety of the fees of the referee for settling the case, but that the defendant declined to contribute,—secondly, that, down to the 22d of January, 1859, negotiations had been pending between the *defendant and the plaintiff's attorneys for raising a large sum upon mortgage [*387 of certain property of the defendant's, in order to enable him to satisfy the plaintiff's claim. The court called on

The Common Serjeant to support his rule.—It is the plaintiff's duty to do all that is necessary to bring the special case forward for argument, otherwise the defendant may have the judgment standing against him for ever. [COCKBURN, C. J.—Have you any authority for saying that the duty of forwarding a special case is cast exclusively upon the plaintiff? Where the parties agree to take a cause out of the ordinary course of decision by a jury, is not their position altered in that respect? But, what do you say to the other point?] The court cannot take notice of the matters suggested as to the negotiations for a mortgage. It is true the plaintiff's attorneys have been engaged in such negotiations; but that was on behalf of other clients, and not for the plaintiff.

COCKBURN, C. J.—There is no pretence for this application. The defendant ought, under the circumstances, to have acceded to the plaintiff's proposal to pay his moiety of the referee's fees for settling the case. The rule must be discharged, with costs.

The rest of the court concurring, Rule discharged, with costs.

*KEARNS *v.* THE CORDWAINERS' COMPANY. [*388

THE CORDWAINERS' COMPANY *v.* KEARNS.

May 10.

By the 53d section of the Thames Conservancy, 1857 (20 & 21 Vict. c. cxlvii.), it is enacted that "it shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a license to make any pier, jetty, &c., immediately in front of his land, and into the bed of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose."

And by s. 179, it is enacted that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, &c., are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made:"—

Held, that it was competent to the conservators under this act to grant to the owners of a wharf a license for the projection of a jetty or landing-stage into the bed of the river in front of their premises, although such erection might in some degree obstruct the enjoyment by the adjoining owners of the free navigation of the river,—such right of enjoyment by them in common with the rest of the public, not being a right contemplated by the saving clause.

By an order of Nisi Prius made the 25th of June, 1857, it was ordered that a verdict should be entered for the plaintiffs in these causes respectively for the claims in the declarations, subject to the award, order, arbitrament, final end, and determination of a barrister, to whom the causes and all matters in difference between the parties were referred, and who was empowered to direct that verdicts should be entered for the plaintiffs or the defendants respectively, or nonsuits, as he should think proper, and also to say what should be done between the parties on the agreement in the pleadings in these causes mentioned,—the costs of the causes and the costs of the reference and award to be in the discretion of the arbitrator; and, in the event of any application to the court on the subject of the order, the reference, or the award or certificate, the court was to be at liberty, if it should think fit, to refer back to the arbitrator the whole or any part of the matter of the order, or the award or certificate, upon such terms and with such directions as the court should think proper.

The agreement of the 12th of January, 1855, above referred to, and which was made between one James Josiah Millard, as agent for the Cordwainers' Company, of the one part, and the plaintiff, John Kearns, of the *other part,—after reciting that certain premises situate and being No. 12, Bankside, Southwark, on the east side of Horse-shoe Alley, were the property of the Cordwainers' Company, and that the said John Kearns was desirous of taking a lease thereof from the said company,—it was agreed that the said John Kearns should, at his own cost, before the 25th of December, 1855, expend 250*l.* in substantially repairing the premises, to the satisfaction of the surveyor of the said company; in consideration whereof the said James Josiah Millard, on behalf of the said company, agreed that the said company should (provided the commonalty of the said company should consent thereto) grant a lease by indenture under their common seal, of the said premises, together with the joint right, with the other tenants of the said company, to the use of the wharf on the river Thames in front of the said premises, for the purpose of landing and shipping goods, with the appurtenances, &c., for the term of twenty-one years from the 25th of December, 1854, at the yearly rent of 100*l.*, payable quarterly, on the four usual quarter-days: *And it was further agreed that application should be made by the said company to the corporation of the city of London and such other parties as the corporation might direct, or as might be necessary, for a grant or license to erect a permanent platform or landing-place on the river side of the said wharf*, at the expense of the said company, with as little delay as might be; and that, when and so soon as the same platform or landing-place should be completed and finished, the right of user of the same, in common with the other tenants of the said company, should be demised by the said company to the said John Kearns for the then residue of the said term, at a further yearly rent of 10*l.*, the same platform or landing-place to be held in common with the other tenants of the said company, and subject to the like terms and

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conditions as those to be inserted in the lease thereby agreed to be granted, so far as the same relate to the joint user by the tenants of the said company of the wharf and premises agreed to be demised.

The arbitrator by his award made on the 27th of February, 1858,—reciting the order of reference,—awarded as follows:—

"I direct that the verdict in the first cause above mentioned, viz. Kearns *v.* The Cordwainers' Company, be entered for the plaintiff in respect of the claims in the declaration, for 1000*l.*, and that the costs of the said cause, to be taxed, be paid by the defendants; and, as to the second cause above mentioned, viz. The Cordwainers' Company *v.* Kearns, I direct that a verdict be entered for the defendant in respect of the claim in the first count of the declaration, and that a verdict be entered for the plaintiffs in respect of the claim in the second count of the declaration, for 5*s.*: And further I award and determine, as to what is to be done between the parties on the said agreement in the pleadings in these causes mentioned, in manner following, that is to say, I direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do tender to the said John Kearns a lease in the terms and in the words set forth in a certain draft of a lease marked A. by me, and with my name written thereon by my own hand, and that the said John Kearns do execute the said lease upon its being tendered to the said John Kearns as herein directed: And I do further direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers in the city of London should forthwith, and as soon as it can be done, *apply to the proper authorities for a grant or license to erect a permanent platform or landing-stage* on the river side of a [*391 *certain wharf opposite the Bankside premises occupied by the said John Kearns, being 20 feet in width, excluding the stairs in front of Horse-shoe Alley, and extending out into the stream as far as Walker's line, or as near thereto as such authorities will permit by their license: and I further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do proceed without delay to *erect such permanent platform as soon as the said grant or license has been obtained;* and I direct, that, as soon as the said platform has been erected, the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do demise the same to the said John Kearns on the terms mentioned in the said agreement: And I direct, with respect to the said second action, that each party, plaintiff and defendant, do bear their own costs and expenses incurred by him in respect of his witnesses, counsel, attorney, or otherwise, in attending before me as arbitrator during this reference: And I do further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do pay the costs of this reference, and of the award."

Montague Smith, Q. C., on behalf of the Cordwainers' Company, in the following Easter Term, obtained a rule calling upon Kearns to show cause why the award should not be set aside, on the grounds,—"that the said award is not certain nor final, and exceeds the authority of the arbitrator in the following respects, viz. that it is left uncertain who are the proper authorities or persons to be applied to and who have power to make the grant or license to erect the jetty, and that to erect the platform or jetty to the extent of Walker's line without the consent of all

*392] persons entitled to object would subject the Cordwainers' *Company to legal proceedings,—that the direction that the said company shall demise the platform itself to the said John Kearns is an excess of authority, or the direction is uncertain and ambiguous,—that the arbitrator has not settled the plan to be annexed to the lease,—that the award is not final, in not making provision for a counterpart of the lease, or leaves those matters open and uncertain,—and that the directions in the award relating to the platform or jetty cannot be carried out."

T. Jones, in Trinity Term last, showed cause.—He submitted that the award substantially and completely disposed of all the matters in difference between the parties; that the agreement of the 12th of January, 1855, assumed that the persons whose assent to the erection of the platform was necessary was matter within the knowledge of both parties; that the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii., authorized the conservators thereby appointed to grant the required license; and that, if the company should by acting upon the license expose themselves to any legal proceedings, they were still bound by their agreement to incur that inconvenience.

COCKBURN, C. J.—The arbitrator directs the company to erect the platform or jetty upon obtaining the assent of "the proper authorities." Suppose the adjoining owners refuse their assent, upon being applied to, can it be said that the agreement binds the company to erect the platform notwithstanding? I think the award should be sent back to the arbitrator to define who are the proper authorities.

After some discussion, the rule was, by consent, made absolute in the following terms:—"Upon reading, &c., it is ordered that the award be *393] referred back *to the said arbitrator, with power to him to amend the same, &c.: And it is further ordered that it be referred back to the said arbitrator, on the evidence already adduced before him, and that he shall be at liberty, if he shall think fit, to reconsider the damages assessed in the first action, and the costs of such action and reference; but, nevertheless, this term of the rule is not to be deemed an intimation by the court that the arbitrator should either increase or reduce the said damages or alter the said costs: And it is further ordered that the costs of the second reference before the said arbitrator and incidental thereto shall be in the discretion of the said arbitrator, and that each party shall bear his and their own costs of and occasioned by this application to the court: And it is further ordered that this court shall be at liberty to remit the said award already made or any award to be hereafter made on the matters referred by the order of Nisi Prius made in these causes on the 25th of June, 1857, or by this rule, or any or either of them, from time to time, to the said arbitrator, upon such terms and with such directions as this court shall think proper; and that, in the event of the said arbitrator declining to act or dying before he shall have made his award or before the reference shall be finally concluded, the said parties may, or, if they cannot agree, the Lord Chief Justice, or any other judge of this court, may, if he shall think fit, on application by either of the said parties hereto, appoint a new arbitrator: And it is further ordered, that, in case the said arbitrator should increase or reduce the said damages as stated in the said award, that he be at liberty to alter the same accordingly; and, if the

amount payable to the said John Kearns in respect of damages and costs or otherwise shall be reduced below the sum of 700*l.* already paid to the said John Kearns, he the said John Kearns *shall repay to the said company the difference: And it is lastly ordered that all [*394 further proceedings in these causes be stayed, except such as shall be taken before the said arbitrator, until the fifth day of the term next following the publication by such arbitrator of such award, or until this court shall otherwise order."

By his second award, made on the 12th of February, 1859, the arbitrator,—after reciting the order of reference, and that he had duly made his award thereon and also reciting, that, "afterwards, on the 11th of June, 1858, by a rule of the said court [of Common Pleas] made in the said causes, it was ordered by the said court, with the consent of the said parties, their counsel and attorneys, that the said award so made and published by him as aforesaid should be and the same was thereby referred back to him as such arbitrator, with power to him to amend the same, so that the same, when amended, should, subject to any alteration pursuant to the said rule, stand in the words in the said rule and hereinafter expressed and set forth, with a view to the opinion of the said court being taken on the question whether the grant or license of the conservators would alone protect the company from all proceedings, as raised in the amended award; and that by the said rule, and by the like consent, it was further ordered that the costs of the said second reference before him, and incidental thereto, should be in the arbitrator's discretion, and that each party should bear his and their own costs of and occasioned by the application to the said court for the said rule, and that the said court should be at liberty to remit the said award then made, or the said award thereafter to be made from time to time to the arbitrator, upon such terms and with such directions as the court should think proper,"—made his further award as follows:—"Now, I, the said [arbitrator], having *taken upon [*395 myself the burthen of this award, and having examined upon oath all such witnesses as have been tendered to me for examination by the said parties to the said actions at law and to the said agreement hereinbefore mentioned; and, having read and considered such letters, papers, plans, and documents as have been brought before me, and having heard what was to be said by both parties, and having duly considered all the matters submitted to me, do award and determine as follows, that is to say, I direct that the verdict in the first cause above mentioned, that is to say, Kearns *v.* The Cordwainers' Company, be entered for the plaintiff in respect of the claims in the declaration, for 1000*l.*, and that the costs of the said cause, to be taxed, be paid by the defendants; and, as to the second cause above mentioned, that is to say, The Cordwainers' Company *v.* Kearns, I direct that a verdict be entered for the defendant in respect of the claim in the first count of the declaration, and that a verdict be entered for the plaintiffs in respect of the claim in the second count, for 5*s.*: And further I award and determine as to what is to be done between the parties to the said agreement in the pleadings in these causes mentioned, in manner following, that is to say, I direct that the Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do tender to the said John Kearns a lease in the terms and in the words set forth in a certain draft of a

lease marked A. by me, and with my name written thereon by my own hand, and that the said John Kearns do execute the said lease upon its being tendered to the said John Kearns as directed; and I award and direct that the plan to be drawn in the margin of the lease so to be tendered shall be a copy of the plan I have annexed to the said draft, and signed: And I do further direct that the Master, Wardens, and
*396] Commonalty of the *Mystery of Cordwainers of the city of London should forthwith, and as soon as it can be done, apply to the conservators of the river Thames for a grant or license to erect a permanent platform or landing-stage on the river side of a certain wharf opposite the Bankside premises occupied by the said John Kearns, being twenty feet in width, excluding the stairs in front of Horseshoe Alley, and extending out into the stream as far as Walker's line, or as near thereto as such conservators will permit: and I further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do proceed without delay to erect such permanent platform, if and as soon as the said grant or license has been obtained: but, if the said Court of Common Pleas shall be of opinion, on the true construction of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), and of the agreement set out in the declaration in the action by the said John Kearns against the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London,—a copy of which agreement is appended to and is to be taken as part of this award,—the grant or license of the said conservators alone would not protect the said Master, Wardens, and Commonalty from all proceedings by other parties, then, in lieu of the direction above given for the said Master, Wardens, and Commonalty to apply to the said conservators, and make the platform on obtaining their grant or license alone, I direct that the said Master, Wardens, and Commonalty shall apply to the said conservators and to such other parties as may be necessary for grants or licenses and consents to erect such platform extending to Walker's line or as near thereto as such conservators and other parties will permit; and, further, that the said Master, Wardens, and Commonalty do proceed without delay to erect such platform if and as soon
*397] as *such grants or licenses and consents shall have been obtained, and to such extent as such conservators and other parties will permit: And I direct, that, as soon as the said platform has been erected, the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do grant to the said John Kearns a right of user of the same in common with the other tenants of the company, on the terms mentioned in the said agreement,—the grant to be settled by me, in case the parties differ as to its terms: And I order that the said John Kearns shall execute a counterpart of the said lease and grant, and shall pay all such fees, charges, and expenses as by the agreement he has agreed to pay: And I direct, with respect to the second action, that each party, plaintiff and defendants, do bear their own costs, and likewise, that, in the second action, the said John Kearns do bear all the expenses incurred by him in respect of his witnesses, counsel, attorney, or otherwise, in attending before me as arbitrator during the first reference; and I do further direct that the said Master, Wardens, and Commonalty of the Mystery of Cordwainers of the city of London do pay the costs of the said first reference and of the said

first award, except as aforesaid: And I do further direct, with respect to the said second reference, that each party do bear and pay his own costs; and that, as to this my second award, each party do bear and pay one-half of the costs of the same: And, as to the damages mentioned in the said first award, I direct that the sum therein mentioned of 1000*l.* stand and remain as the amount of damages."

F. Russell, on a former day in this term, obtained a rule calling on Mr. Kearns to show cause why the last-mentioned award, or so much of it as directs the Cordwainers' Company to apply for a license to the *Thames Conservators, and to make the platform on getting their license alone, should not be set aside,—on the ground that the [*398 arbitrator had no authority to make any such direction, and that the grant or license of the conservators would not protect the company from all proceedings by other parties.

T. Jones and *Honyman* showed cause.—The only question here is, whether the license of the Thames conservators for the erection of the jetty or landing-stage opposite the plaintiff's premises would protect the Cordwainers' Company against any action or claim which might be brought against them by the owners or occupiers of the adjoining premises: and this depends upon the nature and extent of the powers conferred upon the conservators by the Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii. The preamble to that act commences with a recital of a suit by the Crown against the mayor and corporation of London for determining their rights to the soil of the Thames, and an agreement between them for putting an end to that suit, by which the corporation withdrew their claim to the ownership of the soil, and the same was afterwards vested in the corporation, as conservators, upon certain trusts; and it concludes thus,—"and whereas it will be necessary that all the powers, authorities, rights, and privileges heretofore given or granted to, and which are now vested in, or which have been or may be exercised, used, or enjoyed by the mayor and aldermen of the city of London, or the mayor, aldermen, and commonalty of the city of London in common council assembled, or the mayor for the time being of the said city, with reference or in relation to the conservation of the river Thames, should be transferred to and vested in and exercised by the conservators appointed by or under the authority of this act." The *3d section vests the powers to be exercised under the act in twelve conservators, viz. the Lord Mayor, two alder- [*399 men, four members of the common council, the deputy-master of the Trinity House, two persons appointed by the Admiralty, one person appointed by the Board of Trade, and one person appointed by the Trinity House. The 44th section authorizes the persons so appointed to make by-laws for the regulation of the river. The 50th section vests all the estate, right, &c., of the Crown and of the corporation in the bed and soil of the river, in the conservators. The 52d section enacts, that, "from and after the commencement of this act, all the powers and authorities, rights, and privileges which are now vested in, or which have been or may be exercised by, Her most excellent Majesty, in right of Her Crown, and all the powers and authorities, rights, and privileges at any time heretofore given or granted to, or whih are now vested in, or which have been or may be exercised by, the mayor and commonalty and citizens, or by the mayor and aldermen of the city of

London, or by the common council, or by the mayor for the time being of the said city, by prescription, usage, charter, or act of parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames, and of the several rivers, streams, and watercourses within the flow and reflow of the tides of the said river, within the limits aforesaid, and upon the banks, shores, and wharfs of the said river and the port of London, shall be and the same are hereby vested in the conservators by this act appointed, to be by them exercised in the same manner, and under and subject to the same restrictions as the same are now respectively legally exercised by Her Majesty, or by the mayor and commonalty and citizens, or by the said *400] mayor and aldermen, or by the common council, or by *the said mayor, save only and except so far as the same may be modified by or be inconsistent with the provisions herein contained, and particularly that nothing herein contained shall prejudice or affect the free use and enjoyment and power of disposition by Her Majesty or any department of Her Majesty's government entitled thereto, of those parts of the bed, soil, and shores of the river Thames, and the embankments, encroachments, and enclosures thereupon, which are hereinbefore reserved and excepted from the operation of this act, or shall authorize the conservators in any manner to interfere therewith." The 53d section gives very large powers to the conservators with reference to erections on the banks of the river: it enacts that "it shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a license to make any dock, basin, pier, jetty, wharf, quay or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose." The 54th section provides "that it shall not be lawful for any person whomsoever to erect, build, or make any embankment or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators." [COCKBURN, C. J.—The act gives power to encroach on public rights, with the consent of the conservators. But, can the conservators by granting their license interfere with any private right? Suppose, under the Metropolitan Building Act, 18 & 19 Vict. c. 122, the commissioners grant permission for the erection of a building which would cause an obstruction of an *401] *ancient light,—would that be within the scope of their authority? The difficulty I feel is, whether the powers given to the conservators under this act would enable them thus to override private rights.] The 59th section, which authorizes the conservators to erect piers and landing-places where they please, seems to show that there are cases in which private rights may be interfered with, where the general convenience of the public requires it. The 87th, 92d, 93d, 94th, and 99th sections all show how extensive are the powers vested in the conservators. The 179th section,—the saving clause,—applies to rights and claims of a strictly private nature, and not to the mere right of an individual as one of the public. [WILLES, J., referred to Rose v. Groves, 5 M. & G. 613 (E. C. L. R. vol. 44), 6 Scott N. R. 645. There, the plaintiff declared that he carried on the business of a licensed

victualler in a certain house abutting upon the river Thames, which was of right accessible from the river to persons navigating thereon in boats and other craft; that the defendants, with intent to hinder and prevent persons from coming from the river to the plaintiff's house for refreshments, wrongfully and maliciously placed certain beams and spars so that they might and did at certain states of the tide drift and float opposite to and against the plaintiff's house, and thereby obstruct the access thereto from the river; and that divers persons who would otherwise have come to the plaintiff's house for refreshments were thereby hindered and prevented from so doing: and it was held, on motion in arrest of judgment, that the declaration disclosed such a private and particular damage to the plaintiff as to entitle him to maintain an action for the obstruction.] In the late case of The Queen *v.* Cubitt, where the defendant was indicted for an obstruction of the navigation of the river by the erection of a landing-pier, a license granted by *the conservators under this statute was held to justify its continuance. In The King *v.* Pease, 4 B. & Ad. 30 (E. C. L. R. vol. 31), by an act, reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest, and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company, or persons authorized by them, were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage-road: and upon an indictment against the company for a nuisance, it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. That case is a distinct authority to show that it is competent to the legislature by such words as are here used to abridge or encroach upon the enjoyment by individuals of rights which they enjoy as members of the public. [WILLES, J.—That case has not met with universal approval: see the dictum of Pollock, C. B., in Manley *v.* The St. Helen's Railway and Canal Company, 2 Hurlst. & N. 840, 848,† cited by Bramwell, *B., in Vaughan *v.* The Taff Vale Railway Company, 3 Hurlst. & N. 743, 749,†—"Though the legislature permits the company to do the various acts described in their statutes, they are to be considered as persons doing them for their own private advantage, and are therefore personally responsible if mischief arises from their not doing all they ought."] There, there was evidence of negligence.

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M. Smith, Q. C., and *F. Russell*, contrà.—The 53d section of the 20 & 21 Vict. c. cxlvii., gives the conservators no greater power than the corporation committee had before. [COCKBURN, C. J.—As at present

advised, I think the conservators have power by their license to extinguish any public rights. The question is, how far that is to prevail against any private rights of individuals. But, before we come to that, we must inquire whether there are any private rights which would be affected by the license of the conservators, or any rights except those the interference with which would be redressable by a proceeding on behalf of the public.] There is nothing in the act to empower the conservators, as against the public, to legalize a nuisance: The King *v.* Lord Grosvenor, 2 Stark. N. P. C. 511 (E. C. L. R. vol. 3). The 53d section, which is relied on by the plaintiff, is not an enabling, but a restrictive clause, and relates only to private rights and interests. The public clauses are the 57th and 59th. The former of these enacts that "it shall be lawful for the conservators from time to time, upon such terms, and upon the payment of a fair and reasonable consideration, &c., and under and subject to such rules, regulations, and restrictions as they shall think fit to impose, to license the erection by the owners or occupiers of lands adjoining the river, at the places where the piers or landing-places hereinafter mentioned are to be erected, at any convenient
*404] *places, of piers or landing-places of such form and construction as the conservators shall consider most advantageous to the public, and as causing the least obstruction to the navigation of the river Thames; and also to license the driving of piles, &c.; and also from time to time to cause any such piers or landing-places, piles, &c., to be removed and taken away," &c. And the 59th section provides that it shall be lawful for the conservators from time to time as they shall deem necessary for the convenience of the public, to erect at any convenient places piers or landing-places of such form and construction as they shall deem most advantageous to the public, and causing the least obstruction to the navigation of the river Thames; and also from time to time to alter and vary the form and construction of such piers or landing-places; and also from time to time to shut up or take away and remove any such piers or landing-places, &c. If the 53d and 54th sections give the conservators all the powers contended for on the other side, the 57th and 59th were unnecessary. The cases of Wilks *v.* The Hungerford Market Company, 2 N. C. 281 (E. C. L. R. vol. 29), 2 Scott 446, and Rose *v.* Groves, 5 M. & G. 613 (E. C. L. R. vol. 44), 6 Scott N. R. 645, show that any interference with a public highway or a public navigable river which occasions a private and particular damage to an individual, may be made the foundation of a claim for compensation in damages. [COCKBURN, C. J.—That is, assuming that the thing done is a public nuisance.] Any unauthorized obstruction of or interference with the full enjoyment of a public right, is a public nuisance.

COCKBURN, C. J.—I am of opinion that this rule, which asks us to set aside a part of the award made in this case, must be discharged.
*405] It seems to me unnecessary to decide in this case whether the *conservators appointed under the statute 20 & 21 Vict. c. cxlvii. can, in the exercise of the powers with which the act invests them of licensing the erection of projections into the body of the river, interfere with private rights already vested in individuals, because at present it appears to me that no private right is interfered with. The only right the invasion of which the owners or occupiers of the adjoining premises could complain of would be, an interference with the public right operating

to their private injury. The whole question, therefore, turns on whether there is any public right which in the present instance is interfered with. The erection which the conservators are in this case supposed to be about to authorize, is not one which is immediately brought into contact with or can directly interfere with the access to the premises of the adjoining owners. The whole interference which can be made matter of complaint is simply the commodious approach to the premises by means of the river. In that respect, all that is complained of is, the obstruction of the free navigation: that is not a private, but a public right. So long as that part of the river is free to the public, the owners of the adjoining premises would have a right to make use of it; and, if any unauthorized obstruction to the navigation operated a private and particular injury to them, then, according to Rose *v.* Groves, and other cases, they would have a right of action. But, if the public right can be and is taken away or diminished by a license granted by a public body duly authorized by act of parliament, there can be no redress by action on account of such interference with or obstruction to an individual and private right. The principal being taken away, the private right, which is only accessory, falls with it. This brings us to the question whether the conservators appointed by the statute have under the 53d section power to *authorize the erection of buildings calculated to interfere with the free navigation of the river, and so to obstruct the right which the public have, and which the owners or occupiers of the adjoining premises have, as a portion of the public, to the free and unrestricted navigation. I entertain no doubt that such is the operation of that section. The corporation of London, acting as conservators of the river, and arrogating to themselves the ownership of the soil, had long been in the habit of granting licenses to make encroachments on the bed of the stream. That right was questioned by the Crown; and the result of the litigation which thereupon ensued between the Crown and the corporation was, the passing of this act of parliament. I entertain no doubt whatever that it was the intention of the legislature to confer upon the new body of conservators created by the act powers which should be beyond the reach of question, of granting permission to make encroachments on the bed of the river, and even to some extent to interfere with the navigation; it being thought, no doubt, that, taking into consideration the great benefits which would result from the facilities thus afforded to commerce, such a course would upon the whole operate advantageously for the public. There is nothing restrictive in the 53d section, save that the conservators are not to grant these licenses for nothing, but are to receive a fair and reasonable consideration, whereby a fund may be raised for public purposes more immediately connected with the duties they are intrusted with. Beyond this I see no limit to the power conferred on this body,—reserving always the question, upon which I desire to be understood as expressing no opinion, whether the exercise of those powers is at variance or inconsistent with the maintenance of rights already acquired by individuals. Entertaining, as I do, no manner of *doubt that the conservators have under the statute power to authorize encroachments upon the public right of free navigation of the river, and assuming that they have done so, or will do so by the license which they are about to grant in this case, and it appearing to me that the owners of the adjoining

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premises, who have no existing private right which can be affected by it, have no claim for redress except for a private and particular damage resulting from an interference with the public right which is taken away by the license, there can be no ground for maintaining an action against the Cordwainers' Company for anything which they may do under it. I see no ground, therefore, for meddling with the award.

CROWDER, J.—I also think this rule should be discharged, and that the arbitrator has done quite right in directing that the application for a license to erect the platform or landing-place in question shall be made only to the conservators appointed by the statute. I do not find in the affidavits any suggestion of any right which can be shown to belong to the owners of the adjoining premises, other than such rights as they have as part of the public. I agree with my Lord Chief Justice, that, if the granting of the license would be an act within the scope of the powers vested in the conservators, the right to be affected by it being a public right only, the question must be considered only as it regards the effect of the provisions of the act, and the powers thereby conferred upon that body. The 53d section is relied on as authorizing that which the company are by this award directed to call upon the conservators to do, viz., to license the erection of a pier or landing-place extending into the body of the river. The language of that section is most general. Reading it alone, it is impossible to doubt that it does empower *the conservators to grant licenses to make erections so as to interfere with the general right of the public to the free navigation of the river, subject only to such conditions and restrictions as they in their discretion may think fit to impose. Then it is argued that we must look at the preamble of the act, and consider the circumstances which led to its passing. Now, the preamble begins with reciting the suit by the Crown against the corporation touching the ownership of the river. It then recites an agreement between the Crown and the corporation for putting an end to the disputes between them. It is argued that the language of the enacting part of the statute is to be referred to and explained by the preamble and the several clauses of the agreement therein recited. But it appears to me, that, in construing the various provisions in this statute, the general rule must prevail which I find laid down by Dampier, J., in the case of Truman *v.* Lambert, 4 M. & Selw. 238. "I have always," says that learned judge, "understood it as a standing rule in the construction of acts of parliament, that the enacting clause shall not be restrained by the preamble, if the enacting words are large enough to comprehend the case." The language of Lord Abinger, C. B., in Walker *v.* Richardson, 2 M. & W. 889,† is to the same effect:—"The general rule is, that the preamble may extend, but cannot restrain the effect of a particular clause." I see no reason why we should deviate from the general rule in this case. Looking at the preamble, and taking into consideration the reasons for which the act was passed, I should judge that it was intended to give the new conservators greater powers than were before vested in the body whom they were to supersede. And I am very much fortified in this conclusion by a reference to the provision contained in the 3d section, which names the Lord Mayor of the city of London, *two aldermen and four members of the common council, the deputy-master of the Trinity House, two persons to be appointed by the Admiralty, one person appointed by the Board of Trade, and one

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person appointed by the Trinity House, to be conservators of the river Thames. The 52d section shows that very large powers were intended to be conferred upon that body. The 53d section enables them to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a license to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose. The saving clause, s. 179, does not, I think, go to the extent which has been contended for on the part of the company. It enacts "that none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any *right*, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made." This was evidently not intended to save any "rights of action," but refers to vested rights of property, and probably has a more particular application to s. 59, which authorizes the conservators to erect piers and landing-places, and to vary the public landing-places already erected or intended to be erected. In exercising their authorities, the conservators are not to interfere with any rights of *the owners of the soil. It seems to me that no right of that sort is at all interfered with or assailed by that [*410 which is proposed to be done here; and that the only persons whose consent or license was necessary, are the persons to whom the company are by this award directed to apply.

WILLES, J.—I am of the same opinion. The words of the 53d section of the 20 & 21 Vict. c. cxlvii. appear to me to be quite large enough to authorize the erection of a pier or landing-stage under the license of the conservators such as is contemplated by this award. As to the saving clause, s. 179, one may conceive a species of right existing concurrently with a public right which could not be interfered with. One can conceive a way first used as an occupation-way, and then turned into a public highway, and the public right afterwards extinguished, and so the private right alone remaining. Such a right would be within the saving clause. The rights here intended to be saved are, such rights, &c., as may belong to the parties as owners and occupiers of the adjoining premises, not as individuals forming part of the public. The sum of these rights of individuals as part of the public put together makes the public right; and that right is taken away or abridged by the powers conferred by the act upon the Thames conservators.

BYLES, J., having been engaged as counsel in the cause, contented himself with generally expressing his concurrence.

Rule discharged, without costs.

*411] *THE LONDON GAS-LIGHT COMPANY *v.* THE VESTRY OF THE PARISH OF CHELSEA. *May* 11.

It is no objection to an order, under the 14 & 15 Vict. c. 99, s. 6, for the inspection of a document in the possession of a defendant, that its production will disclose his case, provided that it be satisfactorily shown that it also supports the plaintiff's case.

THIS was an action to recover the price of gas supplied by the plaintiffs to the defendants.

The declaration stated, that, theretofore, by deed, made the 23d of March, 1858, between the defendants of the first part and the plaintiffs of the second part, the plaintiffs, amongst other covenants of the plaintiffs as in the said deed mentioned, covenanted with the defendants that they the plaintiffs should and would at their own costs and charges, to the satisfaction of the defendants or their surveyor, for and during the term of three years, to be computed from the 1st of October, 1857, determinable as thereinafter mentioned, well and sufficiently light or cause to be lighted with gas, in all and every the streets and other public places and passages in the said parish of Chelsea in which their mains were at the time of the making of the said deed, or might thereafter be laid (exclusive as thereinbefore mentioned), each and every night at sunset, and continue lighted till sunrise, such number of public lanterns, to be fixed in the manner therein mentioned, at and after the rate of 4*l.* 10*s.* for every lantern for a year, and so in proportion for any period less than a year, during which the said lanterns should be duly supplied and lighted with gas, such gas to be well and sufficiently purified, so that the said gas should give a clear and white and brilliant light, agreeably to the true meaning of the said contract, and the light or flame to be in all respects such a light or flame as is known by the name of the large "bat's-wing burner," each burner consuming at the rate of five cubic feet of gas per hour at the least: And the defendants *412] *thereby, as far as they lawfully could or might, covenanted and agreed with the plaintiffs, that, if the plaintiffs should and would paint and keep the columns and posts and service-pipes, bracket lanterns, iron lanterns, stop-cocks, bat's-wing burners, glass, and other apparatus therein mentioned, in good repair and condition, and well and effectually light the said lanterns with gas, and observe, perform, fulfil, and keep all and singular the covenants, clauses, and agreements therein contained, and which on their part ought to be observed, performed, fulfilled, and kept, in all respects, and particularly according to the true meaning of the said presents, they the defendants should and would well and truly pay, or cause to be paid, out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities vested in them, unto John Rigby Hinde, the then secretary, or unto any future secretary for the time being of the plaintiffs, or such other person as the plaintiffs might appoint, for and on their account, for every lantern lighted with gas of the plaintiffs, at and after the rate of 4*l.* 10*s.* for the year, and so in proportion for a less period than a year during which such lantern should be actually so lighted, painted, and repaired as thereinbefore mentioned, in manner following, that is to say, on the 1st of October, the 1st of January, the 1st of April, and the 1st of July in every year, or as soon after as conveniently might be, without any

deduction or abatement whatsoever: Averment, that the said deed had been from the time of the making thereof hitherto, and still was, in full force and effect, and not determined; and that the said term of years thereby created had not been determined; and that the plaintiffs did, in pursuance of the said deed, supply and deliver to the defendants, who accepted the same, large quantities of gas during the year 1858, to wit, to the *value of 2296*l.* 0*s.* 6*d.*; and that the plaintiffs had performed all conditions precedent on their part to be performed [*413 according to and under the said deed, and that all things had been done and happened necessary to entitle them to payment from the defendants in the manner provided by the said deed for the said gas so supplied and delivered as aforesaid, and that all times had elapsed necessary to entitle the plaintiffs to such payment by the defendants as aforesaid, and to maintain the action: Breach, that the defendants had not paid the plaintiffs, or any person on their behalf, for the said gas supplied as aforesaid, or any part thereof, but had therein wholly failed and made default, contrary to the said deed.

The declaration also contained counts for gas sold and delivered, and for money due on accounts stated. Claim, 4000*l.*

The defendants pleaded,—first, to the first count, non est factum,—secondly, to the first count, that the plaintiffs did not during the said period light the said public lanterns, or cause the same to be and continue lighted, pursuant to the said deed, to the satisfaction of the defendants or their surveyor,—thirdly, to the first count, that the plaintiffs did not supply and deliver, nor did the defendants accept, as alleged,—fourthly, to the first count, that the plaintiffs did not during the said period so light the said public lanterns during each and every night, at sunset, and so continue the same lighted till sunrise, that the light or flame therein was such a light or flame as is known by the name of the large bat's-wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the said deed,—fifthly, to the residue of the declaration, payment of 1800*l.* into court.

Upon these pleas issue was joined on the 8th of April, 1859.

*On the 13th of April, the following order was made by Byles, J., at Chambers, on the application of the defendants:—"Upon [*414 hearing the attorneys or agents on both sides, I do order that the plaintiffs do produce to the defendants, and permit them to take copies of, the following documents mentioned in the affidavit of J. R. Hinde, except such parts as do not relate to the matters in question in this cause, viz. Weekly reports of the inspector, Daily pressure papers in the districts, Pressure register papers at the works at Vauxhall, District inspector's book, containing list of public lamps, District inspector's report book, District inspector's book of measurement of quantity of gas consumed in public lamps in Chelsea during the last two months of 1858, Mr. Warrington's reports of the quantity of illuminating power of the plaintiffs' gas, and Ledger containing defendants' account,—the defendants to pay cost of inspection and copies; and all further proceedings herein to be stayed till such inspection is granted and copies taken."

This order was made on production of an affidavit of the plaintiffs' secretary (Mr. Hinde) in obedience to an order under the 50th section of the Common Law Procedure Act, 1854, which affidavit set forth in a schedule the plaintiffs' documents, and stated that the plaintiffs did

not, to the best of his belief, object to the production of such documents, except such parts of them as did not relate to the matters in question in this cause.

On the 13th of April, the plaintiffs served a summons for inspection and copies of the defendants' documents, with a copy of an affidavit in support, sworn by the plaintiffs' engineer, who deposed that "he was informed and believed that the defendants had, by their officers and others, made experiments and observations with regard to the lighting by the plaintiffs of the lamps in the defendants' parish under the contract *declared on, and that they had in their possession and power certain papers and writings showing the results of the said experiments and observations, which would prove that the plaintiffs had performed their said contract both as to the quantity and quality of the gas supplied to the parish of Chelsea; and that the deponent was informed and believed that it would be material and necessary for the plaintiffs, in order to enable them to prepare for the trial of this cause, to inspect and take copies of or extracts from the said papers in the defendants' possession, showing the results of the said experiments and observations."

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This summons was opposed on the part of the defendants, on the ground that the title to discovery was not shown, that the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), had not been complied with, and that the matters of which discovery was thereby sought were evidence relating exclusively to the defendants' case, and that obedience to the order would disclose the manner in which the defendants' case, and their disproof of the case of the plaintiffs, was to be established. The learned judge, nevertheless, on the 14th of April, made the following order:—

"I do order that the plaintiffs by their attorneys and officers be at liberty forthwith to inspect and take copies of or extracts from certain papers and documents in the defendants' possession, showing the results of observations and experiments made by the defendants' officers and others on the lamps lighted by the plaintiffs, and of the quantity and quality of the gas supplied by the plaintiffs to the defendants from the month of June, 1858, to the month of December, 1858, both inclusive."

David Keane, on a former day in this term, obtained *a rule nisi to set aside the last-mentioned order. He referred to Micklethwait *v.* Moor, 3 Meriv. 292, and Bligh *v.* Berson, 7 Price 205. [BYLES, J., observed that the documents on both sides tended to show the quantity and quality of the gas supplied and consumed.]

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Bovill, Q. C., and *Holland*, now showed cause.—If the papers in question show the quantity and quality of the gas supplied by the plaintiffs under the contract declared on, they must necessarily be material to their case. The 6th section of the 14 & 15 Vict. c. 99, enacts, that, "whenever any action or other legal proceeding shall be pending in any of the superior courts of common law, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same,(a)

(a) The costs of the inspection of documents under this statute must be paid by the party seeking it; but the costs of the application are costs in the cause: Hill *v.* Philp, 7 Exch. 232.†

or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge." There are several cases both at law and in equity clearly showing that the order in question was fully warranted by the statute. Hill *v.* Philp, 7 Exch. 232,† is very like this case. In an action against the keeper of a lunatic asylum licensed under the 8 & 9 Vict. c. 100, for improper treatment of the plaintiff whilst confined there as a lunatic, the defendant was *held not to be privileged from producing the books required by that statute to be kept; and therefore an [*417 order was made under the 14 & 15 Vict. c. 99, s. 6, for the plaintiff to inspect "The book of admissions, The book of entries, The medical visitation book, The case book, and The patients' book," so far as related to the plaintiff: and the court also ordered inspection of the defendant's license, and of the order and medical certificates under which the plaintiff was confined, and also of all letters written by the plaintiff's wife and the commissioners in lunacy to the defendant, relating to the plaintiff. It was argued there that the documents an inspection of which was prayed were privileged on the ground of public policy, that they were of a private and confidential character, and not material for the plaintiff's case. But these arguments did not prevail. In Hunt *v.* Hewitt, 7 Exch. 236,† which is a leading case upon this subject, it is laid down that the 14 & 15 Vict. c. 99, s. 6, has not given to courts of common law the power of compelling a *discovery*, but only of allowing an *inspection* of documents, subject to the following limitations,—first, there must be an action or other proceeding pending,—secondly, the documents must relate to such action or other proceeding,—and thirdly, the case must be one in which a discovery could be obtained in a court of equity: and that the right of a plaintiff in equity is limited to a discovery confined to a question in the cause, and to such material documents as relate to the proof of the plaintiff's case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates *exclusively* to his case. A further illustration of the rule is to be found in the case of Riccard *v.* The Enclosure Commissioners for England and Wales, 4 Ellis & B. 329 (E. C. L. R. vol. 82). There, on a feigned issue directed under the statute 8 & 9 Vict. *c. 118, s. 56, to try whether the plaintiffs had such an interest in a manner as entitled them to object to [*418 the enclosure of certain lands lying within it, the substance of the defendant's case was, that, though the plaintiffs were lords of the manor, yet a former lord, L., to whom the plaintiffs were privy in estate, agreed, in 1800, not under seal, to take an allotment in severalty of 151 acres of the waste in lieu of his interest, in the rest of the waste; that the agreement was acted upon, and the plaintiffs still enjoyed the allotment. A judge's order having been obtained by the defendant to inspect the conveyances by which L. acquired the manor before 1800, and the conveyance by L. to his son, the probate of the will of the son, under which the plaintiffs were executors, and also all leases and entries relating to the letting of the 151 acres alleged to have been allotted,—the court, upon a rule to rescind the order, held that each of the documents was relevant to the support of the defendant's case, and, being so, the

defendant was entitled to inspect them, though they were also title-deeds of the plaintiffs. [WILLES, J.—The case of The Attorney-General v. The Corporation of London, 12 Beavan 8, is in point upon that. The corporation of London, who held the office of conservators of the river Thames under the Crown, claimed the freehold of the bed and shores, and, in answer to an information, which insisted on the right of the Crown thereto, set up a prescriptive title, and refused to discover the charters, &c., under which they held, the particulars of their title, the mode in which they intended to make it out, or the evidence by which it was to be supported. They admitted the possession of documents relating (as they said) to their own right, and which formed material evidence for them, but they did not (as they said) tend to prove the right *419] of the Crown; and they submitted they were not bound to *set forth a list thereof. But the court, on a consideration of the whole case, having regard to the nature of the title claimed to the bed or soil of the river, to the circumstances under which it was claimed, and to the fiduciary relation which subsisted between the Crown and the corporation in respect of the conservancy,—held that the defendants were bound to give the discovery required.] In Colman v. Trueman, 3 Hurlst. & N. 871,† in an action for a breach of contract, in not accepting goods, to which the defendant pleaded fraud, a judge having made an order for the inspection of the correspondence between the plaintiffs and the consignors of the goods and the plaintiffs and their broker, after the contract and alleged breach,—it was held that the order was properly made. [WILLIAMS, J.—In actions upon policies, the underwriters always get inspection of surveys.] It is every day's practice. The cases in equity clearly sustain the propriety of this order: see Maden v. Veevers, 7 Beavan 489; Kerr v. Gillespie, 7 Beavan 572; Smith v. The Duke of Beaufort, 1 Hare 507. In Flight v. Robinson, 8 Beavan 22, the Master of the Rolls says: "According to the general rule which has always prevailed in this court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question." In Goodall v. Little, 20 Law Journ. Ch. 132, 133, Lord Cranworth, V. C., says: "The plaintiffs assert a title which the defendants deny. The defendants admit that they have in their possession *420] documents relating to the *matters in the bill mentioned. Some of the matters in the bill mentioned are the facts from which the plaintiffs show, or allege they show, a title. The documents in question relate or, for aught that appears in the answer, may relate to those very facts. The defendants, it is true, say that the documents would not show the facts to be as the plaintiffs allege them to be. But that is the very point in issue. The documents relate to the matters in dispute. What is the true result of them, is the matter to be decided. It may be true, as stated by the answer, that by the documents, that is, by them alone, the truth of the plaintiffs' case would not appear; but they may form material links in the chain of proof, and, at all events, as it is admitted they relate to the matters in dispute, the plaintiffs, unless

there be some other objection, are entitled to see them, in order to form their own opinion whether they do or do not make out or help to make out their title." [WILLES, J.—In equity, the only inquiry is, whether the plaintiff has an interest in the document, and whether it is privileged. If the matter rested upon the defendant's affidavit, there would clearly be no privilege.] The judgment of Richards, C. B., in Bligh *v.* Berson, 7 Price 205, has no application to this case: and Micklethwait *v.* Moor, 3 Meriv. 292, turned on the want of a sufficient admission.

David Keane, in support of the rule.—It is positively sworn on the part of the defendants that the documents, the production of which is directed by the order in question, are exclusively applicable to their case: that necessarily involves a negation that they have any application to the case of the plaintiffs: whereas, on the other side, there is a mere statement as to the deponent's information and belief that they will be material and necessary for the plaintiffs' case. The *authority [*421 the most analogous to this is the case of Micklethwait *v.* Moor, 3 Meriv. 292. There, on a bill to set aside a partition on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, was contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission,—a motion by the defendant for production of the valuation and papers, &c., relative thereto, was refused with costs. And Lord Eldon said: "The case cited of Pickering *v.* Rigby, 18 Ves. 484, is very different from the present case. There, the bill was for an account of partnership dealings: the plaintiff and defendant were jointly entitled to the possession of the documents the production of which was the object of the motion; and I then stated that I thought I remembered an instance of an application by a defendant under such circumstances to stay proceedings for want of an answer until he had been assisted with the inspection sought, and that that sort of motion might do without a cross-bill. But this case goes very much further than any I have ever yet heard of; and, even if a cross-bill were filed (which is the usual course), I should not have been able to compel the production of these documents." The valuation there, was very much in the nature of the experiments here. To entitle a party to inspection under this statute, it must be shown that the case is one in which a discovery would be ordered in a court of equity. This is not such a case. If the results had not been set down on paper, the plaintiffs clearly could not have asked for the information. No instance can be shown where a discovery has been ordered of experiments in relation to a patent. In what does that case differ from this? If the plaintiffs had proceeded, as they might have *done, under the [*422 50th section (*a*) of the Common Law Procedure Act, 1854 (17 &

(*a*) Which enacts, that, "upon the application of either party to any cause or other civil proceeding in any of the superior courts upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds) to the production of such as are in his or their

18 Vict. c. 125), the defendants would have had an opportunity of setting out the documents in their possession, with their objections to the production of each seriatim. [WILLES, J.—This is a contest between two public bodies. It is hardly a case in which to raise these small matters of practice.] If the court uphold this order, it will lead to results of the most inconvenient nature: for, no party will be safe where it is known that he has made experiments or calculations with a view to assist him in the prosecution of his claim or in establishing his defence.

WILLES, J.—I am of opinion that this rule must be discharged: and I trust that the decision to which we find ourselves compelled to come will not lead to the inconveniences which Mr. *Keane* seems to apprehend. It may be that this case comes very near the dividing line at which the province of discovery ceases. To go beyond that line would *423] be, improperly to permit *the one party to pry into the case or defence of the other. But it appears to me that the present case falls clearly within the line. Two points have been urged upon the argument of this rule, on the part of the defendants. First, it is said that certain requirements of the 17 & 18 Vict. c. 125 have not been complied with, and that the application is not before the court in such a form as to enable the court to come to a decision upon the main question. As to that, it appears to me that the course of proceedings at Chambers and upon the application for this rule, precludes the defendants from urging that objection. Mr. *Keane* moved the rule upon the substantial question whether or not the plaintiffs were entitled to the production of the documents they sought; and he did not then set up the point last relied on. I do not say that the objection, if taken, could have been urged successfully. It is enough to say that it was not urged. I will now proceed to consider the other ground submitted by Mr. *Keane*, viz., that the documents in question are of such a nature that a court of equity would not order a discovery. In order to determine that, we must look at the character of the documents. The action is brought by The London Gas-Light Company against the vestry of the parish of Chelsea to recover a large sum alleged to be due to the company for gas supplied to the parish. The defendants have paid into court a certain sum, denying their liability for anything further. I assume that the dispute is bonâ fide on the defendants' part, and that the plaintiffs also think they are in the right. The question is, whether the gas which has been supplied by the plaintiffs was in point of quality and quantity such as to entitle them to a larger sum than that which has been paid into court by the defendants. Proceedings have been taken, and the matter is pending in court. Upon application to my Brother Byles *424] *at Chambers, the defendants, on the 13th of April, obtained an order requiring the plaintiffs to produce certain documents, viz., "Weekly reports of the inspector, Daily pressure papers in the district, Pressure register papers at the works at Vauxhall, District inspector's book, containing list of public lamps, District inspector's report book, District inspector's book of measurement of quantity of gas consumed in public lamps in Chelsea during the last two months of 1858, Mr. Warrington's reports of the illuminating power of the plaintiffs' gas, and

possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just."

Ledger containing defendants' account." Under that order, the defendants were entitled to have from the plaintiffs an inspection of documents containing information which they had obtained from their officers as to the quantity and quality of the gas supplied by them under their contract with the defendants. That order having been obtained, and the required information having been given by them under it, the plaintiffs apply, and not, I think, unreasonably, for similar information at the hands of the defendants. The substance of the application is this,—the vestry by their officers have watched the lamps, and have ascertained by experiment or observation the quantity and quality of the gas supplied to them. The results of these experiments or observations are not mere proofs collected by the defendants' attorney for the purpose of establishing their defence to the action. It seems to me to be just as if a person who has received a quantity of goods were to weigh or measure them and write down the results of that process in his journal. I apprehend the seller of the goods would have such an interest in that entry as would entitle him to a discovery. I cannot see any difference between that case and this: the observations which apply to quantity will equally apply to quality. Without going through *the authorities in equity, it seems to me that this is clearly a case in which a discovery would be ordered. I need only refer to the affidavit of Mr. Jones, the company's engineer, which is the one which was acted on by my Brother Byles, to show that this is so. The third and fourth paragraphs of that affidavit are as follows:—"I am informed and believe that the defendants have, by their officers and others, made experiments and observations with regard to the lighting by the plaintiffs of the lamps in the defendants' parish under the said contract, and that they have in their possession and power certain papers and writings showing the result of the said experiments and observations, which will prove that the plaintiffs have performed their said contract, both as to the quantity and quality of the gas supplied to the parish of Chelsea;" and "I am informed and believe that it will be material and necessary for the plaintiffs, in order to enable them to prepare for the trial of this cause, to inspect and take copies of or extracts from the said papers in the defendants' possession showing the result of the said experiments and observations." That appears to me to bring the matter within the case I put. Now, is there any answer to that affidavit? It is suggested that there is, in the third paragraph of the affidavit of Mr. Hobbs, the managing-clerk to the defendants' attorneys, in which he says,—"It was stated to Mr. Justice Byles by the counsel for the defendants, *as the fact was and is*, that the matters of which discovery is by the said order directed, are evidence relating exclusively to the defendants' case, and that obedience to the said order will disclose the manner in which the defendants' case and their disproof of the case of the plaintiffs is to be established." As to the second branch of that paragraph, it is immaterial, because it is not an objection to discovery that it discloses the defendants' case, if it *proves the plaintiffs'. The first part is all which is material. I assume that these documents are evidence for the defendants. But we must take that in conjunction with what is sworn on the other side, and not denied, viz., that the contents of the papers will prove that the plaintiffs have performed their said contract both as to the quantity and quality of the gas supplied to the

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parish. Taking the affidavits together, it may be that the mode of reconciling them may be, that the results of the experiments and observations may go to *diminish* the plaintiffs' claim. It is enough to say it may be so, and therefore I think no sufficient answer has been given to the application. I am not aware of any principle in the law of discovery which should prevent us from giving the plaintiffs the inspection they ask, and which they are in justice entitled to. A case was referred to, of Bligh *v.* Berson, 7 Price 205, in which the court refused to give discovery of a book in the possession of the defendant's attorney. But there it did not appear that the book, if produced, would be evidence in favour of the plaintiff. The observations of the Lord Chief Baron show plainly the principle upon which he proceeded. "This book," he says, "is part of the defendant's evidence; and the rule is clear, that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury. Besides, you must show in all cases of an application for production of papers, that they would be evidence making in your favour; and that must be shown by admission in the defendant's answer." That, therefore, was evidently a fishing application. As to the case of Micklethwait *v.* Moor, 3 Meriv. 292, that falls within the same observation. There did not exist the additional circumstance of interest there, viz., that the document would be evidence to support the defendant's case. *These are* *427] documents *which would be evidence for the plaintiffs. For these reasons, I think the order of my Brother Byles was right, and that the rule must be discharged with costs.

Byles, J.—The matter has been so fully gone into by my Brother Willes that I do not think it necessary to add anything.

Rule discharged, with costs.

Under the Pennsylvania Act of 1798, a party to a suit is entitled to call for the inspection of a document, where he has a common interest in it, without regard to the right of custody: Arrott *v.* Pratt, 2 Wharton 566.

In general, however, a plaintiff is not entitled to a discovery of the defendant's case, or the manner or means by which it is to be established, unless when there is privity between the defendant's title and that of the plaintiffs: Cullison *v.* Bossom, 1 Maryl. Ch. 95; Haskell *v.* Haskell, 3 Cush. 543.

DRESSER *v.* NORMAN and Another. *April* 21.

The court has no power to grant a rule for a special jury before issue joined, even where, in consequence of the defendant's being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial.

The proviso at the end of the 44th rule of Hilary, 1853, applies to the six days' notice.

The declaration in this case was delivered on the 4th of April, and the defendants pleaded on the 20th, but the plaintiff had not replied. The defendants were under terms to take short notice of trial for the first London sitting in this term, the 27th. Upon an affidavit stating these facts, and that the defendants were advised that the cause was a fit and proper one to be tried by a special jury, but that, should the

plaintiff give notice of trial for the 27th, the defendants would be prevented, by reason of the holidays which would intervene between the 21st and 27th of April, from applying for a special jury after issue joined.

Crompton Hutton moved for a rule for a special jury notwithstanding the non-joinder of issue.—[COCKBURN, C. J.—I do not see how we can dispense with the general law, which precludes the application for a special jury before issue joined. Your better course probably will be to apply to the judge at Nisi Prius to postpone the cause under the special circumstances.] In Sayer *v.* Dufaur, 9 Q. B. 800 (E. C. L. R. vol. 58), it was held that a defendant cannot, *without special application to a judge*, have a *rule for a special jury before issue joined, [*428 although, being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial. [CROWDER, J.—Is that any authority that it *can* be done *with* leave? WILLES, J.—The court had no power to award jury process before the cause was at issue: 6 G. 4, c. 50, s. 30. The Common Law Procedure Act, 1852, dispenses with jury process, but it has not altered the law in this respect.] The proviso in the rule 44 of Hilary Term, 1853, cures that. That rule is as follows:—"No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day: *provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.*" [WILLES, J.—That proviso only applies to the six days' notice.] The 44th rule of Hilary, 1853, is a mere reproduction of the rule of Hilary, 1 Vict. [WILLES, J.—It therefore introduces no new practice. The 6 G. 4, c. 50, s. 30, in terms enacts that there can be no jury until there is an issue joined.]

PER CURIAM.—The whole power and authority of the court in this respect is based upon the fact of there being an issue joined between the parties. The 30th section of the 6 G. 4, c. 50, enacts that the court or judge may order a special jury to be struck "in any case depending in court," and that "every jury so struck shall be the jury returned for the trial of *such issue.*" We cannot help you. Rule refused.

*429] *Between HENRY DRESSER, Judgment-creditor,
and
WILLIAM JOHNS, Judgment-debtor,
THE MARITIME PASSENGERS' ASSURANCE COMPANY,
Garnishees;
and
Between JAMES CHILTON, Judgment-creditor,
and
WILLIAM JOHNS, Judgment-debtor,
THE MARITIME PASSENGERS' ASSURANCE COMPANY,
Garnishees;
and
In re JAMES CHILTON, Gentleman, one, &c. *April* 30.

A mere verdict in an action of contract for unliquidated damages is not a "debt owing or *accruing*," so as to be attachable under the 61st section of the Common Law Procedure Act, 1854.

A. obtained a verdict against B. for 100*l.* on the 21st of February, but judgment was not signed until the 8th of March. On the 4th of March, C., who had an unsatisfied judgment against A., obtained an order nisi under the 61st section of the Common Law Procedure Act, 1854, to attach the 100*l.* in the hands of B., upon which an absolute order was made on the 11th:—Held, that the order was invalid, there being no debt "owing or accruing" when the order nisi was obtained.

In July, 1857, William Johns was arrested at the suit of Henry Dresser for an alleged claim of 100*l.* and upwards; upon which Johns paid into the hands of the sheriff 100*l.* in lieu of bail, and 20*l.* for costs. In the action in which that arrest took place (in the Common Pleas), Mr. Chilton acted as attorney for the defendant, and the cause was referred, and an award was ultimately made in favour of the plaintiff, Dresser, for 200*l.* and costs, which costs were afterwards taxed and allowed at 74*l.* 19*s.* 2*d.* Final judgment was signed in this action on the 1st of May, 1858; and Dresser afterwards obtained the 120*l.* out of court.

Whilst the action at the suit of Dresser against Johns was pending, Chilton, as attorney for Johns, brought an action against The Maritime Passengers' Assurance Company, to recover the sum of 100*l.*, on a policy
*430] of insurance on certain effects belonging to *Johns, which had been lost at sea: but, in consequence of the plaintiff's absence at sea, that action was not carried down for trial until the sittings in London after last Hilary Term. The trial took place on the 21st of February, when a verdict was found for the plaintiff for 100*l.* The plaintiff's costs of this action were taxed at 60*l.* 2*s.*, and on the 8th of March judgment was signed therein for 160*l.* 2*s.*

Johns, being indebted to Chilton for the costs incurred by him in the defence of the first-mentioned action, and also for the extra costs in the action against The Maritime Passengers' Assurance Company, and being desirous to secure to him the payment of what should be due to him, on the 25th of February executed a warrant of attorney in his favour for 500*l.*, with a defeasance conditioned to avoid the same on payment of 250*l.* and costs.

Judgment was signed upon this warrant of attorney on the 26th of February; and on the 4th of March, 1859, Dresser obtained a judge's

order nisi, under the 61st section (*a*) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to attach the debt due to *Johns from The Maritime Passengers' Assurance Company. [*431
On the same day, Chilton obtained a similar order. Upon service of this last-mentioned order, Chilton was informed that the money had already been attached in the company's hands by Dresser. Chilton thereupon gave the company notice of his lien for costs upon the judgment so recovered against them by Johns; and on the 10th of March he obtained a second garnishee order to attach the debt, judgment having then been signed; and, at the return of the order for attachment obtained by Dresser, viz. on the 11th of March, Chilton appeared by counsel to oppose the payment over to him of the amount of the verdict, but the learned judge refused to hear him, on the ground that he was not a party to the order, and that the company were willing to pay the money to Dresser; and the following order was made:—

"In the matter of attachment of debt,

"Henry Dresser, judgment-creditor, agst. "William Johns, judgment-debtor, "The Maritime Passengers' Assurance company, garnishees.

Upon hearing the attorneys or agents for the judgment-creditor and for the garnishees, and the order made herein on the 4th day of March, 1859, whereby it was ordered that all debts *owing [*432
(or accruing due) from the said garnishees to the said judgment-debtor be attached to answer a judgment recovered against the said judgment-debtor by the said judgment-creditor in the Court of Common Pleas on the 10th day of March, 1858, for the sum of 274*l.* 19*s.*, and upon which judgment the sum of 154*l.* 19*s.* 2*d.* remained due and unpaid, I do order that the said garnishees do forthwith pay the said judgment-creditor the debt of 100*l.* due from them to the said judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt, and that, in default thereof, execution may issue for the same."

The 100*l.* was paid over to Dresser's attorneys on the 14th of March; and on the same day they were served with a summons at the instance of Chilton calling upon them to show cause why the garnishee summons and order of the 4th and 11th of March respectively should not be set

(*a*) The 60th section enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him before a master of the court or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

And the 61st enacts that "it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt."

aside, or why the garnishee order of the 4th of March, at the instance of Chilton, should not have priority over and supersede the said order of the 11th of March at the instance of Dresser,—on the ground, amongst others, that Chilton, as the attorney for Johns, had a lien for his costs upon the moneys so attached.

This last-mentioned summons was attended before Williams, J., on the 17th of March, who, after reading the affidavits and hearing counsel, made an order that Dresser, the judgment-creditor, "do pay into court within three days 100*l.* received from the garnishees under the order of the 11th of March instant, made in the first-mentioned cause, that the whole matter be referred to the court, and that all costs shall abide the event."

The money was accordingly paid into court on the 21st of March. On the 22d of March, Chilton obtained an order upon the garnishees to
*433] pay him the 60*l.* 2*s.*, *the amount of the taxed costs in the action of Johns *v.* The Maritime Passengers' Assurance Company; and on the second day of this term,

Pearce, on behalf of Chilton, obtained a rule calling upon Dresser to show cause why the order of the 4th of March should not be rescinded, and why the order of the 22d of March should not be varied by increasing the amount to be paid to Chilton, the judgment-creditor in the secondly mentioned matter, from the sum of 60*l.* 2*s.* to 160*l.* 2*s.*; and why the sum of 100*l.* paid into court pursuant to the order of the 17th of March should not be paid out to Chilton; and why Dresser should not pay to Chilton or his agent the costs of and occasioned by the several applications at Chambers and of this application to the court. He referred to Jones *v.* Thompson, 27 Law J., Q. B. 234, where it was held that a verdict in an action of contract for unliquidated damages, without judgment, is not a "debt owing or accruing," and cannot be attached under the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

J. Brown now showed cause.—The judgment in the action of Johns *v.* The Maritime Passengers' Assurance Company was signed on the 8th of March, for 100*l.* and 60*l.* 2*s.* for costs. The garnishee order was made on the 11th. [WILLES, J.—An attorney's lien cannot be got rid of by a garnishee order.] Mr. Chilton does not insist upon his lien. He seeks, in virtue of the judgment signed on his warrant of attorney, to obtain the 100*l.* which has already been paid over to Dresser. As to the two orders of the 4th of March, that of Dresser is clearly entitled to priority. [BYLES, J.—At that time neither party was entitled to anything. There was then no debt.] It does not lie in Chilton's mouth
*434] to *say there was no debt: and the garnishees do not dispute the matter. [CROWDER, J.—Although the garnishees make no objection, can there be an order under the statute where upon the face of the matter it appears that there is no debt?] As between two judgment-creditors, it is submitted, the objection cannot arise. [CROWDER, J.—If there was no debt, there can be no valid order.] As to the order of the 10th of March, the rule does not bring the proper materials before the court. [CROWDER, J.—The whole matter was before my Brother Williams on the 17th of March, including the application of the 10th.] The order of the 10th was not mentioned on that occasion: and the plaintiff Dresser is no party to the order of the 22d, which this rule

seeks to vary. It is no straining of the language of the 61st section of the statute to say that a debt is accruing as soon as a verdict is recovered. [CROWDER, J.—In Jones *v.* Thompson, Wightman, J., says: "Ex parte Charles, 14 East 197, and several other cases, decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed. Those cases were decided under the Bankrupt Acts. Now, the Common Law Procedure Act enables a judge, on its being made to appear that another person is indebted to the judgment-debtor, to order that all debts owing or accruing from such third person to the judgment-debtor shall be attached to answer the judgment-debt. Mr. *Prentice* draws a distinction, relying on the word 'accruing,' and says the amount of this verdict is a debt accruing to the defendant. But it appears to me that it is neither a debt owing nor accruing: the latter word can only be applied, in my opinion, to a debitum in præsenti solvendum in futuro. There must be a debt perfected, in order to entitle a judgment-creditor to the benefit of this clause." And Crompton, J., says: *"I think the question to be the same as in a fiat or commission of bankrupt, and that there must be an actual debt. [*435 Now, in Ex parte Charles, it was decided that a verdict in an action for unliquidated damages did not constitute a debt so as to be the foundation of a commission of bankruptcy. It was argued that the Common Law Procedure Act makes a distinction, by using the word 'accruing:' but, in my opinion, there must still be a debt which, though not due in point of payment, is yet an absolute debt."] That is inconsistent with Skelton *v.* Mott, 5 Exch. 231,† where it was held, that, under the 69th section of the Insolvent Act, 1 & 2 Vict. c. 110, the words "debts growing due," were debts ascertained and payable in futuro. [WILLES, J.—The question was very fully gone into in the case of Sparks *v.* Younge, 8 Irish Common Law Rep. 251, where Pigot, C. B., puts the same construction upon similar words in the 63d and 64th sections of the Irish Common Law Procedure Act, 19 & 20 Vict. c. 102, as Wightman, J., and Crompton, J., adopted in Jones *v.* Thompson,—saying: "When the words 'accruing or owing,' are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. The phrase 'debitum in præsenti solvendum in futuro' is one well known and understood in our law. In a case of Jones *v.* Thompson, which was before the Court of Queen's Bench in England so lately as last Easter Term, the court appear to assume that such a debt is liable to an attachment under the garnishee sections of the English Common Law Procedure Act, 17 & 18 Vict. c. 125."] The debt was *accruing* from the time the verdict was pronounced, though not perfected until judgment was signed. [WILLES, J.—There is no existing debt until judgment.] If the *court should think that Mr. [*436 Chilton is entitled to the 100*l.*, the plaintiff Dresser at all events is entitled to the costs of the proceedings at Chambers, where Chilton was equally in fault.

Pearce, in support of the rule, was desired to confine himself to the question of costs. He submitted that Chilton was entitled to all the costs occasioned by Dresser's resistance to his claim. [BYLES, J.—If you get the 100*l.* and pay no costs, I think you ought to be content. CROWDER, J.—Up to the 10th of March both parties were in the wrong.]

CROWDER, J.—I am of opinion that this rule should be made absolute. It appears that on the 4th of March, orders were obtained both by Dresser and Chilton to attach in the hands of The Maritime Passengers' Assurance Company the money which was to become payable to Johns upon the verdict recovered by him in his action against the company. But at that time there was no debt "owing or accruing" from the company to Johns, judgment not having then been signed: both, therefore, were acting in mistake; for, there could be no proper application under the 61st section of the Common Law Procedure Act, 1854, until there was a debt, viz. the 8th of March, when the judgment was signed. On the 10th of March, Chilton obtained a second order. It has been argued by Mr. *Brown* that there was on the 4th of March, when Dresser's order nisi was obtained, a debt *accruing due* within the meaning of the statute, and therefore that the order made on the 11th was a valid order. Jones *v.* Thompson, however, is a direct decision, and, as we all think, a correct decision, that there was no debt owing or accruing until the final judgment was signed on the 8th. I myself have certainly acted upon
*437] that view on *several occasions at Chambers. And the Irish Court of Exchequer, in Sparks *v.* Younge, 8 Irish Common Law Rep. 251, put the same construction upon similar words in the Irish Common Law Procedure Act, 19 & 20 Vict. c. 102. There being, then, no debt until judgment was signed, the order of the 4th of March was clearly invalid. Then comes the order obtained by Chilton on the 10th, which was not discussed until the 17th, when my Brother Williams ordered that Dresser should pay into court the 100*l.* which he had received from the garnishees under the order of the 11th of March, and that the whole matter should be referred to the court, and the costs abide the event. We are of opinion that Mr. Chilton is, under his order of the 10th, entitled to the 100*l.* so directed to be paid into court, and also to the costs of the summons on which the order of the 17th was made, but not to the costs of this application.

Rule absolute accordingly.

In many of the United States, it is settled, that foreign attachment or trustee process, will not reach a claim of the defendant against the garnishee, upon a cause of action which sounds in unliquidated damages: Rundlet *v.* Jordan, 3 Greenl. Maine 47; Paul *v.* Paul, 10 N. H. 117; Despatch Line of Packets *v.* Bellamy Manuf. Co., 12 Id. 205; Foster *v.* Dudley, 10 Foster 463; Hemmenway *v.* Pratt, 23 Verm. 332; Hugg *v.* Booth, 2 Ired. 282; Deavey *v.* Keith, 5 Id. 374. In Pennsylvania, however, it has been held, that a claim under a policy of insurance, for a loss by fire, is the subject of an attachment, at least after an adjustment: Boyle *v.* Franklin Fire Ins. Co., 7 Watts & Serg. 76; Franklin Fire Ins. Co. *v.* West, 8 Id. 352; S. C. 3 Penn. Law Journ. 299.

Under an early statute in Massachusetts, which excluded negotiable paper from the operation of the trustee process, it was held, that a mere verdict in an action against the endorser of a note. did not make the debt thereupon liable to attachment: Eunson *v.* Healy, 2 Mass. 32.

CAZENOVE and Others, Assignees of JOHN THOMSON, a Bankrupt, *v.* THE BRITISH EQUITABLE ASSURANCE COMPANY. *May* 6.

One T. effected a policy on his own life, with a condition thereon endorsed, that, "in case any fraudulent *or untrue* statement was contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy should be void."

Among the documents referred to was one called a "personal statement," which contained, amongst others, the following questions:—"4. Whether had, since infancy, any and what other disease (than those enumerated in a preceding question) requiring confinement?" "8. How often has medical attendance been required?" "9. How long did such attendance continue?" "10. For what disease or diseases?" "11. For what period confined to the house or bed?" "12. How long is it since these circumstances occurred?" "13. Name and address of the medical attendant or attendants employed on occasion of such disease?"

The answers to these questions were as follows,—To the 4th, "No;" to the 8th, "Two years ago;" to the 9th, "About one week;" to the 10th, "Disordered stomach;" to the 11th, "A week;" to the 12th, "One year;" and to the 13th, "Dr. R., Rock Ferry."

It appeared that the attendance of Dr. R. was in December, 1855; that, in January, 1856, the assured had had a relapse, when he was attended by one Dr. C.; and that, in February, while at Birmingham, he had another severe illness, when his life was despaired of, and on which occasion he was attended by *three* other medical men:—

Held, that the *untruth* of the above answers avoided the policy, notwithstanding the jury found that no *material* information had been withheld from the insurers, and it was conceded that there was no intentional fraud.

THIS was an action by the plaintiffs, assignees of John Thomson, a bankrupt, deceased, to recover the sum of 500*l.*, for which the deceased had insured his life with the British Equitable Assurance Company.

*The declaration stated, that, in the lifetime, and before the bankruptcy of the said John Thomson, the said company, by deed [*438 under their common seal, dated the 5th of March, 1857, covenanted with him that they the said company, or their successors, if their corporate funds, property, and effects for the time being, including the amount of capital subscribed for and not paid up, if any, after satisfying all prior claims and charges thereon, should be sufficient for the purpose, and if the current premium should have been paid, and the other regulations endorsed thereon should have been observed by the person entitled to the benefit of that assurance, would within two calendar months next after satisfactory proof should have been made, according to the rules, regulations, and practice of the said company for the time being, of the death of the said John Thomson, pay unto his executors or administrators the full sum of 500*l.* sterling, and all such other sums, if any, as the said company by their directors might have ordered to be added to such amount, by way of bonus or otherwise, according to their practice for the time being: provided always that that policy was made subject to the conditions and regulations thereon endorsed: that the said John Thomson afterwards departed this life, and satisfactory proof of his death was, more than two months before the *commencement [*439 of the action, made, according to the rules, regulations, and practice of the said company for the time being: that all current premiums on the said policy were paid, and all the conditions and regulations endorsed thereon were observed and performed: that, at the time of the said death, and thenceforth continually, the corporate funds, property, and effects of the said company for the time being, including the amount of capital subscribed for and not paid up, after satisfying all

prior claims and charges thereon, were sufficient for the purpose in the said policy mentioned: and that the time had elapsed, and all things had taken place and been done necessary to entitle the plaintiffs, assignees as aforesaid, to have the said sum of 500*l.* paid to them as assignees as aforesaid: yet that the said company had made default, and had not paid the said sum of 500*l.*, or any part thereof, according to the said policy; and the said sum of 500*l.* still remained wholly due and unpaid to the plaintiffs, assignees as aforesaid.

The defendants pleaded,—first, that one of the said conditions and regulations endorsed on the said policy was and is to the tenor following, that is to say, "4th. In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void; but, in case of a mere accidental erroneous statement of the age of the assured, the said company, provided application shall be made within three months after discovery of the error, and proof shall have been given to the satisfaction of their directors that no fraud was intended, will waive such forfeiture on such terms as the said directors shall impose by an endorsement on this policy under the hand of their manager or
*440] of their *chairman:" and that, before and at the time of the making of the said policy, divers fraudulent statements were contained in two certain documents addressed to and deposited with the said company by the said John Thomson in relation to the said assurance so made as aforesaid, the said statements being other than a mere accidental erroneous statement of the age of the said John Thomson; whereby the said policy was and is void.

Secondly, that one of the said conditions and regulations endorsed on the said policy was and is to the tenor of that set forth in the said first plea; and that, before and at the time of the making of the said policy, divers untrue statements were contained in two certain documents addressed to and deposited with the said company by the said John Thomson in relation to the said insurance so made as aforesaid, the said statements being other than a mere accidental erroneous statement of the age of the said John Thomson; whereby the said policy was and is void. Issue thereon.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool, when the following facts appeared in evidence:—

On the 22d of December, 1856, the deceased, Ralph Hardie Thomson, being desirous of insuring his life in the British Equitable Assurance Office, was required by them to answer certain matters which were contained in a printed form of proposal. The material ones were,—"7th. Have you ever, and when, been attended by a medical man?" "8th. Names and addresses of the usual medical attendant, and the last medical attendant." The answers given were, to the 7th,—"About one year ago;" and to the 8th, "Names: Mr. Craigie. Addresses: Birkenhead. Have known the party two years." There was a further
*441] *requirement, viz. "Date of last professional attendance," the answer to which was not filled in. At the foot of the document was the following:—"I declare that the above particulars are true, and that I have withheld no material information.

RALPH HARDIE THOMSON."

In addition to the form of proposal, the party was required to answer certain other questions which were contained in a document called the "personal statement," of which the following are the material parts:—

"PERSONAL STATEMENT.

"To be made to the medical officer of The British Equitable Assurance Company, and to be signed by the party whose life is proposed for assurance.

N. B. *It is particularly requested that precise answers may be obtained to each inquiry.*

Questions.	Answers.
2. Whether had any and which of the following diseases, viz., rheumatism, gout, shortness of breath, asthma, palpitation of the heart, fainting, giddiness, headache, fits, epilepsy, consumption, spitting or other discharges of blood, scrofula, cancer, piles, stone, gravel, stricture, rupture, insanity, delirium tremens, or dropsy? . . .	No.
4. Whether had, since infancy, any and what other diseases requiring confinement?	No.
5. Whether had tumour or swelling of any kind? State its nature and position?	No.
6. Whether had any and what accident requiring confinement? .	Nose fracture at school.
7. If ever engaged in any and what unhealthy business or pursuit?	No.
8. How often has medical attendance been required? . . .	Two years ago.
9. How long did such attendance continue?	About one week.
10. For what disease or diseases?	Disordered stomach.
11. For what period confined to the house or the bed? . . .	A week.
12. How long is it since these circumstances occurred? . . .	One year.
13. Name and address of the medical attendant or attendants employed on occasion of such disease?	Dr. Roper, Rock Ferry.
16. Whether of strictly temperate or intemperate or free habits?	Temperate.
General Question.	
Do you know of any and what other circumstances connected with your family, habits, constitution, health, or condition, which may tend to affect your life?	No.
Is there any other circumstance which the officers of the company ought to know?	No.

"I declare all the above answers to be correct and true.

"RALPH HARDIE THOMSON.

"January 6th, 1857."

Being satisfied with the above answers, the company, on the 6th of March, 1857, issued the policy declared on, subject to certain conditions endorsed thereon, one of which was as follows:—

"4. In case any fraudulent *or untrue* statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void. But, in case of a mere accidental erroneous statement of the age of the assured, the said company, provided application shall be made within three months after discovery of the error, and proof shall have been given to the satisfaction of their directors that no fraud was intended, will waive such forfeiture, on such terms as the said directors shall impose, by an endorsement on this policy, under the hand of their manager or of their chairman."

The first plea, so far as related to the imputation of *fraud, was abandoned; and the defendants' counsel relied solely upon [*448 the fact of the statements contained in the answers to certain of the

questions contained in the "proposal" and "personal statement" being *untrue*, as alleged in the second plea. The evidence upon the subject was as follows:—The assured was a man of dyspeptic habit. In the month of December, 1855, whilst residing at Birkenhead, he had a violent bilious attack, and was attended by one Dr. Roper. After a few days he got better, and went to Dublin. He returned thence to Birkenhead, where he had a second attack, and was again attended by Dr. Roper. Before his recovery, Dr. Roper becoming ill, the assured was attended by one Dr. Craigie, under whose care he remained from the 2d till the 8th of January, 1856, when he was restored to his usual state of health, and so remained until the 5th of February, when, being in Birmingham, his complaint returned with such violence as to require between the 15th and 21st the constant attendance of three medical men, viz., Dr. Fletcher, Dr. Palmer, and an apothecary. Having recovered from this attack also, he returned to Birkenhead, where he remained without requiring any further medical attendance until December, 1857, when he was again under the care of Dr. Craigie for an inflammatory affection of the liver, which complaint caused his death in April, 1858.

Thomson became bankrupt in March, 1857, and the plaintiffs were appointed his assignees.

It was contended, on the part of the defendants, that the *untrue* answers given by Thomson to the questions contained in the proposal and personal statement, which formed the basis of the contract, avoided the policy; and that it was unnecessary to inquire whether the concealment of the names of the medical men who had attended him at Birmingham was fraudulent or accidental.

*444] *For the plaintiffs it was insisted, that, there being no fraud, and the answers being substantially true, and the information uncommunicated immaterial, the plaintiffs were entitled to recover.

The learned judge, reserving the question as to the construction of the contract for the court, left it to the jury to say whether or not any material information had been withheld. They found in the negative, and accordingly returned a verdict for the plaintiffs for the sum insured.

Atherton, Q. C., on a former day in this term, in pursuance of the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, on the ground that the untruth of the statements contained in the proposal and personal statement avoided the policy; or for a new trial, on the ground that the verdict was against the evidence. He referred to Anderson *v.* Fitzgerald, 4 House of Lords Cases 484. The proviso in the policy there was, that, "if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or *any false statements made to the company in or about the obtaining or effecting of this insurance*," the policy should be void: and it was held, that, in an action against the company on the policy, they were entitled to succeed if the answers to the questions contained in the proposal were false; and that it was not essential to their case that the matters therein contained should be material as well as false.

Edward James, Q. C., and *Henderson*, showed cause.—No fraud is imputed; neither is there substantially any untrue statement. Thomson

was seized with an illness in December, 1855, which was supposed to be then cured, but which returned in January and February, *1856. This was all one illness, with intervals of alleviation. It was [*445 enough, therefore, to give the name of one medical man who attended him,—his usual medical attendant; and the omission to state that he was attended by more than one was not a suppression of any material information. From these attacks Thomson recovered completely. The proposal for insurance was made on the 22d of December, 1856, the personal statement was made on the 6th of January, 1857, and the policy was effected on the 7th of March. Thomson continued to enjoy his usual health until April, 1858, when he died of a disorder not mentioned in the policy, and one which was wholly unconnected with the disorders with which he had been afflicted before. It is said that the answers to the 7th and 8th questions in the proposal were untrue: but there clearly was no untruth in the first answer, nor any material concealment in the second answer: the assured had been attended by a medical man about a year before; and the name of such medical attendant was correctly given, Dr. Craigie being in fact the last usual medical attendant. [COCKBURN, C. J.—I do not understand Mr. *Atherton* to deny that Dr. Craigie was the *usual* medical attendant of Thomson, but merely that he was the *last*. The answer was calculated to mislead, and to induce any one to suppose that Dr. Craigie was both the usual and the last medical attendant.] Then, has there been any untruth in the personal statement? Although, in answer to the fourth question, Thomson denies that he had had since infancy any other disease requiring confinement than those mentioned in the second question, yet his answers to the subsequent questions qualify that, and show what is meant. [CROWDER, J.—The language of the fourth condition is very stringent. If there are any untrue statements, I do not see how you can get over it. The House of Lords, in Anderson *v.* Fitzgerald, *4 House of Lords Cases 484, say there is no distinction in this [*446 respect between materiality and immateriality. We cannot overrule that.] The language of the condition here is totally different from that contained in the contract there. There may be an omission here, but there clearly is no untruth: and the jury have found the omission to be immaterial. The medical attendant referred to in the 7th question is not the one accidentally called in when the usual medical attendant was unable from illness to attend, but the one who usually attended the party at his place of abode. The answer, therefore, was perfectly reconcilable with truth; and the bona fides of the transaction was not impeached. Then, as to the other branch of the rule, there is no pretence for saying that the evidence did not warrant the verdict. [COCKBURN, C. J.—We would hardly be disposed to disturb the verdict on that ground, as my Brother Byles reports to us that he is not dissatisfied with the conclusion the jury came to on the evidence.]

Atherton, *Q. C.*, and *Quain*, in support of the rule.—Upon the authority of Anderson *v.* Fitzgerald, 4 House of Lords Cases 484, the defendants are clearly entitled to make this rule absolute. There, F. applied to an insurance office to effect a policy on his life. He received a form of proposal, containing questions requiring to be answered. Among these were the following: "Did any of the party's relations die of consumption or any other pulmonary complaint?" and "Has the

party's life been accepted or refused at any office?" To each of these questions F. answered, "No." The answers were false. F. signed the proposal, and a declaration accompanying it, by which he agreed "that the particulars mentioned in the above proposal should form the basis
*447] of the contract." The policy mentioned *several things which were warranted by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that, "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this assurance," the policy shall be void, and the moneys paid shall be forfeited. In an action on the policy,—it was held, reversing the judgment of the Courts of Exchequer and Exchequer Chamber in Ireland, that it was misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict; for that, the representation being part of the contract, its truth, not its materiality, was the question. Lord St. Leonards says, at p. 509,—"Whether the circumstances warranted were material or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true; and therefore the word 'untrue' there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue; it signifies not whether the circumstances were material or not; the contract is to be avoided." It is impossible to distinguish that case from the present. If a statement be at variance with the fact, it is untrue: and the court is not to be embarrassed with the consideration of honesty of purpose or otherwise. In Duckett *v.* Williams, 2 C. & M. 351,† Lord Lyndhurst, C. B., says: "The point is, whether the facts stated were *not truly* stated within the meaning of the declaration and agreement. It was contended, on the part
*448] of the plaintiffs, that the words must mean 'truly' or *'untruly' within the knowledge of the party making the statement; and that, if the party insuring ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue because the party making it is not apprised of its untruth; and, looking at the context, we think it clear that the parties did not mean to restrict the words in the manner contended for. Two consequences are to follow if the statement be untrue,—one, that the premiums are to be forfeited,—the other, that the assurance is to be void. Now, if the statement were untrue within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and therefore must be so as to the first; for, it would be contrary to all the rules of construction to hold that it was material as to one consequence, and not as to the other." The distinction between fraud in fact and fraud in law is familiar: see Pawson *v.* Watson, Cowp. 788, Polhill *v.* Walter, 3 B. & Ad. 114 (E. C. L. R. vol. 23), Milne *v.* Marwood, 15 C. B. 778 (E. C. L. R. vol. 80), and that class of cases. Here the statements contained in the answers to the questions in the "proposal" and in the "personal statement" are avowedly the basis

of the contract. What is more reasonable or likely than that the office should seek to know who was the usual and also who the last medical attendant of the party desirous of insuring? The answer to the 8th question in the "proposal" is clearly untrue: the question is put thus,—"Names and addresses of the usual medical attendant, and the last medical attendant?" The answer is, "Names, Mr. Craigie; addresses, Birkenhead. Have known the party two years." Now, it was not true to say that Dr. Craigie was the usual and *also the last medical attendant. [COCKBURN, C. J.—It is a true answer as to part, and an omission as to the rest.] Then, as to the "personal statement," the answer to the 4th question is clearly untrue. If it had stopped there, the case would have been free from a shade of doubt. The answer to the 13th question confirms the defendants' view. The party being required to give the "name and address of the medical attendant or attendants employed" on occasion of the disease mentioned in the answer to the 10th question, gives the name of "Dr. Roper, Rock Ferry, Cheshire." The names of Dr. Palmer, Dr. Fletcher, and the surgeon, who attended him at Birmingham in February, are not mentioned at all. In substance, the answers amount to this,—"I have never since infancy had any disease (other than those enumerated in the 3d question) requiring confinement, except for about a week one year ago, when I was attended by Dr. Roper, of Rock Ferry." That was an untrue statement, and one which effectually concealed from the office the fact of the much more serious illness which occurred at Birmingham, after the attendance of Dr. Roper had ceased. [*449

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. The action is brought upon a policy of insurance which is made subject to a condition (the fourth), that, "in case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void." Now, one of the documents which formed the basis of the contract was that which is called the "personal statement;" and, amongst the questions therein contained, we find the following,—"No. 4. Whether had since infancy any and what *other disease requiring confinement?" To that the assured answers simply and emphatically, "No." If that answer had stood alone, with nothing to qualify it, it is clear, beyond all controversy, upon the evidence which was given at the trial, that it was an untrue answer in point of fact. It remains, therefore, to be seen whether there is anything in the answers to the subsequent questions so to qualify that negation as to make it reconcilable with truth, and to except it out of the operation of the fourth condition. The 8th question is, "How often has medical attendance been required?" To which the answer is, "Two years ago." Then comes the 9th question, "How long did such attendance continue?" Answer, "About one week." The 10th question is, "For what disease or diseases?" Answer, "Disordered stomach;" the eleventh, "For what period confined to the house or the bed?" answer, "A week;" the twelfth, "How long is it since these circumstances occurred?" answer, "One year;" and the thirteenth, "Name and address of the medical attendant or attendants employed on occasion of such disease;" answer, "Dr. Roper, Rock Ferry." It is contended on the part of the plain- [*450

tiffs that the answers given to these latter questions so qualify the denial contained in the answer to the fourth question, as to make that denial consistent with the truth. I however think they do not. The only illness to which the assured refers in these answers is that which occurred in December, 1855, when he was attended by Dr. Roper. He makes no allusion whatever to the last and more serious illness which occurred at Birmingham, when he was attended by Dr. Fletcher and Dr. Palmer, and also by a surgeon. The effect of all the answers taken together amounts to this,—there is a positive denial of the assured's having since infancy had any disease (other than those mentioned in the *451] *preceding question) requiring confinement, with an admission of his having had a year ago one disease, viz. a disordered stomach, which continued for a week, and for which he was attended by Dr. Roper. That clearly is not true; for, within a month after, he had a serious attack, which placed his life in imminent danger, and during the continuance of which he was attended by no less than three medical men. I will only add, that, this being the view which I take of the "personal statement," it becomes in my opinion unnecessary to consider the answers given to the questions contained in the "proposal."

CROWDER, J.—I also think it unnecessary to consider the effect of the questions and answers contained in the proposal, because I feel myself compelled to come to the conclusion that there is falsehood in the answers to the questions in the personal statement. The answer to the fourth question is a positive negation of any disease requiring confinement since infancy, and the answers which are relied on as a qualification of that positive negation are a denial of any other illness than that for which the assured had been attended by Dr. Roper at Birkenhead in December, 1855; whereas, the more important illness was that which occurred at Birmingham, when the assured was attended by three medical men, and when his life was in great danger.

WILLES, J.—I am of the same opinion. It appears to me, that, taking the answers all together, they do amount to a denial of any illness coming within the description of the illness which occurred at Birmingham, when the life of the assured was in great danger. There was not a mere omission to disclose that illness, but a direct and positive denial that it ever took place. I therefore agree that this rule must be made absolute.

*452] *BYLES, J.—I am of the same opinion. I think those words in the fourth condition,—"in case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void,"—interpreted by the decision of the House of Lords in Anderson v. Fitzgerald, 4 House of Lords Cases 484, clearly mean this, that, if any statement contained in either of the documents referred to be inconsistent or irreconcilable with the facts, whether it be material or immaterial, the policy is void. I forbear, in common with the rest of the court, from expressing any opinion as to the answers to the questions contained in the proposal. In his answer to the fourth question in the personal statement, the assured in effect says, "I never had since infancy any disease requiring confinement." Clearly that is not an omission, but a positive negation of the illness at Birmingham. But,

in his subsequent answers, the assured goes on to say,—"I was confined to the house or bed for a week about one year ago; and my medical attendant on that occasion was Dr. Roper." He thus introduces one exception, viz. the illness at Birkenhead in December, 1855, leaving the general negation of the Birmingham illness still remaining. That statement is untrue; and upon this ground the defendants are entitled to a verdict on the plea relating to the untruth of the statement.

Rule absolute.

Affirmed in the Exchequer Chamber, 1 Law Times R. N. S. 484, 6 Jurist N. S. 826.

*CLARKE *v.* DICKSON. *May* 2. [*453

An action will lie against a director of a mining company for false and fraudulent representations contained in a prospectus issued with his sanction, although the language *might* be susceptible of a meaning which would make it not literally untrue: and it is not necessary that the representations should have been made directly by the defendant to the plaintiff; it is enough that they are contained in a document which is meant to be circulated amongst the class of persons who are likely to be deceived by it.

Nor is it any defence to such an action, that the false representations contained in the prospectus were not the *sole* inducement to the plaintiff to buy shares in the concern.

THIS was an action for false representations in a prospectus of a mining company.

The first count of the declaration stated that the defendant was a promoter and director of a certain company or association of persons having a capital stock divided into shares, and professing to be constituted and managed upon the cost-book principle, and which was called "The Welsh Potosi Lead and Copper Mining Company," and which was formed for the purpose of working certain lead and copper mines situate in the county of Cardigan; and the defendant was interested in and desirous of having the shares of the said company subscribed for and taken, and the amount of such shares paid up; and thereupon the defendant, in order to induce and procure the plaintiff to subscribe for and take certain shares of and in the said company, and to pay up the amount thereof respectively, falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he, the defendant, and the other directors of the said company, had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, 5000 paid-up shares in the said company, and 5000*l.* in money, *to the proprietor of the lands and property in and upon which the said mines were situated*, in consideration of his making over to the said company all the right and interest to which he was entitled in the said mines, and the plant, buildings, and property thereon or therewith connected; whereas, in truth and in fact, as he the defendant well knew, he the defendant and the said other directors had, on behalf of the said company, given or appropriated, or agreed to give or appropriate, *a much smaller sum in money, and a much smaller number of [*454 shares, to such proprietor, in respect of the matters aforesaid, and the residue of the said 5000 shares and of the said 5000*l.* in money

had been given and appropriated to the defendant and another promoter and director of the said company for their own use and benefit, and without any value or consideration whatsoever: And the defendant, for the purpose aforesaid, also falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that he the defendant and the other directors of the said company had on behalf of the said company made advantageous arrangements for the purchase of the lands and property in and upon which the said mines were situated, and had agreed that five-sixths of the purchase-money should be received in paid-up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property, and that the said lands and property were of that value; whereas, in truth and in fact, as he the defendant well knew, the persons with whom such arrangements had been made, and from whom the said company were to purchase the said lands and property, were the defendant himself and one of the other directors of the said company, and no other person, and such purchase and all the arrangements made in reference thereto were wholly collusive, and were made and entered into for the private benefit of the defendant and the said other promoter and director, and the said arrangements were extremely disadvantageous to the company, and the price so agreed to be given far exceeded the fair price and true value of the said lands and property: And the defendant, for the purpose aforesaid, falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that the said lead and *copper mines to be so worked by the said company were the same lead and copper mines which had been described by one William Waller, in a book published by him in the year 1698, and which mines so described by the said William Waller were of very great extent, richness, and value; whereas, in truth and in fact, as he the defendant well knew, the said lead and copper mines to be worked by the said company were not the same as the said mines described by the said William Waller, and were situate at a considerable distance therefrom, and were of very inferior extent, richness, and value to those so described by the said William Waller: And the defendant, for the purposes aforesaid, and in order to induce the plaintiff to believe that the said company was in a thriving condition, and the shares thereof were in demand and of value, also falsely and fraudulently represented and caused and procured to be represented to the plaintiff, that, out of the 5000 shares in the capital of the said company which it was proposed to issue in the first instance, a considerable portion had been already subscribed for and taken, and part of the purchase-money paid; whereas, in truth and in fact, as the defendant well knew, a very small portion only of the said 5000 shares had at that time been subscribed for, and no part of the purchase-money thereof had at that time been paid: Averment, that the plaintiff, believing and relying on the said representations, was induced to and did subscribe for and take from time to time certain shares in the said company, which shares were in fact of no worth or value whatsoever, and become and continue the holder thereof, and pay certain deposits, calls, and instalments of the purchase-money thereof.

*455]

The second count stated, that the defendant was such promoter and director as in the first count mentioned, and was interested and desirous

of having the *shares of the said company subscribed for and taken, and the amount thereof paid up; and thereupon, after [*456 the making of the representations in the first count mentioned, and after the plaintiff had subscribed for and while he was the holder of certain shares in the said company, and before he had fully paid up the amount of the same, he the defendant, in order to induce the plaintiff to subscribe for and take certain other shares of and in the said company, and to pay up as well the amount of such other shares as the part remaining unpaid of the amount of the said first-mentioned shares, did, as a director of the said company, fraudulently prepare, present, and publish, and cause to be prepared, presented, and published, for, at, and to certain general meetings of the shareholders in the said company, certain false and fraudulent accounts, balance-sheets, reports, and statements, whereby it was made to appear to such general meetings that the said company, and the affairs and prospects thereof, were in a thriving and flourishing condition, and that dividends of 10 per cent. might and could properly and fairly be declared and paid to the shareholders of the said company from and out of the profits realized by the said company in and by the working of the said mines during the respective half-years immediately preceding such general meetings respectively, and sent and caused to be sent such accounts, balance-sheets, reports, and statements to the plaintiff, and fraudulently caused to be declared and paid to the plaintiffs and others dividends out of the funds and moneys of the said company in respect of their shares in the said company at and after the rate aforesaid; whereas, in truth and in fact, and as he the defendant well knew, the said company and the affairs and prospects thereof at the time of the preparing, presenting, and publishing of the said accounts, balance-sheets, *reports, and [*457 statements respectively, and the declaration of the said dividends respectively, were in a bad and unsatisfactory condition, and no such dividends ought to have been or could have been declared out of the profits of the said company during the said half-years respectively, and such dividends were not bonâ fide, and were as to all or some of the shareholders in the said company paid out of the capital moneys of the said company, or by paid-up shares, and not out of the revenue or profits of the said company: Averment, that the plaintiff, believing and relying on the said accounts, balance-sheets, reports, and statements, and believing the said dividends to be bonâ fide, and to have been really paid out of profits as aforesaid, was induced to and did subscribe for and take certain other shares of and in the said company, which shares were in fact of no worth or value whatsoever, and pay certain deposits, calls, and instalments of the purchase-money thereof, and also pay certain further calls and instalments by and upon the shares previously held by him: And, by reason of the premises above mentioned, he the plaintiff not only lost all the moneys which he paid upon all the above-mentioned shares, and never derived any benefit or advantage therefrom, but was also compelled, by reason of his being the holder of the said shares respectively, to pay certain large sums of money as a contributory, upon the winding-up of the said company, for the payment and discharge of the debts and liabilities thereof. Claim 4000*l.*

The defendant pleaded,—first, not guilty,—secondly, to the first count, that the plaintiff was not induced to and did not subscribe for

and take the said shares, and become the holder thereof, and pay as therein mentioned, believing and relying on the representations in that count mentioned,—thirdly, to the second count, that the plaintiff was
*458] not induced to and did not *subscribe for and take the said shares and pay as in that count is alleged, believing and relying as therein is alleged. Issue thereon.

The cause was tried before Crompton, J., at the last Summer Assizes for the county of Cardigan. The evidence was as follows:—The plaintiff was a surgeon and apothecary at Over Darwen; the defendant was a colonel in Her Majesty's service, and one of the directors of a mining company called The Welsh Potosi Lead and Copper Mining Company. The action was brought to recover compensation for certain alleged false and fraudulent representations contained in a prospectus issued by the directors, whereby the plaintiff was induced to purchase shares which turned out to be valueless and entailed upon him considerable liabilities as a contributory on the winding-up of the concern.

The prospectus, which was issued in September, 1853, was as follows:—

"The Welsh Potosi Lead and Copper Mining Company, Cardiganshire,

"On the Cost-Book system,
"which limits the liability of shareholders.
"Capital £100,000, in 20,000 shares of £5 each,
"Of which 2*l.* will be payable on or about the
17th of January, 1854, and no further call
will be made until the expiration of
three months from that date.

"*Directors.*

"E. Bates, Esq., Boundary Road, St. John's Wood.
"James Burt, Esq., Briar House, Stoke Newington.
"S. A. Dickson, Esq., Grafton Street, Berkeley Square.
"J. S. Orton, Esq., Upper Hamilton Terrace.
"T. W. Wilkinson, Esq., 26 Gresham Street, London.
"John Williams, Esq., Middleton Place.
*459] *"Robert Campbell, Esq., Jermyn Street, St. James's.
"T. Gibbs, Esq., 36, Tavistock Place, Russell Square.
"With power to add to their number."

[Then followed the names of the bankers, solicitors, stock-brokers, and auditors.]

"*Purser and Manager,*
"T. W. Wilkinson, Esq.
"*Offices, 26 Gresham Street, London.*

"This company is formed for the purpose of effectually working and developing the Esgair-hir and Esgair-fraith Lead and Copper Mines, commonly known as 'The Welsh Potosi,' situated midway between Aberystwith and Machynlleth, Cardiganshire, at a distance of nine miles from the shipping port of Aberdovey, where vessels of 300 tons burthen can load alongside; and to which there is a good road (the greater portion of which leading from the mines was made a few years back, at a cost of at least 1000*l.*), whereby the company will be enabled to convey the ores to the port at a moderate cost.

"The setts are very extensive, being about two miles long and one

road, comprising a territory of mineral ground between 1400 and 1500 acres in extent; and the lodes, which are champions, are of very large dimensions, equal in size and strength to any in the principality, and extend upwards of one mile in length.

"The property is held for a term of twenty-one years, under a lease granted by Pryse Loveden, Esq., at a royalty of 1-14th, with a covenant for renewal for a further term of twenty-one years at the same royalty.

"These mines are some of the oldest on record, and have been partially worked at various periods, but never properly developed to any depth, as will be seen by referring to the annexed plan of the property.

"Some idea may be formed of their value by a *reference to [*460
the annexed extracts and small plan taken from a work (in the British Museum) published in 1698, by W. Waller, Esq. (the then steward of these mines), wherein he asserts that 'The Great Lead vein is 11 feet wide, and 7½ feet in pure ore, and which he had no doubt would increase to 11 feet in ore as it descends:' and, after showing the various workings and expenses of these mines, he goes on to state 'that 40,000*l.* was refused for one moïety.' He also asserts that 'Sir Hugh Middleton was enabled out of the profits (viz. 2000*l.* per month) arising from the mines in Cardiganshire to project and carry out so great an undertaking as the New River from Ware to London,' and that one Mr. Thomas Bushell, by his ingenuity also in working these mines, did amass so large a sum as to be able to clothe the whole of the King's army.'

"A few years since, houses or barracks for about two hundred miners, with counting-house, smith's shop, powder, fuel, and store-houses, and cottage for engine men, were erected upon the property at a very considerable outlay, and are in a good state of repair, and fit for immediate use.

"The machinery consists of a 40 feet water-wheel, 4 feet breast, working a line of 1½ inch iron rods 600 fathoms long, fitted with iron rollers or wheels fixed to oak bearers, and connected with the principal shafts, in one of which are 20 fathoms of 10-inch pumps, and also 10 fathoms somewhat smaller, reaching to the bottom of the mine; and in the other shaft are 24 fathoms of 10-inch pumps, also two double-horse whims for raising the ore, three pairs of powerful iron crushers, one fluted and two plain, connected with a 22 feet water-wheel, 3 feet breast, with jiggers, dressing-floors, and five large reservoirs, at a convenient distance for working the above machinery, and dressing the ores when raised: thus enabling the company at once to *carry on exten- [*461
sive mining operations. The cost of sinking the shafts, driving the levels, forming reservoirs, constructing roads, erecting buildings, and machinery, is estimated as having amounted to not less than 50,000*l.*, of which the present company will have the full and immediate benefit.

"The directors have visited and inspected the mines, and have had the same carefully examined and surveyed by engineers and practical miners of considerable experience, to whose reports they beg to refer; and therefore, both as directors and shareholders, have the greatest confidence in recommending this undertaking to the public as a most promising and profitable investment."

[Then followed a report made by Messrs. Johnson & Son of their assay of specimens taken from different parts of the mine.]

"The directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and *have agreed that five-sixths of the purchase-money shall be received in paid-up shares of the company, and the remainder in cash:* (see cost-book rules annexed).

"The directors have also come to the determination of establishing this company with so large a capital, from the peculiar nature of these mines. The large extent of mineral ground over which they have obtained the right of working, and the very small extent to which any of the lodes have hitherto been developed, have induced them to suppose that by the employment of a large capital a better opportunity may be afforded of more fully developing these valuable mines, and obtaining a large return to the shareholders.

"The directors propose, however, in the first instance, to issue 5000 shares only to the public: but, should further capital be found necessary for the *development of the mines, the existing shareholders will *462] have the preference in the issue of shares.

"A considerable portion of the capital has already been subscribed, and a part of the purchase-money paid. Active operations have been commenced at the mines; and it is expected that in a month or six weeks the engine-shafts will have been pumped free from water, and a considerable quantity of ore raised.

"The directors do not consider it necessary to enter into any calculation of the probable profits which may arise from these mines. The present value of mines in the county of Cardigan is a sufficient evidence of the result which may be expected, and amply proved by an inspection of the share-list, showing the present value of the shares in such mines as the Lisburne, 18*l.* 15*s.* per share paid,—present value 225*l.*; Cwymstwith, 60*l.* paid,—present value, 190*l.*; East Daren, 28*l.* paid,—present value, 105*l.*; and Goginan, 8*l.* paid,—present value, 20*l.*

"Further information may be obtained, specimens of the minerals inspected, and orders for leave to inspect the mines furnished, upon application to T. W. Wilkinson, Esq., the managing director, 26, Gresham Street, London."

The rule referred to was as follows:—"That the said 5000 paid-up shares, together with 5000*l.* in money, shall be appropriated to the proprietor in consideration of his making over to the company all the right and interest to which he is entitled in 'The Welsh Potosi Lead and Copper Mines,' together with all the valuable plant, machinery, buildings, implements, tramways, and other property and articles now in and upon the said mines."

It appeared that the mines in question had some years since been demised by Mr. Pryse Loveden to one Williamson, who, not finding the speculation successful, *in 1847 ceased to work them. Subse- *463] quently the working of the mines was resumed by one Davies, under an arrangement with Williamson, Davies having obtained from Mr. Pryse Loveden a promise to grant a lease to him on the determination of Williamson's interest, in 1861. In the year 1853, one Wilkinson, who had inspected the mines, was desirous of forming a company for the purpose of working them. He accordingly purchased William

son's interest under the lease, together with the plant, machinery, &c., for 1000*l.*, and Davies's contingent interest for 200*l.* more, and an allotment of a small number of shares in the proposed company. Wilkinson also obtained from Mr. Pryse Loveden the promise of a lease of the mines, machinery, &c., on the expiration of Williamson's term; for which, however, he was to pay no premium, but only a royalty. Whilst these arrangements were pending, Colonel Dickson became associated with Wilkinson in the scheme, and advanced the greater part of the money which was paid to Williamson and Davies for their interest in the mines; and Wilkinson and the defendant proceeded to form a company for the purpose of working them, of which company the defendant and Wilkinson were two of the directors, the latter being also purser. An arrangement was afterwards made between Wilkinson and Colonel Dickson and the other directors of the proposed company, that the interest which Wilkinson had thus acquired in the mines and the proposed lease from Mr. Pryse Loveden, should be purchased by the company for 5000*l.* in money and 5000 paid-up shares. This arrangement was carried out, and, pursuant to a previous agreement between them, a moiety of the money and shares was handed over to the defendant. All this occurred before the issuing of the prospectus.

There never was any personal communication *between the plaintiff and the defendant: but the former, having seen the [*464
prospectus, and relying upon the statements contained therein, *and upon the assurances of his broker*, Mr. Lofthouse (who, it appeared, had been employed by the directors to use his influence in promoting the success of the scheme), *that the speculation was a promising one*, bought a number of shares, which, upon the concern proving unsuccessful, became wholly worthless, and entailed upon him considerable liability. The plaintiff swore that he would not have bought the shares, but for the statements contained in the prospectus.

On the part of the defendant it was submitted that the action was not maintainable, inasmuch as there was no personal representation of any kind made by the defendant to the plaintiff; and that, assuming that the statements contained in the prospectus were untrue, and that the defendant was shown to be an assenting party to its publication, the plaintiff could not recover unless those false statements were the *sole* inducement to the plaintiff's becoming the purchaser of shares. It was also insisted that the statements contained in the prospectus as to the purchase of the mines was perfectly consistent with truth.

The learned judge, in summing up the case to the jury, told them, that, if the prospectus was issued to the public with the sanction and assent of the defendant, and contained statements which were false to his knowledge, he was liable to the plaintiff, if, acting upon the faith of it, he sustained damage therefrom; that, if such false statements in the prospectus were some of the inducements which led the plaintiff to purchase shares in the adventure, the existence of other inducements, such as the broker's recommendation, would not interfere with the plaintiff's right to sue the defendant; that, to render the defendant liable, they *must be satisfied that he was guilty of moral fraud in the trans- [*465
action, that the representations complained of were false to his knowledge, and that the plaintiff sustained damage therefrom; and that it was for them to say in what sense the word "proprietor" was used in

the prospectus, and whether it was used in the sense imputed to it in the first count of the declaration.

The jury returned a verdict for the plaintiff, damages 1600*l.*

John Evans, Q. C., in Michaelmas Term last, in pursuance of leave reserved to him at the trial, obtained a rule calling upon the plaintiff to show cause why the verdict should not be reduced by the sum of 500*l.*, being the price of the shares purchased by the plaintiff from Lofthouse; or for a new trial, on the ground that the verdict was against the weight of evidence, "and that the judge misdirected the jury in not telling them that the proof did not support the second supposed fraudulent representation in the declaration mentioned, because there was no evidence whatever that the defendant or any one else had alleged that the proprietors of the lands and property in and upon which the mines were situate had agreed that part of the purchase-money should be received in paid-up shares; and also that the judge should have directed the jury, that, as between the plaintiff and defendant, there was no personal fraudulent representation made by the latter to the former, and therefore that in point of law the action was not maintainable."

H. Allen, *F. Lloyd*, and *G. B. Hughes*, now showed cause.—The plaintiff complains of false and fraudulent representations contained in the prospectus issued by the directors of this company (of whom the defendant was one), whereby he was induced to purchase shares
*466] *which turned out to be worthless. The jury by their verdict have found that those representations were false, and have affirmed the defendant's complicity in the fraud. It said that there was no evidence of any personal representation made by the defendant to the plaintiff. But that is not necessary: it has been decided in numerous cases that a prospectus is an undertaking to all into whose hands it may come. Thus, in the recent case of Scott *v.* Dixon, 29 Law J., Exch. 62, n., which was an action against one of the directors of the Liverpool Borough Bank for false representations contained in a report published by the bank, Lord Campbell says: "Reports of joint stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company: and I have no doubt that the directors in the present case knew that this particular report would a few hours after its publication be in the hands of all the share-brokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here the positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs by the perusal of it were induced to buy shares in the bank. I have, therefore, no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs, is most completely established; and the damages given are no more than the damnification which they have suffered in consequence." Bedford *v.* Bagshaw, 29 Law J., Exch. 50, 4 Hurlst. & N. 538,† is an authority to the same effect. There, the defendants and others forming the board of management of a joint stock company, for the purpose of getting the shares of the company inserted in the official list of the
*467] Stock Exchange, through their *secretary, untruly represented that two-thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the official list,

the plaintiff, knowing the requirements of the Stock Exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury having found that the representation was made fraudulently, it was held that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. Pollock, C. B., lays down the rule thus,—"Generally speaking, a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events, to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing." Then, the allegations in the declaration are fully borne out by the statements in the prospectus respecting the property, and the persons from whom it was obtained. If the plaintiff was induced to buy the shares by the representations contained in the prospectus, the mere circumstance of other inducements also in some degree operating upon his mind, can make no difference.

John Evans, Q. C., *Grove*, Q. C., and *Giffard*, in support of the rule.—The objection that there was no personal representation by the defendant to the plaintiff is undoubtedly removed by the cases of Scott *v.* Dixon and Bedford *v.* Bagshaw. The point as to the *misdirection, however, still remains. The material fraud alleged is, that the [*468 defendant, in order to induce and procure the plaintiff to subscribe for and take shares, "falsely and fraudulently represented to the plaintiff that he the defendant and the other directors of the company had on behalf of the company given or appropriated 5000 paid-up shares in the company and 5000*l.* in money *to the proprietor of the lands and property in and upon which the said mines were situated*, in consideration of his making over to the company all the right and interest to which he was entitled in the said mines, and the plant, buildings, and property thereon;" and that "the defendant and the other directors of the company had on behalf of the company made advantageous arrangements for the purchase of *the lands and property* in and upon which the said mines were situated, and had agreed that five-sixths of the purchase-money should be received in paid-up shares of the said company, and the remainder in cash, and that the price so to be paid was the fair and proper price for the said lands and property." This is not a correct statement of the representation contained in the prospectus,—the word there used being "proprietor" only, not, as in the declaration, "proprietor of the lands and property in and upon which the said mines were situated." Now, Wilkinson was the proprietor of the interest in the mines and plant: therefore, the statement in the prospectus aptly pointed to him; and there was no misrepresentation,—or, at all events, none such as that charged in the declaration. The learned judge ought to have told the jury that there was no evidence of the misrepresentation *as to the land*. There was no falsehood at all, if Wilkinson is assumed to be the proprietor. [BYLES, J.—The plaintiff was induced to believe that the directors had acquired the property by purchase from the owner

*469] of the *fee, not from one of their own body. COCKBURN, C. J. —Is it likely that the plaintiff would have bought shares if he had known the real facts of the transaction?] The charge against the defendant here is, that he has wilfully made, or been party to the making by others, of a false and fraudulent representation, not that he concealed something which it was convenient that the plaintiff should know. Then, as to the evidence. [COCKBURN, C. J.—The learned judge who tried the cause intimates to us that he is not dissatisfied with the verdict.]

COCKBURN, C. J.—I am of opinion that this rule must be discharged. Looking to the prospectus issued by the directors of this company, of whom Colonel Dickson was one, it seems to me to be impossible not to come to the conclusion that there was misrepresentation. The prospectus states that "the property is held for a term of twenty-one years under a lease granted by Pryse Loveden, Esq., at a royalty of one-fourteenth, with a covenant for renewal." Then, in another part, it is stated, that "the directors have the satisfaction to inform the public that they have made advantageous arrangements for the purchase of the whole of this valuable property, and have agreed that five-sixths of the purchase-money shall be received in paid-up shares of the company, and the remainder in cash." The effect of that plainly is this,—it is a representation to the public, that, whereas the property in question was held under a lease, the directors had made arrangements for the purchase thereof from the lessee who at that time was entitled to the interest in the mine. Now, the lessee of Mr. Pryse Loveden was Mr. Williamson: and he had in point of fact made over his interest in the lease to Wilkinson, whom we find associated with the defendant at the

*470] time of the issuing of the *prospectus. The sum paid by Wilkinson for Williamson's interest was 1000*l.*; and the price agreed to be paid by the directors, who were thus purchasing from two of their own body, was 5000*l.* in money and 5000 paid-up shares. This, therefore, was an important misrepresentation,—first, as to the party from whom the mine was purchased,—secondly, as to the amount of the consideration paid for it; and that it was one which was calculated to exercise a material influence upon the minds of persons who became shareholders is too plain to admit of doubt. That being so, the only question is, whether the declaration sufficiently states the ground of complaint. On the part of the defendant it is said that the fraud charged in the declaration is, that the directors represented that they had agreed to give and appropriate 5000 paid-up shares in the company and 5000*l.* in money to "the proprietor of the lands and property in and upon which the said mines were situated, in consideration of his making over to the company all the right and interest to which he was entitled in the said mines," &c.; whereas the prospectus contains no such representation,—the word there used being "proprietor" only, which, it is said, means proprietor or person having the interest in the mine, who was Wilkinson. Looking, however, at the whole declaration, it seems to me that the prospectus may fairly admit of the construction there put upon it: it means, the person who then had the interest in the mine, and who was capable of conveying that interest to the company. If so, the matter was properly left to the jury. At all events, it seems clear that this was mere matter of variance, which, if any application had been made to the judge to nonsuit, would have been amended, if

thought necessary, by striking out the word "lands:" and it is open to us to amend now. The substantial gravamen is, that the plaintiff was *induced to take shares by the representation that the property had been purchased at the price mentioned from the person having the lease of the mine and plant, when in truth the contract which the lessee had he had parted with to one of the directors for a very insignificant sum. It seems to me that there is no ground for saying that there was any misdirection in omitting to tell the jury that there was no evidence to support the plaintiff's case; and that there is no ground for finding fault with the verdict [*471

The rest of the court concurring, Rule discharged.

See Bedford *v.* Bagshaw, 4 Hurlst. & Norman 538, 549, and American note.

It is not necessary, in order to render the directors or officers of a corporation liable for false representation, as to its pecuniary standing or condition, by reason of which a person has been induced to buy its stock, that they should have been made directly to him. It is sufficient if they were contained in circulars and advertisements, published with the intent to influence the public at large, on the faith of which he purchased: Cazeaux *v.* Meli, 25 Barb. 583; Cross *v.* Sackett, 2 Bosw. 618; Davidson *v.* Tulloch, 2 Law T. N. S. 97, in the House of Lords.

In the last cited case, which was a Scotch appeal, D. and other directors of a bank, had systematically published false and fraudulent reports, and made dividends which purported to be out of profits, while in reality the bank was insolvent. It was held, that an action lay against D., at the suit of a shareholder, to recover damages for loss sustained, in purchasing shares on the faith of such reports, and also to recover damages for misconduct, in misapplying the funds while the shareholders continued to hold the shares.

CHIDELL and Others *v.* GALSWORTHY. *April* 19.

A., in consideration of a debt due from him to B., granted and assigned to B., for securing that or any future debts, "all the fixtures and fittings, household furniture, stock-in-trade, chattels, and effects in and about the premises of A., and which were more particularly mentioned in the schedule thereto, and all the right and interest of A. thereto;" and, for the more effectually securing the payment of the said debt and other moneys and interest, A. thereby authorized and empowered B., his executors, &c., to enter into and upon the said premises of A., whether acquired subsequently to the date of the deed, and not legally passing under it, or previously thereto, which before the satisfaction of that security should at any time be upon the said premises, in the name or names of A., his executors or administrators, or otherwise, to make and perfect any assignment, transfer, or delivery thereof to any agent or trustee for B., his executors, &c., or to a purchaser, or otherwise:"—

Held, that, under this deed, A. was justified in seizing after-acquired property of B., upon premises built subsequently to the date of the instrument.

THIS was an interpleader issue to try whether certain goods seized by the sheriff of Surrey on the 1st and 9th of February, 1859, under a fi. fa. at the suit of Galsworthy, upon a judgment recovered by him against one John Wood, were at the time of the seizure the property of the plaintiffs.

The cause was tried before Wightman, J., at the last Assizes at King-

ston, when it appeared that John Wood, the execution-debtor, being
*472] indebted to the *plaintiffs in the sum of 278*l.* for goods sold and delivered, executed to them the following bill of sale:—

"This indenture, made the 24th of September, 1859, between John Wood, of Heath End, near Farnham, in the county of Surrey, beer-retailer, of the one part, and John Chidell the elder, John Chidell the younger, and Edward Chidell, of Aldershot, grocers and provision merchants, carrying on business under the style or firm of John Chidell & Sons, of the other part: Whereas, the said John Wood is indebted to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, in the sum of 278*l.*, and it has been agreed that the payment of the same, together with all other moneys which shall from time to time become due from the said John Wood to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, with interest thereon respectively, shall be secured in manner hereafter mentioned: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, the said John Wood doth hereby, for himself, his heirs, executors, and administrators, covenant with the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, that he the said John Wood, his heirs, executors, or administrators, will immediately upon demand thereof in writing signed by or on behalf of the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors or administrators, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, being delivered to or left for him or them at his or their last known place of abode, or upon any premises where the said John Wood shall be carrying on business, pay or cause to be paid to the said John Chidell the elder, John Chidell the younger, and Edward
*473] *Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners (or other the person or persons for the time being constituting the said firm), the said sum of 278*l.*; and also such other moneys as for the time being shall be owing from the said John Wood to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors or administrators, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, on any account whatever, with interest at five per cent. per annum, such interest on the said sum of 278*l.* to be calculated from the day of the date of these presents, and on such other moneys from the time or respective times at which, according to the terms of any contract, the usual course of credit, or otherwise, the same shall become due; and that, in the mean time, and until such payment of the said 278*l.* and such other moneys as aforesaid, he the said John Wood, his executors and administrators, will pay unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners, or other the person or persons for the time constituting the said firm, interest on the said sum of 278*l.* and such other moneys respectively, at the rate of 5*l.* per cent. per annum, by equal half-yearly payments: And this indenture further witnesseth, that, in further pursuance of the said agreements, and in consideration of the premises, the said John

Wood doth hereby grant and assign unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, all the fixtures and fittings, household furniture, stock-in-trade, chattels, and effects in and about the premises of the said John Wood situate respectively at *Heath End, near Farnham [*474
aforesaid, and Knapp Hill, near Woking, and which are more particularly mentioned in the schedule hereto; and all the right and interest of the said John Wood thereto, to hold, receive, and take the same unto the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, and assigns, as their own property and effects: and, for the more effectually securing the payment of the said sum of 278*l.* and such other moneys and interest aforesaid, he the said John Wood hereby authorizes and empowers the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, his executors, administrators, and assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, *to enter into and upon the said premises of the said John Wood, whether acquired subsequently to the date of these presents, and not legally passing under this assignment, or previously thereto*, which before the satisfaction of this security shall at any time be upon the said premises, in the name or names of the said John Wood, his executors or administrators, or otherwise, to make and perfect any assignment, transfer, or delivery thereof to any agent or agents, trustee or trustees, for the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, and assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, or to a purchaser or purchasers, or otherwise: provided, that, in case the said John Wood, his executors or administrators, shall pay to the said John Chidell the elder, John Chidell the younger, and Edward Chidell, the sum of 278*l.* and such other moneys and interest aforesaid at the times and in the manner hereinbefore *appointed [*475
for payment of the same respectively, then the grant and assignment hereinbefore mentioned shall be void: And it is hereby agreed and declared, that, if default shall be made in payment of the said sum of 278*l.*, or such other moneys as aforesaid, or any part thereof, at the times and in manner hereinbefore provided, it shall be lawful for the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, his executors, administrators, and assigns, and their or his partner or partners, or other the person or persons for the time being constituting the said firm, to take possession of the said chattels and effects hereby assigned, or any of them, and to sell the same, *and also such other chattels as aforesaid*, or any of them respectively, by public auction or private contract, upon such conditions and generally in such manner as the said John Chidell the elder, John Chidell the younger, and Edward Chidell, or the survivor of them, his executors, administrators, or assigns, or their or his partner or partners, or other the person or persons for the time being constituting the said firm, shall think fit, with power to buy in the said chattels and effects or any of them at any sale or sales, and to resell the same, without being responsible for any loss occasioned thereby, and to give valid discharges for the purchase-moneys of any effects which may be sold.

And, for the better enabling the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, and the executors or administrators of such survivor, and their or his partner or partners, and other the person or persons constituting the said firm, to obtain and keep possession of the said chattels and effects in case of such default as aforesaid, the said John Wood hereby irrevocably licenses and empowers the said John Chidell the elder, John Chidell the younger, *476] and Edward *Chidell, and the survivor of them, and the executors and administrators of such survivor, and their or his partner or partners, and other the person or persons for the time being constituting the said firm, and their or any of their agents, to enter, and, if necessary, break into and upon the said premises in which the said chattels and effects shall be, to seize and remove or otherwise convert the said chattels and effects: And it is hereby agreed that the said John Chidell the elder, John Chidell the younger, and Edward Chidell, and the survivor of them, and the executors or administrators of such survivor, and their or his partner or partners, and other the person or persons for the time being constituting the said firm, shall stand possessed of the moneys or money arising from any sale or conversion of the said chattels and effects, in trust, in the first place, to pay and satisfy all costs and expenses of the said sale or sales and incidental to these presents, and then to pay and discharge all moneys and interest intended to be secured by these presents; and, subject thereto, in trust for the said John Wood, his executors, administrators, and assigns: Provided always, that, until default as aforesaid, the said John Wood, his executors, administrators, or assigns, may possess, use, and enjoy the said chattels and effects without any disturbance or interference by the said John Chidell the elder, John Chidell the younger, and Edward Chidell, their executors, administrators, or assigns. In witness whereof, the parties aforesaid have hereto set their hands and seals the day and year first above written.

"*The schedule above referred to.*

"Effects at Heath End. Bar,—6-pull engine, pipes, and taps, counter and fittings, shelves, and partitions, 6 dozen pots, 4 dozen glasses, table. Parlour,—mahogany table, 24 Windsor chairs. Coffee-room,—window *477] *board, 3 tables, seats, scales and weights. Kitchen,—3 coppers and fittings, 5 coffee-boilers, table, kitchen utensils. Tap-room,—2 tables and seats. Stable,—poney and cart, corn-bin, wheelbarrow, and ladder, and sundries. Club-room,—9 tables, 15 forms, stage. Bedrooms,—6 bedsteads, bedding, 2 washhandstands, 11 cane-bottomed chairs, 1 table. Booth,—tables, bar-seats, and fittings, stock of ale and porter. Effects at Knapp Hill,—wooden felt-covered hut, 18 bedsteads and bedding complete, all tables, forms, mugs, glasses, sundries, wooden partitions, &c."

Default having been made by Wood, the plaintiffs entered under authority of the bill of sale, and seized the goods of Wood, as well after-acquired as those in his possession at the date of the instrument, including goods in a portion of the premises which had not at that time been built.

On the part of the defendant it was submitted that nothing passed by the bill of sale except the goods mentioned in the schedule; and that the power to seize goods afterwards coming upon the premises was

limited to substituted goods, and did not extend to all after-purchased property.

The learned judge directed a verdict to be entered for the plaintiffs, reserving the defendant leave to move.

W. Pearce, accordingly, now moved to enter a verdict for the defendant.—The question is whether the goods not enumerated in the schedule to the bill of sale passed to the plaintiffs by that instrument. [WILLES, J.—They certainly did not pass by it; but the question is, whether the property did not vest in the plaintiffs by the seizure made under the authority of the bill of sale.] In Lunn *v.* Thornton, 1 C. B. 379, it was held that a grant of goods which are not in *existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view after he has acquired the property therein. [WILLES, J.—The decision in Lunn *v.* Thornton is founded on the maxim "Nemo dat qui non habet." But Tindal, C. J., suggests "whether a deed might not have been so framed as to have given the defendant *a power of seizing* the future personal goods of the plaintiff, as they should be acquired by him and brought on the premises, in satisfaction of the debt." That was acted upon in Congreve *v.* Evetts, 10 Exch. 298,† which was followed by Hope *v.* Hayley, 5 Ellis & B. 830 (E. C. L. R. vol. 85). And all these cases were cited and adopted in the recent case of Carr *v.* Allat, in the Exchequer, 27 Law J., Exch. 385 [3 H. & N. 964, Am. Ed.], where it was held, that, when on the face of an assignment of personalty it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired, and substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied: and where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed.] In the case last referred to, the deed contained an express power to take possession of all crops on after-taken land; and therefore Martin, B., says "it is immaterial whether they were on land in his occupation at the time of the deed or not." [COCKBURN, C. J.—Do not the words of this instrument import, "Go and seize and sell or deal with the property as your own?" The plaintiffs did seize. Does not that vest the property in them?] [*478

*COCKBURN, C. J.—Upon the authority of the cases referred to, I am of opinion that all the goods passed to the plaintiffs under and by virtue of the authority given to them by the deed. I therefore think there should be no rule. [*479

CROWDER, J.—The authorities are quite conclusive. It has been attempted to distinguish this case on the ground that the goods here seized were not substituted property, but after-acquired. I do not see that that makes any difference. The authority given by the instrument is precisely the same as to both. The subject has been under the consideration of all the courts; and nobody has ever suggested a distinction between substituted and after-acquired goods.

The rest of the court concurring, Rule refused.

*480] *NICHOLLS and Others *v.* ROSEWARNE. *May* 7.

Quære, whether a mining company on the cost-book principle is a "public company" within the meaning of the 1 & 2 Vict. c. 110, s. 14, so as to make shares therein liable to be charged with a judgment-debt?

An order under the statute having been made by a judge at Chambers,—the court confirmed it, on the ground that by setting it aside they would preclude the judgment-creditor from taking the opinion of a court of appeal.

Quære, whether one who has sold his shares in such a company, and whose vendee has accepted the transfer, but has not caused it to be registered, is a person having shares "standing in his name in his own right" within the statute?

On the 11th of February, 1859, an order was made by Willes, J., under the 14th section of the 1 & 2 Vict. c. 110,(*a*) charging Rosewarne's interest in ten shares in a certain company called The East Wheal Russell Mining Company, of which Rosewarne was entered as proprietor, with a judgment recovered against him in this court at the suit of the plaintiffs. It appeared that the company was formed on the cost-book principle; that Rosewarne on the 28th of January sold the shares in question to one Hallett, who duly paid him the price, receiving from him the usual notice to the purser to enter Hallett's name in the cost-book as the proprietor of the shares in lieu of Rosewarne; and that
*481] Hallett accepted the transfer by signing the *notice; but that he did not send it to the purser for registration until the 12th of February, when the purser, having been previously served with the judge's order, declined to enter it, and consequently the shares still remained in the name of Rosewarne.

An application having afterwards been made to Williams, J., to rescind the order of Willes, J., on the ground that a cost-book mining company was not a "public company" within the statute, and that Rosewarne was not at the time of the order the beneficial owner of the shares in his own right, the learned judge declined to interfere, but directed that the application should be made to the court.

Collier, Q. C., accordingly applied for a rule to rescind the order of Willes, J.

Lush, Q. C., and *Gibbons*, showed cause in the first instance.—The objections to the order of Willes, J., are two,—first, that this is not a "public company" within the meaning of the 14th section of the 1 & 2 Vict. c. 110,—secondly, that, if it is, the shares were not, at the time the order was made, standing in the defendant's name *in his own right*. The first point came under the consideration of Parke, B., and Alderson, B., in the year 1850, in a case of Graham *v.* Connell, 19 Law J., Exch. 361, respecting shares in the Union Bank of London, a bank

(*a*) Which enacts "that, if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any government stock, funds, or annuities, or *any stock or shares of or in any public company* in England (whether incorporated or not), *standing in his name in his own right*, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment-debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

carrying on business under a deed of settlement, and entitled to sue and to be sued by a public officer under the 7 & 8 Vict. c. 113, s. 47. Those two learned judges were not quite agreed as to whether or not the bank was a public company; but, the matter being doubtful, they declined to set aside the order. Application was then made to the Court of Chancery,—see the case of Macintyre *v.* Connell, 1 Sim. N. S. 225,—and Lord Cranworth, V. C., made the order. In the *course [*482
of a very elaborate judgment, his Honour says: "The real difficulty which arises on this subject, is, that the statute speaks of a public company, whether incorporated or not, as being something known to the law, that is, as if it were something that, when mentioned, a court could be able to say, ex cathedrâ, this is or is not a public company; there being, in truth, no such legal term known as a public company not incorporated. Then, the question is, there being no legal meaning to the term 'public company,' how are the courts to interpret that term? because it would be very improper to say that the legislature has used words that could have no meaning; and therefore we must find out as well as we can what meaning is to be attributed to the words. And that must be ascertained by discovering what the state of the law was in respect of companies at the time of the passing of the act of the 1 & 2 Vict.; because it must be with reference to the then state of the law that the question is to be determined, and not by the state of the law at any subsequent period; although, perhaps, what passed subsequently may enable us to interpret, in some degree, the language used by the legislature upon a prior occasion; but it cannot of itself give us the meaning. Now, it appears to me, having looked at the matter with some care, that there were only two classes of companies to which, by possibility, at that time the expression 'public company not incorporated' could apply. What was the state of the law at that time? In the first place, there was the statute of 7 G. 4, c. 46, for the better regulating copartnerships of certain bankers in England. It is well known, that, prior to that act, nowhere within Her Majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on the banking business. The Bank of England were interested in *sustaining that privilege upon their part. They had advanced [*483
large sums of money to the government; and their remuneration, in part, was, that they were to have a monopoly in banking, except where there should not be more than six partners. But that monopoly was restricted, in the first instance, by the act to which I have alluded, the 7 G. 4, c. 46, which enabled partnerships consisting of more than six members to carry on the business of bankers, provided only they carried it on sixty-five miles or upwards from London, and provided they carried it on under the restrictions and in the manner provided by that act of parliament, which were that they should make regular returns of the names of all the partners to the stamp-office. That list was to be amended from time to time when a transfer of the shares took place; and they were to return to the stamp-office the names of two or more persons to be called the public officers of the bank; and parties having claims on the bank were not to sue the bank as a partnership, according to the ordinary rule of common law, but were to sue the public officers instead; and those public officers were, for the purposes of the act, to

represent the company. On the other hand, if the copartners had any claims against third parties, they were to sue, not in the ordinary mode in which partnerships, independent of that act, would sue, but by their public officers; and the effect of a judgment against a public officer was, that you might take out execution under it against the partnership and every number of it. Now, that act was in force, at the time of the passing of the 1 & 2 Vict. c. 110. In the year 1833, the 3 & 4 W. 4, c. 98, was passed, and by it banking copartnerships consisting of more than six members were permitted to carry on business in London or within sixty-five miles of it, on certain terms. Now, let us see whether
*484] there were *any other companies to which the language of the 1 & 2 Vict. c. 110 can be held to apply. There certainly was one other class of trading companies; because, by the act which was passed in 1837, viz., the 7 W. 4 & 1 Vict. c. 73, intituled 'An act for better enabling Her Majesty to confer certain powers and immunities on trading and other companies,' power was given to the Crown, not to incorporate partnerships, but to grant them privileges which by common law would not be granted, viz., to trade under liabilities to a certain degree restricted." His Lordship read the 2d, 3d, 4th, and 5th sections of the statute, and proceeded,—"And then, just in the same way as in the Bank Act of the 7 G. 4, a return is to be made to certain public officers of the names and addresses of the members, and the number of the shares they respectively hold; and that is to be renewed from time to time as changes take place. That, therefore, was a class of companies not incorporated, or which might come under the description of public companies not incorporated, which existed at the time of the passing of the 1 & 2 Vict. c. 110. Now, these two classes are, as far as I can discover, the only two classes of companies not incorporated to which the act of Victoria can by possibility refer. I mean banking companies existing under the 7 G. 4, c. 46, and the subsequent extension of that act by the act passed in 1833, the 3 & 4 W. 4, c. 98, and companies associated for trading or other purposes, having letters patent granted by the Crown, but not incorporated. And it seems to me, if those were the only two classes, that either one or both of them must be the class or classes to which the act of Victoria refers. That the words 'public company not incorporated' would be applied properly to the last class, seems to me to admit of no doubt. The names of the members, and of
*485] the officers who are to sue and *be sued on behalf of the company, the objects of the society, and many other particulars relating to it, are to be enrolled, and thereby made public. Therefore it seems to me to be impossible to doubt that such a company would be a public company not incorporated within the meaning of the act of Victoria. Then, the question is whether there is any real distinction whatever between that which I assume must be taken to be a public company not incorporated within the meaning of the act of the 1 & 2 Vict. and a public company acting under the law that was then in force, viz., the 7 G. 4, c. 46, and the 3 & 4 W. 4, c. 98. I see no real distinction between the two. It is true that the banking company was not a banking company carry on its operations under the provisions of a charter or letters patent not incorporating them; but all the attributes of publicity appear to me to exist as well in the one case as in the other. The names of the members are all enrolled, with their addresses, and every transfer of

interest is enrolled: and the company is to sue and be sued by public officers, just in the one case as in the other; and it seems to me, that, in the absence of a legal definition, I must treat the one case to be just the same as the other,—that that which was the attribute of publicity in a trading company quasi incorporated under the statute of the 7 W. 4 & 1 Vict. c. 73, was the attribute of publicity in the case of a banking partnership. In my opinion, the two cases are undistinguishable; and, the one being, as I assume it must be taken to be, within the meaning of the act of the 1 & 2 Vict., the other must be taken to be so likewise. It does not appear, that, in the case of banking companies, it is at all necessary that their capital should be divided into shares; although, with respect to companies quasi incorporated under the 7 W. 4 & 1 Vict., it is necessary that their capital should be divided *into shares, [*486 and should be transferable. But, in point of fact, the capital of the Union Bank of London is divided into shares. I do not, however, think I can hold the Union Bank of London to be a public company within the meaning of the 1 & 2 Vict. merely because its capital is divided into shares. In my opinion, it would have been a public company if its capital had not been so divided; because the attributes of publicity would exist, viz., the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company. There was another ground that was relied upon as showing that this was a public company, which I confess I do not pay much attention to. It was this, that the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, defines a joint stock company to be a company the shares in which are transferable without the express consent of all the members; and it was said that this company is a joint stock company according to that definition: and so I think it is: but I do not rely upon that: I advert to it merely to show that the observation did not escape me." [CROWDER, J.—Was it brought to the attention of Lord Cranworth there, that there were such things as cost-book mines?] It does not appear from the report, which notices the argument very shortly. [BYLES, J.—It certainly was not necessary to the decision to confine it to the two cases mentioned. WILLES, J.—This might become a public company under the 19 & 20 Vict. c. 47, by registration.] The attributes of publicity which Lord Cranworth speaks of,—that the register of shareholders is prepared by the public officer, and that the public have ready access thereto to see who are partners,—do not exist here: the affairs of the company are kept as secret as those of any ordinary partnership. It is true there is in the cost-book a rule *authorizing the transfer of shares without the consent of the [*487 co-adventurers: but it is open to them at any time to rescind that rule. [BYLES, J.—In the 6 G. 1, c. 18, s. 18 (the Bubble Act), the word "public" seems to have been used with reference to the assignable quality of the shares without the assent of the co-adventurers: the act appears to have been levelled at companies as to which it was open to any of the public to take shares.] 2. Before the order was served, the defendant had parted with his shares. [WILLES, J.—The purser had no notice of the sale, and therefore the transfer of the shares was not completed at the time the order for charging them was served. The case of Watts *v.* Porter, 3 Ellis & B. 743, is against you on this point. There, A., an attorney employed by B. to invest money, lent it to C.

on an agreement by which C., as a security, charged his interest in 5000*l.* Consols, standing in the names of trustees in trust for C. A. neglected to give notice to the trustees. A judgment-creditor of C., subsequently to this loan, obtained a charging order under the 1 & 2 Vict. c. 110, s. 14, notice of which was given to the trustees. C. took the benefit of the Insolvent Act. B. brought an action against A. for negligence; and, on the trial, the judge directed the jury, in estimating the damages, to consider, that, as no notice had been given to C.'s trustees of the charge in favour of B., the subsequent charge created by the judge's order had priority over it. On a rule for a new trial, it was held by Lord Campbell, Wightman, J., and Crompton, J., that the direction was correct, and that the judgment-creditor had the same rights as a subsequent encumbrancer without notice, and was therefore to be preferred in equity to A. But Erle, J., dissented, holding that the judgment-creditor had only those remedies which affected what at
*488] the time of the charging order remained the *property of the judgment-debtor. It is true that that case has been the subject of comment in the equity courts; and that Lord Cranworth and Lord Justice Turner in Beavan *v.* The Earl of Oxford, 6 De Gex, M'N. & G. 507, 524, 532, and Sir John Romilly, M. R., in Kinderley *v.* Jervis, 25 Law J., Chan. 538, incline to agree with the judgment of Erle, J.] In Whitworth *v.* Gaugain, 3 Hare 416, it was held that an equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of elegit and attornment of the tenants. In Fuller *v.* Earle, 7 Exch. 796,† the defendant, a registered owner of shares in a joint stock company, deposited the certificate with E. as a security for money advanced. The defendant afterwards borrowed a further sum from an insurance office, and executed to C., one of his sureties on that occasion, with the consent of E., who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. The money not having been paid to the insurance office, they claimed it from E. and C., when C. requested the insurance office to transfer the shares into his name, which they refused to do, on the ground that they had been previously served with a judge's order nisi to charge the shares: and it was held that the shares were properly charged as shares standing in the defendant's name "in his own right," within the meaning of the 1 & 2 Vict. c. 110, s. 14. [WILLES, J.—That is quite right. A person coming in under a charging order would be in the position of one having an elegit, and desiring to pay off a mortgage.] In Morris *v.* Manesty, 7 Q. B. 674 (E. C. L. R. vol. 53),
*489] it was held by the Court *of Queen's Bench that a pension granted by the East India Company could not be charged under this statute. [BYLES, J.—You are asking us, in effect, to overrule the decision of the Court of Queen's Bench in Watts *v.* Porter. CROWDER, J.—And in a matter where there is no appeal. I must confess I am disposed to agree with Lord Cranworth: but I think we must leave you to your remedy in equity.] The Court of Equity will doubtless adhere to the opinions already expressed in Beavan *v.* The Earl of Oxford and Kinderley *v.* Jervis. To make this order absolute, will in effect be to

take one man's money to pay another man's debt. [WILLES, J.—This is a mere proceeding ad fundandem jurisdictionem. Can we say that the creditor shall not have the opportunity of taking the opinion of a court of error?]

CROWDER, J.—I am of opinion that the order of my Brother Willes must be confirmed. There are two grounds upon which it has been contended that the order is invalid,—first, that it is made for the purpose of charging shares in a company which is not a "public company" within the meaning of the statute,—secondly, that the order charges shares which are not standing in the name of the defendant in his own right. 1. This is the case of a mine worked on the cost-book principle, the shares in which may, if so arranged, be disposed of without the assent of the co-adventurers; and in this respect it certainly differs from an ordinary partnership. Still it is said that such an association is not a public company. The point is quite a new one, it never having been decided that this peculiar sort of association is either the one or the other. We have been much pressed with the discussions which arose in the case of the Union Bank of London, which first came before Parke, B., and Alderson, B., in the Court *of Exchequer in Graham *v.* Connell, 19 Law J., Exch. 361, when those two learned judges [*490 expressed contrary opinions; the former thinking that the bank was a public company within the statute, the latter that it was not: but both expressly said the case was a very fit one for discussion, and they declined to set aside the order. The matter then came before the Court of Chancery,—Macintyre *v.* Connell, 1 Sim. N. S. 225,—where the decision was that it was not a public company. In the course of a very elaborate judgment, Lord Cranworth gives a very strong intimation that in his opinion there are only two classes of unincorporated companies to which the 14th section of the 1 & 2 Vict. c. 110 could refer. The case, however, of a cost-book mine was not brought to his attention. On that point, therefore, I am not disposed to express any opinion. 2. As to the other point, it is said, that, assuming that this is a public company within the statute, the shares in question are not chargeable, because they had previously been disposed of by the judgment-debtor. It is true they have been sold, but the sale has not been completed, and the shares are still standing in the name of the person sought to be charged. This raises the very question which came before the Court of Queen's Bench in Watts *v.* Porter, 3 Ellis & B. 743 (E. C. L. R. vol. 77). That is a decision which has not been reversed. It has been the subject of comment in the Court of Chancery: and Erle, J., differed from the other three judges. It is unnecessary to say which was right, though several of the equity judges have leaned to the opinion of the dissentient judge. But we cannot act upon that view, for that would deprive the party of the opportunity of appealing against our decision. I give no judgment upon the matter: but, in order that the party may not be concluded, I prefer making the rule absolute.

*WILLES, J.—I am entirely of the same opinion, and for the same reasons. This is not a proceeding in which the rights of [*491 the parties can be finally determined. By refusing to set aside the order, we leave the matter open. If, on the other hand, we set the order aside, we should be finally deciding the matter so far as the particular creditor is concerned, by depriving him of the opportunity of

raising the question so as to obtain the opinion of a court of appeal. The point cannot be said to be by any means clear. Another court might take a view different from ours: and possibly the House of Lords might not agree with us. We might, therefore, by our decision against the creditor, deprive him of the right to resort to the highest tribunal to correct our judgment. Consequently, I think the proper course for us to take is that which was taken by this court in the case of Davies, dem., Lowndes, ten., 7 M. & G. 762 (E. C. L. R. vol. 49), 8 Scott N. R. 539. The 3 & 4 W. 4, c. 27, by a section (s. 36) framed in general terms, enacted that no writ of right should be brought after a given day. The tenant in that case being dead, the demandant, in defiance of the above statute, sued out a new writ by journeys accounts. It was a writ which was clearly and obviously issued in violation of the act of parliament. So thought Lord Lyndhurst (see 7 Scott N. R. 217), and so thought this court: but, inasmuch as it was possible that the court of ultimate appeal might entertain a different view of the matter, they concurred in declining to set the writ aside. Tindal, C. J., in giving judgment, stated his opinion in these words,—"The Lord Chancellor, after expressing an opinion, in terms which it is impossible to misunderstand, that the writ of journeys accounts was not maintainable by law upon the ground of the first objection" (that writs of right having been abolished from and after the 31st of December, 1834, by the statute 3 & 4 *492] W. 4, c. 27, no writ *of right could now be issued under any circumstances), "declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings, where it might become subject to the review of the ordinary tribunals of the law. The same objections have been raised before us upon this application to set aside the count and all the judicial process that has been issued in this court; and, after hearing a learned argument in support of and against such application, we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason, viz., that, by analogy to the course of practice adopted in this and the other courts of Westminster Hall, we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, where the very same question may be raised on the record, and thereby not only the judgment of this court may be obtained, but, if thought necessary, the judgment of the court of ultimate appeal." The same rule of procedure was acted on by Lord Wensleydale and Alderson, B., in Graham *v.* Connell, upon the construction of this very section; and I think we ought to follow the same course, unless we are clearly satisfied that the question raised is frivolous, and that it would be merely vexatious to allow such an order to stand. Whether the application is frivolous or not depends upon two questions; the first of which is, whether the words "public company" in the 1 & 2 Vict. c. 110, s. 14, are used in the popular sense, or mean a company incorporated by act of parliament or by charter. It is impossible to say that that is not a question which is well worthy of consideration. And, as to the second point, *493] fully appreciating as I do the learned argument of Mr. *Lush* and Mr. *Gibbons*, as to what ought to have been the decision in Watts *v.* Porter, I think we are bound to defer to that case, though it is

not impossible that the House of Lords might take a different view of it. Following the rule I have referred to, I think we cannot properly interfere to set aside this order, and that the rule for confirming it ought to be made absolute.

BYLES, J.—I also am of opinion that the order of my Brother Willes must be confirmed. The words "public company" import, no doubt, some relation to the public: but the decisions leave it doubtful what that relation should be. It may mean a company the shares in which are open to all the public. It is enough, however, that there is a difference of opinion amongst judges; and therefore the proper course for us to take is, to leave the matter in such a position that the opinion of a court of error may be taken upon it. As to whether the judgment-debtor was entitled of his own right to these shares, I offer no opinion. I cannot help saying there is great cogency in the arguments which have been urged by Mr. *Lush* and Mr. *Gibbons;* but still there is standing in the way a decision of the Court of Queen's Bench in Watts *v.* Porter, 3 Ellis & B. 743 (E. C. L. R. vol. 77), which has not been overruled. This, therefore, seems to me to be a stronger case than that of Davies, dem., Lowndes, ten. Our proper course will be to confirm the order, and thus give the party who seeks to question it the opportunity of taking the matter to a superior jurisdiction for a final decision.

Order confirmed, without costs.

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*JOHN MALTASS *v.* SIDDLE. *May* 6. [*494

One who endorses a bill as surety is entitled to notice of its dishonour, although it be given for the purpose of raising funds for a company in which he (as well as the holder of it) is a shareholder.

THIS was an action against the defendant as acceptor of a bill of exchange for 240*l.* drawn by one William George Maltass at Smyrna, and payable to the plaintiff. The declaration also contained the money counts and a count upon an account stated.

The defendant pleaded, amongst other pleas, a set-off for money payable by the plaintiff to the defendant upon a bill of exchange for 500*l.*, now overdue, drawn and accepted in parts beyond the seas, to wit, at Smyrna, on the 9th of March, 1853, by M. Lafontaine and one William George Maltass, on behalf of and as agents of The Smyrna Steam Flour-Mill Company, who were the drawers and also the acceptors of the said bill, payable two years after date to the order of the plaintiff, although he had no effects then or afterwards in the hands of the said company, nor any reasonable grounds to suppose he would have such effects, or that they could or would ever pay the said bill, and which said bill was, as between the plaintiff and the drawers and acceptors thereof, wholly without value or consideration, as the plaintiff always knew; and which said bill was endorsed by the plaintiff to one Thomas Jackson, and endorsed by him to the said William George Maltass, and endorsed by William George Maltass to the defendant; and which said bill was, when due, not paid by the acceptors, whereof the plaintiff had notice. Issue.

The cause was tried before Willes, J., at the sittings in London after last Michaelmas Term. The only question was as to the right of the defendant to set off the 500*l.* bill mentioned in the plea. It appeared *495] that both the plaintiff and the defendant had been holders *of scrip in a company or association at Smyrna, called The Smyrna Steam Flour-Mill Company; that, the company being in want of funds, William George Maltass, who was a shareholder and one of the managers of the company, in the early part of 1853 opened a negotiation with the defendant for an advance of 2500*l.* for the purposes of the company, to be secured by the joint bond of William George Maltass, the plaintiff, and one Thomas Jackson (who was also a shareholder). Subsequently, however, it was arranged, that, instead of a bond, five bills for 500*l.* each should be given, of which that sought to be set off was one,—being drawn, as alleged in the plea, upon and accepted by the company, and endorsed by the plaintiff to the defendant. The company stopped payment in July, 1853. The bill became due on the 12th of March, 1855; but notice of its dishonour was not given to the plaintiff until the 12th of May. The plaintiff swore, that, when he endorsed the bill, he had every reason to believe that it would be duly paid by the company, and that it was understood that it was to be held as a mere security, and not to be put in circulation.

The learned judge ruled, that, under the circumstances, the plaintiff was entitled to notice of dishonour; and he thereupon directed a verdict to be entered for the amount of the bill declared on and interest,—reserving leave to the defendant to move to enter a verdict for him, if the court (who were to be at liberty to draw inferences) should think the plaintiff was not entitled to notice: the plea to be amended if necessary.

Shee, Serjt., in Hilary Term, accordingly obtained a rule nisi, on the ground that the bill (in the plea mentioned) was drawn and accepted for the accommodation and for the purposes of the plaintiff as well as for *496] those of the drawers and acceptors, and that the *plaintiff had no recourse against any one else, on its non-payment, and consequently was not damnified by the want of a notice of dishonour.

Huddleston, Q. C., and *Bushby*, now showed cause.—The simple question is, whether the plaintiff was entitled to a notice of dishonour of the 500*l.* bill, the subject of the set-off. It is clear, upon the facts, that John Maltass, the plaintiff, was a surety only for the payment of the amount of the 500*l.* bill by the company; and, if so, he was entitled to notice of dishonour. The case of Bickerdike *v.* Bollman, 1 T. R. 405, only decides that one who has no reason to expect that the bill will be paid by the acceptor, and can sustain no prejudice by the want of notice, is not entitled to receive a notice of dishonour. In the notes to that case, in 2 Smith's Leading Cases 46, it is said: "Claridge *v.* Dalton, 4 M. & Selw. 226, is another strong exemplification of this doctrine. There, the drawer of a bill had no effects in the hands of the drawee, but had supplied him with goods upon a credit, which would not, however, expire till long after the bill would have become due. He was held not to be entitled to notice of its dishonour. 'The case of Bickerdike *v.* Bollman,' said Bayley, J., 'has established, and, I am disposed to think, rightly, that a party who cannot be prejudiced by want of notice, shall not be entitled to require it.'" That would be the case where the drawer knows he has no effects in the hands of the acceptor,

and has no chance of having any before the maturity of the bill. "But even," continues the learned author, "in the very cases in which Bickerdike *v.* Bollman has been acted upon, it has been declared that the rule established in that case must not be extended. In Claridge *v.* Dalton, Le Blanc, J., went so far as to regret that any such decision had ever taken *place: and see the judgment delivered by Parke, B., in [*497
Carter *v.* Flower, 16 Law J., Exch. 201. Accordingly, it has been settled that the drawer is entitled to notice, though he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee: Rucker *v.* Hiller, 3 Campb. 217, 16 East 43. So, it was laid down by Lord Eldon, in a case of bankruptcy,—Ex parte Heath, 2 Ves. & B. 240, 2 Rose 141,—that, 'if a bill were accepted *for the accommodation of the drawer*, and there were nothing but that between them, notice would not be necessary, the drawer being, as between him and the acceptor, first liable: but, if the bills were drawn *for the accommodation of the acceptor*, the transaction being for his benefit, there must be notice without effects; and if, in the result of various dealings, the surplus of accommodation is on his side, he is, with regard to the drawer, in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental.' And this rule thus laid down by Lord Eldon extends to cases where the drawer has reason to expect that some third party will provide for the payment of the bill: thus, in Cory *v.* Scott, 3 B. & Ald. 619 (E. C. L. R. vol. 5), where the bill was drawn and accepted for the accommodation of the first endorsee, the drawer was held to be entitled to notice: and the same point was decided in Norton *v.* Pickering, 8 B. & C. 610 (E. C. L. R. vol. 15), 3 M. & R. 23." If the plaintiff had received notice of dishonour, he might have had recourse against the property of the company. [COCKBURN, C. J.—It is enough for you to show that John Maltass was not the person primarily liable to provide funds for the bill. We will hear what is to be said on the other side.]

Thrupp (with whom was *Shee*, Serjt.), in support of the rule.—The evidence shows that the plaintiff was *primarily liable on the bill [*498
in question, and therefore not entitled to notice. He was a shareholder, and substantially interested in the advance made to the company for repayment in part of which the bill was given. [COCKBURN, C. J.—The defendant's own evidence shows that he treated the plaintiff as a surety only.] The true test is, not whether or not the party is primarily liable, but whether he has any remedy over against any other person. In Cory *v.* Scott, Abbott, C. J., says: "It has been held (alluding to Bickerdike *v.* Bollman) that the drawer of a bill who has no effects in the hands of the acceptor, and who has no right upon any other ground to expect that the bill will be paid, is not entitled to notice of its dishonour; and that for this reason, because the facts show that he must have known that the bill when presented would not be paid. That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. This case, however, is very different. The ground for the former decision was, that, if notice had been given, *there would still have been no person to be found upon whom the party to whom notice was omitted to be given might call for the money:* but here, at least one, and perhaps two persons are in that

situation." So, Bayley, J., says: "One test is this,—suppose the drawer to pay the bill, has he any remedy over against a third person? In the case of Bickerdike *v.* Bollman, he had none." The same doctrine is laid down by Parke, B., in delivering the judgment of the Court of Exchequer in Carter *v.* Flower, 16 M. & W. 743.† Here, the plaintiff had no remedy over, and therefore could not be damnified by the want of notice. [WILLES, J.—Might he not have had recourse to William George Maltass or to Fontaine?] It is submitted he could not: he was equally *499] *interested with them in the concern. No notice of dishonour is necessary where the bill is drawn by several persons upon one of themselves. The reason for this is thus given in Byles on Bills, 7th edit. 260,—"Since the acceptor is likewise a drawer, notice of dishonour is superfluous, as the dishonour must be known to one of them, and the knowledge of one is the knowledge of all,"—citing Porthouse *v.* Parker, 1 Campb. 82.(*a*) [COCKBURN, C. J.—There would be a remedy here against the funds of the company.] In De Berdt *v.* Atkinson, 2 H. Bla. 336, A. drew a promissory note payable to B. or order, which B. endorsed, having given no value for it, and knowing that A. was insolvent. In an action by the endorsee against B., it was held that it was not necessary to prove that the note was presented for payment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it. Eyre, C. J., there says,—"As to notice, and the application for payment to the defendant, what did it signify to him when the application was made? It could make no difference to him whether it were made on one day or another; he meant to guaranty the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance, therefore, the general rule fails in its application." And Buller, J., says: "The general rule has been long settled, but it is only applicable to fair transactions where the bill or note has been given for value in the ordinary course of trade." That case has never been overruled: and it is said to have been followed in the American courts.(*b*) [BYLES, J.—Maule, J., in Sands *v.* Clarke, 8 C. B. 751, 760, says that De Berdt *500] *v.* Atkinson has been dissented from, if not *distinctly overruled,—referring to the remarks of Chambre, J., in Leach *v.* Hewitt, 4 Taunt. 731, and to the cases of Brown *v.* Maffey, 15 East 216, and Cory *v.* Scott, 3 B. & Ald. 619 (E. C. L. R. vol. 5). COCKBURN, C. J.—It appears, that, when the bills were drawn, there was reason for expecting that they would be paid by the company.] That is hardly consistent with the plaintiff's statement that the bills were not to be put in circulation.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The defendant, Siddle, seeks, by way of defence to an action brought against him as the acceptor of a bill of exchange, to set off another bill for 500*l.* drawn by the administrators of a company called The Smyrna Steam Flour-Mill Company upon themselves, and accepted payable to the order of the plaintiff, John Maltass, and endorsed by John Maltass to one Jackson, by Jackson to one William George Maltass, and by

(*a*) But the learned author adds in a note,—"It may be doubtful how far this rule would hold in the case of a joint stock company."

[(*l*) But see French's Executor *v.* Bank of Columbia, 4 Cranch 141, 162; Jackson *v.* Richards, 2 Carnes R. 344, and other cases cited in note at the end of this case.]

William George Maltass to the defendant. The plaintiff's answer to that set-off is, that the defendant has no right to set-off that bill for 500*l.*, because, upon its being dishonoured at maturity, no notice of that fact was given to him. The defendant insists, that, under the circumstances, the plaintiff was not entitled to notice, because he was a shareholder in the company, by whom and for whose use it was accepted, and he was so mixed up with the transaction that the bill was in point of fact an accommodation bill for his benefit. Now, if the evidence had established that the bill was solely matter of accommodation, and for his benefit, then, upon the principle referred to in the course of the argument, it seems, that, inasmuch as the plaintiff could not have been prejudiced by the absence of a notice of dishonour, he could not have resisted the defendant's claim of set-off. It seems to me, however, that the facts altogether fail to establish the *proposition contended for on the part of the defendant. It appears that the company being in want of funds, it was proposed that these should be supplied to a certain extent by certain persons of whom the defendant was one. Not being satisfied with the mere liability of the company, the persons making the advance required the guarantee of John Maltass, the plaintiff. A bond was at first proposed; but ultimately, instead of a bond, it was arranged that bills should be given, one of which was the bill sought to be set off. It is clear, that, in this transaction, the defendant was dealing with John Maltass in his individual capacity, and not as a member of the company. It follows, then, that, upon the dishonour of the bill, John Maltass, not being primarily liable, was entitled to notice of dishonour, and that, for want of such notice, the bill cannot be made the subject of a set-off against him. [*501

CROWDER, J.—I am of the same opinion. The defendant could not establish his set-off unless he could show a right to sue John Maltass upon the bill without having given him a notice of dishonour. It seems to me to be clear, upon the facts, that John Maltass was entitled to notice. The advance was made upon the five bills for 500*l.* each, instead of upon the security at first proposed, viz., a bond in which John Maltass and Thomas Jackson were to join as sureties. John Maltass was not a party for whose accommodation the bills were drawn, though he was a holder of scrip in the company. As between themselves, Siddle seems to have dealt with John Maltass in his individual capacity. The latter, therefore, is in the ordinary situation of one not primarily liable on the bill, and consequently was entitled to notice.

The rest of the court concurring, Rule discharged.

Where a bill is drawn by one member of a firm upon the partnership, notice of its dishonour to the drawer, is not necessary: Fuller *v.* Hooper, 3 Gray 334; Gowan *v.* Jackson, 20 Johns. 176, following Porthouse *v.* Parker, 1 Campb. 82. In a case where A., B., and C. were partners under the firm of B., C. & Co. at New Orleans, and under the firm of A. & Co. at Nashville, and A. & Co. had drawn a bill on the firm at New Orleans, which was protested for non-acceptance, it was held, that no notice was necessary to the house at Nashville: Hill *v.* Planters' Bank, 3 Humph. 670. But in Dwight *v.* Seavil, 2 Conn. 654, where a note was made by one firm to the order of and endorsed by another, the principal or managing partner being the same per-

son in both, it was held, that this did not dispense with due presentment for payment to the makers, and notice to the endorsers.

In Foland *v.* Boyd, 23 Penn. St. 476, where two persons constituting an existing partnership, bought goods which were paid for in the note of the one, endorsed by the other; it was held, that the endorser was entitled to due notice of the dishonour of the note. A similar decision was made in Morris *v.* Husson, 4 Sandf. S. C. 93.

Notice to one of several joint endorsers of a note or drawers of a bill, not being partners, is not notice to all: Sayer *v.* Frick, 7 Watts & Serg. 383; Willis *v.* Green, 5 Hill 232; Miser *v* Troomger, 7 Ohio N. S. 281.

It seems settled in the United States, in opposition to the *dicta* if not the decision in De Berdt *v.* Atkinson, 2 H. Bl. 336, that an accommodation endorser of a note is discharged by want of demand and notice, unless where he knew that the note would not be paid: French's Exr. *v.* Bank of Columbia, 4 Cranch 141; Jackson *v.* Richards, 2 Caines 344; Richter *v.* Selin, 8 Serg. & R. 439; Bogg *v.* Keil, 1 Missouri 743; Holland *v.* Turner, 10 Conn. 308. See Mr. Wallace's note to Bickerdike *v.* Bollman, 2 Smith's Lead. Cas. 22.

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*502] *COOPER, who has survived TRUSCOTT, *v.* LAW. *May* 5.

The vestry-clerk of a parish, upon his appointment (by the vestry) to the office, was told that it would be part of his duty to collect the church-rate and poor-rate, and to apply them as his predecessor had done. In pursuance of these instructions, and in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry-clerk applied a portion of the money arising from a church-rate made in the plaintiffs' year of office as churchwarden to the payment of certain parochial charges not legally payable out of the church-rate:—Held, that, inasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of,—he having previously filled the office of overseer, and also of auditor of the parish accounts,—and did not object, the two were precluded from suing the vestry-clerk for this misapplication of the rate.

Held, also, that (one of the plaintiffs being a vestryman) the parish books were admissible in evidence to show the usage of the parish as to the appropriation of the rates.

THE first count of the declaration stated that the plaintiffs, being churchwardens of the parish of Allhallows the Less, in the city of London, at the request of the defendant, retained him, then being the vestry-clerk of the said parish, and the attorney and legal adviser of the plaintiffs as such churchwardens, to collect a certain church-rate therein mentioned, and to lay out and expend for them the said rate in payment of the costs and charges of the necessary repairs and expenses of the church; and alleged for breach that the defendant wrongfully, and without the consent of the plaintiffs, laid out and expended a certain balance of the said rate in and about charges and expenses not lawfully chargeable to church-rate, &c.

There was a count for money received for the use of the plaintiffs, and for money found due upon accounts stated.

The defendant pleaded (amongst other pleas), to the first count,—first, a denial of the alleged retainer,—fourthly, that he laid out and expended the said balance of the rate, and did all that was in that count complained of, by the plaintiffs' leave; and, to the residue of the declaration, never indebted, and payment. Issue.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—The plaintiffs Cooper and Truscott were churchwardens of the parish of Allhallows the Less, in the city of London, for the years 1856–1857. The defendant was the *vestry-clerk of the [*503 parish, having been appointed to that office at a meeting of the vestry in October, 1848. In December, 1856, a vestry meeting was held, at which it was resolved that a church-rate should be made of 1*s.* 1*d.* in the pound; the proceeds of this rate, amounting to 277*l.* 8*s.* 10*d.*, were received by the defendant; and this action was brought against him to recover a balance of 150*l.* which it was alleged that the defendant as vestry-clerk had improperly applied in making certain payments not legally chargeable to the church-rate.

It appeared, that, at the time the defendant was appointed vestry-clerk, he was told that he was to collect the poor-rate and church-rate, and to apply them as his predecessor had done: and the parish books were produced, showing that for the last fifty or sixty years it had been the practice to make the payments now objected to out of the church-rate (some ever since 1793), though properly and legally chargeable on the poor-rate.

Truscott died shortly after the commencement of the action.

On the part of the surviving plaintiff (Cooper) it was submitted that these books were not admissible,—at all events, not those kept before his time. The Lord Chief Justice, however, overruled the objection, holding that the books were admissible for the purpose of showing that the plaintiff Cooper, who had access to them, and therefore must be presumed to be aware of their contents, knew of and sanctioned the defendant's appropriation of the rate.

Truscott, being in bad health at the time he became churchwarden, had never performed any of the duties of the office: and Cooper had been told by the defendant when he accepted the office of churchwarden that he would have nothing to do; all the duty of the office being in fact performed by himself. Cooper had been *a member of the [*504 vestry since 1850; he had also filled the offices of overseer and auditor of the parish accounts, in which latter capacity he necessarily became aware of the manner in which the payments in question had been usually made.

On the part of the defendant, it was submitted that there was no evidence of his employment by the churchwardens; and that, if there was, it was upon the understanding that he was to make the payments in the accustomed manner.

His lordship left it to the jury to say whether, assuming the payments in question to have been improperly made out of the church-rate, the plaintiff Cooper knowing or having the means of knowing the practice which had so long prevailed, and not objecting, must not be taken to have acquiesced in and consented to that course being continued.

The jury found that Cooper knew of and acquiesced by his conduct in the payments: and his lordship thereupon directed a verdict to be entered for the defendant, reserving leave to Cooper to move to enter the verdict for him, for such sum as the court should direct, if they should be of opinion that he was entitled to recover.

Collier, Q. C., in Hilary Term last, accordingly obtained a rule nisi,

on the ground that there was no sufficient evidence of the acquiescence of Cooper in the misappropriation of the sums complained of, and that, even if there had been any such acquiescence, it would not bind *the plaintiffs* in the action; and also on the ground of the improper reception of evidence.

Montague Smith, Q. C., and *Maude*, now showed cause.—The case is disposed of by the finding of the jury. The churchwardens seem to have delegated their *duties to the vestry; and the vestry appointed the vestry-clerk, with instructions to do the very thing now complained of. There was no retainer of the defendants by the plaintiffs; and, if there was, it was clearly upon the tacit understanding that he was to go on in the old way, and apply the proceeds of the church-rate as he and his predecessor in the office of vestry-clerk had always done. Cooper had himself audited the accounts of previous years, containing these very items. [COCKBURN, C. J.—Cooper knew that it was the invariable usage to make these payments out of the church-rate, and he took no objection to it, nor intimated any desire that the same course should not be pursued during his year of office. I thought that was abundant evidence that he acquiesced in and sanctioned the particular course of proceeding. And the jury thought so too.]

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Collier, Q. C., *Prideaux*, and *Garth*, were called upon to support the rule.—There was sufficient evidence of a retainer of the defendant by the churchwardens; and that primâ facie would be a retainer to collect the church-rate and to apply it according to law. [COCKBURN, C. J.—According to the directions of his employers.] Churchwardens are by the 7 & 8 Vict. c. 101, s. 32, subject to a penalty for wilfully authorizing or making an illegal or fraudulent payment from the church-rate. There was no evidence that the plaintiffs either directly or indirectly authorized the misappropriation of the money. It was the defendant's duty to inform the churchwardens that the application he was about to make of a portion of the rate was a violation of the law. [COCKBURN, C. J.—Cooper knew that the defendant was about to apply the money as he had always done. Can it be said that it was not done with his acquiescence?] Mere knowledge surely was not *enough to charge the churchwardens with an illegal act. [COCKBURN, C. J.—They had the power to prevent it, but forbore to exercise that power. Cooper was as much bound to know the law as the defendant was.] Assuming that Law had by tacit acquiescence the authority of Cooper for what he did, that would not prevent the two churchwardens from maintaining this action. It is not pretended that Truscott knew anything of what was done. Churchwardens are a corporation for the benefit of the parish; and, if one of them release a debt due to the parish, it will not bar the suit of his companion: Starkey *v.* Barton, Cro. Jac. 234, Yelv. 173. In Dr. Prideaux's Directions to Churchwardens, edit. 1835, p. 130, it is laid down, that, "if any one break the church windows, cut down the seats in the church, demolish any part of the walls either of the church or churchyard, or any other way damnifieth the church in such particulars as are not of the goods of the church, but are either parts or appurtenances of the freehold; in this case the churchwardens cannot sue in their own names for reparations to be made for these damages, but must bring the action in the name of the minister, to whom

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the freehold belongs. But, if the damage be done to any of the utensils or goods of the church, in this case the churchwardens are to bring the action in their own names, because the property of all such utensils and goods is in them *as a corporation*, for the use and benefit of the parish: but in the doing hereof they are to observe two things: the first is, that, being a corporation, they act jointly together; for, neither of them alone is that corporation, but both together, and, consequently, what one doth without the other hath no force in law. For, should one of them alone commence the action in his own name, without joining the name of the other with it, or, when it is rightly commenced *in the name of both, *should either of them give a discharge from the action, or* [*507 *from the costs or damages which are recovered upon it, all that is so done is void and null in law*, and so it will be in everything else wherein either of them shall take upon him to act alone in his office without the other, except only in presentments." [WILLES, J.—The plaintiffs are not suing here as churchwardens.] They are suing in respect of rights which they allege they had before they ceased to fill the office of churchwardens. Then, as to the evidence. The parish books were not admissible, unless they were shown to have come to the possession or control of the plaintiffs. [COCKBURN, C. J.—The plaintiff Cooper had access to them. He was a parishioner and a vestryman.] He was not a parishioner at the time Law was appointed vestry-clerk. [BYLES, J.—He was a vestryman at the time of the trial, consequently the books came out of his custody. How, then, can you say that they were not admissible?]

COCKBURN, C. J.—I am of opinion that this rule should be discharged. It seems to me to be unnecessary to decide the question first submitted to us on the part of the defendant, viz. as to whether or not he could be considered as the agent of the plaintiffs at all. It is true that he was not appointed vestry-clerk (in which capacity the church-rate was received by him) by the plaintiffs, but by the vestry. I cannot help thinking, that, having collected the rate, if the churchwardens had demanded the money, the defendant would have been bound to hand it over to them; and a question, perhaps a nice one, might have arisen, whether he was not to be considered as their officer or agent. But it seems to me to be quite clear that the payments made by the defendant must be taken to have been payments made on behalf and with the sanction and approbation *of the plaintiffs. It seems clear, that, [*508 according to the practice of a long series of years, the churchwardens did not take upon themselves the discharge of the duties of their office, but left them to be performed by the vestry-clerk appointed by the vestry; and that for very many years payments which in strictness were not proper to be made out of the church-rate, had been made out of that fund. The churchwardens having delegated their duties to the vestry, payments made by the direction of the vestry must be taken to have been made by the direction and under the authority of the churchwardens themselves. But, independently of that, it appears to me that the finding of the jury was well warranted by the facts. The plaintiff Cooper, at all events, knew of and acquiesced in, and so sanctioned, the payments in question being made out of the church-rate. He had been for several years a member of the vestry, and for a still longer period he had been a parishioner. He had filled the office of

auditor of these very accounts. He had served the office of overseer, and knew what parochial charges were paid out of the poor-rate, and what out of the church-rate. Payments similar to these had all along been made and carried to the same account. Looking to these facts, and to the further fact of his having free access to the parish books, I think it is impossible to doubt that he knew of these payments and did not prevent their being made. If a person knows that an agent of his is about to apply moneys to a particular use, and chooses to lie by and suffer the payment to be made, I think it may fairly be said dum tacet loquitur, and that it has the same effect in law as in justice and honesty it should have. These circumstances seem to me plainly to show that the finding is right and the defendant entitled to judgment. It has been urged that the knowledge and acquiescence of one churchwarden
*509] cannot affect the *right of the two to sue. The answer to that was given in the course of the argument, viz. that this is not an action brought to enforce the plaintiffs' rights as churchwardens, but is brought by them in their private capacity, simply because in their public capacity they have no authority to delegate their functions to anybody. As to the reception of evidence, I think the reason suggested by my brother Byles for receiving the evidence is in itself sufficient, viz. that Cooper, being a member of the vestry, had access to the parish books, and may therefore be taken to have had knowledge of their contents. In addition to that, I think the evidence was receivable as showing the practice which had prevailed in this parish. The defendant having been appointed vestry-clerk, and being told that he would find his duties in the books of his predecessors, and there being no direct appointment of the defendant by the churchwardens, it must be taken that he was employed by them on the terms upon which he was appointed by the vestry. And, when he is told that he will find his instructions in the books, and those are adopted as the basis of his employment, it seems to me that the books must be admissible to show what the instructions were, and what were the terms on which he acted. Upon the whole, I am of opinion that justice and equity and fairness equally concur in requiring that our judgment should be in favor of the defendant.

CROWDER, J.—I am of the same opinion. Upon the evidence, it seems to me to be exceedingly doubtful whether there is any contract express or implied to render the defendant answerable to the plaintiffs in this action. The only part of the evidence from which any implication can arise, is, that, when Law asked Cooper to be churchwarden, he
*510] told him he would have *no trouble, as he (Law) transacted all the business. It seems to me, however, to be very doubtful, particularly when it appears that the defendant was distinctly appointed by the vestry, and to do the very thing he did, viz., to collect and dispose of the church-rate as had been done for many years. Acting as vestry-clerk by appointment of the vestry, and receiving his instructions from the vestry, it seems to me to be exceedingly doubtful whether there was any evidence that the defendant was employed by the plaintiffs. But it is unnecessary for us to decide that; for, assuming that he was employed by them, it seems to me that the fourth plea was established, viz. that the payments were authorized by them. Now, what was the evidence to establish that? There was no language expressly used to that effect: but there was very strong evidence to show that

Cooper was well aware of the manner in which the church-rates of former years had been dealt with by order of the vestry, viz. that payments had been improperly made out of that fund. Being aware of that, and knowing how the payments would be made, we must assume that he acquiesced in them. Then it is said that the evidence showed acquiescence on the part of Cooper only, and not on that of Truscott; and it is said that the latter was necessary also. The ground for that contention is, that there is this peculiarity in the character of churchwardens, viz. that they are a quasi corporation. The answer to that is, that the plaintiffs are not suing as churchwardens. The defendant has been guilty of no breach of duty towards them as churchwardens. The only way it can be put, is, that there was a contract by which the defendant was employed as agent of two persons who are churchwardens: but that would not render the defendant responsible as for the breach of a public duty. It only reduces it to the ordinary case of two persons *employing a third, and one of them giving him permission or authority to do an act, which would prevent the other from [*511 bringing an action. As to the alleged misreception of evidence,—I am glad to find that my learned Brothers are of opinion that the books were properly received, though I must own that I entertain some doubt. The books kept whilst Cooper was a vestryman would clearly be evidence. But, whether those kept before that period would be so, is a matter upon which I do not feel altogether satisfied. Upon the whole, however, I agree with my Lord in thinking that the rule should be discharged.

WILLES, J.—I am of the same opinion. Assuming that there was evidence of an employment of the defendant by the plaintiffs, I think that employment is shown to have been upon terms one of which was that the payments in question should be made as they were made. There was evidence of a course of business for a long series of years: and I think the jury were justified in inferring from that an intention that that course of business should be continued. Assuming that there was an authority from one of the two churchwardens, is there any difference between that and the case of one of two trustees releasing a debt, and one afterwards bringing an action for it? In Starkey *v.* Barton, Yelv. 172, Cro. Jac. 234, it is said by the court, "13 H. 7, 10, is, that, if churchwardens release or give the goods of the church, it is nothing worth; for, the law gives them power to receive a thing for the advantage of the church, but not for the disadvantage." Therefore, if this *were* an action by the plaintiffs as churchwardens, I am not satisfied that there is not a good answer to it. But there is another answer, viz. that this is a contract with the plaintiffs individually, the right of action in respect of which *would pass to the executors of the survivor. [*512 In either view, therefore, I think there is nothing in that point. Then, as to the admissibility in evidence of the parish books,—I think it would be clipping the evidence very close to say that you cannot show the history of the transaction, which, as it seems to me, these books were. It appeared from them that there was a long course of dealing with reference to payments out of the church-rate; and that Cooper had access to those books. If he was ignorant of the facts disclosed by those books, he might, when called, have negatived his knowledge of their contents. He did not do so.

BYLES, J.—I also think this rule should be discharged. I think it necessary only to say a word as to the disqualification of one of several plaintiffs to sue. I apprehend, that, if one of several plaintiffs is disqualified, his disqualification vitiates the right of his co-plaintiffs to sue, 1 H. 4, 15 a; Penruddock's Case, 5 Co. Rep. 100 b. And further I find that this question arose before the Court of King's Bench in Jones v. Yates, 9 B. & C. 532, 538 (E. C. L. R. vol. 17), 4 M. & R. 613, 621, where Lord Tenterden says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that, where one of two persons who have a joint right of action dies, the right then vests in the survivor; so that, in this case (if it be held that Sykes and Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act, by alleging his own misconduct." And still more recently has this rule been recognised in Wallace *v.* Kelsall, 7 M. & W. 264.† There, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant: and it was held that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement. Parke, B., there said: "In the case referred to of Jones *v.* Yates, the principle of the decision is, that, if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act." And there is no greater hardship in this than there is in holding a release by one of several plaintiffs a bar to an action by all. For these reasons, it appears to me, that, when it is made out that one cannot sue without committing a fraud, no other person can join him in an action for the same cause. Upon the other grounds, I entirely agree with the opinions expressed by my Lord and my Brother Willes,—not participating in the doubt entertained by my Brother Crowder as to the admissibility of the parish books. Rule discharged.

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*514] *HUNTLEY *v.* WARD. *May* 11.

The plaintiff's attorney having at his desire written to the defendant demanding payment of an alleged debt, the latter sent a letter to the attorney containing gross imputations upon the plaintiff's character, wholly unconnected with the demand made upon him:—Held, not a privileged communication, although the jury found that the letter was written bonâ fide, and negatived malice in fact.

THIS was an action for a libel contained in a letter addressed by the defendant to the plaintiff's attorney.

The cause was tried before Williams, J., at the second sitting at Westminster in this term. The facts were shortly these:—The defendant being indebted to the plaintiff in the sum of 6*l.* 10*s.*, the latter caused his attorney to write him a letter threatening to take proceedings against him to recover it. To this the defendant sent an answer ad-

dressed to the attorney, containing very gross aspersions on the character of the plaintiff.

On the part of the defendant, it was submitted, upon the authority of Toogood *v.* Spyring, 1 C. M. & R. 181,† 4 Tyrwh. 582, and Harrison *v.* Bush, 5 Ellis & B. 344 (E. C. L. R. vol. 85), that assuming the letter to contain libellous matter, the occasion upon which it was written rendered it a privileged communication.

The learned judge thought otherwise, and he left it to the jury to say whether or not the defendant was actuated by motives of malice in writing as he did.

The jury expressed an opinion that the letter was written bonâ fide and without any malice in fact; and they returned a verdict for the plaintiff, damages one farthing.

The learned judge certified, under the 3 & 4 Vict. c. 24, s. 2, that the grievance for which the action was brought was wilful and malicious; but he reserved to the defendant leave to move to enter a verdict for him, if the court should be of opinion that the occasion of the writing rendered the communication privileged.

Cole now moved accordingly.—The simple question *is whether the letter was not written upon an occasion which fairly [*515 brings it within the class of privileged communications. It was addressed to a person who had been employed by the plaintiff to put the law in motion to enforce a demand which the defendant believed to be unjust. In Toogood *v.* Spyring, Parke, B., thus lays down the rule,—"In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." Now, this letter was written by the defendant with reference to the conduct of his own affairs, and in a matter in which his interest was concerned. "In such cases," says the learned Baron, "the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; *and the law has not restricted the right to make them within any narrow limits.* [WILLES, J.—If you have any case where such a communication as this has been held to be privileged, I should like to see it.] In Harrison *v.* Bush, 5 Ellis & B. 344 (E. C. L. R. vol. 85), the defendant was an elector and an inhabitant of the borough of Frome; and, after the election was over, he and several other inhabitants of the borough prepared, signed, and transmitted to the Home Secretary a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly *inciting to a breach of the [*516 peace; that, after reading the riot act, he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in the commission of the

peace, and concluded thus,—"Your memorialists, therefore, earnestly pray that your Lordship will cause such an inquiry to be made into the conduct of the said Dr. H. (the plaintiff) as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to Her Majesty that the said Dr. H. be removed from the commission of the peace." The jury having found that the defendant acted bonâ fide,—it was held that the defendant was entitled to the verdict on not guilty, notwithstanding that the memorial was addressed to a person who had no power to entertain the matter. All the authorities upon the subject of privileged communications are referred to and discussed in an elaborate opinion by Lord Campbell. [WILLES, J.—That is put upon the ground that the memorialist had both an *interest* and a *duty* in the subject-matter of the communication.] Cooke v. Wildes, 5 Ellis & B. 328 (E. C. L. R. vol. 85), was not a case of public duty. The onus of showing malice lay on the plaintiff.

WILLES, J.(*a*)—I am of opinion that there ought to be no rule in this case. Mr. *Cole* has not complained of the direction of my Brother Williams upon the question whether the letter was libellous or not: nor *517] could *he properly have complained of that direction, because whether libel or no libel is equally in civil and criminal proceedings a question for the jury: yet the judge cannot properly withhold from the jury his opinion. The construction of writings in most cases belongs to the court: this is an exception to the general rule; and I quite agree in the propriety of the exception. Every lawyer is well aware, that, although the Libel Act, 32 G. 3, c. 60, applied more particularly to criminal cases, yet there is no distinction in this respect between the law in criminal cases and that in civil;(*b*) and that the opinion of the dissentient judge (Willes, J.) in the case of The King v. The Dean of St. Asaph, 3 T. R. 428, n., is the proper exposition of the law. Then, the jury here have found the letter to be libellous in the sense of imputing to the plaintiff matter tending to injure his reputation, and to expose him to hatred, contempt, and disgrace. Generally speaking, a writing is libellous if it has that effect. There are, however, certain excepted cases, where a communication is privileged, though primâ facie libellous. But these are cases where the matter is written in the assertion of some legal or moral duty, or in self-defence, and the thing is done honestly and without sinister motive, and in the bonâ fide belief in the truth of the statement at the time of making it. In such cases, no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged, because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury. Therefore, upon principles of public policy, such communications are protected. The question is whether the letter in the present case falls within that category. It appears to me that the *518] principle does not *apply. There was no legal or moral duty to be discharged by writing a letter to the plaintiff's attorney heaping abuse upon his client. It was not written either in assertion of or

(*a*) The Lord Chief Justice was absent on account of indisposition; and Crowder, J., was presiding at the Central Criminal Court.

(*b*) See per Littledale, J., in Bayliss v. Lawrence, 11 Ad. & E. 925 (E. C. L. R. vol. 39).

defence against any claim; and therefore does not fall either within the principle or within any of the decided cases. As to the authorities which have been cited,—one of course at once assents to the doctrine, that, if the communication would be privileged provided the statement were made honestly and bonâ fide, there must be some evidence of sinister motive or untruth to turn the scale, and to take the case out of the privileged class. If that were not so, the privilege would be all but useless. But, to entitle him to the benefit of the rule, it is necessary that the defendant should make out that the circumstances of the publication were such as to bring the case within it. I think in this case the defendant has failed to do that, and therefore there is no ground for disturbing the verdict.

BYLES, J.—I am of the same opinion. The libel complained of was contained in a letter written by the defendant to the plaintiff's attorney in answer to a letter addressed to him by the latter demanding payment of a debt alleged to be due to the plaintiff. The letter, however, is not confined to the history of the supposed ground of action, but contains general and gross abuse of the plaintiff, and imputations upon his character. Words of general abuse, if in writing, are actionable, because they tend to bring the party libelled into public hatred and contempt.(a) There clearly was no legal or moral duty here to justify the defendant in the course he took. Rule refused.

(a) See 2 Selwyn's Nisi Prius, 12th edit. 1049 et seq.

*COOPER v. LLOYD. *May* 12. [*519

The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries.

And, in such a case, the wife herself is an admissible witness to prove the adultery.

A cause was tried on the last day but two of Easter Term. The court refused to allow a motion for a new trial to be suspended until the first day of Trinity Term, on the ground that the attorney had not had time since the trial to prepare himself with affidavits of surprise.

THIS was an action to recover the price of necessaries supplied by the plaintiff to the wife of the defendant. The cause was originally commenced in the Lambeth county court, but was removed thence to this court by certiorari.

At the trial before Williams, J., at the second sitting at Guildhall in this term, the defence set up was that the wife had been guilty of adultery, and was living apart from her husband: and to prove this the wife herself was called, and she, after some hesitation, admitted the fact.

To rebut this, the plaintiff called witnesses to prove, that, after the alleged adultery, the defendant had several times visited his wife at the house where she was residing, which was not the place where the goods had been supplied.

On the part of the defendant it was shown that these visits had reference to a treaty which was pending between him and his wife for a deed of separation, which was ultimately agreed upon and executed.

The learned judge told the jury, that, if the wife had been guilty of adultery, and there had been no subsequent pardon or condonation, the

husband would not be liable upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery, unless there has been a subsequent condonation on his part: and he left it to them to say whether they were satisfied that *520] *adultery had been committed, and that there had been no condonation, telling them, that, if they were of that opinion, they must find for the defendant.

The jury accordingly returned a verdict for the defendant.

Patchett now moved for a new trial, on the grounds of misdirection, the improper reception of evidence, and that the verdict was against evidence. Before proceeding with his motion, he prayed to be allowed to reserve it until the first day of the next term, on the ground that, the trial having so recently taken place,—viz. on the 10th instant,—he was unprepared with affidavits of surprise, which he otherwise would have had. [WILLIAMS, J.—The rule of court (*a*) precludes us from allowing that: you must move upon the materials you have.]—The liability of a husband in respect of goods supplied to his wife arises from her implied agency: Reid *v.* Teakle, 13 C. B. 627 (E. C. L. R. vol. 76). In the notes to Manby *v.* Scott (1 Lev. 4, 1 Siderf. 109, 1 Keble 69, 80, 87, 206, 337, 361, 383, 429, 441, 482, 1 Mod. 124, 1 Ventr. 24, 42, 2 Ventr. 155) in 2 Smith's Leading Cases, 385, it is said: "The principle affirmed in Manby *v.* Scott, and followed up by the later authorities, is to be found so far back as Fitzherbert,—'A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his *521] bailiff or *servant to buy and sell for him; *and so for the contract of his wife, if he giveth authority to his wife, otherwise not:*' F. N. B. 120 G. The principle thus laid down by Fitzherbert, and acted on by the majority of the judges in Manby *v.* Scott, viz. that a wife's power, where it exists, to bind her husband, is as his agent, by virtue of an *express* or an *implied* authority derived from him, has never since been shaken. Consequently, wherever it is sought to charge a husband on his wife's contract made during the coverture, the only question is,—as where it is sought to charge him with the contract of any other agent,—had the wife in the one case, or the agent in the other, authority, either *express* or *implied*, to make such a contract?" The learned judge, therefore, should have left the question of agency to the jury; and, notwithstanding the adultery (assuming it to have been proved), there was abundant evidence to establish an implied agency, inasmuch as the husband was shown to have been visiting at the house where the wife lived, and so giving his sanction to the supply of the goods. Thus, in Norton *v.* Fazan, 1 Bos. & P. 226, where the defendant, knowing his wife to have committed adultery, allowed her to remain under the marital roof, with children bearing his name, his lia-

(*a*) Hilary Term, 1853, which provides, that "no motion for a new trial, or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the day of trial, *nor in any case after the expiration of the term*, if the cause be tried in term, or after the expiration of the first four days of the ensuing term when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court."

bility was held to continue, though he himself had separated from her. [WILLES, J.—There, she remained the apparent mistress of his establishment. That was, as Buller, J., observed, an anomalous case. The cases on this subject are divisible into two classes,—"1. Where the contract made by the wife was made while living with her husband. 2. Where the contract made by the wife was made while living away from her husband. The principle which governs cases ranging themselves under the former class, is, that, during cohabitation, there is a presumption arising from the very circumstances of the cohabitation, *of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate." There, the husband is bound by acts done by his wife within the ordinary scope of her agency. Norton *v.* Fazan falls within that class. "The next class of cases is that in which the wife, at the time of making the contract, is living apart from the husband. We have just seen, that, during the cohabitation, the presumption is, until the contrary be shown, that she has authority to contract for necessaries. But, in the class of cases we are now considering, the presumption is the other way; and it is on the creditor to show that she is living apart from the husband under such circumstances as give her an implied authority to bind him. And this is just; for, when a tradesman sees two persons living together as man and wife, he naturally infers that there is that degree of confidence and affection subsisting between them, which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes. But, when a tradesman finds a woman living alone, the presumption is quite the other way; and he must naturally suppose that she is either a feme sole, or, if he knew her to be married, that she is not on such terms of confidence and affection with her husband as could induce him to intrust her with authority to bind him by her contracts:" 2 Smith's Leading Cases 286, 288. In the first class of cases, it is immaterial whether the woman be his wife or not. The present is a totally different case. Where the separation is caused by the wife's misconduct, she carries with her no implied authority to bind her husband.] Then, the wife's evidence was not admissible to prove the adultery. [WILLES, J.—Did you object to the question?] No. [BYLES, J.—Why do you say her evidence was inadmissible?] Because her answer would criminate her. In *Taylor on Evidence, § 695, 3d edit. Vol. I., p. 626, it is said: "The admissions of a wife cannot be received in evidence *for her husband* in any suit between him and a stranger, unless, perhaps, in the single event of their constituting part of the res gestæ. An instance of their admissibility on this ground is afforded by the case of Walton *v.* Green, 1 C. & P. 621 (E. C. L. R. vol. 12), where, in an action of assumpsit for goods supplied to a wife who had been turned out of doors by her husband, the defendant, evidence was admitted, in support of a defence which relied on her previous adultery, that she had confessed her guilt to a third party; as it appeared to have been partly in consequence of this confession that she had been put away by her husband. This case is here noticed more out of respect for the eminent judge [Abbott, C. J.] who decided it than because it appears to rest upon any sound principle of law. The question was, not whether the husband had reason to suspect his wife's fidelity, but whether she had in fact committed adultery; and, to allow her admis-

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sions to establish that fact, and thus screen her husband from the claims of a stranger, would seem to be directly opposed to the rule of law which rejects hearsay evidence." [BYLES, J.—The admissions of the wife rest upon a totally different principle.(a)] The effect is the same.

WILLES, J.(b)—With regard to the matters of law relied upon in support of this motion, we are prepared at once to dispose of the rule. With regard, however, to that part of the motion which prays for a new trial on the ground that the verdict is against evidence, we will speak to
*524] my Brother Williams. The fact of this being *the last day of the term, and of only one day having intervened between the trial and the motion, ought not, I think, to induce us to depart from the rule of court (Hilary, 1853, r. 50) which requires that all applications to set aside verdicts shall be made within four days after the trial, in term. We should be overwhelmed with applications to postpone motions if we were to permit this rule to be relaxed. That disposes of the matter so far as regards a new trial on the ground of surprise, the learned counsel not being furnished with the necessary affidavit. The next ground upon which the motion rests is an alleged misdirection; and that arises thus,—This being an action against a husband for necessaries supplied to his wife, and it appearing that at the time of the supply she was living apart from him, my Brother Williams told the jury, that, if the wife had been guilty of adultery, and there had been no subsequent condonation, the husband would not be liable upon the implied obligation which the law imposes upon him to support his wife when living apart from him either in consequence of his misconduct or by his consent; for, that the implied authority of a wife who is not living with her husband as a part of his family, to charge him for necessaries, is put an end to by the effect of her adultery. That seems to have been the substance of the direction; and it appears to me that it is perfectly good law. Mr. *Patchett* contends that it was not sufficiently shown here that the wife was living apart from her husband, and that there was evidence of authority which should have been submitted to the jury, apart from the conjugal relation. But I think he wholly failed to show any evidence of such authority. All that appeared, was, that the husband had visited his wife, but not at the place where the goods were supplied. This was
*525] a circumstance from which, if unexplained, the jury might *have inferred condonation. These visits, therefore, must have been thought by them not to have been visits for the purpose of restoring the wife to the society and confidence of her husband, but to have been made altogether alio intuitu. It would be a gross abuse and perversion of justice, when the law lays down that which is a substantial and honest position, that the implied authority of the wife to bind her husband by her contracts is put an end to by her adultery, for us upon slight circumstances pointing equally to one conclusion as to the other, to hold that the jury have come to a wrong one. It appears to me that this disposes of the plaintiff's first proposition: there was proof of adultery, and no condonation. For this there is abundant authority: see, amongst others, the cases of Govier *v.* Hancock, 6 T. R. 603, and The King *v.* Flintan, 1 B. & Ad. 227 (E. C. L. R. vol. 20), and the expressions of the judges in Atkyns *v.* Pearce, 2 C. B. N. S. 763 (E. C. L. R. vol. 89).

(a) See Taylor on Evidence, 3d edit. p. 628, § 698.

(b) Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

Then, assuming that the direction of the learned judge was right, it is said there was no such evidence of adultery on the part of the wife as ought to have been left to the jury. That rested upon her own confession of her guilt. It is undoubtedly true that such a confession may be the result of collusion between the husband and wife for the purpose of defeating the plaintiff's claim. That consideration has been allowed to weigh in some of the cases. Thus, in divorce cases, the confession of the wife has always been held an insufficient ground of judgment. But I am not aware that that principle has ever been introduced into the common law courts. The statute (14 & 15 Vict. c. 99) which permits a wife to give evidence for or against her husband has no such exception, though it has in respect of criminal proceedings: s. 3. And, if there were any force in the objection, it goes rather to the value than the admissibility of the evidence. With regard *to the privilege suggested, that is the personal privilege of the witness: it gives no right to the plaintiff,—more especially where no objection was made at the time. [*526

As to the remaining question, viz. whether the verdict was against the evidence, we will consult my Brother Williams, and communicate the result to the officer of the court.

BYLES, J., concurred. The rule was afterwards refused.

See notes to Manby *v.* Scott, 2 Smith's Lead. Cas. 385; and to Johnston *v.* Sumner, 3 H. & N. 270.

MASON *v.* HADDAN. *May* 12.

Quære, whether the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), applies to an agreement to refer *existing* matters in difference to arbitration, or is limited to contracts containing stipulations for the reference of *future* differences?

By a memorandum it was agreed that all matters in difference in relation to the W. Railway, between A. and B., and between A. and the W. Railway Company, and also between C. and B., and between C. and the W. Railway Company, whether retrospective or prospective, present or future, should be referred to an arbitrator. This memorandum was signed by B. for himself, and also as agent for the company. A formal deed of reference was afterwards prepared and executed by B., but by none of the other parties:—Held, that, assuming the agreement to be within the 11th section of the Common Law Procedure Act, 1854, at all events it was not one which the court ought in its discretion to enforce by staying the proceedings in an action brought by B. against A. in respect of a matter in difference included within it.

That office copies of affidavits upon which a rule is moved have not been taken, is not an objection which this court will entertain after the argument has been allowed to commence.

ON the 10th of July, 1856, the following agreement was made and signed by the defendant and also by the plaintiff for himself and for the railway company therein mentioned, whose solicitor he then was:—

"Memorandum, 10th July, 1856. It hath this day been agreed that all matters in difference relative to the Westminster Terminus Railway and the Clapham *and Norwood Railway, between John Coope Haddan and Nathaniel Mason, and John Coope Haddan and the Westminster Terminus Railway Company, and also between Price Pritchard Baly and the said Nathaniel Mason, and the said Price Pritchard Baly and the same company, whether retrospective or prospective, present or future, shall be referred to T. Webster, Esq., as the arbitrator mutually agreed on between the parties in difference, with full powers in relation thereto, and particularly as to mutual releases, such [*527

releases to include, if required, all contingent payments and benefits: the necessary arbitration bond or agreement or bonds or agreements to be settled by Mr. Webster, or a conveyancer appointed by him, as counsel for and on behalf of all parties, and to be duly signed and executed by the parties in difference.

"NATHANIEL MASON, for self.

"N. MASON, for the Westminster Terminus Railway Company.

"I undertake to have the seal of the company affixed hereto forthwith. "N. MASON."

Shortly after the execution of the agreement Haddan was informed by Mason that the company's seal had been affixed thereto. Mr. Webster being a shareholder in the company, one Baxter was subsequently appointed arbitrator in lieu of him. A formal agreement of reference was afterwards prepared by a conveyancer (Mr. Bullar), and executed by Mason, but neither by Haddan nor by the company.

After many ineffectual attempts by Haddan to get the company to execute the deed of reference, and a long correspondence between the solicitors for the respective parties, the present action was brought by
*528] Mason to recover the sum of 610*l.* 1*s.* 6*d.* alleged to be *due to him from the defendant upon the following items of account:—

"John Coope Haddan to Nathaniel Mason.

"1855.		£	s.	d.
"March 1.	To your loan	100	0	0
"April 3.	To paid London and County Bank interest on deposit for the Clapham and Norwood Junction Railway	172	7	0
	To paid Messrs. Wilkinson & Stevens for costs of securities	42	0	0
"May 4.	To paid ditto balance of costs	28	0	0
14.	To you loan	100	0	0
25.	Ditto, for counsel's fees	67	14	6
"June 23.	To paid Messrs. Marchant & Pead by your order	100	0	0
		£610	1	6

Summonses were afterwards taken out before Williams, J., at Chambers, when that learned judge suggested that the reference should proceed as between Mason and Haddan alone, but he ultimately referred the parties to the court.

Upon an affidavit of these facts, and also stating that Haddan was and always had been willing and desirous to proceed to a reference of the matters in difference which had been referred in the manner thereinbefore stated, whether generally or (in the event of the company refusing to concur) such of them as were between the plaintiff and himself alone,

David Keane, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why all further proceedings in this cause should not be stayed, the action having been brought in respect of matters previously agreed by the parties to be referred to arbitration, and
*529] why he should not pay the costs of the *action and of the application. The affidavits upon which the rule was obtained further stated "that the plaintiff's claim in this action for moneys alleged to have been advanced by him to the defendant or on his account in the year 1855, was part of the matters in difference between the plaintiff and himself which were comprised in the agreements for reference there-

inbefore set forth and referred to respectively, as the moneys of which such claim consisted were advanced (if and so far as they were so at all) with special reference to or in aid of his (the defendant's) promoting the Clapham and Norwood Junction bill then before parliament and in which the plaintiff was interested, on security of the large claims the defendant then had and still had on the plaintiff and the said Westminster Terminus Railway Company respectively, and of the defendant's interest in the Clapham and Norwood Railway project, as the promoter thereof; and further that Mason had ceased to be solicitor for the company, and that the deponent believed that one object of the change of solicitors was in collusion with the plaintiff, for the purpose of defeating or delaying the arbitration which he and the company had agreed on with the defendant."

Matthews now showed cause (*a*) upon an affidavit by Mr. Mason, in which he deposed, amongst other things, as follows,—that he executed the agreement of *reference prepared by Mr. Bullar, as mentioned in the affidavit of the defendant, *as an escrow*, and he would not have executed the same except upon the understanding that the company would join in and proceed with the reference according to the terms of the said agreement; that he ceased to be solicitor for the company on the 12th of April, 1858, when Messrs. Terrell & Chamberlain were appointed to be such solicitors, of which fact he informed the defendant's attorney on the following day; that, under the advice of Messrs. Terrell & Chamberlain, the company had hitherto refused to proceed on the reference; that the change of attorneys was not in any respect collusive or intended to delay or defeat the proposed arbitration; that the deponent ceased to be the solicitor of the company, not for the purpose of preventing the arbitration, but in consequence of certain proceedings in Chancery to which the company and himself were parties; that Messrs. Terrell & Chamberlain, in advising the company, acted wholly independently of the deponent, and without any reference to any supposed interests of his in preventing the said arbitration; and that he had no power to compel the directors or the company to proceed with the reference, but was advised and believed that the defendant could have compelled them to do so if he had thought proper. [*530

This motion is founded upon the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then-existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against *the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which [such] action or suit is brought, or a judge thereof, on [*531

(*a*) After the argument had proceeded some little way, *Keane* interposed, and objected that office copies of the affidavits on which the rule was obtained had not been taken. WILLES, J.—The objection comes too late. *Keane*.—In the Queen's Bench and Exchequer, the objection is permitted to be taken at any time: it is for the protection of the Treasury. WILLES, J.—The practice is otherwise in this court. You are at least five minutes too late.

application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require." A memorandum like this is not within that section. It does not apply to an agreement of reference entered into subsequently to the differences arising. In Blythe *v.* Lafone, 5 Jurist N. S. 364, Lord Campbell says: "I have no doubt that s. 11 of the Common Law Procedure Act, 1854, contemplates the case of an agreement, whether under seal or not, in which there is a stipulation, that, if differences should arise, they should be referred to arbitration, and that, if an action at law should be brought, instead of settling the matter by arbitration, the court might stay the proceedings in the action. There were some strange decisions in law, that the jurisdiction of the courts was not ousted by a private agreement to refer, and persons were not allowed to choose their own tribunal for the settlement of their disputes. To remedy that, s. 11 *532] was enacted: *it does not apply to a subsequent *agreement of parties to refer, where there is no such stipulation in the original deed or instrument.*" [BYLES, J.—The words of the section are, "any then-existing or future differences."] Crompton, J., in the case above referred to, says: "Sect. 11 of the Common Law Procedure Act, 1854, was intended to remedy the case in which parties entered into a deed or instrument containing a clause agreeing that there should be no action, but a private settlement of differences by arbitration; there was a doubt whether as to future differences such an agreement would be enforced.(*a*) It was intended by s. 11 to give the court power in such a case to stay the proceedings in an action." The statute clearly was intended to apply, not to cases where differences had already arisen, but to differences which might in future arise upon the construction of the contract. [BYLES, J.—I am not prepared to accede to that: it would be giving a very narrow construction to the language of a very useful section, which is very large and comprehensive.] An agreement to refer existing differences is a submission, not a contract with a collateral agreement to refer. At all events, this is clearly not a case in which the court would feel inclined to exercise the discretion given to them by the latter branch of the clause. The plaintiff only entered into the agreement to refer, upon the faith of all the other parties concurring in it.

Keane, in support of the rule, submitted, that, having signed the agreement to refer, the plaintiff ought not now to be permitted, in defiance of his contract, to bring an action for that which was confessedly one of the matters in difference intended to be embraced by the proposed *533] reference; that there could be no reason *why the court should not exercise the jurisdiction given to them by the statute, to pre-

(*a*) See Tattersall *v.* Groote, 2 Bos. & P. 131.

vent injustice being done; and that it was manifest from the affidavits that the plaintiff was colluding with the railway company, and had ceased to be their solicitor merely for the purpose of evading the engagement he had entered into.

WILLES, J.(a)—I am of opinion that this rule should be discharged. It is a rule founded on the 11th section of the Common Law Procedure Act, 1854, calling on the plaintiff to show cause why all further proceedings in this cause should not be stayed, on the ground that he and the defendant were parties to an instrument in writing by which it had been agreed that the cause of action should be referred to arbitration, and that this action had been brought in violation of that agreement. Now, in order to entitle him to make this rule absolute, he must make out, first, that there is such an agreement, and, in the second place, he must satisfy the court that "no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement." As to the first point, it is perhaps unnecessary to express any decided opinion; but, as at present advised, the court would not be disposed to abstain from holding that the memorandum in question would be within the statute, notwithstanding the Court of Queen's Bench is suggested to have expressed a different opinion in Blythe *v.* Lafone. I will say no more upon that case than that I am hardly satisfied that the court really did lay down such a matter. There is, however, another objection connected with the first point here, upon which, if necessary, we might pronounce against the rule; that is, that no such deed or instrument in *writing has been made or executed as the [*534
statute contemplates. It can hardly be contended that a mere executory memorandum such as that first drawn up here is a deed or instrument within the 11th section: and, as to the more formal document afterwards prepared by Mr. Bullar, that was not executed by the defendant himself, nor was it executed by the company which was intended to be a party to the reference. I feel great difficulty in interposing under that section in favour of a person who comes merely alleging that he is ready and willing to execute and to carry into effect the proposed reference. We could hardly make the rule absolute upon the defendant's mere undertaking that he will execute the deed or that he will proceed with the reference. It seems to me that the section points to a completed instrument already binding between the parties. It may be possible that the non-execution by the company might not be open to the objection I have suggested; but, at all events, it is a matter which comes within the second consideration to which I have referred, because it affords a sufficient reason for not referring to arbitration. It is clear that the inducement for the plaintiff's entering into the agreement to refer, was, that there should be a final settlement of the matters in difference, not only between Mason and Haddan, but also between Haddan and the Westminster Terminus Railway Company, and between Baly and Mason, and between Baly and the company. If the proceedings in this action were stayed upon the notion that there is to be an arbitration between Mason and Haddan only, the intention of the submitting parties would not be carried out. Upon the whole, therefore, it appears to me that this is not a case in which the court ought to be

(a) Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

called upon to interfere under the 11th section, even if it clearly had jurisdiction in respect of the character of the instrument and the matter
*535] *to which it relates. As to the costs,—looking at the affidavits, I think Mr. Mason has sufficiently answered the affidavit of the defendant, so far as to satisfy the court that the change of solicitors was not made for the purpose suggested, and that the directors are not so far in his power or under his influence as to enable him to compel the company to execute the deed. Still I think there is enough upon the affidavits to show that there exists such a degree of connection between Mason and the company, that I am not disposed to discharge the rule with costs.

BYLES, J.—I am of the same opinion. The old rule of law was, that an agreement to refer was no bar to an action at common law. That rule was productive of great hardship and inconvenience; and accordingly the 11th section of the 17 & 18 Vict. c. 125 was directed to remedy the evil. That section is conceived in the widest terms: and, in the absence of any express decision the other way, it is our duty to give it the full construction which is due to a remedial statute,—to suppress the mischief and to advance the remedy. Subject to the observations on Blythe *v.* Lafone, I conceive the present case comes within the first branch of the 11th section; but, to enable us to act upon that, it is necessary that we should be satisfied that no sufficient reason exists why the matters cannot or ought not to be referred,—that is, why the arbitration between Haddan and Mason, and Haddan and the company, and the other parties, should not be carried out. The onus of satisfying the court of that lay upon the defendant. I for one am not satisfied. Mason has not the full consideration to which it is entitled. I therefore think the rule must be discharged, but without costs.

Rule discharged accordingly.

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*536] *NOTMAN and Another *v.* THE ANCHOR ASSURANCE COMPANY. *May* 12.

Quære, whether a special case can be amended after judgment, and writ of error brought, without consent?

ON the 23d of June, 1853, the plaintiffs (in Glasgow) effected a policy for 2000*l.* upon the life of one Michael Finlayson Stirling, one of the conditions of the insurance being that the policy should be void if Stirling should go beyond the limits of Europe without leave of the directors. Stirling contemplating a return to Belize, Honduras, where he had been some years residing, the following endorsement was made upon the policy:—"The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed."

The (original) premiums were regularly paid each half-year down to the 22d of December, 1857.

The extra premium for *one year's* foreign residence was paid on the 23d of June, 1853, but Stirling did not in fact proceed to Belize until the 9th of June, 1856. No further premium for foreign residence was ever paid.

Upon a case stated by judge's order under the Common Law Procedure Act, 1852, in which the question presented to the court was, whether the permission to go and reside "for one year" at Belize meant a year's residence unconditionally and *at any time*, or was intended to be a year commencing within a reasonable *time, it was erroneously stated as a fact that the assured arrived at Belize "about [*537 the middle or latter end of August, 1856," and died there on the 13th of August, 1857.

This court having given judgment for the plaintiffs,—holding that the permission to reside "for one year" at Belize was not limited to any particular year, and consequently that the plaintiffs were entitled to recover the sum assured,(*a*)—the defendants brought error.

It being afterwards discovered that the defendants had been misled by the information which they had received from the plaintiffs, and that, in point of fact, Stirling arrived at Belize on the 29th of July, 1856, and consequently did not die within the year for which the extra premium had been paid,

Bovill, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiffs to show cause why the special case should not be amended in this respect, or why, if the fact were not admitted, an issue should not be directed to ascertain it.

J. Wilde, Q. C., now showed cause.—He admitted that the party assured arrived at Belize on the 29th of July, 1856, and not "about the middle or latter end of August," as stated in the case, and that the decision of this court was based upon the supposition of his having died within a year after his arrival. But he urged that it was an unusual thing to amend a special case after judgment. Res judicata pro veritate accipitur. [BYLES, J.—The case was argued on both sides upon the assumption of a certain fact being true, which has since turned out not to be so. Does it not resolve *itself into a question of costs? [*538 WILLES, J., referred to Marriott *v.* Hampton, 7 T. R. 269, 2 Esp. N. P. C. 546, and Hamlet *v.* Richardson, 2 M. & Scott 811 (E. C. L. R. vol. 28), 9 Bingh. 644 (E. C. L. R. vol. 23).] Down to this moment the plaintiffs have been perfectly in the right. [WILLES, J.—I think as the price of the amendment, *which seems to be consented to*, the plaintiffs should have all the costs thereby occasioned,—so as to be a full indemnity.]

Bovill, in support of the rule, submitted that the costs should abide the event.

WILLES, J.(*b*)—The court feel relieved by the consent of the plaintiffs to the proposed amendment; but counsel must take care that that consent does not involve consequences beyond the mere amendment of the case. All costs should be paid by the defendants from the time the

(*a*) Vide 4 C. B. N. S. 476 (E. C. L. R. vol. 93).

(*b*) Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

mistake occurred, and they should be full indemnifying costs. This application, and the order of the court made thereon by consent, must not be drawn into a precedent. The Common Law Procedure Acts undoubtedly contain very large powers of amendment: (*a*) but we must
*539] construe them according *to the general rules which regulate the procedure of the courts; for it is expedient that there should be an end of litigation, seeing that litigants are mortal.

BYLES, J.—It must be distinctly understood that what is done is done by consent, and is not to form a precedent for any future similar application. Rule accordingly.

(*a*) In Hills *v.* Hunt, 15 C. B. 30 (E. C. L. R. vol. 80), Jervis, C. J., upon an application to amend a special case, said,—"The points are presented for our opinion by consent of the parties. They are bound by what they have consented to."

That case, however, occurred just before the passing of the 17 & 18 Vict. c. 125, the 96th section of which enacts that "it shall be lawful *for the superior courts* of common law, and every judge thereof, and any judge sitting at Nisi Prius, *at all times* to amend all defects and errors in *any proceedings* under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."

OLDFIELD *v.* PRICE. *May* 12.

Upon a reference to arbitrators or an umpire to ascertain the amount due for fire-damage upon a policy of assurance,—the court will not interfere to set aside or to send back the award, on a mere suggestion that the umpire has adopted an erroneous principle of valuation.

An order for enlarging the time for making an award as to matters in difference, was intituled in a cause in the Queen's Bench which was at an end:—Held, that the title was mere surplusage, and did not invalidate the order.

THE following agreement of reference was entered into on the 22d of September, 1858, between the plaintiff, Alexander Oldfield, and the defendant, Thomas Price, as secretary of The General Life and Fire Assurance Company.

"Whereas, by a policy of assurance dated the 18th of March, 1856, the said Alexander Oldfield effected an insurance with the British Empire Mutual Fire Assurance Company against loss or damage by fire on the property therein described (not exceeding the sum therein specified on
*540] each article as the value thereof), *viz. on household goods, wearing apparel, linen, plate, printed books, wine and liquors in private use, 200*l.*; on pictures, prints, and drawings (not more than 10*l.* on any one picture or print), musical and mathematical instruments, jewels, watches, and trinkets in private use, china, glass, earthenware, and looking-glasses, 50*l.*, in a dwelling-house situate No. 17, Devonshire Street, Queen's Square, Bloomsbury; on stock and utensils in trade and fittings in workshop in rear, 700*l.*; on goods in trust therein and in house, 400*l.*,—upon and subject to the several conditions, restrictions, and stipulations therein mentioned and thereon endorsed: And whereas, the business of the said British Empire Mutual Fire Assurance Society has since the date of the said policy been amalgamated with that of the said General Life and Fire Assurance Company, who have undertaken

the responsibility of the said British Empire Mutual Fire Assurance Society (if any) upon the said policy; and the said Thomas Price is the person in whose name the said General Life and Fire Assurance Company sues and is sued: And whereas, on or about the 2d of February, 1858, a fire happened on the premises No. 17, Devonshire Street aforesaid, and the said Alexander Oldfield has made a claim for loss in respect of the articles so insured as aforesaid, amounting in the whole to 994*l.* 9*s.* 7*d.*: And whereas, the said General Life and Fire Assurance Company dispute their liability to pay the amount so claimed under the said policy as aforesaid, upon various grounds: And whereas an action has been brought by the said Alexander Oldfield in the Court of Queen's Bench at Westminster against the said Thomas Price as the public officer of the said General Life and Fire Assurance Company for the recovery of the said sum of 994*l.* 9*s.* 7*d.* under the said policy, and the defendant pleaded thereto, and, among other things, alleged as a *third plea that the plaintiff had not complied with a condition endorsed [*541 on the said policy which required him to deliver to the said British Empire Mutual Fire Assurance Society a certain certificate therein mentioned or described, before any loss under the said policy should be made good: And whereas, in order to prevent further litigation, and for the purpose of settling all disputes between the said parties, it has been agreed that the said Thomas Price, on behalf of the said General Life and Fire Assurance Company, should pay to the said Alexander Oldfield the sum of 100*l.* in part payment, or in satisfaction (as the case might be) of any moneys which the said Thomas Price or the said General Life and Fire Assurance Company might be declared liable to pay to the said Alexander Oldfield by the award hereinafter mentioned (such payment to be without prejudice to the position or rights of the said General Life and Fire Assurance Company), and that such agreement for reference should be entered into as hereinafter contained: And whereas, the said sum of 100*l.* hath accordingly, in part performance of the said agreement, been paid to the said Alexander Oldfield before the execution hereof, as he doth hereby admit and declare: Now, this agreement witnesseth, that, in further performance of the agreement, and in consideration of the premises and of the several agreements on the part of the said parties hereto hereinafter contained, it is hereby mutually and reciprocally agreed by and between the said Alexander Oldfield and the said Thomas Price for and on behalf of the said General Life and Fire Assurance Company in manner following, that is to say, that the amount of the loss alleged to have been sustained by the said Alexander Oldfield in respect of all and every or any of the goods, articles, and things (whether the property of the said Alexander Oldfield, or held in trust by him), insured, *or alleged or claimed to be [*542 insured, by or under the said recited policy, and all questions, disputes, and differences whatsoever between the said parties hereto in relation to the amount of the loss so alleged to have been sustained by the said Alexander Oldfield in respect of such goods, articles, and things, by reason of the said fire, shall be and the same are hereby referred to the award, order, arbitrament, final end, and determination of Mr. Thomas Young, of, &c., as the arbitrator for and on behalf of the said Alexander Oldfield, and Mr. Adolphus John Lewis, of, &c., as the arbitrator for and on behalf of the said Thomas Price, or, in case of any

difference between the said arbitrators, then to the award, order, arbitrament, final end, and determination of their umpire, to be chosen by them before entering upon the matters hereby referred to them; so as the said Thomas Young and Adolphus John Lewis or their umpire shall make and publish their or his award in writing of and concerning the matters referred to them or him, ready to be delivered to the said parties hereto, or to either of them, on or before the 1st day of November next, or on or before any other day to which the said Thomas Young and Adolphus John Lewis or their said umpire shall extend the time of making their or his award: And it is hereby agreed that the said Thomas Young and Adolphus John Lewis or their said umpire shall in their or his award separate and distinguish between the several classes, divisions, or descriptions of goods, articles, and things, in the same manner as the same are separated or distinguished in the said policy, and shall apportion and fix the amount of loss, if any, which has been sustained or incurred in respect of each such class, division, or description: And, further, that the said Thomas Young and Adolphus John Lewis
*543] and their said umpire shall be at liberty, either with or *without any other person or persons, to inspect the premises No. 17, Devonshire Street aforesaid, and also all and every or any of the goods, articles, and things as are not destroyed, included in, or claimed to be insured by, the said policy, wheresoever the same may now be, and also all and every or any of the books of account and other books, papers, and documents of or belonging to the said Alexander Oldfield, or which he can obtain, and which the said Thomas Young and Adolphus John Lewis or their said umpire may deem it necessary or expedient to inspect, and to take copies thereof or extracts therefrom respectively; and also to examine the said Alexander Oldfield or any other person or persons, upon oath or otherwise; and to do all other things which the said Thomas Young and Adolphus John Lewis or their said umpire may deem necessary to enable them or him to make their or his award of and concerning the moneys hereby referred to them and him: And this agreement further witnesseth, that, in further pursuance of the said agreement, and for the considerations and purposes aforesaid, it is hereby further agreed between and by the said Alexander Oldfield and Thomas Price, that, so soon as the award of the said Thomas Young and Adolphus John Lewis or their said umpire of and concerning the matters so referred to them and him as aforesaid shall have been made and published as and in manner and form aforesaid, the liability of the said Thomas Price as the public officer of the said General Life and Fire Assurance Company, or of the said company, under the conditions of the said policy, to pay all or any of the amounts or items of loss which shall have been so fixed and determined in and by the said award of the said Thomas Young and Adolphus John Lewis or their said umpire, or any part of such respective amounts or items, and all questions, dis-
*544] putes, and *differences in relation to such liability, shall be referred to the award, order, arbitrament, final end, and determination of A. C., Esq., so as the said A. C. shall make and publish his award in writing, ready to be delivered to the said parties hereto, or either of them, on or before the expiration of one month from and after the said award of the said Thomas Young and Adolphus John Lewis or their said umpire shall have been made and published, or on or before

any other day to which the said A. C. shall extend the time for making his award: And it is hereby agreed that the said A. C. shall be at liberty to call for and inspect all or any of the books, papers, or other documents of or belonging to the said Alexander Oldfield, or of the said British Empire Mutual Fire Assurance Society, or the said General Life and Fire Assurance Company, or either of them, and also to examine the said parties hereto and any other person or persons, upon oath or otherwise, and to do or cause to be done all other things which he the said A. C. may deem necessary or expedient to enable him to decide or determine all or any of the matters hereby referred to him, unless the parties hereto shall agree upon a written case or statement of facts to be laid before the said A. C.; and, in the event of such case or statement being so agreed upon, the said A. C. shall make his award on the statement contained in such case: Provided always, that the said Thomas Price shall be at liberty before the said A. C. to avail himself of all or any legal grounds of defence which he might raise or avail himself of under the pleas which have been pleaded in the action hereinbefore mentioned, or otherwise, except that the said Thomas Price shall not dispute that the liability (if any) under the said policy has devolved upon the said General Life and Fire Assurance Company in the same manner as if the name of that company had been *inserted therein instead of the said British Empire Mutual Fire Assurance Society, and [*545 except also that the said Thomas Price and the said General Assurance Company shall not be at liberty to avail themselves, upon such reference, as a matter of defence of the third plea in the said action, which alleges that the condition endorsed on the said policy as to a certificate of two householders was not delivered to the said company previously to the commencement of the said action: Provided also that neither of the said parties hereto shall attend before the said Thomas Young and Adolphus John Lewis, or their said umpire, by counsel, but only by his attorney; but the said parties shall be at liberty to attend by counsel or special pleader before the said A. C.; and also, that, in case either of the said parties hereto shall neglect to attend before the said Thomas Young and Adolphus John Lewis or their said umpire, or the said A. C., respectively, to proceed in the matters referred to them or him respectively, after seven days' notice of an appointment for that purpose served upon such party, or left at his usual place of abode or business, then it shall be lawful for the said Thomas Young and Adolphus John Lewis or their said umpire, or the said A. C., respectively, to proceed ex parte, and all acts so done shall be as valid and effectual as if the said parties hereto had duly attended in pursuance of such notice; and, further, that the costs and expenses of the reference hereby made to the said Thomas Young and Adolphus John Lewis and their umpire, and of their or his award, and incidental thereto, respectively, shall be in the discretion of the said Thomas Young and Adolphus John Lewis or their said umpire; and that the costs and expenses of the reference made to the said A. C., and of his award, and incidental thereto, respectively, shall be in the discretion of the said A. C.; and, in case all or any portion *of the costs and expenses of either of the said references shall be [*546 adjudged to be paid by the said Alexander Oldfield to the said Thomas Price, then the said Thomas Price shall be at liberty to deduct and retain the amount thereof from and out of the sum, if any, which he the

said Thomas Price or the said General Fire and Life Assurance Company may be adjudged liable to pay under the terms and conditions of the said policy, or for or in respect of the costs and expenses of either of the said references hereby made; and also that the death of the said Alexander Oldfield shall not determine or put an end to these presents, but the same shall continue in full force for or against his representatives, in the event of his so dying; and also that the said parties hereto shall and will on their respective parts in all things stand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, final end, and determination of the said Thomas Young and Adolphus John Lewis or their said umpire, and A. C., respectively, so to be made as aforesaid, and shall not continue the said action hereinbefore mentioned, or bring or prosecute, or cause to be brought or prosecuted, any writ of error, or any other action or suit at law or in equity against the said Thomas Young and Adolphus John Lewis, or their said umpire, or the said A. C., or either of them, or against any of the said parties hereto, of or concerning the matters aforesaid; and that, if either of the said parties hereto shall by affected delay or otherwise prevent, impede, or delay the said arbitrators or either of them from making an award, he or they shall and will pay to the other or others of the said parties hereto, such costs as the said arbitrator so delayed shall think reasonable: And, lastly, that these presents, or the submission hereby made, shall be made a rule of Her Majesty's Court of Common Pleas at Westminster, pur-
*547] suant to the statute *in such case made and provided; and that, in case any application shall be made by either party to the said court on the subject of the said reference, or the awards, or either of them, the said court shall have full power to refer back to the said Thomas Young and Adolphus John Lewis, or their said umpire, or the said A. C., respectively, the whole or any part of the matters in difference referred to them respectively, upon such terms as the said court shall think fit: And, lastly, the said Thomas Price, as such secretary as aforesaid, doth hereby agree with the said Alexander Oldfield, his executors, administrators, and assigns, that he the said Thomas Price, his executors or administrators, shall and will within ten days after notice of the amount, if any, which he or the said company shall by the award of the said A. C. be declared liable to pay, shall be served on him, or left for him at the office of the said General Life and Fire Assurance Company, pay unto D. D., of, &c. (which payment he the said Alexander Oldfield doth hereby direct and request accordingly), out of the amount, if any, which he the said Thomas Price or the said company shall be so declared liable to pay as aforesaid (after deducting thereout the sum of 100*l.* so paid to the said Alexander Oldfield as hereinbefore mentioned, and also all costs and expenses, if any, which shall have been awarded to be paid by the said Alexander Oldfield to the said Thomas Price) the sum of 309*l.* 3*s.*, and interest thereon, or so much thereof as the amount so payable by the said Thomas Price shall be sufficient to pay, and pay the balance (if any) to the said Alexander Oldfield, his executors, administrators, or assigns: Provided lastly, and it is hereby expressly agreed and declared that the payment of the said sum of 100*l.* as hereinbefore mentioned shall not in any wise prejudice
*548] or affect the position or rights of the said General Life and Fire *Assurance Company in relation to the matters or questions in

dispute, or otherwise howsoever; and that such payment shall not, nor shall anything herein contained, in any way prejudice or affect any of the rights or defences of the said Thomas Price or the said General Life and Fire Assurance Company, or the said British Empire Assurance Society, upon or in relation to any other action or claim which may be brought or preferred against them or either of them in the name or names of the said Alexander Oldfield, his executors or administrators, or otherwise, by him or them, or any other person or persons claiming through or under him or them. In witness," &c.

The arbitrators not agreeing, the matter came before the umpire. Part of the plaintiff's claim was in respect of certain valuable tools which had been destroyed in the fire. As to these, the umpire took the valuation of one Price, who valued them at the price they would have fetched at a forced sale, and, without hearing any other evidence, he said he would be bound by that valuation.

The award was not made within the time limited by the agreement; but the time had been enlarged by an order of Hill, J. This order, however, was intituled *in the cause in the Queen's Bench.*

Joyce now moved to set aside or send back the award, on the grounds that it had been made after the expiration of the prescribed time, and without any due enlargement, and also that the umpire had been guilty of misconduct. As to the first, he submitted that the order of Hill, J., being wrongly intituled, was a mere nullity: and, as to the second, that, in adopting the valuation of Price, the umpire proceeded so erroneously as to establish a case of misconduct against him, for that, inasmuch as the plaintiff was entitled *to a full indemnity, the tools destroyed should have been valued at the sum it would have cost him to replace them. [*549

WILLES, J.(*a*)—I am of opinion that there should be no rule in this case. One objection to this award is, that the umpire has adopted an erroneous principle of valuation as to certain tools, he having valued them at the price they would have fetched at a forced sale, instead of at the price the plaintiff would have to pay for replacing them. If that be an error, it is either an error of fact as to the value of the articles, or an error of law as to the principle upon which the damages ought to be assessed. In either case, the court cannot interfere. The parties have chosen their own tribunal, which is to judge as well of the law as of the fact; and they are bound by the result, unless they can show misconduct. Now, misconduct in the ordinary sense is not imputed to the umpire: and mistake or misconduct in law is not enough to entitle the court to interfere.(*b*) Then, as to the time. The award was sufficiently early, unless the order of my Brother Hill was a void order. The precise form of the order is not brought before us: it is merely recited in the award. But it appears that it did substantially enlarge the time for making the award in respect of the matters referred by the agreement. It further appears that it was intituled in a cause in the Queen's Bench which is at an end. Does that affect the validity of the order? In my opinion it certainly does not. The title of the cause is

(*a*) Cockburn, C. J., was absent on account of indisposition, and Crowder, J., was presiding at the Central Criminal Court.

(*b*) See Russell on Arbitration, 2d edit. 302, 306, 646, 649. And see Hodgkinson v. Fernie, 3 C. B. N. S. 189 (E. C. L. R. vol. 91).

*550] mere surplusage. The order is a *perfectly valid order with reference to the matters in difference.

BYLES, J.—I am of the same opinion. The first objection resolves itself into an objection upon the merits. If the umpire adopted a wrong principle of valuation, that was a mistake in point of law. We have no power to send back an award to the arbitrator or umpire except for a cause for which the award might be set aside. The persons selected by the parties are judges of the law as well as of the fact. As to the other point, I will only observe that nothing has been brought before us to show that the order of my Brother Hill is not a perfectly valid order.

Rule refused.

In Boston Water Power Co. *v.* Gray, 6 Metcalf 169, it was held, that mistake as to conclusions of fact, or of scientific principles applied in an award, could not be remedied upon the after admission of the arbitrators; but it was said, that it was different where the mistake was in some preliminary fact, inadvertently assumed and believed, as in the use of false measures or weights: See Robison *v.* Carson, 8 Maryl. 206. And in Eaton *v.* Eaton, 8 Ired. Eq. 102, this rule, that the testimony of the arbitrator could not be received to show mistake in matter of law or fact, was held on the authority of Phillips *v.* Evans, 12 Mees. & Welsb. 309, to be without exception. Chief Justice Ruffin, however, dissented in an able opinion.

THE GENERAL STEAM NAVIGATION COMPANY *v.* ROLT. *Feb.* 1, 1858.

A material variation of the terms of the contract with the principal discharges the surety.

A. contracted with B. to build for him a ship for a given sum, to be paid by instalments as the work reached certain stages; and C. became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments; and B. becoming bankrupt before the ship was finished, A. was compelled to expend a larger sum of money than the unpaid portion of the purchase-money in completing her.

In an action by A. against C. (the surety) to recover the excess and also a stipulated sum by way of damages for the delay in the completion of the ship, C. pleaded that the prepayments were made to B. without the knowledge or consent of C., and that, by making such payments without his consent, A. materially and prejudicially altered his position as surety. To this A. replied that the advances so made by him to B. were made with the knowledge, authority, and consent of C., and at his request, or for his use and benefit, and on his account:—

Held, that the plea afforded a primâ facie answer to the action, and that the onus lay upon A. to prove that the advances were made with the knowledge and assent and at the request of the surety

THIS was an action brought by the General Steam Navigation Company against the defendant as surety for the due performance of an agreement by one Mare.

The first count of the declaration stated, that, by a certain deed or *551] articles of agreement, dated the 26th *of April, 1855, made between Charles John Mare of the first part, the defendant of the second part, and the plaintiffs of the third part,—after reciting that the said Charles John Mare had agreed to build for the plaintiffs an iron paddle-wheel steamship or vessel of the dimensions thereinafter

mentioned, and to launch and deliver the same to the plaintiffs at the time and for the price or sum thereinafter expressed, and that the defendant had agreed to become the surety for the due performance of the said agreement by and on the part of the said Charles John Mare, and to execute the said agreement as such surety in manner thereinafter mentioned,—it was witnessed, that, in pursuance of the said agreement, and in consideration of the covenants thereinafter contained by and on the part of the plaintiffs, he the said Charles John Mare did thereby covenant with the plaintiffs that he the said Charles John Mare should and would, at his own proper costs and charges, in the best and most substantial and workman-like manner, construct and build for the plaintiffs an iron paddle-wheel steamship or vessel, of best Staffordshire iron, or iron of equal quality, and the decks and such other parts thereof as were to be constructed of wood of good sound and well-seasoned timber and plank, and the whole of the materials of every kind to be used by the said Charles John Mare in the construction of such ship or vessel to be the best of their respective kinds; and the said ship or vessel and fittings up to be built and constructed conformably to and of the description and dimensions and in the manner particularly mentioned and set forth in the specification thereunder written or thereunto annexed, and the drawing or plan prepared and signed by or on behalf of the said parties thereto of the first part and third part; and that the said Charles John Mare should and would complete the said vessel, including the *fittings, and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and [*552 deliver her safe afloat into the charge of some person or persons appointed to receive her in the river Thames by or on behalf of the plaintiffs on or before the 13th of September then next ensuing; and, in case the said vessel should not be so finished, launched, and delivered fit for sea on the said 13th of September then next ensuing, the said Charles John Mare did thereby agree to pay to the plaintiffs as and for liquidated damages to be incurred by such default the sum of 10*l.* per day for every subsequent day until the said vessel should be so finished, launched, and delivered as aforesaid: And it was declared and agreed by and between the said parties thereto of the first and third parts, that the said company should and might deduct and retain to themselves, their successors and assigns, all and every such sum and sums of money as should or might become payable for or in respect of such liquidated damages aforesaid, from and out of any consideration or other moneys or instalments of moneys as should or might from time to time become due or payable by them to the said Charles John Mare, his executors, administrators, or assigns, under or by virtue of the covenants in that behalf on the part of the said company thereinafter contained: And for the due and punctual performance of the covenants thereinbefore contained on the part of the said Charles John Mare, he the defendant did by the said deed or articles, in pursuance of the thereinbefore recited agreement on his part, bind and oblige himself to and with the plaintiffs, in the penal sum of 20,000*l.*: Averment, that the plaintiffs have always been ready and willing to do, perform, and observe, and have done, performed, and observed all things on their part, and all things have happened and exist to entitle them to a performance

*553] *of the said covenants of the said Charles John Mare and the defendant respectively, and to maintain this action: nevertheless the said Charles John Mare did not nor would complete the said vessel, including the fitting and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and deliver the same safe afloat or otherwise into the charge of the plaintiffs, or any person or persons appointed to receive the same in the river Thames by or on behalf of the plaintiffs, or in any other manner, on or before the said 13th of September, 1855, but had wholly neglected so to do, and the said vessel was not so finished, launched, and delivered according to the said covenant, and the said Charles John Mare made default and default was made in that behalf for and during divers, to wit, seventy days after that day; whereby the plaintiffs became and were entitled to be paid, and the said Charles John Mare became and was liable to pay them, a large sum of money, to wit, 700*l.*, being at and after the rate of 10*l.* for each and every of those days, and neither the said Charles John Mare nor the defendant hath paid the same, nor hath the defendant paid the plaintiffs the said 20,000*l.*: That the said Charles John Mare became and was declared a bankrupt without having completed or finished the said vessel as aforesaid, and the plaintiffs, in order to obtain the construction, completion, and delivery thereof, were forced and obliged to pay large sums of money to the assignees of the estate and effects of the said Charles John Mare under his said bankruptcy, for work done and materials provided by them in the construction and completion of the said vessel, and which sums, together with divers sums amounting, to wit, to 2000*l.*, which the plaintiffs paid to said Charles John Mare before his bankruptcy for and on account of the moneys to

*554] be paid to him for work to be done *and materials provided by him under the said deed, greatly exceeded the sum of money for which the said vessel was by the said deed to be built, constructed, completed, and delivered to the plaintiffs according to the said deed; and a large sum of money over and above the moneys to be paid by the plaintiffs under and by virtue of the said deed for the price of the building, constructing, and completing of the said vessel, had thereby become and was lost to the plaintiffs.

To this count the defendant pleaded, inter alia, as follows:—

First,—to the first count, that the said deed in that count mentioned is not his deed.

Secondly,—to so much of the said first count as alleges that the said Charles John Mare did not nor would complete the said vessel, including the fitting and all carpenters' and joiners' and painters' work, and in every respect fit for sea, and launch and deliver the same safe afloat or otherwise into the charge of the plaintiffs, or any person or persons appointed to receive the same in the river Thames by or on behalf of the plaintiffs, or in any other manner, on or before the day and year in that behalf in the declaration mentioned,—the defendant denies the same allegation and every part thereof.

Thirdly,—to so much of the first count as alleges that the said vessel was not finished, launched, and delivered according to the said covenant, that the said Charles John Mare made default, and that default was made in that behalf, for and during the said time in that behalf in the

declaration mentioned,—the defendant denies the same allegation and every part thereof.

Fourthly,—to the first count, that, in and by the said deed in the declaration mentioned, the plaintiffs covenanted and agreed that they would well and truly pay or cause to be paid to the said Charles John *Mare the sum of 14,120*l.* as the purchase or consideration money for the said vessel and fittings, by four even and equal instalments or payments, at the times and in the manner following, that is to say, one equal fourth part thereof when the surveyor employed to superintend the works should certify that the whole of the premises, including the stem and stern-post of the said vessel, should be up and complete,—one other equal fourth part thereof when the said vessel should be plated up and all the beams and stringers in,—one other equal fourth part thereof when the vessel should be launched,—and the remaining equal fourth part thereof when the said vessel should be completely finished and delivered, and should have proved upon trial to fulfil all the terms and conditions of the said deed and the specification thereunder written: that the said covenants so made by the plaintiffs as in this plea aforesaid are the same covenants which are mentioned in the said deed and in the declaration respectively under or by virtue of which the consideration or other moneys or instalments of moneys therein mentioned were to become or might become due and payable from the plaintiffs to the said Charles John Mare, his executors, administrators, or assigns, as therein mentioned; that, after the said first two instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said covenant in that behalf, but long before the said vessel had been launched, and before the third of the said instalments had become due to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, without the knowledge or consent of the defendant, and contrary to the true intent and meaning of their *said covenant in that behalf, paid and advanced to the said Charles John Mare nearly the whole of the said third instalment; that, afterwards, and long before the said ship had been completely finished and delivered, and before the last of the said instalments of the said sum of 14,120*l.* had become due or payable to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, without the knowledge or consent of the defendant, paid and advanced to the said Charles John Mare a large portion of the said last-mentioned instalment: that each of the said advances so made to the said Charles John Mare of the said third and last instalments respectively as aforesaid amounted to a large sum, to wit, to the amount of the said debts and penalties due from the said Charles John Mare to the plaintiffs as in the declaration mentioned, and of all damages sustained by the plaintiffs by reason of the breaches of covenant by the said Charles John Mare in the declaration alleged; and that, by making the said payments and advances without the consent of the defendant, the plaintiffs materially and prejudicially altered his the defendant's position as surety for the said Charles John

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Mare as aforesaid, and the defendant was and is by reason of the premises discharged and exonerated from liability as such surety.

Fifthly,—to the first count, upon equitable grounds, that, in and by the said deed in the declaration mentioned, the plaintiffs covenanted and agreed that they would well and truly pay or cause to be paid to the said Charles John Mare the sum of 14,120*l.* as the purchase or consideration money for the said vessel and fittings, by four even and equal instalments or payments, at the times and in the manner following,

*557] *that is to say, one equal fourth part thereof when the surveyor employed to superintend the works should certify that the whole of the premises, including the stem and stern-post of the said vessel, should be up and complete,—one other equal fourth part thereof when the said vessel should be plated up, and all the beams and stringers in,—one other equal fourth part thereof when the said vessel should be launched,—and the remaining fourth part thereof when the said vessel should be completely finished and delivered, and should have proved upon trial to fulfil all the terms and conditions of the said deed and the specification thereunder written: that the said covenants so made by the plaintiffs as in this plea aforesaid are the same covenants which are mentioned in the said deed and in the declaration respectively under or by virtue of which the consideration or other moneys or instalments of money therein mentioned were to become or might become due and payable from the plaintiffs to the said Charles John Mare, his executors, administrators, or assigns, as therein mentioned: that, after the said first two instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said covenant in that behalf, but long before the said ship had been launched, and before the third of the said instalments had become due or payable to the said Charles John Mare from the plaintiffs according to the true intent and meaning of the said deed, and before the accruing of any of the said causes of action in the declaration mentioned, the plaintiffs, by arrangement between them and the said Charles John Mare, without the knowledge and consent of the defendant, and contrary to the true intent and meaning of their said covenant in that behalf, paid to the said Charles John Mare divers moneys by way of anticipation and in advance

*558] *and discharge of nearly the whole of the said third instalment: that, afterwards, and after the said first three instalments of the said sum of 14,120*l.* had been paid to the said Charles John Mare by the plaintiffs under the said last-mentioned covenant, but before the said vessel had been completely finished and delivered, and before the last of the said instalments had become due or payable to the said Charles John Mare according to the true intent and meaning of the said deed in that behalf, and before the accruing of any of the said alleged causes of action in the declaration mentioned, the plaintiffs, by arrangement between them and the said Charles John Mare, and without the knowledge or consent of the defendant, paid to the said Charles John Mare divers moneys by way of anticipation and in advance and discharge of a large portion, to wit, 3000*l.*, of the said last-mentioned instalment: that the said moneys so paid to the said Charles John Mare by way of anticipation of each of the said third and last instalments as aforesaid amount to a large sum, to wit, the amount of the debts and penalties due from the said Charles John Mare to the plaintiffs as in the declara-

tion mentioned, and of all damages sustained by the plaintiffs by reason of the breaches of contract by the said Charles John Mare as in the declaration alleged: that, by making such payments as in that plea aforesaid, the plaintiffs deprived themselves, without the consent of the defendant, of the security which they had for the payment of the said last-mentioned sum under and by virtue of the said deed; and that the defendant's position as surety was much altered and prejudiced thereby, to wit, to the whole amount of the plaintiffs' claim in respect of this action: that, afterwards, and long before the said vessel was completely finished and delivered, the said Charles John Mare became and was duly and according to law adjudged a *bankrupt on the 25th of September, 1855, and that his estate has not paid and is not capable [*559 of paying his debts in full, and that he the defendant had no notice of the causes of action alleged against him in the declaration until the 6th of March, 1856; and that he (the defendant) hath been much aggrieved by reason of the premises, and he ought to be and is thereby exonerated and discharged from liability to the plaintiffs.

The plaintiffs took issue upon all the pleas.

Second replication, upon equitable grounds, to the fourth plea,—that the last of the said advances so made by the plaintiffs to the said Charles John Mare as in that plea mentioned, was made with the knowledge, authority, and consent of the defendant, and at the request, or for the use and benefit, and on account of the defendant, and was of a large amount, to wit, 2000*l.*, and, before and at the time of the making of the said advance, the defendant had notice and knowledge of the plaintiffs' having made the said previous advances to the said Charles John Mare as in that plea mentioned; and the defendant did not at any time before or after the said alleged breaches of the said deed by the said Charles John Mare, or any or either of them, disaffirm or disavow the said deed, or his liability under the same or to perform the defendant's covenants therein, or otherwise avoid the said deed, but acquiesced in and recognised the same as a valid deed, and that he continued liable for the performance of his covenant therein; and, at the time of his so authorizing and consenting to and requesting the said last of the said advances to be made by the plaintiffs as aforesaid, the defendant, by virtue thereof, affirmed the said deed and his said covenant, and waived and abandoned any release or discharge to him of the same by reason of the said advances so before then made by the plaintiffs as in the said fourth plea alleged.

*Third replication, upon equitable grounds, to the fifth plea,— [*560 that the last of the said payments so made by the plaintiffs to the said Charles John Mare by way of anticipation and in advance and discharge of a portion of the said last of the said instalments as in that plea mentioned, was made with the knowledge, authority, and consent of the defendant, and at the request or for the use and benefit and on account of the defendant, and was of a large amount, to wit, 2000*l.*; and, before and at the time of the making of the said payment, the defendant had notice and knowledge of the plaintiffs' having made the said previous payments and advances to the said Charles John Mare as in that plea mentioned, and the defendant did not at any time before or after the said alleged breaches of the said deed by the said Charles John Mare, or any or either of them, disaffirm or disallow the said deed, or

his liability under the same, or to perform the defendant's covenants therein, or otherwise avoid the said deed, but acquiesced in and recognised the same as a valid deed, and that he continued liable for the performance of his covenant therein; and, at the time of his so authorizing and consenting to and requesting the said last of the said advances to be made by the plaintiffs as aforesaid, the defendant, by virtue thereof, affirmed the said deed and his said covenant, and waived and abandoned any release or discharge to him of the same by reason of the said advances so before then made by the plaintiffs as in the said fifth plea alleged.

The defendant rejoined to the last two replications, and also took issue thereon.

The cause was tried at the sittings in London after Trinity Term, 1857, before Willes, J., and a special jury, when the following evidence was given on the part of the plaintiffs:—

*561] *An agreement under seal was put in, dated the 26th of April, 1855, between Charles John Mare, of the first part, the defendant of the second part, and the plaintiffs of the third part. This was the agreement upon which the action was brought; and the terms of it corresponded in substance with such portions of it as are mentioned in the declaration and in the fourth and fifth pleas.

It was also proved (by admissions entered into between the parties for the purposes of the trial), that Mare was adjudged a bankrupt on the 25th of September, 1855; that Charles Lee was appointed the official assignee, and that the defendant, Mark Hunter, and Samuel Turner, were duly appointed creditors' assignees, under the bankruptcy; that the steam-ship the subject of the agreement was launched on the 12th of September, 1855, and that she was not finished and fitted for sea by Mare on or before the 13th of September, 1855; that the plaintiffs paid to Mare the following sums on account of the moneys payable or to become payable under the agreement, at the dates following, viz.

On the 28th of April, 1855, 3500*l.*,—on the 24th of May, 3500*l.*,—on the 5th of July, 3500*l.*,—on the 11th of August, 1000*l.*, on the 13th of September, 2000*l.*; and that these sums were paid by checks on the plaintiffs' bankers, Messrs. Spooner, Attwood, & Co.

It was also arranged, by consent, that, in the event of the plaintiffs being entitled to a verdict, the amount of damages should be settled by an arbitrator.

Mr. Benjamin Attwood was then called, and stated in effect as follows:—"I am one of the directors of the General Steam Navigation Company. Mr. Mare applied to me in July, 1855, for payment of the third instalment under the deed of the 26th of April, 1855. I do not

*562] remember the precise day on which he applied, *but I had several communications with him upon the subject; and the instalment was subsequently paid on the 5th of July, 1855. I saw the vessel from time to time myself while she was in course of building; and, on the 5th of July, she was in a launchable condition, and might have been launched any day. Mr. Mare carried on his business in Orchard Yard, Blackwall, but communications were frequently made to him at Mr. Rolt's (the defendant's) office, in Clement's Lane. Mr. Mare is Mr. Rolt's son-in-law: and Mr. Rolt has been connected in business with

Mr. Mare, in the way of advancing him sums of money to carry on his business."

On cross-examination, M. Attwood said,—"Lloyds' surveyors were employed by our company to superintend the work done upon the ship. I know that before the first instalment was paid the surveyor certified, either verbally or in writing, that the frames were completed; and on the 24th of May, when the second sum of 3500*l.* was paid, the vessel was plated up. The 3500*l.* which under the contract was payable when the vessel should be launched, was paid on the 5th of July. The vessel was not in fact launched till the 12th of September following. The vessel was not completed and delivered till the 22d of November. Of the last instalment of 3500*l.*, 1000*l.* was paid on the 11th of August, and 2000*l.* on the 13th of September, 1855. At the time when the vessel was completed and delivered, there was only 620*l.* of the contract money unpaid. Our claim in this action is 1629*l.*, including penalties. I saw the progress of the work going on before the 5th of July: and, if I had said I would not pay the instalment in July, Mr. Mare had power to enforce it when he put the ship into the water. I say on the 5th of July the ship was ready for launching. When I say that the ship was ready for launching, I *should explain that the time when a ship shall be launched depends entirely upon the will and pleasure of the builder: some who can afford it keep the vessel on the stocks much longer than others; and some vessels are launched as speedily as possible, because that is generally the time when by the terms of the contract an instalment of the purchase-money becomes due. When the 2000*l.* was paid on the 13th of September, a great deal more work had been done to the ship than was necessary for launching the vessel. A ship may be launched in various conditions. The Dolphin was capable of being launched in July; but it was thought better not to launch her. I had no communication during these transactions with Mr. Rolt personally, nor till after Mr. Mare's bankruptcy." [*563

On re-examination, Mr. Attwood said,—"Mr. Rolt was one of the assignees under the bankruptcy; and they finished the vessel according to the contract, except that the same was finished very much behind the time. This was an arrangement between the company and the assignees. I received this letter from the defendant, as assignee of Mr. Mare's estate, on or about the 14th of February, 1856,—'Dear Sir,—Will you ask the board to give Mr. Lee (meaning the official assignee) a check this week for 1000*l.* on account of the Dolphin. I am sure they will not consider it intrusive under the existing circumstances of the estate.' I saw Mr. Rolt two or three times while the assignees were finishing the vessel. On one of those occasions, I said to him, 'I am surprised you do not get on faster with the ship, because you know you are now liable to penalties.' Mr. Rolt in reply said, 'I will set about it directly I get the money; I will put more men on, and get on as fast as possible.' Mr. Rolt did not during that time make any complaint to me of the prepayments. The last payment of 2000*l.*, on the 13th of *September, was paid to Messrs. Spooner & Co. by Mr. Mare's order, and placed there to Mr. Rolt's credit. I do not recollect anything else that passed between myself and Mr. Rolt. The payment of the 1000*l.* and 2000*l.* did not delay the finishing of [*564

the vessel: on the contrary, they greatly expedited it: they certainly did not contribute to that head of damage, at all events."

By leave of the judge, the witness was further examined by the defendant's counsel, and said,—"This was not the only ship Mr. Mare was engaged in building. Unfortunately, he was over head and ears in work; and I do not suppose that all the money we advanced from time to time was bestowed specially upon our ship. I do not myself know that the 2000*l.* went to Mr. Rolt. I heard it from Messrs. Spooner."

Mr. Philip Twells, one of the partners in the banking-house of Spooner, Attwood & Co. was called. He deposed in substance as follows:—In the year 1855, and up to the date of Mr. Mare's bankruptcy, we acted as his bankers. In the month of August in that year, three checks of the defendant's were paid in to Mr. Mare's credit, one for 5000*l.*, and one for 2000*l.*, on the 7th of August, and another for 1000*l.*, on the 8th. We held all these three checks at the same time; and, upon their being presented at Prescotts', who were the defendant's bankers, they were dishonoured. At this date, Mr. Mare's account was overdrawn. We then made application to the defendant for payment of these checks; and we also applied to Mr. Payne, his clerk. Soon after this, the defendant paid us 2000*l.* in bank-notes; and we thereupon gave up to him the check for 2000*l.*; and then we were holders of dishonoured checks for 6000*l.*,—one of 5000*l.*, and another of 1000*l.* Shortly after this payment, viz. on the 16th of August, an attachment upon Mr. Mare's account was lodged at our bank; in consequence of which, another account *was opened the same day, in the defendant's name; and he stated to us as the reason for opening this account, that there were at that time several acceptances of Mr. Mare's outstanding, which were made payable at our bank, and, in order that funds might be provided to meet these acceptances, and as we could not pay them out of any funds belonging to Mr. Mare, an account should be opened in the defendant's name; and he authorized us to pay any of the said acceptances, or any checks drawn upon us by Mr. Mare, out of the moneys standing to the credit of that account. The defendant paid in various sums from time to time to the credit of that account, and we applied them exclusively to the payment of Mr. Mare's acceptances and checks. On the 27th of August, the two dishonoured checks for 5000*l.* and 1000*l.* still remained in our hands unpaid. On that day, the defendant made us a further payment of 500*l.* on account of the dishonoured checks; upon which we gave up to him the check for 5000*l.*, and he gave us a fresh check for 4500*l.* on his bankers, Messrs. Prescott & Co. We continued frequently to press him upon the subject of these checks, and saw both him and his solicitor several times about them. I believe it was mentioned on one of these occasions (I think by the solicitor) about money which Mr. Mare had to receive from the General Steam Navigation Company. We also saw Mr. Payne, the defendant's clerk; and he generally assured us that he was doing every thing he could to put the matter right without unnecessary delay. He further stated that large sums of money were coming due to Mr. Mare shortly, and, amongst others, he mentioned a sum of 2000*l.* which Mr. Mare was to receive from the plaintiffs, which should be paid to us. I know a person named Payne, who was clerk to Mr. Rolt, and who

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generally communicated between Mr. *Rolt and us. My impression is, that he was the person who paid in these checks, but I [*566 cannot say I recollect the particular transaction. Mr. Mare's account was frequently overdrawn. I should state, generally, it was to an amount perhaps varying from 5000*l.* to 25,000*l.*"

[A note was here shown to the witness, who was told to look at it, but not to read it aloud: he then proceeded.]

"This is a note which I received from the defendant's attorney about this time, with reference to a proposition which was afterwards made by the defendant himself, that the sum of 2000*l.* which I have just mentioned should be paid to us."

[WILLES, J., here asked the plaintiffs' counsel whether the note was to be read or not: and stated that there was no reason why the plaintiffs should not put it in and read it as evidence, if they pleased. *Byles*, Serjt., however, on the part of the plaintiffs, stated that he did not want the note read; that it was a note saying that Mr. Rolt would make a proposition; and that he was asking the witness whether it recalled to his mind that Mr. Rolt did make a proposition. The witness then proceeded.]

"The proposition which the defendant made shortly after I received this note, was, that a sum of 2000*l.* would be payable by the General Steam Navigation Company as soon as a new vessel was launched; and that, as soon as that money was paid, it should be handed over to us in part satisfaction of the dishonoured checks. Between that time and the 13th of September, the amount due to us from the defendant on these checks was reduced to 3486*l.* 13*s.* 4*d.* He paid us 500*l.* on the 31st of August, when we gave up to him the check for 4500*l.*, and he gave us a fresh check for 4000*l.*, and, on the 4th of September, he *paid us a further sum of 513*l.* 6*s.* 8*d.* We then gave up to [*567 him his check for 4000*l.*, and he gave us a fresh check for 3486*l.* 13*s.* 4*d.* On that day, the 13th day of September, a check of the plaintiffs' for 2000*l.*, in favour of Messrs. C. J. Mare & Co., was paid into our bank to the defendant's credit; and on that occasion we returned the defendant his check for 3486*l.* 13*s.* 4*d.*, and he gave us a new one for 1486*l.* 13*s.* 4*d.* That left his balance, 1486*l.* 13*s.* 4*d.*, which was afterwards paid by various payments."

On cross-examination Mr. Twells stated as follows:—"I know that very large advances were made from time to time, and very frequently, by Mr. Rolt to Mr. Mare; and this transaction of which I have just spoken was one of many of the like description. When Mr. Mare required an advance or advances of money, the defendant would give him his check or checks upon his own bankers (as in this instance for 7000*l.*, or 8000*l.*); and these checks remained in our hands in expectation of payments being made by Mare. We in the meanwhile advanced to Mr. Mare whatever he required, upon the faith and to the amount of the defendant's checks; and they were paid in and received by us in discharge of the amount due upon the defendant's checks. These sums were frequently drafts and checks payable to Mr. Mare; and sometimes we received from Mr. Payne bank notes to a large amount: and, as from time to time sufficient sums were paid in to cover the amount of the checks, such checks were always given up. I think the checks were always returned, to the best of my recollection, to Mr. Rolt's clerk,

Payne, and generally on his bringing us money. In the transaction in question, Mr. Rolt, the defendant, gave checks altogether to the amount of 8000*l.* Shortly before or on the 8th of August, we made advances
*568] to Mr. Mare to the extent *of 8000*l.* Mr. Mare did not make payments to us to that amount: and we then presented the checks, and they were not paid."

On re-examination, Mr. Twells said,—"The only communication that I recollect upon the subject of the 2000*l.* was, that we sent a letter to the defendant requesting that the transaction (with reference to the dishonoured checks) might be closed. It was sent to the defendant's office in Clement's Lane; and I received in answer a letter from Mr. Mare, in the following terms,—'In Mr. Rolt's absence, I opened your letter. The G. S. N. Co.'s ship will be launched on Thursday, when the 2000*l.* order will be payable.' The defendant and others had mentioned to me that 2000*l.* was likely to become due from the General Steam Navigation Company, and that it should be paid to the account of the defendant's unpaid checks. The account of Mr. Rolt's unpaid checks was not the account he opened for Mr. Mare. I think Mr. Mare's letter was written from the office of the Dover Mail Packet Company, with which Mr. Mare was connected, and from which he sometimes dated his letters. I am not aware that the defendant Mr. Rolt knew anything of it. The letter to which that is an answer was directed to Clement's Lane. Whenever we had any communication to make to Mr. Mare, we used to send it to Clement's Lane. I think Mr. Mare had not an office with his name up in Lombard Street; I feel sure he had not; I think we must have known it if he had. Mr. Payne, the defendant's clerk, constantly interfered and took part in business that related to Mr. Mare: indeed, I should think that he must have brought to us on Mr. Mare's account, within the last three or four years, checks to the amount of several hundred thousand pounds of the defendant's."

*569] It was submitted on the part of the defendant, that, *upon the evidence as it stood, the fourth and fifth pleas were proved, the three instalments of 3500*l.* on the 5th of July, 1000*l.* on the 11th of August, and 2000*l.* on 13th of September, having been paid prematurely; and there being no evidence that the defendant had consented to any of these prepayments: and, further, that the onus of proving the defendant's consent to these prepayments lay on the plaintiffs.

The learned judge said:—"My present impression is, that the pleas are made out. I do not think that any creditor has a right to pay away the security which is in his hands, to the prejudice of the surety; and here the moneys which the General Steam Navigation Company had in their hands for the purpose of paying to Mr. Mare when the instalments had been earned, were a security to them that the work would be properly performed before the payments were made: and I think they parted with the money without the consent of Mr. Rolt. I think there is no assent either as to the 3500*l.* or as to the 1000*l.*; and I think it is for the plaintiffs to prove it. I think the company, in parting with the moneys without the assent of Mr. Rolt, parted with securities which the surety had a right to so long as the creditor had elected to treat or retain those as securities. And, secondly, until the work was done which earned the respective instalments, I think that they had no right to anticipate the payment, so far as the surety was concerned; because,

so far as they had those moneys in their hands, they had them to look to, instead of looking to the surety. I put it on the principle that the plaintiffs had no right to part with the securities which the creditors, and consequently the surety, would have a right to look to. The question is,—and it is a question raised on the plea as to the prepayments, —whether that is an answer to the whole of the *creditors' claims, [*570 or only an answer to the extent of the loss sustained by the surety in consequence of the securities being thus given up. I have doubt about that. My impression at present is rather in favour of holding with the plaintiffs: but I do not see what the damages should be; therefore I cannot make a substantive ruling upon that, and, consequently, I think the better thing to do, for the purpose of to-day, is, to rule according to the tendency of my opinion,—to rule for the defendant, giving the plaintiffs leave to move to enter a verdict for them, if the court shall think my law is wrong, either as to the pleas being an answer to the action, or any answer as to the 1000*l.*" Ultimately his lordship directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for the amount of damages to be ascertained by an arbitrator.

Byles, Serjt., in Michaelmas Term, 1857, accordingly obtained a rule nisi to enter a verdict for the plaintiffs, or for a new trial, or to enter judgment for the plaintiffs non obstante veredicto,—on the grounds that the acts of the plaintiffs occasioned no injury or prejudice to the defendant,—that the defendant was a party to the acts of the plaintiffs,—that the defendant was cognisant of and consented to them,—that the defendant ratified them and took the benefit of them,—that the burthen of showing that he had no notice of them lay on the defendant,—that the prepayment of the 1000*l.* on the 11th of August, 1855, could be no bar to the whole action,—that it was the defendant's duty to have made inquiry,—and that the defendant was neither at law nor in equity released from his contract.

Sir Fitzroy Kelly, *J. Wilde*, Q. C., and *Garth*, showed cause.—The plaintiffs seek to recover from the *defendant, as surety, the [*571 damages they have, as they allege, sustained by the failure of Mare, the principal, to complete his contract. The sum agreed to be paid by the plaintiffs for the Dolphin was 14,120*l.*, by four instalments, which were to be payable as the work progressed. The first two instalments of 3500*l.* each were duly and properly paid at the times stipulated for. The third instalment of 3500*l.* was payable when the ship should be launched; it was, however, paid on the 5th of July, whereas the ship was not launched until the 12th of September. On the 11th of August a further payment of 1000*l.* was made on account of the fourth instalment,—still before the ship was launched; and on the 13th of September a further sum of 2000*l.* was paid: thus leaving only 620*l.* unpaid at the date of Mare's bankruptcy, the 25th of September. The ship was not actually completed and delivered until the 22d of December, which was seventy days after the day limited by the contract. The cost of completing her expended by the plaintiffs after Mare's bankruptcy amounted to 1629*l.* Deducting, therefore, 620*l.* which remained unpaid of the stipulated price, the plaintiffs now claim from the surety 1009*l.*, and also 700*l.* for the seventy days' delay, at 10*l.* per day. The answer which the defendant sets up against this claim, is, that he engaged to

guarantee the due completion of the ship by the 13th of September, the plaintiffs paying the purchase-money in four instalments as the work reached certain stages of completion; and that, if the plaintiffs had not deviated from their contract by prematurely paying those instalments, they would have had ample funds in hand at the time of Mare's bankruptcy to complete the ship. Whether the surety was damnified or not by the course adopted by the plaintiffs is quite immaterial. The question is, was the contract broken? Has the situation of the surety been altered? *The plaintiffs have parted with that which by the terms of the contract was to have remained in their hands for the benefit of the surety as well as of themselves. The nearest case to this is that of Calvert *v.* The London Dock Company, 2 Keen 638. There, one Streather, a builder, contracted to perform certain works for the London Dock Company, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work: and it was held that the sureties for the due performance of their contract were released from their liability, by reason of payments exceeding three-fourths of the work done, having, without their consent, been made to the contractor before the completion of the whole work. Lord Langdale, M. R., in giving judgment, said: "The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that, by the advances made to him he was enabled to do more than he otherwise could have done; and that, to assist him, was to assist his sureties; and it was only for the purposes of affording that assistance that the company did more than they were obliged to do. The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety; and the answer has always been, that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him: and, bearing in mind that the surety, if he pays the debt, ought to have all the securities possessed by the creditor, the question always is whether what has been done lessens that security. In this case the company were to pay for three-fourths of the work done every two months; the remaining one-fourth was to remain unpaid for till the whole was completed: and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not: and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith: but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors having in their hands one-fourth of the value of the work done, became creditors to a

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large amount without any security: and, under the circumstances, I think their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship."(a) This is just like the case of a party to a bill or note who is discharged by the absence of a notice of dishonour. No inquiry can take place as to whether or not he is damnified by the want of notice. He is absolutely discharged. Whitcher *v.* Hall, 5 B. & C. 269, 8 D. & R. 22, is also an authority to show, that, to charge a surety, it must be shown that there has been a literal performance of the contract *with the principal. The surety, said Bayley, J., there, "had a right to [*574 insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference: the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party." Littledale, J., did not agree in the judgment in that case, but he did not deny the general principle, that, if by the act of the creditor any alteration is made in the position of the surety, the latter is discharged. The rule is the same in equity as at law; see White & Tudor's Leading Cases, 2d edit. 827 et seq., notes to Rees *v.* Berrington, 2 Ves. jun. 540; and see Newton *v.* Chorlton, 10 Hare 646; Bonar *v.* Macdonald, 3 House of Lords Cases 226, 238. There is no pretence, upon the evidence, for saying that Mr. Rolt assented to the instalments being anticipated. No doubt he was aware of the payment of the 2000*l.* on the 13th of September; but there is nothing to show that he was aware that it was part of the fourth instalment. And, as to the 1000*l.* paid on the 11th of August, it was not shown that that got into the hands of Spooner & Co. [WILLES, J.—It was not pretended that Mr. Rolt knew anything about the payment of the 1000*l.*] In Samuell *v.* Howarth, 3 Meriv. 272, A. guarantied the payment of any goods to be supplied by B. to C. between the 2d of April, 1814, and the 2d of April, 1815; and it was held, that, although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and, C. having accepted bills for the amount of the goods delivered, which B. permitted him to renew *when payable, without any communication to A. on the subject [*575 of such renewal, A. was discharged from his guarantee by virtue of the rule that a creditor giving time to the principal debtor without the consent of the surety, releases the surety; and that although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A.,—the surety being himself the fit judge of what is or is not for his own benefit. [COCKBURN, C. J.—It may not be necessary, in order to discharge the surety, that he should be actually prejudiced,—that the result should have been produced: but he must be put into a worse position. Now, as to the 3500*l.* paid on the 5th of July, I do not see how Mr. Rolt could have been put into a worse position. The ship was then capable of being launched: but she was not actually launched, because the keeping her in the yard would rather accelerate her arrival at the next stage, and so

(a) Cited in Strong *v.* Forster, 17 C. B. 211 (E. C. L. R. vol. 84). And see Warre *v.* Calvert, 7 Ad. & E. 143 (E. C. L. R. vol. 34), 2 N. & P. 126.

promote the ultimate completion of the contract by the stipulated day.] That is by no means certain: there is considerable expense and risk incurred in the launching. [COCKBURN, C. J.—The case of Samuell *v.* Howarth proceeds upon the assumption that the position of the surety was prejudiced: the creditor had no right to prolong the duration of his responsibility.]

Knowles, Q. C., *W. A. Collins*, and *Welsby*, in support of the rule.—The allegation in the fourth plea,—that the prepayments were made to Mare by the plaintiffs without the knowledge and consent of the defendant, and that, by making the said payments and advances without the consent of the defendant, the plaintiffs materially and prejudicially altered his position as surety for Mare,—is a material allegation, and one which it was incumbent on the defendant to prove. *[COCKBURN, C. J.—Is it not enough for the surety to say, "You have varied the terms of the contract"? The only question is upon whom lay the onus of proof.] In Mayhew *v.* Crickett, 2 Swanst. 185, it was held that a creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and, without the knowledge of the sureties, withdrawn the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. "I always understood," said Lord Eldon, "that, if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterwards makes a promise to pay, he cannot object to that as a promise without consideration: the promise is valid, not as the constitution of a new, but the revival of an old debt. So, when a bankrupt is discharged by his certificate, he cannot for that reason impeach a subsequent promise to pay a former debt, as a promise without consideration." That case has never been impugned in any court either of law or equity. In Smith *v.* Winter, 4 M. & W. 454,† A. endorsed to S. & Co., as a security for advances made to him by them, certain promissory notes made by B. While the notes were running, A. stopped payment, and a deed was executed by him and several of his creditors, and among them by S. & Co., whereby his affairs were placed in the hands of inspectors, and the creditors parties to the deed agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed by A. and S. & Co., and before the notes became due, B. *signed a written consent to the creditors' signing the deed and giving time to A. without prejudice to their claims on her, B. It was held that her liability on the notes to S. & Co. was thereby revived: and Lord Abinger said,—"We must take the law to be, according to the case of Mayhew *v.* Crickett, that, if the defendant, at any time before the bills became due, gave her consent to the forbearance, she remains liable." [CROWDER, J.—You will observe that the allegation in the plea is negative. COCKBURN, C. J.—Is it not an answer for the defendant to say that the contract for the breach of which by his principal he is sought to be charged, is not the contract he entered into? Does it not lie upon the plaintiff to reply that the surety knew of and assented to the altered state of circumstances?] A suggestion of that

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sort was thrown out by counsel in Smith *v.* Winter. "The plea," it was said, "alleges that the plaintiffs forbore and gave time to Innes without the defendant's consent. They did so, by the deed: if the subsequent consent cures it, that should have been replied." But Parke, B., said,—"Must we not reasonably construe your plea so as to make it a good plea, i. e. as alleging that time was given without the defendant's consent at any time? otherwise it is bad, according to the authority of Lord Eldon." [WILLES, J.—The plea there stated that time was given without the assent of the defendant. The replication took express issue on that. Now, it is a rule of pleading, that, where a plea contains a negative allegation which need not have been made, if the other side take issue on it, that makes it material and necessary to be proved. All that is discussed in Lush *v.* Russell, 5 Exch. 203,† 7 D. & L. 228.(*a*)] The argument is not inconsistent with Lush *v.* Russell. Here, the plaintiffs do take issue on the plea. [WILLIAMS, J.—*That amounts to no more than putting the defendant to proof of all the material allegations in the plea.] [*578 The doctrine of the discharge of the surety by indulgence being given to the principal, is to be judged of upon equitable principles. If a good defence in equity, it is a good answer at law. The contract of the surety is absolute: his discharge is an equitable doctrine. [COCKBURN, C. J.—The surety guaranties the due performance of the contract, subject to certain conditions. If the conditions are varied, so as to make the contract more onerous to the surety, must it not be assumed that it is done without the assent of the surety, until the contrary is shown?] The defence suggested is, "You have varied the contract without my consent." Who is to prove that, but the party who asserts it? [COCKBURN, C. J.—Is not the absence of consent to be presumed from the fact of the contract having been made more burthensome?] The plaintiffs had simply to prove the defendant's contract, and the breach. Then comes the defence. If the position of the surety has by the act of the creditor been altered so that he might be prejudiced, whether he has been actually damnified or not, he is discharged. It is enough that the contract has been varied, and that the surety *may be* damnified: see the judgment of Richards, C. B., in Bowmaker *v.* Moore, 7 Price 223, 231, Daniel 264, 270.(*b*) The rule is thus laid down in Story's Equitable Jurisprudence, 6th edit. 363, § 323,—"On the whole, the doctrine may be generally stated, that, *wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice [*579 those interests which he is bound to protect, he will not be permitted to hold any such advantage. § 324. The case of principal and surety, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish

(*a*) And see Powell *v.* Bradbury, 7 C. B. 201 (E. C. L. R. vol. 62).

(*b*) "The real and only question in the case is, whether the surety was in point of fact placed in a different situation by what had taken place on the arrangement between the principal and the obligee, and whether by such change of situation he *might have been prejudiced*, not whether he did in fact actually sustain any injury in consequence." 7 Price 231.

a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract. And, on the other hand, if any stipulations for additional security or other advantages are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them. § 325. Indeed, the proposition may be stated in a more general form,—that, if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity. § 326. It is upon this ground, that, if a creditor, without any
*580] communication with *the surety, and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the former contract, or should stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety." So, in Bell *v.* Banks, 3 Scott N. R. 497, 503, 3 M. & G. 258 (E. C. L. R. vol. 42), Tindal, C. J., says: "No doubt, the general rule is that the surety is discharged by any arrangement between the creditor and the principal, by which the situation of the surety is altered. The general class of cases exemplifying this principle, are those where without the knowledge or assent of the surety time has been given to the principal debtor by some contract that is binding upon the creditor. There, the surety was held to be discharged, on the ground that such secret arrangements amount to a legal fraud: the surety relying upon the contract by which the principal is to be called upon for payment on a given day, his situation is altered, inasmuch as he is prevented from having adverse recourse to the principal." The Bank of Ireland *v.* Beresford, 6 Dow. 233, is to the same effect. In order to displace this defence, it is necessary to show that the surety knew of the advance made to the principal. If the circumstances of the case were such as to make it his duty to make inquiry, and he abstains from making it, he is in equity affected with the knowledge he would have had or might have had if he had made inquiry. [CROWDER, J.—This part of your argument fails, unless you show that Mr. Rolt had either actual or constructive notice of the prepayment of the third instalment.] Exactly so. In Goring *v.* Edmonds, 6 Bingh. 94 (E. C. L. R. vol. 19), 3 M. & P. 259, Gaselee, J., says: "I think a surety has a duty upon him to go and inquire as to the state of the transaction." And in Wright *v.* Simpson, 6 Ves. 714, Lord Eldon says: "The surety is a
*581] *guarantee; and it is his business to see whether the principal pays, and not that of the creditor." In The Mayor of Berwick *v.* Murray, 3 Jurist, N. S. 1, the treasurer of a municipal corporation, for whom A., B., and C. were sureties by bond to the extent of 2000*l.*, kept a banking account in his own name, which was shown to have been in continuation of an account kept as treasurer, and several sums of

money paid in to that account were shown to have been corporation money. He drew from his account a sum of 2300*l.*, and placed it at interest, upon a deposit-note, in another bank, in the name of his daughter. Being indebted to the corporation in a sum greater than that amount, he was required to account, but refused; and, the corporation having informed the sureties of the debt, and his refusal to account, A., one of the sureties, went to him and demanded an indemnity, when he gave him the deposit-note for 2300*l.*, stating at the same time that he had sufficient means to meet any demand of the corporation against him. Upon a bill by the corporation for the purpose of recovering the 2300*l.*, it was held that it was to be considered as part of the corporation moneys, although A. by his answer stated that at the time the deposit-receipt was delivered to him he believed that it was the proper money of the treasurer. In giving judgment, Lord Cranworth, C., said: "When, by way of indemnity, he (A.) was offered a deposit-note,—a deposit-note made a month previously by Daniel Murray in the name of his daughter, a young woman of twenty-three years of age,—it is impossible that suspicion should not have been excited. He was bound to ask why such a deposit was made, not in his own name, but in that of his daughter. It is not alleged that he was ever led to suppose the daughter had any beneficial interest in the money. For what purpose, then, was her name used? In fact, her name was evidently *used as a [*582
means of disguising the truth. Perhaps inquiry would not have brought out the truth: but it does not lie in the mouth of William Murray to say this. He made no inquiry, although the circumstances were such as ought to have induced him to do so. He knew that the corporation alleged great misconduct and default against David Murray. If he had applied to the daughter, he would probably have learnt from her that she knew nothing of the deposit till she was called on by her father to endorse the deposit-note, that it was made without any previous communication with her, and that she was never possessed of any such sum as 2300*l.* It is impossible to permit a man who received by way of security from a defaulting agent a deposit of money which had been withdrawn from the funds of his principal, to insist, in circumstances like these, on his ignorance of the truth. I am clearly of opinion that William Murray must be treated as a person who had notice of the truth." So, here, the slightest inquiry of Mare would have made Mr. Rolt acquainted with all the facts. As he chose to make no inquiry, "he must be treated as a person who had notice of the truth." The same principle is enunciated in Owen *v.* Homan, 4 House of Lords Cases 997. And the doctrine of constructive notice from the absence of inquiry is further considered in Hewitt *v.* Loosemore, 9 Hare 449. There was nothing to show that Mr. Rolt did or could sustain any prejudice from the circumstance of the 2000*l.* having been paid in advance: it did not appear that the work went on with less vigour. [COCKBURN, C. J.—What evidence is there that Mr. Rolt knew that the prior payments had been made in anticipation?] The whole surrounding circumstances show that he must or ought to have known it. All might have been made clear if Mr. Rolt had been called, as he ought to have been. [WILLIAMS, J.—I *must confess I do not see any evidence an- [*583
nexing the prepayment to the final instalment.]

COCKBURN, C. J.—As there is not perfect unanimity amongst us, we will take a little time to consider.

J. Wilde.—We are content to take our stand upon the ruling of the learned judge, that there was no evidence to go to the jury.

Cur. adv. vult.

COCKBURN, C. J., now said:—Upon the whole, we are of opinion that there must be a new trial in this case. Leave was reserved to the plaintiffs to move to set aside the verdict entered on the assumption of certain facts, and, amongst others, that there was no evidence to go to the jury of knowledge on the part of the defendant that the payment of the 2000*l.* was a prepayment made in anticipation of the period at which, according to the contract for the due performance of which he was surety, it was to become payable. My Brother Willes was of opinion at the trial that there was no evidence to go to the jury of that fact. Upon a full discussion of the case, and after consideration,—although my learned Brother still adheres to that opinion,—the rest of the court(*a*) are of opinion that there *was* some evidence to go to the jury. We, however, think it better not to enter into the merits of the case, lest it should in any way prejudice the future trial. It is enough to say that the majority of the court think that there was some evidence which ought to have been submitted to the jury, in support of the plaintiffs' replication. We are all agreed that the burthen of proof was upon the plaintiffs. The rule must therefore be made absolute for a new trial.

*584] *WILLIAMS, J.—I may add that a great many arguments were used for the purpose of showing that the allegation in the plea,—that the prepayments were made to Mare without the knowledge or consent of Rolt, and that, by making such payments without his consent, the plaintiffs materially and prejudicially altered Rolt's position as surety,—was material, and must be proved. But we are of opinion that the burthen of proof was upon the plaintiffs.

WILLES, J.—All I think it necessary to say, is, that my Lord has accurately stated the view which I entertain.

Rule absolute accordingly.

The defendant appealed against this decision; and the case was argued in the Exchequer Chamber on the 18th of June, 1858, before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Hill, J., by The Attorney-General (Sir *F. Kelly*, with whom were *James Wilde*, Q. C., and *Garth*), for the appellant, and *Knowles*, Q. C. (with whom were *Welsby* and *W. A. Collins*), for the respondents.

The points urged on the part of the appellant (the defendant) were, that the rule of Michaelmas Term, 1857, ought to have been discharged for the following reasons,—1. That the fourth and fifth pleas were proved by the plaintiffs' own evidence at the trial, and that there was no evidence to go to the jury in support of the plaintiffs' replications to those pleas,—2. That the onus of proving the defendant's knowledge of and consent to the prepayments of 3500*l.*, 1000*l.*, and 2000*l.*, respec-

*585] tively, lay upon the plaintiffs, and that *the defendant's case was complete, upon proof of those prepayments,—3. That it was not shown at the trial that the defendant knew anything of the prepay-

(*a*) Cockburn, C. J., Williams, J., and Crowder, J.

ments, but, on the contrary, the evidence adduced by the plaintiffs showed him to have been in ignorance of them,—4. That the verdict for the defendant ought to stand, and that there was no ground either for entering the verdict for the plaintiff or for granting a new trial,—5. That the said pleas, and the facts proved in support of them, afford a clear defence to the action both in law and equity: see Calvert *v.* The London Dock Company, 2 Keen 638.

The plaintiffs' points were as follows:—"1. That the defendant's fourth and fifth pleas were not proved at the trial, and therefore the verdict on the issues joined on the replications to those pleas ought to be entered for the plaintiffs,—2. That, if the fourth and fifth pleas were proved, the replications thereto were also proved in substance, and therefore the issues joined thereon ought to be entered for the plaintiffs,—3. That, assuming that it was necessary, in order for the plaintiffs to succeed on the above issues, that they should give evidence to prove that the defendant knew of and consented to the prepayments made by the plaintiffs to Mare, evidence of such knowledge and consent was given by the plaintiffs at the trial, which evidence ought to have been left to the jury; and that therefore the learned judge at the trial was wrong in directing a verdict for the defendant on the above issues, and the Court of Common Pleas were right in ordering a new trial. And the plaintiffs will rely on the grounds set forth in the rule obtained by them in the Court of Common Pleas.

WIGHTMAN, J.—We are of opinion upon the whole *case that the conclusion come to by the Court below was right. What may [*586 be the result of a new trial, we do not pretend to say; but, as we think there was some evidence which ought to have been submitted to the jury, the cause must go down again. We will not prejudice the case by offering any opinion upon the weight of the evidence.

Judgment affirmed.

The cause was tried again at the sittings after Hilary Term, 1859, before Cockburn, C. J., and a special jury. The following admissions were made by the attorneys for the respective parties:—

"1. That the defendant signed the agreement mentioned in the pleadings:

"2. That Charles John Mare also signed such agreement, and that he was adjudicated a bankrupt on the 25th of September, 1855:

"3. That Charles Lee was appointed official assignee, and Peter Rolt (the defendant), Mark Hunter, and Samuel Turner, all three being creditors, were chosen and appointed creditors' assignees under the bankruptcy:

"4. That the steam-ship, the subject of the said agreement, was launched on the 12th of September, 1855, and was not finished and fitted for sea by Charles John Mare on or before the 13th of September, 1855.

"5. That the plaintiffs paid to or on account of Charles John Mare the following sums on account of the moneys payable, or to become payable, under the said agreement, at the dates following:—On the 28th of April, 1855, 3500*l.*,—on the 24th of May, 3500*l.*,—on the 5th of July, 3500*l.*,—on the 11th of August, 1000*l.*,—on the 13th of September, 2000*l.*

*587] *"6. That such sums were paid by checks on the plaintiffs' bankers, Spooner, Attwood & Co."

The following evidence was given on the part of the plaintiffs:—

Mr. Attwood, one of the directors of the General Steam Navigation Company, gave substantially the same evidence as he gave on the former trial. As to the 2000*l.* paid on the 13th of September, he stated that it was paid into Spooner & Co.'s to the credit of Mr. Rolt, on Mare's order.

Mr. Twells, a partner in the house of Spooner, Attwood & Co., also gave evidence as to the pecuniary transactions between Mare and Mr. Rolt, substantially as upon the former occasion.

The defendant was then called. On his examination in chief, he stated in substance as follows:—Mr. Mare is my son-in-law. Previously to his bankruptcy, he carried on a very extensive business as a ship-builder at Blackwall. My office is in Clement's Lane, Lombard Street. Mr. Mare used to avail himself to some extent of the services of my clerk, with my consent. I had nothing to do with his ship-building business, or any interest in it. In 1855, I was in the habit of assisting Mr. Mare to a very considerable extent, by lending him my checks. With the exception of Mr. Mare making use of the services of my clerk at my office, I had no knowledge of the details of his business as a ship-builder. His communications with my clerk were generally carried on without my knowledge. He required the services of my clerk for his convenience. At the time I am speaking of, Mr. Mare had an office of his own in Lombard Street. When he came to my counting-house and saw my clerk, he saw him in his place, and generally not in my presence, but in another room. I recollect becoming surety for Mr. Mare under the *588] agreement now in question. I had become surety *for him in respect of other ships in like manner, on account of the same company. The first time I heard of the company having made advances to Mr. Mare before the time stipulated for in the contract, was when I received the letter which has been read, of the 21st of February, 1856.(*a*) Before I received that letter, I certainly had not any knowledge that the company had made prepayments. Mr. Mare had not told me at any time anything about the sums he was receiving from the company, with the exception of the 2000*l.*, nor ever asked my assent to the money being paid out of its proper time. Neither Mr. Mare nor anybody else ever told me that that 2000*l.* was a prepayment, a payment made out of order and before the company were bound by the contract to pay it.

(*a*) This letter and Mr. Rolt's answer were read in the cross-examination of Mr. Attwood. The letter, which was addressed to Mr. Rolt by Mr. Pratt, the secretary of the company, was as follows:—

"Dear Sir,—Mr. Lee is pressing for payment of the bill sent in by the assignees of Messrs. C. J. Mare & Co., and the directors propose to pay him a sum on account on Saturday next. The account is now under revision, as you suggested: but the directors have desired me to state that whatever deductions may be made, with the instalments already paid to Messrs. Mare & Co., will exceed the sum agreed to be paid for the vessel by the terms of the contract; which overpayment, with a further outlay by this company for sundry stores supplied to the vessel, the directors will have to claim from you."

To this letter, Mr. Rolt replied as follows:—

"22 February, 1856.

"Dear Sir,—In reply to your letter of the 21st instant, I request you will be kind enough to furnish me, with the terms of the contract between Mr. Mare and The General Steam Navigation Company, the mode of payment for the ship, and the amounts and the dates when the various instalments were paid to Mr. Mare."

On cross-examination, Mr. Rolt said:—I knew what *I was doing when I signed the agreement: I knew I was undertaking [*589 a responsibility as surety for my son-in-law. I knew the payments were to be made at certain stipulated times until the vessel was finished. I kept my engagements in mind. I was under very heavy advances for Mr. Mare during the whole of the year 1855. He sometimes told me when his money was coming in: and, when he got money from me, I asked him when I should get it back. The checks I gave (the 5000*l.*, 2000*l.*, and 1000*l.*) were to be held as collateral security for the repayment of advances to Mr. Mare. Spooner, Attwood & Co. took those checks as collateral security until the advances were repaid. When Mare got the payment from the General Steam Navigation Company (meaning the 2000*l.*), he paid it in to the bankers' in liberation of my checks. Mr. Mare and I never talked at all about the sources from which he got the money which he paid in liberation of my checks. I cannot say whether it was ever mentioned. Mr. Payne was my cashier, and managed that department. Until the 2000*l.* was paid, I never knew anything of it. I took no trouble in the matter. I certainly did not keep it in mind that Mr. Mare would have to receive money under that agreement. I did not consider Mr. Mare's means of receiving money. I had done my part in signing the agreement. I had no motive to inquire about the money. I knew the 2000*l.* was to come from the company. I never discussed the matter with Mare as to where the money was coming from. When I talked about the 2000*l.*, Mare told me it was the launching instalment upon the ship. He told me I should have the 2000*l.* he was going to receive from the company when the ship was launched. I knew perfectly well by the agreement that 2000*l.* was not the whole instalment becoming due. The reason I did not ask him some further question, and *say there must be more than 2000*l.*, [*590 or why I did not get the 3500*l.*, was, because he could not spare any more of it to me, and I had only to pay 2000*l.* I knew he ought to receive 3500*l.* He said he could not spare me more than 2000*l.* I recollect in October meeting Mr. Attwood in the street, and his saying something about the penalties I was incurring. He made some remarks on the subject of penalties. We were a very few moments together. Unquestionably, I did not then know that Mr. Mare had been paid nearly the whole of the contract-money, and that only a few hundred pounds remained in the hands of the company. I supposed the last instalment was in the hands of the company. The fourth instalment was not due until the ship had been completed and tried at sea.

On re-examination, he said:—Whatever I learned from Mr. Mare about the sums he expected to receive from anybody, he did not at any time call my attention to the circumstance that he expected to receive or had received from the General Steam Navigation Company any sum by way of advance. I never heard from Mr. Mare or from any one else that he had received or expected to receive any payment by way of advance.

Joseph Payne, Mr. Rolt's clerk, was called. He stated that he was in the habit of executing orders from time to time for Mr. Mare, and received a separate salary from him, but that he had no knowledge of the particulars of the contract in question. On cross-examination, he stated that he did not know that the 2000*l.* was part of the last instal-

ment: and, upon a receipt being put into his hands, containing these words,—"13 September, 1855. Received of The General Steam Navigation Company 2000*l.* on account of the last instalment due for the new steam-ship,"—he admitted it to be in his handwriting, but stated
*591] *that he knew nothing about it, but merely wrote what Mare dictated.

Mr. Mare was also called, and he corroborated the evidence of Mr. Rolt as to his not having communicated to him the fact of the third and last instalments having been anticipated.

His lordship, having summed up the case to the jury, handed them a paper with the following questions:—

"First,—Did the defendant know that the payment of the 1500*l.* on the 5th of July was a payment made on account of the third instalment, before the vessel had been launched?

"Secondly,—Was the defendant prejudiced by that payment?

"Thirdly,—Did the defendant know that the payment of 1000*l.* on the 11th of August was a payment made on account of the fourth instalment, before the completion of the vessel?

"Fourthly,—Did the defendant know that the payment of 2000*l.* on the 13th of September was a payment made on account of the fourth instalment, before the completion of the vessel?"

To these questions the jury answered,—to the first, "We all agree that he did not know,"—to the second, "We are all agreed that he was not prejudiced by that payment,"—to the third, "We are all agreed that he did not know,"—to the fourth, "We are all agreed that the defendant did not know."

The Lord Chief Justice thereupon directed that a verdict should be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them, upon any grounds, legal or equitable, not inconsistent with this finding of the jury.

Knowles, Q. C. (with whom were *Welsby* and *W. A. Collins*), in
*592] Easter Term, 1859, accordingly moved for *a rule to show cause why a verdict should not be entered for the plaintiffs, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the evidence. 1. The defendant was not, under the circumstances, prejudiced by the prepayments made to Mare: the jury so found. [COCKBURN, C. J.—They found that he did not know of them, and was not prejudiced. I thought the verdict right.] 2. It was the defendant's duty, under the circumstances, to have made inquiry whether the payments made to Mare were made in conformity with the contract; and, not having done so, he must be taken in equity to have had notice that such payments were not made in conformity to the contract. It must be borne in mind that the pleadings are *equitable*. The circumstances proved on the part of the plaintiffs, and admitted by the defendant himself, amount to constructive notice. There was enough to make it the defendant's duty to inquire: and, having neglected to do so, he is, in equity at least, fixed with the knowledge he would have acquired if he had made inquiry. With regard to the 2000*l.* paid on the 13th of September, the defendant knew that the contract had then been broken by Mare, the 12th being the day stipulated for the completion and delivery of the vessel. There are numerous authorities to show, that, in equity, means of knowledge will be taken to be knowledge,

where the circumstances impose upon the party any obligation to make inquiry, and that duty is neglected. Thus, in Kennedy *v.* Green, 3 Mylne & K. 699, it was held, that where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee: and, where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under *circumstances, apparent upon the face of the deed fraudulently obtained, [*593 which ought to have excited the suspicion of a professional man, and have led to inquiry, it was held by the Master of the Rolls,—first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor,—secondly, that the circumstances under which the fraud was committed were sufficient to fix the mortgagee with constructive notice, and that, if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect to constructive notice, as he would have been if he had employed a solicitor. This decision was affirmed, on appeal, on the *second* ground. Lord Brougham, C., being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor, who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal. In pronouncing judgment, his Lordship says, —"The doctrine of constructive notice depends upon two considerations,—first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds knowledge to exist, because it is highly improbable it should not,—and, next, that policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case, it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to *both, whether it be so in fact or not. Under one or other of [*594 these heads, perhaps under both, comes the other principle, which is quite undeniable, that, whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation." The same doctrine is laid down in Hewitt *v.* Loosemore, 9 Hare 449, where it was held that a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud or gross or wilful negligence on his part; and the court will not impute fraud or gross or wilful negligence to the legal mortgagee, if he has bonâ fide inquired for the deeds and a reasonable excuse has been given for not delivering them to him; but the court *will* impute fraud or gross or wilful negligence to the mortgagee, *if he omits all inquiry as to the deeds.* The Mayor of Berwick *v.* Murray, 3 Jurist N. S.(*a*) is a distinct authority to the same effect. [COCKBURN, C. J.—I do not quite see what there was here to court

(*a*) Cited antè, p. 581.

inquiry. Why is the surety to assume that the company will prejudice themselves as well as him by making anticipatory payments?] It is submitted that the circumstances were so fraught with suspicion as to make it incumbent on the surety to ascertain the real facts. Owen v. Homan, 4 House of Lords Cases 997, is also a strong authority in favour of the view now presented. [WILLES, J.—That was a very peculiar case.]

COCKBURN, C. J.—I am of opinion that there should be no rule in this case. As regards the question which arises upon the plea, independently of the equitable ground which Mr. *Knowles* has last taken, it *595] is clear *that the plaintiffs have made a payment on account of the fourth instalment of the contract price before the completion of that portion of the work which was to entitle Mr. Mare to receive the money, and thereby prejudiced the position of the surety, who loses, by that anticipatory payment to the principal, the strong inducement which otherwise would have operated on his mind to induce him to finish the work in due time. Mr. *Knowles*, however, contends that the ground of defence taken in that respect by the surety is removed by the circumstance of the money which was thus paid by way of anticipation having found its way into the pocket of the surety. But I think that argument fails, because, though true it is the money found its way into the pocket of Mr. Rolt, yet it so found its way there because Mare was Mr. Rolt's debtor, and the money was paid to him on that account. It is quite immaterial, therefore, that Mr. Rolt in point of fact received the money so advanced. His position as surety was equally prejudiced by the alteration of the contract for the performance of which he consented to be bound. Then, as to the other ground presented by Mr. *Knowles*, arising out of the equitable defence,—that the surety is not to avail himself of that defence, if he could by inquiry have ascertained that the money had been prematurely or improperly paid, and neglected to make such inquiry. The answer to that is simply this,—that the payment is admitted to have been made wrongfully; that is, that it was a payment whereby the surety has been unduly and improperly prejudiced. But then it is said that the payment was made with the knowledge and assent of the surety. Was there any assent? It is conceded that *actual* assent there was none: but, says the learned counsel for the plaintiffs, there was *constructive* consent, and that in this *596] way,—Mr. Rolt, he says, knew that the money was *paid, and, if he had made inquiry, he would have ascertained that the payment was by way of anticipation of what was to form the fourth instalment of the purchase-money. That, as it appears to me,—adopting the doctrine of constructive assent to the fullest extent,—turns upon whether the circumstances were such as to convey to the mind of Mr. Rolt the existence of such a state of things as to make it incumbent on him to make inquiry. I do not gather from the evidence that they were. Mr. Rolt was told that a payment was about to be made on account of the third or launching instalment. If it had been on account of that instalment, it would have been a perfectly legitimate payment. Mr. *Knowles* says that Mr. Rolt must have been aware that by this time the work should have reached its fourth stage, and consequently that the fourth instalment should have been payable; and that that was enough to put him upon his guard, and to induce him to make inquiry. That argument, however, assumes that it was present to Mr. Rolt's mind that the

13th of September, the day on which the 2000*l.* was paid, was after the day stipulated for the completion of the vessel, when the fourth and last instalment would become payable. I think it would be straining Mr. Rolt's evidence too far to hold it to amount to an admission or acknowledgment such as is suggested. On the contrary, the whole tenor of it seems to me to show, that, although aware of the general scope and character of the contract, the precise circumstances of the case as they then existed were by no means present to his mind. I therefore do not see anything which called upon him to make the inquiry which it is said he ought to have made; for, although by the evidence he appears to have assented to the receipt of this 2000*l.* by Mare, and the money immediately finds its way to him, he assented in the belief that it was a *portion of the third instalment which had before that time become due. To constitute an answer to the equitable defence [*597 set up by the surety, it was incumbent on the plaintiffs to show that his assent was given with knowledge, or the means of knowledge such as he was bound to avail himself of, that the payment was an anticipatory one. For these reasons, it seems to me that the verdict was right, and that there is no ground for this motion.

CROWDER, J.—I am also of opinion that this verdict ought not to be disturbed. The first ground taken by Mr. *Knowles*, is, that the position of Mr. Rolt, the surety, was not in fact prejudiced by what occurred in respect of the mode of paying the instalments, because he says, that, although payments prematurely made might be prejudicial to the surety, there could be no prejudice here, inasmuch as 2000*l.* of the money found its way into Mr. Rolt's pocket. It seems to me, however, that the fact of the money so received by Mare having been handed over to Mr. Rolt in part payment of a debt due from him to Mr. Rolt did not in the slightest degree vary the question before the jury, viz., whether Mr. Rolt was prejudiced in his position as surety by the time of payment of the instalments under the contract being anticipated. It is obvious that a prepayment must prejudice the surety in a case like this, inasmuch as it deprives him of the benefit of that which would be an inducement to the principal to perform the contract in due time. I see nothing in the fact of the money having ultimately come to the hands of the surety, to alter his position in that respect. Then, it is further contended, that, though the jury have found that the money was received by Mr. Rolt, knowing where it came from, but that he did not know that it was a prepayment, believing it to be part of *the instalment which was to become due upon the launching of the vessel, [*598 —yet, looking at this matter as a court of equity would view it, he must be taken to have known that it was a prepayment, because the circumstances were such as should have led him to inquire, and, if he had inquired, he would have ascertained that it was so. Looking at the facts, I find, that, at the time the 2000*l.* was paid, the launch of the vessel, which was to entitle Mare to receive the third instalment, had not taken place; and the jury have found that Mr. Rolt was led to believe, and did believe, that the money was paid on account of the launching instalment. I see nothing in that which made it incumbent on Mr. Rolt to make any further inquiry. I do not find anything in the evidence to lead me to the conclusion, that, when he received the 2000*l.*, Mr. Rolt had present to his mind that the 13th of September

was the day stipulated for the completion and delivery of the vessel: all that he stated on cross-examination was, that, when he entered into the agreement, he knew what the terms of the contract were; beyond that, nothing appears from his cross-examination to show that he had any knowledge or recollection on the subject. Several cases were cited,—among them that of The Mayor of Berwick *v.* Murray, 3 Jurist N. S. 1,—for the purpose of showing, that, though a surety may have no actual knowledge of the course of dealing with his principal, yet, if the circumstances are such as ought reasonably to have led him to make inquiry, and he abstains from doing so, that shall be deemed equivalent to knowledge. The facts of that case seem to me to differ in every particular from the present. There, Murray, the defendant, who was a surety, had taken from his principal property which on the face of it appeared to be the property of another. I do not see how that can have
*599] any *application to the case now before the court. As far as I can judge from the evidence, and looking at the finding of the jury, I feel bound to say that Mr. Rolt did not know that the 2000*l.* which was paid on the 13th of September was any other than a payment on account of the third instalment; though, perhaps, if he had inquired, he might have ascertained that it was a payment on account and in anticipation of the fourth and last instalment. I therefore think there should be no rule.

WILLES, J.—I am of the same opinion. As to the first point, Mr. *Knowles* says, that, as the 2000*l.* was paid to Mr. Rolt or to his account, he sustained no prejudice from its being an anticipatory payment. But I must confess I do not see how the receipt of the money from Mare, or by means of Mare's order, in satisfaction of a debt due to him from Mare, can establish that proposition. A case of Samuell *v.* Howarth, 3 Meriv. 278, was cited on the former argument (antè, p. 574), which is a decision of Lord Eldon's very much in point. His lordship there says: "A creditor has no right,—it is against the faith of his contract,—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." It is clear, therefore, there must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract: and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice. Here, there was an unauthorized payment of 2000*l.* to Mare; and, as this payment was made without Rolt's assent, that, according to Samuell *v.* Howarth, was such a prejudice to him as surety as to discharge him. Then, assuming that to be so, Mr. *Knowles* contends that there was here evidence of
*600] assent on the *part of Mr. Rolt, inasmuch as he knew of the payment, and must under the circumstances have known that it was a prepayment. The jury, however, have found that Mr. Rolt was not aware that the payment of the 2000*l.* was a prepayment. He believed it to be part of the third or launching instalment, which had then become due. But then Mr. *Knowles* contends that the surrounding circumstances were such that they ought to have put Mr. Rolt upon inquiry; and, if he *had* inquired, he would have found that the launching instalment had been all paid more than two months before, and, as he abstained from inquiry, he must in equity be presumed to have knowledge of, and consequently to have assented to, that unauthorized

payment. But no authority has been cited which goes that length: and the doctrine of constructive assent is not one which ought to be admitted, certainly not one which a court of law ought to extend. No case has been cited to show that any such duty to inquire is imposed on a surety. The case of Owen *v.* Homan, 4 House of Lords Cases 997, says that such a duty is, under suspicious circumstances, imposed upon the creditor, but it does not say that that is so as to a surety. In the case of The Mayor of Berwick *v.* Murray, the question really was whether a person obtaining, for no consideration, property from one who was not the true owner, nor even the apparent owner, and under circumstances calculated to engender a suspicion that he was dealing with property which was not his own, could retain it as against the true owner. It was a totally different case from this in all its circumstances. It can have no application to the case of a person bonâ fide receiving money which he has no reason to believe has been unduly obtained. I think there was no duty imposed upon Mr. Rolt to make inquiry, and that there was nothing to excite his suspicion or to put *him upon his guard. The only circumstance which could at all be relied [*601 on, is, the fact that the payment which was called the launching instalment was made at a time when there was reasonable ground for supposing that the vessel was finished, and therefore that the only payment which remained to be made was the fourth or final instalment. But that seems to me to assume that all the payments had been regularly made at the stipulated periods, and, if so, the launching instalment must have been due a long time before. Upon the whole, therefore, I think there should be no rule.

BYLES, J., having been counsel for the plaintiffs upon the former trial, took no part in this decision. Rule refused.

Feb. 3, 1860. The plaintiffs appealed against this decision; and the case came on for argument in the Exchequer Chamber on the 3d of February, 1860, before Lord Chief Baron Pollock, Wightman, J., Channell, B., Hill, J., and Blackburn, J. The first points for argument were as follows:—

For the plaintiffs,—That, under the circumstances stated in the case, there is nothing to show that the defendant was or could be prejudiced in his capacity of surety by any of the advances made by the plaintiffs to Mare, and therefore he was not thereby discharged from his liability as such surety: That the defendant must be taken in equity to have had notice and knowledge of such advances, and of the circumstances under which and of the purposes for which they were made, and to have assented thereto, and therefore he was not by such advances, or any of them, discharged from his *liability as such surety: That, upon [*602 the facts stated in the case, it was the duty of the defendant to make inquiry for what purposes and under what circumstances the said advances were made by the plaintiffs to Mare, and that, the defendant not having made any such inquiry, it must be taken as against him that he knew for what purposes and under what circumstances the same were made, and assented thereto: And that, upon the facts stated in the case, and notwithstanding the findings of the jury, the defendant was not discharged from his liability as surety.

For the defendant,—1. That the Court of Common Pleas were right

in refusing to grant the rule, and that the verdict ought to stand for the defendant,—2. That all the material allegations in the fourth and fifth pleas were proved at the trial and affirmed by the jury, and that the special replications to those pleas respectively were not proved, and were negatived by the finding of the jury,—3. That it is immaterial to the validity of the defence whether the defendant was or was not in fact prejudiced by the prepayments,—4. That the defendant was in fact prejudiced by the prepayment of the two sums respectively of 1000*l.* and 2000*l.*,—5. That the points upon which the rule was moved in the Court of Common Pleas have no foundation in law or equity, and that they are not raised by or open to the plaintiffs upon the pleadings.

Welsby (with whom were *Knowles*, Q. C., and *W. A. Collins*), for the appellants (the plaintiffs).—Having urged, as was urged below, that there was nothing to show that the defendant, as surety, had sustained or could sustain any prejudice or damage from the circumstance of advances having been made to Mare before the stipulated times for payment of the instalments, he proceeded to contend, that, upon the facts *603] *stated in the case, there was enough to show that the defendant had, according to the doctrine of equity applicable to contracts of suretyship, constructive knowledge of those payments. [POLLOCK, C. B.—Can we infer knowledge from the facts stated, when the jury have not found it? HILL, J.—Constructive knowledge or notice is matter of legal inference from certain facts. Until those facts are found, we cannot say whether there was or was not constructive notice.] The facts are found in the special case. [WIGHTMAN, J.—No. All you have, is, the *evidence* and the finding of the jury.] The jury have found that Mr. Rolt did not know of the prepayments. That was the only question of fact expressly left to them. They must be taken to have found that on the undisputed facts of the case as proved in evidence. [HILL, J.—If you contend that there was constructive notice, you ought to have had that found, or the facts found from which constructive notice follows as a conclusion of law from the evidence.] A court of equity would draw the inference from the pleadings. [HILL, J.—In equity the judge performs the functions of a jury also.] This being a motion in effect calling upon this court to enter a verdict for the plaintiffs because certain facts were proved in evidence which amount in equity to constructive notice, undoubtedly those facts should have been found by the jury. [POLLOCK, C. B.—Constructive notice is notice. The jury found that Mr. Rolt had no notice. You are only entitled to move upon any ground, legal or equitable, which is not inconsistent with the finding of the jury.] This is not inconsistent with the finding of the jury. The difficulty is, that the jury have not said anything about it one way or the other; nor have the facts been left to them eo intuitu. [BLACKBURN, J.—Nor have they been admitted by agreement of counsel at the *604] trial.] If we had contended for actual *knowledge, we should have submitted that question to the jury, if there was any evidence of it: or, if the Lord Chief Justice had ruled that there was no evidence of it, we might have moved on the ground of misdirection. But, by the course the cause took at the trial, we were deprived of the opportunity of so doing.

Sir Fitzroy Kelly (with whom were *Wilde*, Q. C., and *Garth*), contrà, was not called upon.

POLLOCK, C. B.—I believe we are all of opinion that there is no occa-

sion to trouble the learned counsel in answer to this application: but that, considering this as a rule to enter a verdict for the plaintiffs, against which cause is to be shown in the first instance, we are all of opinion that the rule ought not to be granted. Speaking in this respect only for myself, I would make this remark, that this case appears to me to illustrate what I have sometimes doubted, viz. whether the power of reserving these points has dispensed altogether with the propriety of tendering a bill of exceptions. This is only my own view; but I think the point which Mr. *Welsby* meant to raise was properly either the subject of a bill of exceptions or of a motion for a new trial,—not that which was reserved by the learned judge,—on the ground of misdirection. Neither of these courses has been adopted. I believe we are all of opinion that this rule ought not to be granted, and upon this ground,—that it is for the purpose of entering a verdict for the plaintiffs. It is the duty of the counsel who moves that the verdict should be so entered, to show that the plaintiffs are entitled to it. Now, certainly, primâ facie, the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is now called upon to pay damages, is a prejudice to the *surety. He is not in the same situation with regard to his principal in which he ought to be placed: he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. With regard to the point that there was constructive notice, that has very properly been abandoned by Mr. *Welsby*. It is clearly not tenable: Primâ facie, the surety was prejudiced by the existing state of things. Whether there could have been any proof to show, that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees. Upon these grounds, we are all of opinion that the rule cannot be granted, and that the judgment of the Court of Common Pleas must be affirmed. Judgment affirmed.

[*605

The American authorities on the subject of the discharge of sureties, will be found collected and ably discussed in the notes to United States *v.* Howell, 2 American Lead. Cas. 136; and Rees *v.* Berrington, 3 Lead. Cas. Eq. 3 Am. Ed. 547.

In Taylor *v.* Jeter, 23 Missouri 244, it was held, that where the owner of a house pays to the contractor the agreed price, after notice of the filing of liens by the workmen, the remedy against the sureties of the contractor was lost to that extent, as he had thereby parted with the means of indemnity to which the sureties were entitled. A payment to a contractor, of the percentage to be retained until the entire completion of the contract, before that time, will in like manner relieve his sureties: Ibid.; Calvert *v.* London Dock Co., 2 Keen 638.

In Oxford Bank *v.* Lewis, 8 Pick. 458, and Freeman's Bank *v.* Rollins, 13 Maine 208, it was held, that the payment of interest in advance on an overdue note, did not discharge a surety; but in N. H. Savings Bank *v.* Colcord, 15 N. H. 119, the opposite view was adopted, on the ground that such a payment was evidence of an agreement to give time: and see Young *v.* Blake, 1 Y. & C. Exch. 420.

END OF EASTER TERM.

*606] *IN THE EXCHEQUER CHAMBER.

EASTER VACATION, 22 VICTORIA.

WHEELER v. GRAY.

A landlord is justified, under the 83d section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3: and it is no objection that he has neglected to give the notice to the district surveyor, required by s. 38.

This was an action of trespass for breaking and entering certain premises in the occupation of the plaintiff, in Gray's Place, King's Road.

The defendant pleaded not guilty "by statute," the statute referred to in the margin of the plea being the Metropolitan Building Act, 18 & 19 Vict. c. 122, ss. 3, 82, 83, 85, and 108; and also leave and license.

At the trial before Cockburn, C. J., at the sittings at Westminster after Michaelmas Term, 1857, a verdict was found for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit. A rule was obtained accordingly, which in Trinity Term last was made absolute, the Court of Common Pleas holding that a landlord is justified, under the 83d section of the Metropolitan Building Act, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3; and that it is no objection that he has neglected to give the notice to the district surveyor, required by s. 38. Vide 4 C. B. N. S. 584 (E. C. L. R. vol. 93).

Against this decision the plaintiff appealed; and the case was argued in the Exchequer Chamber on the 7th of February last, before Crompton, J., Bramwell, B., and Hill, J.

*607] *Gibbons* was heard on behalf of the plaintiff. The arguments urged were substantially the same as those urged in the court below.

T. Chitty, contrà, was not called upon.

Crompton, J.—I am of opinion that the Court of Common Pleas decided rightly in this case. They did not determine it upon any question whether notice of action was necessary or not; and, in the view we take, it is unnecessary for us to consider it. No answer has been given to the question which I put in the course of the argument, why the 83d section of the Metropolitan Building Act does not sufficiently justify this alleged trespass. It was, indeed, urged that there ought to be an exception implied where the "building owner" and the "adjoining owner" are the same person: but I do not see that. I do not see why, if all the party-structure which requires repair belongs to one owner, the section cannot apply. The 83d section gives a protection to the building owner against the tenant of the adjoining owner in doing the requi-

site works. There is, in my opinion, no reason why it should not also protect him against his own tenant. The 86th section governs this case, unless the giving some notice to the tenant is necessary as a condition precedent. The provisions of the 85th section have been relied on by the plaintiff. That section provides that "no building owner shall, except with the consent of the adjoining owner, or in cases where any party-structure is dangerous, in which case the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party-structure, unless he has given at least three months' previous notice to the adjoining owner, by delivering the same to him personally, or by sending it by post in a *registered letter [*608 addressed to such owner at his last known place of abode; and that the notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced." The reasoning of the Court of Common Pleas is very cogent, that the building owner need not give any such notice to himself. The tenant is excluded by the interpretation clause, s. 3, from being considered an "owner," and therefore no such notice need be given to him. He is not protected in any case; for, the adjoining owner might consent to the building owner doing the repairs immediately. Such consent was in fact given in this case. It was further urged that the defendant cannot rely on the statute, because no notice had been given to the district surveyor of the intended work, under s. 38. The judgment of the Court of Common Pleas on this point is satisfactory to me, holding as they do that the giving of notice to the district surveyor is not a condition precedent to the defendant's being entitled to the protection of the act. If the notice is not given, there is only a liability to penalties under s. 41. I therefore think the defendant was justified in what he did, though he had not given either notice.

BRAMWELL, B.—I also abstain from giving any opinion upon the question whether a notice of action was necessary. On the other point, I agree with my Brother Crompton that the defendant is entitled to judgment. It has been contended that ss. 82 and 83 of the act only apply to cases in which the building and adjoining owners are different persons, and not to cases where they are the same person. That argument is not, in my opinion, well founded. The statute does not say that one person may not fill both characters. The term "party-wall" is in s. 3 defined to mean *"every wall used or built in order to be [*609 used as a separation of any building from any other building, with a view to the same being occupied by different persons." So that a "party-wall" may belong in all its parts to one person. The term "party-structure" includes "party-walls," &c., "and other structures separating buildings, &c.," "which belong to different owners, or which are approached by distinct staircases or separate entrances from without." So that a party-structure may belong to the same owner. Section 82, it is true, seems rather to suppose that there would be two owners: but it may have a sensible application when there is one owner only, viz., when there is an owner who occupies one building himself, and who has let the building on the other side of the party-wall to a tenant from year to year. It is said that he might get rid of his tenant by giving him notice to quit, and that he might then do the repairs: but it may be a

very long time before he could legally determine the tenancy in that way. The case of the present defendant may be within the mischief the statute intended to remedy. Further, it was pressed upon us, that, had there been another person as adjoining owner, three months' notice must have been given to him before anything could have been done, and that he could have given notice of it to his tenant. But there is no obligation upon the adjoining owner to give any such notice to his tenant; and also, the adjoining owner may, if he pleases, give his consent that the works shall be commenced immediately. As far as ss. 83 and 85 are concerned, the tenant from year to year is left out of the protection of the statute. I do not think that we ought to put an implied qualification upon the act of parliament, without some necessity. The right to pull down and repair any party-structure is applicable, in my opinion, *610] to a case where one person is the owner *of the two adjoining premises. We have no right to cut down the operation of the statute to a case where there are two owners only. There is no strong ground of reason or convenience to warrant us in so doing. On the contrary, reason and convenience seem to point the other way.

Watson, B.—I am of the same opinion. If we were to adopt the construction contended for, it would be taking out of the act of parliament all cases where the owner of two adjoining premises occupied one of them himself and let the other to a tenant from year to year.

Hill, J.—It is admitted that this is a party-wall; and it is found as a fact that it was out of repair, and that the defendant repaired it. There is nothing to show that anything was done beyond what was necessary for doing the repairs. No negligence or improper delay was shown, or any violation of the Metropolitan Building Act. The defendant is not, I think, a trespasser, for want of giving notice to the district surveyor: nor is he so, in my opinion, for want of the notice required to be given to the adjoining owner. The attention of the legislature was directed to the interests of the adjoining owner and building owner. The only provision in favour of the tenant, is, that the person who has to do the repairs is to do them in such a manner and at such a time as not to cause unnecessary inconvenience to the adjoining owner: s. 85, clause 3. Where there is an adjoining owner, he might waive the necessity of the three months' notice, and give his consent to the repairs being done at once. If he does so, his tenant would have no action of case or trespass against the building owner, if the repairs are *611] done properly. Here the adjoining owner and *building owner is the same person, viz., the defendant. He could not be required to give notice to himself. Trespass, therefore, will not lie: but an action, I think, might nevertheless have been maintained, had there been any negligence or improper delay. Judgment affirmed.

ROBERTS *v.* BRETT. *May* 16.

By an indenture of the 15th of May, 1855, the plaintiff covenanted that he would forthwith, at his own expense, procure a suitable vessel, and stow on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, &c., the said ship, and would have her fully equipped at the Nore, ready for sea, on or before the 15th of July then next, and proceed forthwith to Cape T., and there lay down the cable, &c. And the defendant covenanted to pay the defendant 5000*l.* by certain instalments, viz., 1000*l.* on or before the expiration of *seven days* after the arrival of the vessel alongside Morden's Wharf, 2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside Morden's Wharf, and 2000*l.* when and so soon as the ship should put to sea from the Nore: "And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff (and the defendant respectively) thereinbefore contained, &c., the plaintiff (and the defendant) should, *within ten days from the execution of these presents*, give and execute to the defendant (or the plaintiff), &c., a bond in the penal sum of 5000*l.*:"—Held, that the giving of the bond by the plaintiff to the defendant was a condition precedent to his right to sue the defendant for a breach of his contract in refusing to allow the plaintiff to stow the cable on board a suitable vessel.

ERROR from the Court of Common Pleas: see 17 C. B. 534, and 18 C. B. 561. Since the argument of the demurrer, the declaration was amended by striking out the second breach, and adding the words in italics at p. 618.

The declaration stated, that, by a certain indenture made between the plaintiff of the one part, and the defendant of the other part, and bearing date the 15th of May, 1855, he the plaintiff, for the considerations therein mentioned, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors and administrators, in manner following, that is to say, that he the plaintiff should and would *forthwith*, at his own expense, procure the Cornwall frigate, or some other suitable ship or vessel, and *should and would (unless prevented by fire, tempest, or the Queen's enemies) stow or [*612 cause to be stowed on board the said ship or vessel the submarine telegraphic cable which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, in the county of Kent, and in the said indenture afterwards called for the sake of distinction "The African and Sardinian Cable;" and also should and would, at the like expense, unless prevented as aforesaid, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions; and also should and would, at the like expense, obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and also should and would, at the like expense (unless prevented as aforesaid), provide and place on board the said ship or vessel, to the satisfaction of the defendant, his executors and administrators, proper and sufficient breaks and rollers in order that the said cable might be properly paid out, and should and would to the extent of 600*l.* pay the expense of insuring the said cable to the amount of 60,000*l.*; and should and would, at the like expense (unless prevented as aforesaid), if so required by the defendant, his executors or administrators, place on board from the said Morden's Wharf any further quantity of submarine telegraphic cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require; and should and would

(unless prevented as aforesaid) do and perform all the several acts thereinafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the
*613] Nore, on or before the 15th of July then next; and *further that the plaintiff should and would, as soon as the said ship or vessel should be ready for sea at the Nore as aforesaid, unless prevented as aforesaid, cause the same to proceed with the said cable or cables on board, as the case might be, to Cape Tabague, on the northern coast of Africa; and should and would, at such expense as aforesaid (unless prevented as aforesaid), with all convenient despatch, proceed to pay out and lay down the said African and Sardinian Cable from the said Cape Tabague, or as near thereto as might be practicable, to the Cape Spartivento, in the island of Sardinia, or as near thereto as might be practicable; and should and would, at his own expense, provide all steam-tugs and other vessels necessary for laying down the said cable as last aforesaid; and also should and would (unless prevented as aforesaid), according to the directions in writing of the defendant, his executors or administrators, either discharge the other cable thereinbefore mentioned either at Cape Spartivento or Cape Tabague, as the defendant, his executors or administrators, should by writing under his or their hand or hands direct, and, if no such direction should be given, then at the said Cape Tabague; and should and would with all convenient speed after the said African and Sardinian Cable should have been laid down (unless prevented as aforesaid), lay down the said other cable from and to such places and in such direction as the defendant, his executors or administrators, should by writing under his or their hands direct or require, and for such a sum of money as should be agreed upon between the plaintiff and defendant, his executors or administrators, before the said ship or vessel should sail from the Nore; and should and would, at the like expense, provide all steam-tugs and other vessels necessary for so doing:
*614] And it was in and by the said *indenture provided always, that, if the plaintiff should (unless prevented as aforesaid) make default in having the said ship, with the said cable or cables on board, as the case might be, at the Nore, fully equipped and ready for sea on or before the said 15th of July then next, the defendant, his heirs, executors, or administrators, should be at liberty to retain from any moneys payable by him or them under the covenants for that purpose thereinafter contained, as and for liquidated damages in respect of such default, the sum of 200*l.* per week, and after that rate for any period less than a week during which such default should continue; but the power of the defendant, his executors or administrators to demand and enforce payment of the said sum by way of liquidated damages, and to deduct and retain the same as aforesaid, should be without prejudice to the right of the defendant, his executors or administrators, to exercise any other powers or remedies which the defendant, his executors or administrators, should possess or be entitled to, either at law or in equity, by virtue of those presents or the bond thereinafter referred to for enforcing the completion of the works thereinbefore covenanted to be done, or for indemnifying and compensating himself or themselves for the damage or injury occasioned to him or them by reason of such default: And, by the said indenture, for the consideration therein mentioned, the defendant did further, for himself, his heirs, executors, and administrators, covenant

with the plaintiff, his executors and administrators, in manner following, that is to say, that he the defendant, his heirs, executors, and administrators, should and would, subject to such rights of deduction therefrom as thereinbefore mentioned, pay the plaintiff, his executors and administrators, the sum of 5000*l.* sterling by the instalments and at the times next *thereinafter mentioned, that is to say, the sum of 1000*l.*, part thereof, on or before the expiration of *seven days* after the [*615 arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000*l.*, further part thereof, on or before the expiration of *twenty-one days* after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000*l.*, the remainder thereof, when and so soon as the said ship should put to sea from the Nore,—one-half of such last-mentioned sum to be paid in cash, and the other half thereof by the defendant, his executors or administrators, accepting a bill of exchange at three months' date, to be drawn upon him or them by the plaintiff, his executors or administrators; and, further, that he the defendant should and would, on or before the expiration of twenty-one days from the time when the said Sardinian and African Cable should have been so laid down as aforesaid, deliver or cause to be delivered to the plaintiff, his executors or administrators, or his or their nominee or nominees, five hundred paid-up shares in the Mediterranean Submarine Electric Telegraph Company, of 10*l.* each; and, further, that he the defendant, his executors or administrators, if he or they should require the plaintiff to lay down the said other cable as aforesaid, should and would pay to the plaintiff, his executors or administrators, the sum which might be so agreed upon as aforesaid for his so doing, on or before the expiration of twenty-one days from the time of the said last-mentioned cable having been so laid down: And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, *within ten days from the execution of these presents*, give and execute to the defendant, his *executors and administrators, a bond in the penal sum of 5000*l.*, and, for the due per- [*616 formance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, *within ten days from the execution of these presents*, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000*l.*: And it was in and by the said indenture provided always and thereby expressly agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff, his heirs, executors, and administrators, and of the defendant, his heirs, executors, or administrators, under or by virtue of these presents: Averment, that, after the making of the said indenture, and whilst the same was in full force and effect, he the plaintiff did forthwith, at his own expense, procure a suitable ship or vessel, within the terms and meaning of the said contract in that behalf, and did, at his like expense, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions, and was also ready and willing, at his like expense, to obtain and provide and pay competent and sufficient officers and crew for the

purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and did, at his like expense, provide proper breaks and rollers in order that the said cable might be properly paid out; and was always ready and willing to place the same on board the said ship to the reasonable satisfaction of the defendant in that behalf; and was always ready and willing, to the said extent of 600*l.*, to pay the expense of insuring the said cable to the amount of 60,000*l.*; and was always ready and willing, at his *617] *like expense, if so required by the defendant, his executors or administrators, to place on board from the said Morden's Wharf any further quantity of submarine telegraphic cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require; and was also always ready and willing to do and perform all the several acts thereinbefore covenanted to be performed by him the plaintiff, and to have the said ship fully equipped in all respects and ready for sea at the Nore on or before the said 15th of July then next; and that he the plaintiff was always ready and willing to receive the said African and Sardinian Cable, and to cause the same to be stowed on board the said ship, upon the terms of the said contract, and to proceed with the same and the said other cable to Cape Tabague aforesaid, and with all convenient despatch to proceed to pay out and lay down the same according to the terms of the said contract, and in other respects fully to perform and carry out the same on his part and behalf, *and was also ready and willing, according to the terms of the said contract, to bring the said ship alongside the said Morden's Wharf for the purposes in the said contract mentioned; but, before the time arrived for so doing according to the terms of the said contract, the defendant refused to perform the said contract on his part, and dispensed with the said vessel being brought alongside the said wharf:* and that he the plaintiff has performed and fulfilled all conditions precedent on his part to be performed and fulfilled, and everything has taken place and happened to entitle the plaintiff to a performance by the defendant of the said indenture and all the said conditions, covenants, and stipulations therein contained on his the defendant's part to be performed and fulfilled,—of all which several premises the defendant always had full *618] knowledge and notice, and was from time to time *requested by the plaintiff to stow on board the said ship the said cables on the terms and for the purposes aforesaid, and also to inspect the said breaks and rollers so provided by the plaintiff as aforesaid; for the doing and accomplishing of all which several matters and things a reasonable time had elapsed before the commencement of this suit: Yet the defendant did not nor would stow or allow to be stowed on board the said ship the said African and Sardinian Cable, and the said other cable or either of them, or any part thereof, but wholly refused so to do, and therein made default, and wholly and absolutely refused to perform the said contract on his part; and, by reason of the premises, the plaintiff lost the benefit of the payment and shares that he would otherwise have obtained, and the profits and advantages that would have accrued to him, if the contract had been performed by the defendant: and that the defendant caused the said African and Sardinian Cable to be stowed on board a certain ship or vessel other than the plaintiff's, and thereby broke his said contract with the plaintiff, and thereby discharged,

prevented, and hindered the plaintiff from fully and completely performing the same on his part and behalf: *And the plaintiff further says and assigns for breach of the said contract between the plaintiff and the defendant, that the defendant did not within ten days from the execution of the said indenture, or at any time, give and execute to the plaintiff, nor did he within the said period of ten days, or at any time, procure two responsible persons, or any responsible person or persons, as sureties or surety on his behalf, to give and execute, nor did the defendant and two responsible persons, nor did two responsible persons, or any responsible persons or person, as sureties or surety on behalf of the defendant, then or at any time give or execute to the plaintiff a bond or* [*619 **bonds in the penal sum of 5000l. for the due performance by the defendant of the other covenants on his part to be performed in the said indenture contained, as by his said covenant in that behalf he agreed to do;* and the defendant therein wholly failed and made default: And the plaintiff says, that, for the purpose of the said contract, he chartered the said ship, and, by reason of the several premises, he incurred large expenses and liabilities in respect of such ship, and incidental to the chartering of the same, and also by reason of the premises incurred other large expenses in procuring the said ship and also other ships or vessels, and in having the same surveyed and insured and otherwise fitted for the said purposes, and he also by reason of the premises incurred other large expenses in equipping, provisioning, preparing, and otherwise fitting out the same, and in brokerage, and in procuring and providing the said breaks and rollers and otherwise, and in insuring the said African and Sardinian Cable; and thereby and by reason of the premises the plaintiff hath incurred all the aforesaid expenses to no use, and the said ship and the said breaks and rollers still respectively remain in the hands of the plaintiff useless and unprofitable to him; and thereby also, and by reason of the premises, the plaintiff was hindered and prevented from commencing and carrying out his said contract, and by reason also of the premises he was wholly unable to perform or commence the performance of the same, and by reason also of the premises the plaintiff hath lost and been deprived of all the profits that he would have gained from carrying out and completing the said contract, and he has also thereby lost favourable opportunities of bringing home profitable cargoes in the said ship after completing his said undertaking; and thereby and by reason of the premises the plaintiff hath been and is otherwise greatly damnified: Claim, 10,000*l.*

*First plea,—except as to so much of the declaration as relates [*620 to the not giving, executing, or procuring a bond or bonds,—that the plaintiff did not at his own expense procure a suitable ship or vessel within the terms and meaning of the said contract in that behalf, and place the same alongside the said Morden's Wharf ready to take on board the said African and Sardinian Cable, as alleged.

Second plea,—except as aforesaid,—that the plaintiff did not at his like expense rig, complete, fit out, provide, and provision the said ship or vessel, as alleged.

Third plea,—except as aforesaid,—that the plaintiff was not ready and willing, at his like expense, to obtain and provide and pay such officers and crew for the purpose of navigating the said ship or vessel,

and such workmen and others to assist in laying down the said cable, as alleged.

Fourth plea,—except as aforesaid,—that the plaintiff did not within ten days from the day of the execution of the said indenture (such ten days expiring before the said 15th of July, 1855, and before the time when the plaintiff placed the said ship so provided by him alongside the said Morden's Wharf), or at any time, give and execute, nor did he within such ten days, or at any time, procure two responsible persons or any responsible person as sureties or surety on his behalf, to give and execute, nor did two responsible persons, nor did any responsible person, as such sureties or surety for the plaintiff, then, or at any time, give and execute to the defendant, his executors and administrators, a bond or bonds in the penal sum of 5000*l.* for the due performance by the plaintiff of the other covenants by the plaintiff in the said indenture contained, and for securing any penalties which he the plaintiff might incur under the said indenture, according to the meaning and effect of the said indenture.

*621] *Fifth plea,—as to the breach of covenant by the defendant so excepted as aforesaid, the defendant brought into court the sum of one shilling, and said that the same was sufficient to answer the claim of the plaintiff in respect of the said breach.

The plaintiff joined issue on the second, third, and fifth pleas, and demurred to the fourth plea, the ground of demurrer stated in the margin being "that the matter therein set forth does not amount to a condition precedent to the plaintiff's right to recover in this action."

The court below gave judgment upon this demurrer in Trinity Term, 1856, for the defendant, see 18 C. B. 561. The issues of fact were tried before Cockburn, C. J., at the sittings in London after Trinity Term, 1858, when the jury returned a verdict for the plaintiff, with 2300*l.* damages.

The case now came on for argument in the Exchequer Chamber, before Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Channell, B.

Bovill, Q. C. (with whom was *Beasley*), for the plaintiff.—The question, upon the record as altered, is, whether the fact of the plaintiff not having given the bond, as stipulated by the agreement, affords an answer to the action; or, in other words, whether the giving of bonds was a condition precedent. The substance of the agreement is, that the plaintiff should *forthwith*, at his own expense, procure a suitable vessel and stow on board thereof the cable in question, and rig, provision, and man the ship, and have her ready for sea at the Nore on or before a given day, and proceed with the cable on board to the northern coast of Africa, and lay down the cable from Cape Tabague to Cape Spartivento. Then, the defendant covenants to pay the plaintiff 5000*l.* by certain

*622] instalments,—1000*l.* **seven days* after the arrival of the vessel at Morden's Wharf; 2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside Morden's Wharf; and the remaining 2000*l.* as soon as the ship should put to sea from the Nore; and also to give the plaintiff 500 paid-up shares in a certain company. Then there is a stipulation that, *within ten days from the execution of the agreement*, each party should give the other a bond for the due performance of the covenants on his part. A material part of the

agreement, therefore, was to be performed before the arrival of the time at which the bonds were to be given: the plaintiff was to obtain the vessel *forthwith*, and to put himself to great expense to bring her alongside Morden's Wharf; and he was to be entitled to receive 1000*l.* within *seven days* after the arrival of the ship at Morden's Wharf. The payment of the money was not to be the consideration for the giving of the bond, but for doing the service before mentioned. The clause as to the giving of the bonds is totally distinct and independent of the covenants to be performed on the one side and on the other. Suppose the defendant had sued the plaintiff for not having the vessel forthwith at Morden's Wharf, would it have been any answer for the plaintiff to have said,—"You have broken your covenant, by omitting to give me a bond?" The not giving the bond was a substantive cause of action. Besides, it was a necessary part of the performance of all conditions precedent, as alleged generally, that the plaintiff was ready and willing and offered to give his bond, and requested the defendant to do the like: Bentley *v.* Dawes, 9 Exch. 666.† The defendant does not plead that the plaintiff was not ready and willing to give, but simply that he has not given his bond. [MARTIN, B.—The simple question is, whether the giving the bond was or was not a *condition precedent: that is upon the declaration. Graves *v.* Legg, 9 Exch. 709,† is very much like this case. There, by a [*623 written agreement, the plaintiff contracted to sell to the defendant from 300 to 350 bales of white washed Dunskoy fleece wool, laid down at certain ports in England, "deliverable at Odessa during August then next, to be shipped with all despatch, warranted fair average quality; but, should they prove otherwise, to be taken with a fair allowance, to be assessed by Messrs. H. and R., subject to the safe arrival of the wool in good condition at any of the ports stated, and *the names of the vessels to be declared as soon as the wools were shipped*, &c. In an action for the breach of this contract, by not accepting the wools, the defendant pleaded that the wools were bought, with the knowledge of both parties, for the purpose of re-selling in the course of the defendant's business; that wool is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract; and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped, until after an unreasonable time after they had been shipped: and it was held, that the provision in the contract, that the names of the vessels in which the wools were shipped should be declared as soon as they had been shipped, was a condition precedent to the defendants' obligation to accept and pay for them; and that, consequently, the plea was good. CROMPTON, J.—The clear overriding intention of the parties, as Jervis, C. J., observed in the court below, was, that the bonds should be given as a security for the performance of everything on either side. The real object of the defendant was, to have the plaintiff's bond before he trusted him with this valuable property. He bargains for a security against every breach of covenant by the plaintiff. Neither *party was [*624 bound, as I read the contract, to do anything until the bonds were given.] If one party refuses to perform the contract on his part, or disables himself from performing it, there is an end of all conditions precedent: Lovelock *v.* Franklyn, 18 Q. B. 371 (E. C. L. R. vol. 83); Hochster *v.* De la Tour, 2 Ellis & B. 678 (E. C. L. R. vol. 75). Lord

Campbell in that case says,—"The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured." That principle was acted upon in Cort v. The Ambergate Railway Company, 17 Q. B. 127 (E. C. L. R. vol. 79), and also in the Odessa cases,—see Reid v. Hoskins, 4 Ellis & B. 979 (E. C. L. R. vol. 82), 5 Ellis & B. 729 (E. C. L. R. vol. 85); Avery v. Bowden, 5 Ellis & B. 714; Esposito v. Bowden, 7 Ellis & B. 763 (E. C. L. R. vol. 90); Barrick v. Buba, 2 C. B. N. S. 563 (E. C. L. R. vol. 89). [Martin B., referred to Croockewit v. Fletcher, 1 Hurlst. & N. 893.†] Then, the stipulation as to the giving of the bond formed only part of the consideration for the plaintiff's promise to perform the covenants on his part. One of the earliest cases upon this subject is that of Boone v. Eyre, 1 H. Bla. 273.(a) That was an action of covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* per annum for his life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that *the plaintiff well and truly performing all and everything therein contained* on his part to be performed, he the defendant would pay the annuity. The breach assigned was, the non-payment of the annuity. The defendant pleaded that the plaintiff was not, at the time of making the deed, legally pos-
*625] sessed of the negroes on the plantation, and *so had not a good title to convey; to which there was a general demurrer. And Lord Mansfield said: "The distinction is very clear, *where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.* But, when they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." So, here, if this plea be allowed, a delay in the giving of the bond for a single day would defeat the plaintiff's action, and deprive him of the benefit of all his outlay. In Constable v. Cloberie, Palmer 397, a stipulation in a charter-party that the ship "should sail with the next wind" on a voyage to Cadiz, was held not to be a condition precedent. The like was held in Bornmann v. Tooke, 1 Campb. 377, where Lord Ellenborough says: "To hold that any short delay in setting sail, or trifling departure from the direct course of the voyage, would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going inter apices facti." And in Davidson v. Gwynue, 12 East 381, a stipulation that the ship should sail "with the first convoy" did not amount to a conditior precedent. Lord Ellenborough there said: "It is useless to go over he same subject again, which has been so often discussed of late. The sailing with the *first* convoy is not a condition precedent: the object of the contract was, the performance of the voyage; and here it has been performed. The principle laid down in Boone v. Eyre, has been recognised in all the subsequent cases, that, unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as

a condition precedent, *but as a distinct covenant, for the breach of which the party injured may be compensated in damages. It [*626 is useless to repeat all the cases, because we had the subject so fully before us very lately in Ritchie *v.* Atkinson, 10 East 295, and in the other cases mentioned." In Stavers *v.* Curling, 3 Scott 740, 754, 3 N. C. 355, 368 (E. C. L. R. vol. 32), Tindal, C. J., in delivering the judgment of the court, says: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case: to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of Ritchie *v.* Atkinson, 10 East 295, to be this,—'that, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.'" Kingdom *v.* Cox, 2 C. B. 661 (E. C. L. R. vol. 52), Judson *v.* Bowden, 1 Exch. 162,† Dicker *v.* Jackson, 6 C. B. 103 (E. C. L. R. vol. 60), and Manby *v.* Cremonini, 6 Exch. 808,† are all authorities to the same effect. In all these cases, it is for the party who alleges the covenant to amount to a condition precedent to show that the non-performance defeats the whole object and intention of the contract: Freeman *v.* Taylor, 8 Bingh. 124, 1 M. & Scott 182 (E. C. L. R. vol. 28); Clipsham *v.* Vertue, 5 Q. B. 265 (E. C. L. R. vol. 48). So, in Tarrabochia *v.* Hickie, 1 Hurlst. & N. 183,† it was held, that the stipulations in a charter-party, that the vessel, being tight, staunch, and strong, shall sail with all *convenient speed, are not conditions [*627 precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated.

The court can hardly assume that the giving of the bond by the plaintiff was a material part of the consideration, when neither party has chosen to call for the performance of the stipulation, and the defendant has assumed one shilling to be a sufficient compensation for that breach on his part. In the notes to Pordage *v.* Cole, 1 Wms. Saund. 320 *b*, it is said: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent. This seems to be the ground of the judgment in this case of Pordage *v.* Cole, the money being appointed to be paid on *a fixed day*, which might happen *before* the lands were, or could be, conveyed." The same doctrine is laid down in Mattock *v.* Kinglake, 10 Ad. & E. 50 (E. C. L. R. vol. 37), 2 P. & D 343. There, by articles under seal, A. agreed to sell and B. to purchase certain premises: B. therein covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the time of the completion of the purchase, A. allowing thereout the

same rate of interest for so much of the money as might be paid in the meanwhile; and B. agreed to pay for the conveyance and the stamp. It was held that the conveyance was not a condition precedent to, or concurrent with, the payment, and that A. might therefore sue for the purchase-money and interest, without previously tendering a conveyance.

*628] Littledale, J., there *says: "A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money, without averring performance of the condition." And Patteson, J., says: "Pordage *v.* Cole is directly in point. We must overrule it if we decide in favor of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to or concurrent with it." Wilks *v.* Smith, 10 M. & W. 355,† is to the same effect.

Montague Smith, Q. C. (with whom was *H. Lloyd*), contrà, was not called upon.

MARTIN, B.—My Brother Erle, before he left the court, intimated an opinion that the judgment of the court below ought to be affirmed: and I believe we are all of the same opinion. One point urged by Mr. *Bovill* before us, and which was not urged in the court below, was, that the allegation that the defendant refused to perform the said contract on his part, showed a complete breach. It seems to me, however, to be perfectly clear that those words do not constitute any breach at all, and never were so intended. That depends upon the construction of the language used, and nothing else. The declaration begins with stating, that, by an indenture of the 15th of May, 1855, the plaintiff, for the considerations therein mentioned, covenanted that he would *forthwith*, at his own expense, procure the Cornwall frigate, or some other suitable vessel, and stow or cause to be stowed on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, and provision and man the said ship, &c., and would have her fully equipped at the Nore,

*629] ready for sea, on or before the 15th of July then *next, and proceed therewith to Cape Tabague, and there lay down the cable, &c. It then stated the defendant's covenants for payment of 5000*l.* by certain instalments, viz. 1000*l.* on or before the expiration of *seven days* after the arrival of the vessel alongside Morden's Wharf, 2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside Morden's Wharf, and 2000*l.* when and so soon as the ship should put to sea from the Nore. Then comes this allegation,—"And it was thereby agreed and declared, that, for the true performance *of the covenants* by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, *within ten days from the execution of these presents*, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5000*l.*; and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should *within ten days from the execution of these presents* give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000*l.*" There is, therefore, an express statement that the bonds are to be given for the due performance of "the covenants,"—that is, all the covenants,—by the respective parties. The

declaration then goes on to aver that the plaintiff did forthwith at his own expense procure a suitable ship, and rig, fit out, provision, and man her, and was always ready and willing to do and perform all the several acts thereinbefore covenanted to be performed by him, and to have the ship fully equipped in all respects and ready for sea at the Nore on or before the 15th of July then next, and was always ready and willing to receive the cable and cause it to be stowed on board the said ship upon the terms of the contract, *and to proceed with the same to Cape Tabague, &c., and in other respects fully to perform and [*630 carry out the same on his part, and was also ready and willing, according to the terms of the contract, to bring the said ship alongside Morden's Wharf for the purposes in the contract mentioned. Then comes that which Mr. *Bovill* contends constitutes a breach,—"but, before the time arrived for so doing, according to the terms of the said contract, *the defendant refused to perform the said contract on his part*, and dispensed with the vessel's being brought alongside the said wharf." Then follows a general averment of performance by the plaintiff, an allegation that the defendant did not stow or allow to be stowed on board the said ship the said African and Sardinian Cable, but wholly refused so to do, and wholly and absolutely refused to perform the said contract on his part, and caused it to be stowed on board another vessel, and thereby broke his contract with the plaintiff, and discharged and prevented the plaintiff from fully and completely performing the same on his part. It seems to me to be perfectly clear that this statement of the defendant's refusal to perform the contract on his part is only introduced as ancillary to the alleged dispensation from bringing the plaintiff's vessel alongside the wharf. It never was intended as a breach, but was merely to show the nature of the alleged dispensation. The declaration then goes on to state that the defendant did not within ten days from the execution of the indenture, or at any time, give and execute a bond with sureties, as by his covenant he agreed to do. It is to my mind as plain as language can be that the breach is the refusal to stow the cable. If that be not a good breach, the declaration is bad. The question is, whether a plea that the plaintiff did not within ten days from the day of the execution of the indenture, or at any time, give a bond with two *sureties, as provided hy the contract, is a good plea. It seems [*631 to me that the judgments of Jervis, C. J., and Cresswell, J., in the court below, upon that point, are as clear as can be. The judgment of Cresswell, J., in particular, is quite conclusive. "I am," he says, "of opinion that the giving of the bond was a condition precedent to the plaintiff's right to enforce his remedy for the non-payment of the 5000*l.* at the times stipulated. The essence of the contract is, that the parties shall mutually have remedies for the breach by either of any of the covenants therein. It is true the word 'forthwith' occurs at the beginning of the instrument. But, when once you arrive at the conclusion that the giving of the bond is a condition precedent, that gives a meaning to the word 'forthwith.' As soon as the bonds are given, the plaintiff may be compelled to go on; but not until then. It is evidently used in a very vague sense: it is applied to all the things that are to be done by the plaintiff; and they certainly cannot all be done *immediately*. I feel no difficulty in holding it to have been the plain intention of the parties that each should have the security of the bond of the other for

the performance of all the covenants." That is clearly the good sense of the thing. If the giving of the bond were not a condition precedent, it would be difficult to say what the damages for a breach should be. It evidently was intended, that, before anything should be done, each party should hand to the other a bond, as a mutual security for the performance of the covenants.

CROMPTON, J.—I am of the same opinion. I entirely agree with my Brother Martin as to what is the breach. It is much to be lamented that parties should frame their averments so loosely. But, for the reasons given by the court below, which are entirely satisfactory to *632] *my mind, I think the giving of the bond by the plaintiff was clearly a condition precedent. This does not come within any of the instances given in the cases cited. Boone *v.* Eyre, 1 H. Blac. 273, n., and all those cases, stand upon a totally different footing. Those were all cases of partial failure of consideration, which might well be compensated in damages. Here, the defendant could not be compensated in damages for the omission to give a bond. The object of the stipulation for mutual bonds was, that each party should have security for the performance of the covenants by the other. The giving of the bond was clearly a condition precedent, and to be done before either had any right to call upon the other to do anything. I do not think the word "forthwith" was used by the parties in the sense contended for by the plaintiff. The answer to that is given by Jervis, C. J., in the court below. He says,—"It *may* be, as my Brother Byles suggests, that the seven days provided for the payment of the 1000*l.* may elapse before the expiration of ten days from the execution of the agreement. But it does not follow that the plaintiff would be bound *immediately* to set about the preparation of the vessel. He might, I apprehend, wait until the expiration of the ten days, and then say 'Give me the bond.' That makes the whole thing perfectly consistent; whereas, the contrary construction deprives him of security, which is very different from having a remedy." It seems to me that the intention is as plainly expressed as could be. Practically, it was not supposed that anything would be done within the seven days: but the bond was to be given as a security that anything that was done should not be thrown away. It seems to me to be absurd to say that the failure to give a bond was a matter which might be compensated in damages. It was clearly a condition precedent in the strongest sense, and not a *633] *concurrent act. The only doubt that has arisen in my mind was created by the averment in the declaration that the plaintiff was ready and willing to perform all the acts covenanted by him to be performed. But, looking at that averment, two answers arise. The averment of readiness and willingness amounts to this, that the plaintiff is ready and willing to carry out the contract, when the contract has become binding upon him by the performance of all conditions precedent on the part of the defendant. Another answer is, that I do not think the general averment of readiness and willingness is sufficient in the case of a condition precedent. It is, where the acts to be done on both sides are concurrent. But readiness and willingness, and notice, will not do, where the party is not bound to do the act until the performance of some other act by the other party. The defendant had a right to say to the plaintiff, "Give me the bond before you call upon me to do

anything on my part." We cannot construe the averment of readiness and willingness to give the bond, as an averment of the performance of that which beyond all doubt is a condition precedent.

BRAMWELL, B.—I also am very clearly of opinion that the giving of the bond by the plaintiff in this case was a condition precedent to the plaintiff's right to sue the defendant for a breach of any of the covenants on his part. Wherever the obvious good sense of the thing makes the performance of an act a condition precedent, it ought to be so construed. When a man says, "I require you to give me security for the performance of your part of the contract," when is it reasonable to hold that the security is to be given,—before or after the other party has performed his part? It seems to me to be obviously the good sense of the thing to hold this to be a condition precedent to the *defendant's being in any way liable on the contract. I entirely agree [*634 with Jervis, C. J., that we are to ascertain the intention of the parties. The rules laid down in the notes to Pordage *v.* Cole are very excellent guides, but not arbitrary tests. It is said that the giving of the bond here was not to be a condition precedent, because that was not to be done until *ten days* after the execution of the agreement, whereas 1000*l.* of the stipulated 5000*l.* was to be paid within *seven days* of the arrival of the ship alongside Morden's Wharf, which was to take place *forthwith* on the execution of the agreement. If it had appeared that the seven days *must* elapse before the expiration of the *ten* days, there would have been more weight in the argument, though even then I should have been inclined to hold the giving of the bond to be a condition precedent. Boone *v.* Eyre in reality has nothing to do with this case. That case was decided upon principles of good sense. It may be that the plaintiff may be a loser by not having given a bond Mr. *Bovill* has urged before us a point which was not made in the court below, viz. that a man may break his covenant before the time for its performance has arrived: and for this he relies upon Hochster *v.* De la Tour, 2 Ellis & B. 678 (E. C. L. R. vol. 75). I say nothing about that case, except that there is high authority for saying that the judgment may be supported on the ground that by the defendant's renunciation of the contract the relation of master and servant was destroyed. I agree that the breach commences with the word "yet." The only real question is that which was argued in the court below.

WATSON, B.—I also am of opinion that the judgment of the Court of Common Pleas was right. The whole question is, whether the giving of a bond by the plaintiff was a condition precedent to his right to sue the defendant for a breach of the contract on his part. I *am [*635 clearly of opinion that it was. It lies at the root of the contract. Two parties contract to carry out an expensive undertaking: the one is to procure a ship, and the other to have a telegraphic cable ready to be put on board. The agreement contains several provisions as to what shall be done by each party; and then they provide, that, "for the due performance of the covenants thereinbefore contained," each shall give the other a bond, with two sureties, for 5000*l.* The court below were clearly right in holding the giving of the bond to be a condition precedent. The only doubt that ever crossed my mind, arose from the form of the allegations. But, when looked at, I think the matter is very simple. The real breach alleged is, the defendant's failure to stow the

cable on board the vessel provided by the plaintiff: the subsequent allegation of the refusal to perform the contract on his part, is merely introductory to the plaintiff's excuse for not having the vessel at Morden's Wharf in performance of the contract on his part. The giving of the bond being a condition precedent, it was absolutely necessary for the plaintiff to aver performance or a tender: readiness and willingness is not sufficient, as in the case of concurrent acts. Hochster *v.* De la Tour, which has been relied on by Mr. *Bovill*, has nothing whatever to do with the present case. The declaration there was upon an agreement to employ the plaintiff as a courier, from a day subsequent to the date of the writ,—averring that the plaintiff, from the time of the agreement till the refusal by the defendant after mentioned, was ready and willing to perform his part of the contract; and alleging for breach, that, before the day for the commencement of the employment, the defendant refused to perform the agreement, and discharged the plaintiff from performing *636] it, and wrongfully wholly put an end to the agreement. Upon *motion in arrest of judgment, it was held, that a party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement; that it sufficiently appeared on the face of the declaration that there was on the part of the defendant, not only an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which the plaintiff was entitled to act; and consequently that the plaintiff was entitled to judgment. The principle on which that proceeded is well reconciled by the argument of Mr. *Mellish* in Avery *v.* Bowden, 5 Ellis & B. 722 (E. C. L. R. vol. 85). The case, however, is wholly inapplicable here. The real and sole question here is, whether the giving the bond was a condition precedent. I am clearly of opinion that it was.

Channell, B.—I also am clearly of opinion that the judgment of the court below was right, and must be affirmed. The breach is, that which follows the word "yet." No breach is laid in the earlier part of the declaration. The sole question is, whether the fourth plea is a good answer to that breach. It unquestionably is, if the giving of the bond was a condition precedent. I think it was. It is very probable that the parties contemplated that some part of the agreement would be performed by the plaintiff before the lapse of the ten days. But, I am of opinion that that was to be done at the plaintiff's own peril and risk. But there was no obligation on the defendant to do anything until the bond was given. Judgment affirmed.

END OF EASTER VACATION.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

IN THE

XXII. VICTORIA. 1859.

The Judges who sat in Banc in this term, were:

Cockburn, C. J.	Willes, J.
Williams, J.	Byles, J.

MEMORANDA.

On Friday, the 24th of July, the Right Hon. John Lord Campbell, late Lord Chief Justice of England, was sworn in at Lincoln's Inn, before the Master of the Rolls and the Vice-Chancellor of England, as Lord High Chancellor, in the room of Lord Chelmsford, resigned.

His Lordship, assisted by the Lords Justices Knight Bruce and Turner, then proceeded to hear causes.

*The Right Hon. Sir Alexander James Edmund Cockburn, Knt., late Lord Chief Justice of Her Majesty's Court of Common Pleas, was on the same day sworn in before the Lord Chancellor as Lord Chief Justice of England, in the room of Lord Campbell, promoted to the office of Lord High Chancellor. [*638

The Hon. Sir William Erle, one of the Judges of Her Majesty's Court of Queen's Bench, was at the same time sworn in before the Lord High Chancellor as Lord Chief Justice of the Court of Common Pleas, in the room of Sir Alexander James Edmund Cockburn, promoted to the office of Lord Chief Justice of England.

On the 22d day of June, Sir Richard Bethell, Knt., was appointed Her Majesty's Attorney-General, upon the resignation of Sir Fitzroy Kelly, Knt.

On the same day, Sir Henry Singer Keating, Knt., was appointed Her Majesty's Solicitor-General, upon the resignation of Sir Hugh M'Calmont Cairns, Knt.

On the 27th day of July, Colin Blackburn of the Inner Temple, Esq., was appointed one of the Judges of Her Majesty's Court of Queen's Bench, in the room of Sir William Erle, promoted to the office of Lord Chief Justice of the Court of Common Pleas. He shortly afterwards received the honour of knighthood.

*639] *In the Matter of the Complaint of WILLIAM GARTON and MOSES STONE *against* THE BRISTOL AND EXETER RAILWAY COMPANY. *June* 13.

A railway company has no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them.

The B. and E. Railway Company closed their goods station at B. at 5.15 p. m. against all persons except their agent W., who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8 p.m. For the conveyance of goods from the receiving-house to the station, W. charged 1*s.* 8*d.* per ton on all goods above 3 cwt., and 3*d.* for each package below that weight:—Held, upon the complaint of a rival carrier, that the refusal to receive goods sent by him to the station after 5.15, unless sent through the receiving-house of W., was imposing upon him an undue prejudice, within the 17 & 18 Vict. c. 31, s. 2,—although it was sworn on the part of the company that the goods so brought to the station by W. came there properly classified, weighed, and prepared for loading.

The general rate of charge for the carriage of goods from Bristol to Bridgewater and vice versâ was 6*s.* 8*d.* per ton for first-class, 8*s.* 4*d.* per ton for second-class, 12*s.* 6*d.* per ton for third-class, and 16*s.* 8*d.* per ton for fourth-class goods. The company had special contracts with certain grocers and ironmongers at Bridgewater, under which they agreed to carry all their grocery and ironmongery goods at a uniform rate of 6*s.* per ton, including delivery:—Held, an undue preference,—it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, or to meet competition from another railway or any other mode of carriage.

COLLIER, Q. C., in Easter Term last, obtained a rule on behalf of Messrs. Garton & Stone, common carriers, calling upon the Bristol and Exeter Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the said company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering for themselves or other persons of goods and parcels, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainants; and enjoining the said company not to subject the said complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods and parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such goods and parcels as aforesaid, or in reference to the time of taking in and receiving such goods and parcels,—with costs.

The affidavits upon which the rule was obtained *stated in substance as follows,—That the complainants were common carriers [*640 carrying on business at Bristol, and were in the habit of collecting goods from their customers who required them to be sent between Bristol and Exeter, Exeter and Crediton, Durston and Yeovil, and Highbridge and Glastonbury, and intermediate places: That the Bristol and Exeter Railway Company were proprietors of a railway from Bristol to Exeter, and branch railways from Exeter to Crediton, from Durston to Yeovil, and from Highbridge to Glastonbury: That the said Bristol and Exeter Railway Company, in addition to the management of their said lines of railway, and the traffic thereupon, also carry on the business of common carriers by collecting goods from their customers, and carting them to their several stations upon their said railway from which such goods are consigned, then carrying them on their said railway to the station nearest to the place to which the same goods are consigned, and finally carting them from such last-mentioned station to the residence or place of business of the consignee: That the complainants in their business of common carriers collect goods from their customers in Bristol, and deliver such goods to the company at their station in Bristol, to be carried by them to the several stations on their said lines of railway to which they are severally consigned, and then carting them from such last-mentioned several stations, and delivering them to the several consignees, and it is essential to the carrying on of their said business that goods so delivered by them to the said railway company at their said station in Bristol should be received by them at their said station in Bristol at as late an hour in the day as goods delivered at the said station by the said company or their agents, or any other persons: That the said company close their said station at Bristol to the complainants every day at a *quarter after five o'clock in the evening, and refuse to [*641 receive for transmission on their said lines of railway all goods brought by the complainants to their said Bristol station at a later hour than a quarter after five o'clock in the evening; and the said company have so closed their said station, and refused to receive goods brought by the complainants as aforesaid after the hour aforesaid for a period of four years and upwards, and still continue, and, it was believed, intended to continue so to do: That the complainants had from time to time during the said period of four years and upwards been informed by the servants of the said company that the only goods received by the company at their said station in Bristol at a later hour than a quarter after five o'clock in the evening, were such goods as were brought to such station by one Wall, the agent of the said company, and that goods so brought to the said station by Wall as aforesaid were received up to an hour much later than a quarter after five o'clock in the evening, and transmitted by the trains of the said company leaving Bristol on the same day they were so received; and the deponent believed that during the whole period of four years and upwards the company have always received goods brought to their station at Bristol by themselves and their said agent Wall up to a very much later hour in the day than a quarter after five o'clock in the evening, and that the company still continue and intend to continue so to do: That the deponent had been largely employed in the business of a carrier by railway for fourteen years past, and was well acquainted with the proper mode of assorting

and packing goods for transmission by railway, and that the goods from time to time sent by the complainants to the said station were so sent in a manner and form as convenient in every respect to the company and
*642] their servants, and the same might be and were assorted, *packed, and transmitted in every way as ready, easily, and expeditiously, and inexpensively to the company, as goods sent to the station by the company, or Wall their agent, or any other person: That, on the 31st of January last, at a quarter to seven o'clock in the evening, the deponent tendered at the company's station at Bristol a truss of drapery goods for transmission to Exeter, but the cart in which the same was brought to the station was refused admission within the station by the servant of the company, whereupon the deponent went to the offices of the company, at the station, and requested of the clerk there that the said truss might be received and transmitted, and he then produced to the clerk the particulars and weights of the said truss, in writing, but he refused to receive the same, saying it was too late; and that the deponent thereupon went to the superintendent of the station, and made the same request, and produced the same particulars and weights, and he also refused to receive the said truss; and that, whilst in conversation with the superintendent, a van belonging to Wall entered the station, to which fact the deponent called the attention of the superintendent, who said "I am aware of it, but he is our agent, and we make a rule not to receive goods from any one but him after a quarter past five o'clock in the evening," and the said truss was not received or transmitted; that the deponent then went to the platform of the station and saw Wall's van unloaded, and the goods therefrom, which were of the same nature as the truss of drapery tendered by the deponent, were received by the servants of the company, and in the deponent's presence by such servants packed into the railway trucks, many of the articles being then weighed by the company's servants; and that, on the same occasion, when leaving the station, the deponent saw another van belonging to Wall, containing general
*643] *merchandise of the same nature as the said truss of drapery, admitted into the said station; and that, on the same 31st of January, the deponent sent another truss of drapery to the receiving-office of Wall in Bristol, situate about one mile from the company's said station, at a quarter after seven o'clock in the evening, consigned to one Roberts at the railway station at Exeter, and the same truss was then received at such receiving-office, and the deponent had since been informed by the consignee that such truss was sent by the company by a train which left the said station in Bristol in the night of the said 31st of January: That again, on the 2d of February last, at half past five o'clock in the evening, the complainants tendered at the company's station at Bristol aforesaid, a case of caps for transmission to Bridgewater, and at the time of the arrival at the station of the cart containing such case, a van belonging to Wall containing goods of a like nature to the said case arrived at the same station, and Wall's van was admitted into the station, and the cart containing the said case was excluded by the servants of the company; that the complainants notwithstanding tendered the said case, with the particulars and weight thereof, to the clerk employed by the company to authorize the receipt of goods, who refused to receive the same, whereupon the deponent went on to the platform of the station and saw the company's servants take the goods from the van

belonging to Wall, weigh some of them, and place them in the railway truck of the company; and the deponent afterwards, about a quarter past seven o'clock in the evening of the same day, sent the said case to the receiving-office of Wall, consigned to one Babbage at the station at Bridgewater, and the same case was then received at such receiving-house, and the deponent had since been informed and believed that the said case was sent by *the company by a train which left the station at Bristol in the night of the said 2d of February. Several other instances were then given of goods of the complainants being rejected, and goods received by the company at a later hour from Wall, and forwarded to their destination on the same day: and the affidavit proceeded to state that all goods brought by all or any of the public to the receiving-office of Wall were received there up to the hour of eight o'clock in the evening of every day, and were forwarded by the company to the several stations on their said railway nearest to the several places to which they were severally consigned, on the same day on which such goods were so received: That all goods delivered to and received at the said receiving-office of Wall were charged 1*s.* 8*d.* per ton on all goods above 3 cwt. in weight, and 3*d.* for each consignment under 3 cwt. in weight, for delivery from the receiving-office to the station at Bristol, in addition to the company's usual rates of charge for carriage upon their said several lines of railway: That Wall, besides receiving goods at his said receiving-house as aforesaid, collected goods from the residences or places of business in Bristol of the customers of the company requiring such goods to be carried on their said lines of railway, and delivered the same to the said station in Bristol: and that the deponent had on several occasions and constantly seen the vans of Wall leaving the said residences or places of business of the said customers of the company loaded with the goods of such customers after a quarter past five o'clock in the evening; and that the deponent had seen the same vans of Wall afterwards passing through the streets of Bristol on the way and near to the station; and that such goods were afterwards received into the station at a much later hour than a quarter past five o'clock in the evening, without having been first received at or delivered *to the said receiving-office: That all goods so collected as last aforesaid by Wall were charged with the like sum of 1*s.* 8*d.* per ton in quantities above 3 cwt. in weight, and 3*d.* for each consignment under 3 cwt. in weight, for collection and delivery from the residences or places of business of the said customers of the company to the station at Bristol, in addition to the company's usual rates of charge for carriage upon their said several lines of railway: That the business of the complainants consisted in collecting goods from their customers in Bristol, carting such goods to the station at Bristol, carrying them on the railway, and delivering them to the several consignees; and they derived a profit from the said collection and cartage to the station; but that, if the goods were delivered to the receiving-office of Wall, the complainants charged their customers, or the consignees of the goods, the same sums which the railway company charged the complainants, with a loss to complainants of the said sums of 1*s.* 8*d.* per ton on all goods above 3 cwt. in weight, and 3*d.* for each consignment under 3 cwt. in weight, for delivering the said goods from the said receiving-office to the station, though they were ready and willing and desirous to do and perform the

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services for which the said last-mentioned sums were charged: That the company, through their said agent (Wall), also collected and delivered goods as aforesaid, and competed with the complainants in their said business of collection and delivery; and that the deponent believed that the company so refused to receive goods at their said station at Bristol from all persons except their agent Wall at a later hour than a quarter after five o'clock in the evening, for the purpose of compelling persons desirous of having their goods conveyed on their lines of railway, to employ the said company and their agent Wall to collect and deliver
*646] such goods, and thus *to secure this business, and the profit upon it, to the said company, and to exclude the complainants from competing with them in that department of business: That the company's rates from Bristol to Bridgewater and from Bridgewater to Bristol, for goods sent by their ordinary goods-trains, were,—6*s.* 8*d.* per ton for first-class goods, 8*s.* 4*d.* per ton for second-class goods, 12*s.* 6*d.* per ton for third-class goods, and 16*s.* 8*d.* per ton for fourth-class goods, which said several rates of charge were for the carriage of goods from station to station only: That, on goods consigned by the complainants from Bristol to Bridgewater and from Bridgewater to Bristol, they had paid, and still continued to pay the company their said respective rates last above mentioned, and, on all goods arriving at Bridgewater, the complainants, on the arrival of such goods, carted them at their own expense from the station at Bridgewater to the residences or places of business of their customers in Bridgewater: That the deponent had been informed, and believed, that the company had been in the habit of carrying, and still continued to carry, goods of all and every the aforesaid classes, and of like kinds to those sent by the complainants to and from [certain persons named], all of Bridgewater, charging them respectively for the carriage of goods required to be sent by the company's ordinary goods-trains from the station at Bristol to the several and respective residences or places of business of the several and respective persons in Bridgewater, or from the several and respective residences or places of business of the several and respective persons in Bridgewater to the said station at Bristol, an uniform rate of 6*s.* per ton for all classes of goods, including the charge for collection or delivery at Bridgewater, and all separate parcels of different kinds of goods being charged for on the aggregate weight of the whole carried from
*647] week to week. The affidavits then *set out a correspondence between the attorney for the complainants and the secretary of the company on the subject of the alleged inequality of charges.

Butt, Q. C., *Kinglake*, Serjt., and *M. Smith*, Q. C., now showed cause, upon affidavits, not denying the matters alleged in the affidavits filed by the complainants, but professing to explain the course of dealing adopted by the company for their own convenience, and stating, amongst other things, that the goods carried at the lower rates of charge for the grocers and ironmongers at Bridgewater, were carried under special contracts, which special contracts were limited to grocery and ironmongery by reason of their being sent in large quantities, and that those persons would be charged for other goods the same as was charged to the complainants and the rest of the public.

As to the charge for collection and delivery being included in the charge for carriage on the railway,—it is proposed to ask the court to

reconsider the two cases of Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336 (E. C. L. R. vol. 94), and Garton *v.* The Great Western Railway Company, 5 C. B. N. S. 669. [COCKBURN, C. J.:—Those cases were decided on full consideration.] It will be borne in mind that there is no appeal. [WILLIAMS, J.—It is perfectly competent to the company to make an extra charge for receiving goods at their receiving-houses: but the question is whether they may impose an additional burthen on those who do not require them to convey their goods for them to the station.] If the court considers the question settled by the cases referred to, it would be idle further to argue this point.

The next ground of complaint, is, that the company close their goods station at a quarter past five o'clock in the evening, after which time they refuse to receive *goods from the complainants, though they receive them as late as eight from Wall,—the explanation of that is, that a considerable time is necessary to classify, weigh, enter, and pack the goods before starting the train, and that these duties are performed for the company by Wall in respect of all goods brought by him to the station. [COCKBURN, C. J.—No doubt, the company are entitled to a reasonable time. But, if it is sufficient to take a parcel to Wall's receiving-house an hour before the time of starting the train, why should it not be sufficient to take it to the station at the same time?] If the parcel is brought to the station, it would have to be weighed and entered. [COCKBURN, C. J.—The place of business of the company is the station. What right have they to say to any one, you shall take your goods somewhere else?] The public do not complain that the time of closing the station is unreasonable. [COCKBURN, C. J. —A rival carrier complains, that, by this arrangement, those who bring parcels to him after a quarter past five cannot have them conveyed by that night's train. It is enough for the complainants to say that the company are giving an advantage to A. which they withhold from them.] The case of Parker *v.* The Great Western Railway Company, 6 Ellis & B. 77 (E. C. L. R. vol. 88), shows that the collection of goods by means of receiving-houses is the ordinary mode of conducting railway business. [*648

Then, as to the alleged inequality of charge for the carriage of goods between Bristol and Bridgewater,—it appears from the affidavits, that the company had entered into special contracts with certain grocers and ironmongers at Bridgewater, to carry for them their grocery and ironmongery at the rate of 6*s.* per ton, irrespective of class, in consideration of their sending all their goods of those descriptions by the railway, and abstaining from availing themselves of water-carriage; *and that, if any other description of goods were sent by or to those persons, they would be charged the ordinary rates of carriage. In Nicholson *v.* The Great Western Railway Company, 5 C. B. N. S. 366 (E. C. L. R. vol. 94), this court held that it is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others [*649

upon the same terms: nor is the 2d section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. The special agreements here are as free from objection as the special agreement in that case; and it makes no difference that the exact quantity of goods required to be sent cannot be ascertained and defined. [WILLES, J.—Do your affidavits show that the Bridgewater people have any other mode of carrying their goods than the defendants' railway?] They do. [COCKBURN, C. J.—Do they state, that, but for the special agreements, they would send their goods by water-carriage or otherwise than by the defendants' railway?] Not in terms: but that may fairly be inferred from the affidavits. Nobody in the grocery or ironmongery trade complains; but only the applicants, who are rival
*650] *carriers. [WILLIAMS, J.—These special agreements would not press upon any other description of tradesmen. If the grocer or the ironmonger employed the complainants to carry, would they be charged the lesser rate?] The affidavits so state. [COCKBURN, C. J.—No instance is given. Probably no one ever tried so hazardous an experiment.] The complainants have no right to come and complain until they have made the experiment, and failed. [WILLIAMS, J.—Do your affidavits negative an intention on the part of the company to favour these individuals?] No fraud or intention to favour one class of persons at the expense of another, is suggested.

Collier, Q. C., and *Karslake*, in support of the rule.—As to the first point, assuming that the court will abide by their decisions in Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336 (E. C. L. R. vol. 94), and Garton *v.* The Great Western Railway Company, 5 C. B. N. S. 699, it is unnecessary to say anything upon it. As to the second point, the complaint is, that, whereas the station at Bristol is closed against the complainants at a quarter past five o'clock in the evening, Wall, the favoured agent of the company, is allowed to have access thereto for the purpose of delivering his goods until eight o'clock. This is sworn to by the complainants, and is unanswered. Then, as to the special agreements,—all the complainants could know, was, that the parties referred to were preferred before them. The case of Nicholson *v.* The Great Western Railway Company, 5 C. B. N. S. 366, is clearly distinguishable: the special agreements there were so manifestly for the advantage of the company that the court could not fail to see that it was reasonable that they should enter into them. [BYLES, J.—There, the company got a fair equivalent, in full train-loads
*651] and regular times, for the advantage they *afforded to the Ruabon Coal Company. I do not see that the defendants here do get an equivalent.] The case of Baxendale *v.* The Great Western Railway Company (Bristol Case), 5 C. B. N. S. 309, though not precisely in point, still throws some light upon the subject. There, the company made a special agreement with one Somerville to give him certain advantages, in consideration of his employing them to carry all his paper by their lines; and yet that was held to be a case of undue pre-

ference. [WILLES, J.—We there held that it was undue and unreasonable to charge more or less for the same service, according as the customer of the railway thought proper or not to bind himself to employ the company in totally distinct transactions.]

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. With regard to the first point urged on the part of the complainants, the case appears to me to fall within the principle of Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336, and Garton *v.* The Great Western Railway Company, 5 C. B. N. S. 669. It has not been successfully distinguished from those cases, and we are satisfied to abide by what was there decided; and upon that point the complainants are entitled to have the rule made absolute. With respect to the second ground of complaint, viz. that the goods station is closed against the complainants and the public generally at a quarter past five o'clock in the evening, but is kept open until eight o'clock in favour of the company's agent, Wall,—I also think the rule must be made absolute. It seems to be admitted on the part of the defendants that the charges made by Wall, upon payment of which charges alone goods are conveyed to and received at their station after the hour at which the station is closed to the complainants and the rest *of the public, [*652 includes a charge for cartage to the station. So far, therefore, as that is concerned, the case falls within the principle of the decisions to which I have already referred. That principle is, that a railway company has no right to impose a charge for the conveyance of goods to or from the station, where the customer does not require such service to be performed by the company. Here, the defendants say to the plaintiffs,—"You shall not have the same facility for forwarding your traffic on the railway as we afford to our agent Wall, unless you consent to pay a certain charge for the conveyance of your goods to the station." Without entering any further into the merits of that part of the case, it is plain to my mind that it falls within the principle of those mentioned, and upon which we have held the first objection to be well founded. The third objection is founded upon the special contracts entered into between the company and certain individuals, under which those persons have a preference over the complainants in the carriage of heavy packages of grocery and ironmongery between Bristol and Bridgewater. It is not, as it seems to me, necessary to decide upon the present occasion how far a railway company may for their own advantage enter into special contracts of this sort. Nor is it necessary to say whether, with a view to meet competition by another railway company or by another mode of carriage, the company may not say to persons having large quantities of heavy goods to send, "If you will engage to send a given quantity, or to send all the goods you have to send, by our line, we will give you such an advantage." If that be done bonâ fide, with a view to overcome opposition, and the public in general are offered the same advantages under like conditions, it is unnecessary to say whether that might not be allowable; though I wish to guard myself against deciding *that upon the present occasion. The facts [*653 brought before us upon these affidavits fail to make out any adequate motive for this arrangement. It is suggested that there is certain water-carriage which might enter into competition with the railway between Bristol and Bridgewater. But it is not shown that it actually

does compete with it. We are not told what is the rate of charge for such water-carriage as compared with the carriage by the railway. A primâ facie case is made out on the part of the complainants: it is shown that they have not the same facilities afforded them for the conveyance of their goods as are conceded to certain favoured individuals. That called on the company for an explanation. None has been given: and, in the absence of all explanation as to the grounds of this preference, we cannot come to any other conclusion than that the arrangement is made with a view to induce parties to engage with the company as carriers directly, to the exclusion of a rival carrier. I therefore think the rule must be made absolute.

WILLIAMS, J.—I am of the same opinion. As to the first point, it is enough to say that the case is governed by those of Baxendale *v.* The Great Western Railway Company and Garton *v.* The Great Western Railway Company, from which it is impossible to distinguish it. As to the second point, it appears to me upon the whole that an undue preference has been shown to have been given to Wall by the company in their mode of dealing with him. No doubt, it is perfectly competent to a railway company to prescribe a certain time after which they will decline to receive goods to be forwarded by a given train. So, I do not see why they may not if they please extend the time, for a reasonable compensation for the extra trouble, to be paid by those who bring their
*654] goods late. Nor do I think,—*though upon that I desire not to be understood as giving any decided opinion,—that it would make any substantial difference whether the company received such extra compensation themselves or allowed some other person to receive it. But, looking at the affidavits as to the mode in which the business is conducted by Wall, the agent of the company,—the mode and the time of his receiving goods, and the remuneration he has for it,—I think it is impossible to say that this course of dealing can be brought within those principles. I am clearly of opinion that a case of undue preference has been made out in this respect, and that as to the second ground of complaint also the rule must be made absolute. As to the third ground of complaint, I must confess I have felt more difficulty: but, upon the whole, I think the applicants have made out a primâ facie case of undue and unreasonable preference, by showing that more is charged to them than is charged to other persons for the conveyance of the same descriptions of goods under the same circumstances and by the same trains. The question is whether the company have given any answer to that primâ facie case. If it had appeared that a lower rate had been charged to certain individuals for the purpose of meeting competition by a canal or another railway, or in consideration of their sending large quantities of goods, though the same advantages were not publicly and generally held out, it may be that the company would be warranted in so doing,—though upon that it is not necessary for me to offer any opinion. If such had been the history of the reduced charge, or if, with a view to meet such competition, the company were to say to certain persons, "We will carry for you at a reduced rate, provided you will undertake to send your goods exclusively by our railway and not
*655] to resort to water-carriage, or any *other mode of conveyance," the matter might have been well deserving of full consideration. But no such point is raised upon the affidavits, though it must have been

in the minds of the persons who made the affidavits on the part of the company. The silence of the company as to any apprehension of water-carriage competition, and the absence of any answer to the case made out on the affidavits filed on behalf of the complainants, satisfies my mind that the object of the company in giving the preference charged, was, to shut out the complainants from competing with them as carriers.

WILLES, J.—I am of the same opinion upon all the points. I will only add, in consequence of the mention which has been made of the case of Nicholson *v.* The Great Western Railway Company, that it is a mistake to suppose that the court there intended to decide that a primâ facie case of preference is sufficiently answered by stating a difference which may or may not be material in the circumstances between the carriage for the person complaining and that for the person alleged to have been preferred, without showing that such difference practically affects the fair charge for carriage, to an extent proportionate to the difference of charge actually made by the company to their several customers. It was in that case sworn on the part of the company, and not answered by the complainants, that, having regard to the circumstances there specially set forth, and appearing to the court to be material, the rates charged to the complainants were in every respect fair and reasonable as compared with the rates charged, under the special circumstances, to the company alleged to have been preferred.

BYLES, J.—I also think the rule should be made absolute upon all three branches. With respect to the *first two grounds, I can only repeat what has already been said by my Lord and my two learned Brothers, that the right of the applicants to succeed upon those two points follows as a necessary consequence from the decisions of this court in Baxendale *v.* The Great Western Railway Company and Garton *v.* The Great Western Railway Company. The principle laid down in those two cases, is, that a man shall not be forced to pay for a service which he has no desire to have performed for him, and the performance of which operates injuriously to him by giving others an undue preference over him. As to the third branch of the case, viz. that a lower charge is made by the company to persons residing at Bridgewater for the carriage of goods, than is made to the complainants, no satisfactory reason seems to me to have been given for that reduction. It is not shown that it is rendered necessary for the purpose of meeting and of overcoming competition. As to the case of Nicholson *v.* The Great Western Railway Company, 5 C. B. N. S. 366 (E. C. L. R. vol. 94),—that was merely deciding distinctly a point which was thrown out in Ransome *v.* The Eastern Counties Railway Company, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and Oxlade *v.* The North Eastern Railway Company, 1 C. B. N. S. 454, viz. that a smaller per centage of profit on a larger amount of traffic might be a full compensation to the company for a larger per centage of profit upon a smaller amount of traffic. It does not appear that that is the case here. There is nothing in the affidavits to show that these Bridgewater grocers and ironmongers send any large amount of goods by the defendants' line. The inequality of charge cannot be without a reason: and I am at a loss to see any other possible reason than a desire on the part of the defendants to displace the complainants as carriers, so that they themselves may become the sole carriers on their line of railway. Rule absolute.

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*657] *BAINES and Another v. WOODFALL. *June* 11.

A ship was insured by a time policy from the 30th of July, 1857, to the 29th of July, 1858. Having safely arrived in port on the 12th of April, 1858, her owner on the 15th wrote to the insurance-broker who acted for the insurers, as follows:—"The J. B. having arrived here, we will thank you to render us a credit-note for unexpired time, say, from the 12th instant to the date of the expiration of her policy." On the following day, the broker sent a clerk with a memorandum as follows:—"Please hand bearer stamped policy per J. B., to put forward returns for cancelling." The policy was sent accordingly, and on the 21st the broker's clerk endorsed thereon,—"Cancelled this policy from the 12th of April, 1858, and returned the assured 1*l.* 17*s.* 10*d.*, per cash, for *three months* unexpired time,"—the usage of underwriters at the port being to take into consideration *unbroken months only* in computing the returns.

The vessel was destroyed by fire (one of the perils insured against) in the dock on the 22d of April. Later on the same day, but before they had received the credit-note for the return premium, or had any intimation from the broker that the policy had been cancelled, the assured wrote as follows:—"Not having received any reply to our note of the 15th instant, requesting you to send us a credit-note for unexpired time on policy on ship J. B., we hereby withdraw our said note and the request therein contained." To this the broker replied,—"We beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per J. B. in usual course, and we cannot therefore recognise any withdrawal on your part:"—

Held, that there had been a sufficient acceptance by the broker of the proposal of the assured to cancel the policy, notwithstanding the parties had misunderstood each other as to the mode of calculating the returns.

THIS was an action upon a policy of insurance, for a total loss.

The first count of the declaration was upon a policy subscribed by the defendant, upon a ship called the James Baines, lost or not lost, from the 30th of July, 1857, to the 29th of July, 1858, averring a loss of the ship by fire (which was one of the perils insured against) after the 30th of July, 1857, and before the 29th of July, 1858.

The declaration also contained a count for money had and received, and a count upon accounts stated.

The defendant pleaded,—first, to the first count, that, during the said risk, and before the happening of the loss in the first count mentioned, the said ship arrived at Liverpool safe in all respects, and was then and there in dock moored in safety more than twenty-four hours; that the plaintiffs then proposed to the defendant that the said policy should be cancelled, and the risk and liability of the defendant thereunder should be then terminated and put an end to, and that the defendant should make a return to the plaintiffs of premium paid to the defendant by the
*658] plaintiffs on the *said policy, for the unexpired time covered by the said policy; that he the defendant acceded to the said proposal, and applied to the plaintiffs for the policy, in order that the same might be so cancelled as aforesaid, and the plaintiffs handed the same to him for that purpose, and the said policy was cancelled, and the risk and liability of the defendant thereon and thereunder was terminated and put an end to, and the defendant was then ready and willing to make the said return of premium to the plaintiffs, and always since and still was and is ready so to do; that the premises aforesaid accrued before the said loss in the said first count mentioned; and that the said policy and liability of the defendant thereunder was terminated and put an end to before the said loss.

To the second and third counts the defendant pleaded, except as to 2*l.* 16*s.* 9*d.*, never indebted, and, as to that sum, payment into court. Issue.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool, when the following facts appeared in evidence:—The James Baines having arrived in Liverpool on the 12th of April, 1858, the plaintiffs being desirous of cancelling the policy, and getting a return of premium for the unexpired portion of the year for which she was insured (the policy containing no provision for a return of premium), wrote to the defendant as follows:—

"Liverpool, 15th April, 1858.

"Dear Sir,—The James Baines having arrived here, we will thank you to render us a credit-note for unexpired time,—say, *from the 12th instant* to the date of the expiration of the policy.

"For JAMES BAINES & Co.,

"W. H. WOODFALL, Esq., Liverpool." "J. GREAVES."

*No answer appeared to have been returned to this letter; but, on the 16th of April, a messenger was sent by the defendant to [*659 the office of the plaintiffs with a document which was not produced (it having been lost), but which was proved to have been in the following terms:—

"Liverpool, 16th April, 1858.

"From Woodfall, Willis & Co.

"Please hand bearer stamped policies per James Baines and David M'Iver,(*a*) to put forward returns for cancelling.

"To Messrs. JAMES BAINES & Co."

The policies were accordingly handed over to the defendant's clerk: but, the defendant having divided the risk with another insurance-broker, it was necessary to obtain his assent also to the cancellation; and consequently the act of cancellation was not actually performed until the 20th of April; on which day the defendant's clerk made the following endorsement upon the James Baines's policy,—"Cancelled this policy from the 12th of April, 1858, and returned the assured 1*l.* 17*s.* 10*d.* per cash, for three months unexpired time."

On the morning of the 22d of April the James Baines caught fire, and was totally destroyed. In the course of the same day, but before the credit note for the amount of the return premium had been sent to the plaintiffs, they addressed the following letter to the defendant:—

"Liverpool, 22d April, 1858.

"Sir,—Not having received any reply to our note of the 15th instant, requesting you to send us a credit-note for unexpired time on policy on ship James Baines, we hereby withdraw our said note and the request therein contained. "JAMES BAINES & Co."

"W. H. WOODFALL, Esq."

*To this letter the defendant's firm replied as follows:— [*660

"Liverpool, 22d April, 1853.

"Messrs. James Baines & Co.

"Gentlemen,—In reply to your note of this morning, we beg to say, that, in accordance with your request of the 15th instant, we cancelled

(a) Another vessel insured by the defendant for the plaintiffs at the same time as the James Baines.

the policy per James Baines in the usual course; and we cannot therefore recognise any withdrawal on your part.

"WOODFALL, WILLIS & Co."

On the part of the defendant, evidence was given of a usage amongst insurance-brokers at Liverpool, that, where a return of premium is made in respect of an unexpired time-policy, the unbroken months only are taken into account, no notice being taken of a fraction of a month. And the credit-note which was sent to the plaintiffs was framed upon that principle; and the payment into court was the amount of premium for the months of May, June, and July.

The learned judge was of opinion that the usage was sufficiently proved: and a verdict was by his direction found for the defendant,—leave being reserved to the plaintiffs to enter a verdict for them for 132*l.* 8*s.* 4*d.*; the court to be at liberty to draw inferences of fact.

Edward James, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs on the first count, for 132*l.* 8*s.* 4*d.*, "upon the ground that on the evidence it appeared that the parties never were agreed upon the terms on which the contract of insurance should be put an end to;" or to enter a verdict for the plaintiffs on the second count, for the amount of the premium from the 12th to the 30th of April, in case the court should be of opinion that the
*661] policy was cancelled on the terms that the premium *should be returned from the 12th of April. He submitted that it was competent to the plaintiffs to retract their proposal at any time before it had in terms been accepted by the defendant.—Routledge *v.* Grant, 4 Bingh. 653 (E. C. L. R. vol. 13), 1 M. & P. 717, 3 Car. & P. 267 (E. C. L. R. vol. 14); that the usage proved was applicable only to the case of a policy containing a stipulation for a return of premiums, which this policy did not; and that it was not competent to apply a usage to a written instrument which is inconsistent with it.

J. Wilde, Q. C., and *Milward*, showed cause.—The question is, whether, at the time the fire took place, the proposal of the 15th of April had been carried out so as to be binding and to make the policy cease to be in force. The facts upon which that question depends are extremely short. The plaintiffs are the owners of the James Baines: the defendant is an insurance-broker at Liverpool, whose business it is to take risks and generally to manage the insurances for those underwriters by whom he is employed. The James Baines, which had been insured by the defendant for twelve months, from the 30th of July, 1857, to the 29th of July, 1858, having arrived in safety at Liverpool on the 12th of April, 1858, the plaintiffs, being desirous of getting the policy cancelled, and a return of premium for the unexpired time, wrote to the defendant, as follows,—"The James Baines having arrived here, we will thank you to render us a credit-note for unexpired time, say, from the 12th instant to the date of the expiration of her policy." No precise answer seems to have been returned to this letter; but, on the following day, a clerk of the defendant was sent to the plaintiffs' counting-house with the following memorandum,—"Please hand bearer stamped
*662] policy per James Baines, to put forward returns for *cancelling." On the 21st,—the policy having then found its way to the defendant's office,—a clerk of the defendant made the following endorse-

ment on the back of it,—"Cancelled this policy from the 12th of April, 1858, and returned the assured 1*l.* 17*s.* 10*d.* per cash, for three months unexpired time." The credit-note for the return premium was not sent to the plaintiffs until the 22d. The James Baines was destroyed by fire on that day; and the plaintiffs then (but before they received the credit-note) wrote to the defendant withdrawing their proposal of the 15th. To this, the defendant replied,—"In reply to your note of this morning, we beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per James Baines in the usual course; and we cannot therefore recognise any withdrawal on your part." The point taken on the part of the plaintiffs is this:—In their proposal of the 15th of April, the plaintiffs ask for a return of premium "*from the 12th instant* to the date of the expiration of the policy;" and the credit-note which was afterwards sent was for the three unbroken months from the 1st of May to the end of July. The answer to that is, that, by the usage of the underwriters of Liverpool, which was abundantly proved, unbroken months only are allowed for in calculating returns of premium on time-policies. [COCKBURN, C. J.—Your argument is, that it is the same as if the defendant had answered simply, "I accept your proposal?"] Precisely so. Taking the letter with the evidence of the usage, and the fact that the underwriters were not bound to make any return upon this policy, the case is perfectly clear. [WILLES, J.—The defendant cancelled the policy before the loss happened: he must pay what he was bound to pay. To constitute an agreement, no doubt there must be a consensus or aggregatio mentium. But that is satisfied either by a mutual consent *in words, or it may be gathered from the acts and conduct of the parties. Here, both parties agreed to a [*673 contract, though there was some misunderstanding as to the terms. The proposal being received, the defendant immediately set about carrying it into effect.

Edward James, Q. C., *Blackburn*, and *Mellish*, in support of the rule.—The question is whether there was a mutual agreement to cancel the policy before the happening of the loss. No doubt there was a proposal on the plaintiffs' part to cancel the policy on having a return of premium from the 12th of April. Now, unless there has been an aggregatio mentium ad idem, there is no cancellation. The plaintiffs could not be bound by their offer unless it was accepted in terms, and its acceptance communicated to them. The memorandum of the 16th of April clearly was not an acceptance; it was a mere intimation that the defendant was ready to take the preliminary step. [COCKBURN, C. J.—It is difficult to say that it was not substantially an acceptance of the plaintiffs' offer. The defendant says, in effect,—"Send me the policy, and I will ascertain what return of premium you are entitled to, and put it forward for cancellation."] The parties were never agreed as to the terms upon which the policy was to be cancelled. The defendant assumed that the cancellation was to be upon the terms of a return of premium for the three unbroken months; whereas, the plaintiffs' offer involved a return of premium from the 12th of April. [WILLIAMS, J.—If a man accepts a proposal, is he not bound although he may have misunderstood its terms? COCKBURN, C. J.—The acceptance is by an act done.] In Wilkinson *v.* Johnston, 8 B. & C. 428 (E. C. L. R. vol. 10), 5 D. & R. 403 (E. C. L. R. vol. 16), certain bills of exchange purporting to have,

amongst others, the endorsement of H. & Co., bankers of Manchester, *674] were presented for *payment in London, at a house where the acceptance appointed them to be paid. Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked him to take up the bills for their honour. He did so, and struck out the endorsement subsequent to those of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning, it was discovered that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the endorsers. It was held that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior endorsers; and that the rights of the parties were not altered by the erasure of the endorsements, that having been done by mistake, and being capable of explanation by evidence. And in Novelli v. Rossi, 2 B. & Ad. 757 (E. C. L. R. vol. 22), the defendant, in discharge of a debt to the plaintiff, endorsed bills to him, which had been drawn and endorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. The plaintiff endorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them "cancelled by mistake;" the bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling: they would otherwise have honoured them. A re-acceptance was obtained *675] from *the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior endorsers for payment, but they refused. The defendant, who resided abroad, cited the drawers, the intermediate endorsers, and the plaintiff, before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and consequently that the other parties to the bills were discharged. It was held that the French courts had mistaken the law of England as to the effect of the cancellation; and therefore that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. Here, the broker (the defendant) had no authority from the underwriters to act for them otherwise than according to the usage: he had, therefore, no authority to make such a bargain as that proposed by the plaintiff's letter of the 15th of April. [COCKBURN, C. J.—Is the de-

fendant in a position to deny his cancellation, by alleging his own want of authority to do that which he professed to do?]

COCKBURN, C. J.—I am of opinion that the rule in this case must be made absolute so far as regards the return of the premium from the 12th of April to the 1st of May, so that there will be a verdict for the *plaintiffs for that sum, 10*s.* 7*d.*, beyond the money paid into court. As to the larger question which has been argued before us, our decision must be in favour of the defendant. After the discussion which has taken place, the true view of the case seems to me to be this, that the letter from the plaintiffs originally proposing the cancellation of the policy on the condition of a return of the premium for the unexpired time, must be looked at solely with reference to its terms, irrespective of any usage or practice at Liverpool upon the subject: I read this as an express stipulation, and one upon which the usage cannot attach: and I am strongly fortified in this view by the circumstance that the letter dates from the 15th of April, whereas the time from which it is proposed that the premium shall be returned, is, the 12th of April, the day on which the vessel arrived at Liverpool. If the letter had been written with reference to the custom or usage, it would have been sufficient for the writers to have dated the letter, instead of referring to the 12th of April as the time from which they wished to have a return of premium. Taking that to be the true construction of the plaintiffs' proposal, let us see what was done afterwards, to ascertain whether there was a consent or concurrence of the two minds. The proposition of the plaintiffs must be taken to be this,—"If you, the defendant, will return us the premium from the 12th of April to the 29th of July, we will give you up the policy to be cancelled." To this an answer is returned desiring that the policy may be sent in order that the amount to be returned may be ascertained, with a view to its cancellation. I cannot help thinking that that is an acceptance of the terms contained in the plaintiffs' proposal, because the defendant had no right to ask for the policy unless he was prepared to carry out the terms proposed by the plaintiffs. Looking at the *evidence, it may be assumed that the defendant, in giving this assent, understood the terms of the plaintiffs' proposal in a sense somewhat different from that intended by them. It may, therefore, as was suggested by Mr. *Wilde*, be likened to the case of a written contract in which a term is introduced that was intended to be used in one sense by the one party and in another sense by the other. Neither party can avail himself of this misunderstanding of the terms to get rid of the contract; but the court must construe it. I think that principle applies here. There is in terms an acceptance by the defendant of the plaintiffs' proposal, from which it was not competent to the former to recede. The only question, therefore, is, what is the true construction of the plaintiffs' letter of the 15th of April. Upon that I have already intimated my opinion. The policy was sent to the defendant to be cancelled; and it was cancelled. Upon these grounds, I think the rule should be discharged, except as I before mentioned.

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WILLIAMS, J.—I am of the same opinion. As to the main point, the facts, as I understand them, are these,—The plaintiffs, on the 15th of April, send a letter to the defendant proposing a return of premium for the unexpired time for which their vessel was insured, "from the 12th

instant to the date of the expiration of the policy." If that proposal is accepted, that becomes a complete bargain between the parties. It therefore simply comes to the question whether the memorandum of the 16th of April was an acceptance of that proposal. I think it was. The terms are,—"Please hand bearer stamped policy, to put forward returns for cancelling." The proper construction of that, as it seems to me, is,—"I do accept your proposal, therefore send me the policy for cancellation."

*678] *WILLES, J.—I am of the same opinion. I think the cancellation of the policy took place by the assent of both parties, although the terms of the proposal were not understood between them.

BYLES, J.—I am of the same opinion. The memorandum of the 16th of April was a clear acceptance of the plaintiffs' proposal of the 15th. It amounts to this,—"Give me the policy, and I will forward the returns,"—the returns which the parties were discussing. For what purpose was the policy to be sent, but for that of its being cancelled? If, therefore, it had turned merely on the question whether there had been an acceptance of the proposal contained in the plaintiffs' letter of the 15th of April, I should have held that there clearly had been. But then I observe that there are acts done. The policy is handed over by the plaintiffs to the defendant; and it is received by the defendant, and a calculation of the return made, though upon a wrong footing. Be it, therefore, a question of law or of fact, it is clear that the defendant is entitled to retain the verdict upon the first count.

Rule accordingly.

Where a negotiation is conducted by letters, a proposition made on one side and professedly accepted on the other, but in fact with a material qualification annexed, will not constitute a contract, till that qualification be in its turn assented to by the party making the original proposal: Ocean Ins. Co. *v.* Carrington, 3 Conn. 357; Eliason *v.* Henshaw, 4 Wheat. 228. And in general, parties to a contract, must be agreed upon the sense in which its terms are employed, otherwise it will be void, as made under a mutual mistake: Hazard *v.* N. E. Marine Ins. Co, 1 Sumn. 225. Thus, in a case where there was an agreement for the sale of shingles at $3.25, and there was a dispute as to whether this $3.25 was by the bunch or by the thousand, there being evidence that at Albany, where one party resided, shingles were sold by the bunch, and at Providence, where the other resided, shingles were sold by the thousand, it was held, that unless both parties had understandingly assented to one or other of these standards, there was no special contract as to the price: Greene *v.* Bateman, 2 Wood & M. 359.

Where, however, a particular term has acquired by usage at a particular place, or among a particular class of persons, a special signification, and a contract is made, which, under the circumstances, has reference to that place or class of persons, the term is to be presumed to have been used by both parties in that sense: See 1 Greenleaf on Evidence, § 292. Thus in Hazard's Adm. *v.* N. E. Marine Ins. Co., 8 Peters 558, reversing S. C. 1 Sumn. 218, a letter ordering insurance from a company in Boston, which was written in New York, by the owner of a ship who resided there, represented the vessel to be a "coppered ship." It was in evidence, that the term "coppered ship" had a different signification in Boston and New York, and it was contended that the policy was void on

the ground of mutual mistake. But it was held by the Supreme Court, that the insurers were to be presumed to have known the usages of the port of New York, from which the insurance was ordered, and to have considered the vessel as described according to those usages.

*SHADWELL *v.* SHADWELL and Another. [*679

In an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

The court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made,—the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him.

THIS was an action upon an agreement under which the plaintiff sought to recover from the defendants, executors of one Charles Shadwell, deceased, certain arrears of an annuity.

The declaration stated that the testator, in his lifetime, in consideration that the plaintiff would marry one E. N., agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say, "11th August, 1838. Gray's Inn. My dear L.,—I am glad to hear of your intended marriage with E. N.; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150*l.* yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require. Your ever affectionate uncle, C. SHADWELL:" Averment, that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150*l.* each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said E. N., and in the lifetime of the said testator; and that the plaintiff's *annual income derived from his profession of a Chancery barrister never amounted to six hundred [*680 guineas, which he was always ready and willing to admit and state to the said testator; and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12*l.*, of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue was still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the same five sums were still in arrear and unpaid. Claim, 1000*l.*

The defendants pleaded,—first, that the testator did not agree with or promise the plaintiff in manner and form as in the declaration alleged.

Secondly, that the time for the payments of the yearly sums, or either of them, had not elapsed as alleged.

Thirdly, that, before the accruing of the supposed causes of action in the declaration mentioned, or any part thereof, by the own admission of the plaintiff before then made to the testator, the annual income of the plaintiff derived from his profession of a Chancery barrister amounted to six hundred guineas.

Fourthly, that, before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the same marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said E. N., of which the testator before and at the time of making the supposed agreement and promise also had notice, and the same marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and *without the request of the testator; and that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

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Fifthly, to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855, that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue to practise and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same, yet that, after the making of the said agreement and promise, and before the accruing of the supposed causes of action by that plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister which before and at the time of the making of the said supposed agreement and promise he had so carried on as aforesaid, and although the plaintiff could and might during the time in that plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff after such abandonment thereof never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister appointed yearly to revise the lists of voters for the year, for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Sixthly, that, after the making of the said supposed agreement and promise in the declaration mentioned, *and before the accruing of the causes of action in the declaration mentioned, or any part thereof, it was agreed by and between the testator and the plaintiff that the same supposed agreement and promise should be, and the same accordingly were, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

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Macauley, Q. C., in Hilary Term last, obtained a rule calling upon the defendants to show cause why the plaintiff should not be at liberty to inspect a certain letter written by him to the testator. The motion was founded upon an affidavit of the plaintiff stating that he had written a letter to the testator relating to the annuity, the words of which he could not recollect, and also stating his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the sixth plea, but positively denying that any such agreement was ever made. The application was originally made to Williams, J., at Chambers; but that learned judge referred the plaintiff to the court.

H. Bullar showed cause, upon an affidavit denying that any such documents existed as that mentioned in the plaintiff's affidavit.—When this case was before the learned judge at Chambers, the plaintiff's right to the inspection prayed was not suggested to be based upon the statute 14 & 15 Vict. c. 99, s. 6; and probably the course taken here will be the same, viz., by a contention on his part that the application may be granted by virtue of the common law power of the court. The principle upon which this rests is well stated in the notes to Jevens *v.* Harridge, 1 Wms. Saund. 9 *d*, n. (*i*),—"Where one part only of an instrument is executed, and it is lodged in the hands of one party for the use of both, the court will compel the *production of it for the use of the other party;" and Blakey *v.* Porter, 1 Taunt. 386, King *v.* King, [*683 4 Taunt. 666, Blogg *v.* Kent, 5 Bingh. 614 (E. C. L. R. vol. 15), 4 M. & P. 433, and other cases, are cited. This the courts have invariably acted upon. In all the cases, the existence of the agreement is admitted. So strictly have the courts adhered to this principle, that, in Street *v.* Brown, 6 Taunt. 302, 1 Marsh. 610, where two parts of an indenture of charter-party were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody was lost at sea with the ship, the court would not compel the charterer, being sued thereon, to grant inspection and a copy of the other part, for the purpose of the plaintiff's declaring with certainty. In Hodgson *v.* Warden, 1 D. & L. 286, a debtor assigned his property by deed to trustees for the benefit of his creditors, who by the same deed released him from their claims. The debtor being afterwards sued by one of the creditors, and the deed being necessary for his defence, a rule was made absolute, requiring a purchaser of the property, to whom the trustees had delivered the deed, to produce it. The purchaser having declined to do so, the court refused to grant an attachment, Parke, B., saying, "The court has no power to interfere unless the party holds the deed as a trustee." In Goodliff *v.* Fuller, 14 M. & W. 4,† in an action for breach of promise of marriage, the court refused a rule for the defendant to inspect letters written by the plaintiff to him, which he alleged contained a release of his promise, and which, after the breaking off of the connection, the defendant had returned to her upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part. Parke, B., there said: "This is not a case where the instrument is held by one of the parties as a trustee for the other, *in which case the court generally [*684 allows the instrument to be inspected. There is no foundation at all for this application." And Alderson, B., said: "The matter of this application is the subject of a bill in equity, and for us to grant it would

be nothing short of allowing a bill of discovery. The defendant should have applied for a postponement of the trial until he could file a bill in equity. In Bousfield *v.* Godfrey, 5 Bingh. 418 (E. C. L. R. vol. 15), 2 M. & P. 771, the document of which inspection was demanded was that on which the action was brought. I may observe that there is another case in the books which occasions a great deal of trouble at Chambers: it is perpetually cited there as an authority for applications like the present; and I am sorry it is not corrected." The case there alluded to is said by the reporters to be Barry *v.* Alexander, Tidd's Pr. 592, where Lord Mansfield is stated to have ruled, that, "whenever the defendant would be entitled to a discovery, he should have it here, without going into equity." [WILLES, J.—An application such as that in Goodliff *v.* Fuller, would be successful since the statute. The case of Charnock *v.* Lumley, 5 Scott 438, is the best illustration of the principle upon which this practice rests. There, in an action for money had and received, the court allowed the defendant after he had pleaded to inspect and take a copy of an agreement upon which the plaintiff's claim was founded. It was there said in argument,—"The defendant has already pleaded; and there is no case to be found where an inspection has been granted for the mere purpose of enabling the defendant to ascertain upon what evidence the action is to be supported. The agreement is not the basis of the action: and it is not sworn, in terms, either that the inspection is necessary to the defence, or that the agreement is one in which the parties have an equal interest." But Tindal, *685] C. J., said: *"This case clearly comes within the spirit, though not within the strict letter of the rule. Had the action been founded upon the special agreement, the defendant's right to inspect the agreement could not have been questioned. Although in form this is an action for money had and received, inasmuch as the rights of the parties will be controlled by the agreement, it is in effect the same as if it were brought upon the agreement."] This is a fishing application. In Pritchett *v.* Smart, 7 C. B. 625 (E. C. L. R. vol. 62), Williams, J., observes: "It is difficult to say how the court acquired the equitable jurisdiction which they exercise in compelling the production of documents. According to a case in 1 Wms. Saund. p. 98, 9th edit., n. (*i*), this jurisdiction is as old as the time of Charles the Second. It is clear, however, that we ought not to interfere in a case in which a court of equity would decline to entertain a bill of discovery." The principles which will guide the court in granting inspection under the 14 & 15 Vict. c. 99, s. 6, are well stated in Hunt *v.* Hewitt, 7 Exch. 236;† and there it is stated to be a material part of the affidavit in support of the application, to show that the action is well founded. Here, the action is clearly unfounded: the plaintiff is relying upon a mere voluntary promise, without any consideration. There is no relation of trustee and cestui que trust here.

Macauley, Q. C., in support of the rule.—Upon principle and upon authority, it is submitted, this rule should be made absolute. It is true, that, to entitle a party at common law to inspection of a document in the hands of his opponent, he must in some sense hold it as a trustee. But the true criterion is this, the document must be one in which both parties to the suit have a common interest. The sixth plea here sets up

an agreement to rescind the contract upon which *the plaintiff founds his claim in the action. The plaintiff alleges that the [*686
agreement so set up is based upon a letter of which he has no copy and the contents of which have escaped his recollection. [COCKBURN, C. J.—Would you have had any cause of complaint if the defendants had destroyed the letter?] No. [COCKBURN, C. J.—Is not that conclusive to show that there is no relation of trustee and cestui que trust between the parties?] It is apprehended not. In Doe d. Child *v.* Roe, 1 Ellis & B. 279 (E. C. L. R. vol. 72), which was an action of ejectment for a house, the tenant in possession took out a summons to inspect two leases. No affidavits were used before the judge; but it was stated, for the tenant, that he was in possession as a lawful occupant of the house, and that the lessors of the plaintiff, who were owners of the reversions expectant on two leases comprising a considerable district of which the premises were part, sought to recover on the ground that they had a right of entry for breaches of covenants alleged to be contained in the leases which the tenant sought to inspect. The attorney for the lessors of the plaintiff, without either denying or in terms admitting the statement, argued that the judge had no authority to make an order to inspect. The judge made the order, on the assumption that the statement, not being disputed, was admitted to be true in fact. On a motion for a rule to set aside this order, it was held that the order was properly made in exercise of the common-law powers of the court; the tenant appearing, by the tacit admissions before the judge, to have an interest in the deeds which he sought to inspect. Lord Campbell there says: "If there be power to make such an order, is it not perfectly fair, that, if the tenant has no counterpart of the deeds, he should be permitted to inspect these deeds, and ascertain what the covenants are, so as to learn whether he ought to defend the *ejectment or submit to it? [*687
I give no opinion as to whether this order is authorized by the stat. 14 & 15 Vict. c. 99. It is authorized by common law." And, at the end of the judgment, his Lordship added: "This common-law jurisdiction of the court is likely in future to be of much greater practical importance than formerly. In a large number of cases to which it would have applied, the necessity for its exercise was superseded by profert. Now that, by stat. 15 & 16 Vict. c. 76, s. 55, the legislature has abolished profert, without providing any substitute, it becomes highly important to lay down the rule, that, where an action is brought on an instrument, the court has power to order an inspection of it." [CROWDER, J.—In that case, the tenant came in under a person who was party to the instrument of which inspection was sought.] In a case which occurred before Bramwell, B., at Chambers, the other day, that learned judge ruled in strict pursuance of the decision in Charnock *v.* Lumley. In Bluck *v.* Gompertz, 7 Exch. 67,† it was distinctly held that the court has power, independently of the 14 & 15 Vict. c. 99, to compel the plaintiff to produce for the defendant's inspection a document upon which the action is brought, where the defendant is a party to the document, and has no copy of it. Alderson, P., there says: "In Inman *v.* Hodgson, 1 Y. & J. 28,† Alexander, C. B., said, "It would be a very formidable proposition to lay down, that every party might look into documents in the possession of his adversary, without showing that he was *interested* therein. That implies that a party may inspect a document in which he

is interested; and in the present case the defendant is himself a party to the instrument which he is desirous of inspecting." Here, the document sought to be inspected is, if anything, the agreement against which the plaintiff has to defend himself. He is, therefore, clearly *interested in it. [COCKBURN, C. J.—There is no doubt of your right to inspect a letter which is set out in the declaration: but you insist upon your right to inspect a letter upon which the defence alleged in one of the pleas is founded.] A certain property always remains in the writer of a letter,—for instance, to an extent sufficient to found a jurisdiction in the Court of Chancery to restrain the publication of it: Gee *v.* Pritchard, 2 Swanst. 402. [COCKBURN, C. J.—Do you found your right to inspection on that sort of property?] No. It shows the sort of trusteeship which is spoken of in these cases, which does not mean the ordinary legal relation of trustee and cestui que trust. [COCKBURN, C. J.—A trust with reference to the subject-matter in dispute between the parties?] Exactly so.

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COCKBURN, C. J.—A very important question is involved in this case, and therefore we will take time to consider it. *Cur. adv. vult.*

WILLIAMS, J., delivered the judgment of the court:—

In this case the defendants, who are executors of the late Charles Shadwell, are sued on an agreement under which the plaintiff claims the arrears of an annual payment of 150*l.*

The defendants, amongst other pleas, have pleaded,—sixthly, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

The plaintiff, on an affidavit stating that he had written some letter to the testator relating to the annuity, the words of which he could not remember, and *also his belief that the defendants intend to rely on that letter as constituting the agreement alleged in the plea, but positively denying that any such agreement was ever made, obtained a rule calling on the defendants to show cause why the plaintiff should not be at liberty to inspect the letter.

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On the argument, it was admitted by the plaintiff's counsel that the application could not be supported on any statutory enactment relating to the inspection of documents. It was contended, however, that the court ought to grant the inspection independently of those enactments.

But we are of opinion that the rule cannot be supported on this ground. The plea does not purport to rely on any instrument in writing: and it is plain that the plaintiff, being in utter ignorance of the means of proof which the defendants intend to adduce, conjectures that it may be some letter the contents of which he cannot recollect, and is desirous to ascertain. In other words, the real object of the application is, to obtain a discovery to which the applicant has no right, inasmuch as inspection is sought, not in order to support his own case, but in order to see whether and by what means a defence can be made out against him.

No doubt the courts have long exercised a power, independent of the statute 14 & 15 Vict. c. 99, s. 6, to grant inspection of agreements on which one party to a suit seeks to charge, or defend himself from, the

other who has executed the instrument, when there is only one copy of it, on the ground that the party who has possession of it holds it in the character of trustee for the other party: see Blogg *v.* Kent, 6 Bingh. 614 (E. C. L. R. vol. 19), 1 M. & P. 433, per Tindal, C. J.; Bluck *v.* Gompertz, 7 Exch. 70, per Parke, B. But we think the plaintiff has not sufficiently shown these defendants to be trustees for him of an instrument on which they rely, within *the meaning of this rule. [*690 He has merely surmised that there may be some letter on which they may possibly rely, and which, if they do rely on it, they may perhaps hold under such circumstances as would entitle him to inspection at common law.

In effect, we think the application is nothing but an attempt to discover whether the defendants intend to rely on any and what instrument in support of their plea. And this, we think, cannot be allowed to be done indirectly under colour of the old practice, any more than directly under the new act.

It was urged, in support of the application, that, as the defendants have not denied the suggestion as to the supposed letter being the foundation of their case, they have in effect admitted it; and that the case is then the ordinary one, of one side applying for inspection of a document (of which he had no copy) stated by the other in his pleading. But it is obvious, that, if the plaintiff is allowed to put the defendants to say that they do or do not rely on the suggested letter, this is really nothing less than allowing him a discovery pro tanto as to the mode in which the defendants propose to maintain their case,—a discovery to which he certainly is not entitled.

The truth is, we think, that the court ought not to have granted the rule to show cause. It ought to have been refused, because the plaintiff in his affidavit did not make a proper primâ facie case that the defendants were in possession of any ascertained document which they held as trustee for him, so as to entitle him to call for an inspection of it.

My Brother Crowder concurs in this opinion, and the rule must therefore be discharged. Rule discharged.(*a*)

(*a*) Mr. Justice Willes was understood not to be an assenting party to this judgment.

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*SYMONDS and Another *v.* LLOYD. *June* 12. [*691

The plaintiffs contracted (in writing) to build for the defendant the front and back walls of a house "*for the sum of* 3*s. per superficial yard of work* 9 *inches thick*, and finding all materials, deducting all lights." The lower part of the walls to the height of 11 feet were of *stone* two feet thick, the remainder of brick 14 inches thick:—

Held, that evidence of the usage of builders at the place to reduce brick-work for the purpose of measurement to 9 inches, but not to reduce stone-work unless exceeding 2 feet in thickness, was admissible; and that the proper construction of the contract was, that it provided only for the price of the brick-work, leaving the stone-work to be paid for on a quantum meruit.

THIS was an action for work done and materials provided by the plaintiffs for the defendant at his request, and for money found due upon accounts stated.

Pleas,—first, except as to 30*l.* 1*s.*, never indebted,—secondly, except

as aforesaid, payment,—thirdly, except as aforesaid, set-off,—fourthly, payment into court of 30*l.* 1*s.*

The plaintiffs joined issue upon the first, second, and third pleas; and, as to the fourth plea, said that the sum brought into court by the defendant was not enough to satisfy their claim.

The particulars of demand were as follows:—"This action is brought to recover the sum of 169*l.* 10*s.* for building 1130 superficial yards of walling 9 inches thick, at 3*s.* per yard, at Llandudno, in the county of Carnarvon."

The particulars of set-off were for bricks and carting lime and coals from the 20th of September, 1858, to the 16th of November, 1858.

The cause was tried before Bramwell, B., at the last Spring Assizes at Carnarvon. It appeared that the plaintiffs were stone-masons and bricklayers at Llandudno. The defendant was a brick-maker at the same place. The action was brought to recover the balance of an account for building the front and back walls of a house at St. George's Crescent, Llandudno, in August, 1858, under the following circumstances:—The defendant had entered into a contract with one Evans to build the house in question, and applied to the plaintiffs to do the stone and brick work. After some preliminary negotiations, the terms were
*692] agreed upon and *were reduced into writing by the defendant, and signed by the plaintiffs, as follows,—

"Memorandum of agreement made this 31st day of August, 1858, between William Symonds and Richard Williams of the one part, and Captain David Lloyd of the other part, that is to say, that the said William Symonds and Richard Williams agree to build a house in St. George's Crescent for the said Captain Lloyd (the same being Mr. J. B. Evans's house), *for the sum of* 3*s.* *per superficial yard of work* 9 *inches thick*, and finding all materials, deducting all lights; and wages to be paid every floor."

The plaintiffs accordingly proceeded to build the front and back walls of the house, which to the height of 11 feet were of stone two feet thick, the remainder being of brick 14 inches thick, or a brick and a half.

There was conflicting evidence as to the value of the work, and also as to the mode of measurement. The principle of measurement insisted upon by the plaintiffs, was, to take stone-work, if thicker than 9 inches, as containing in each yard superficial so much more in proportion; and, upon this principle, the quantities were admitted to be, of brick-work 703 yards, and of stone-work 427 yards. The mode of measurement contended for on the part of the defendant was, to reduce the brick-work to 9 inches, but not the stone-work, and according to this mode of measuring the quantity was 934 yards in all.

On the part of the plaintiffs it was insisted that the defendant was bound by his agreement, the words of which were plain and unambiguous, "3*s.* per superficial yard of work 9 inches thick," and that evidence in support of the defendant's mode of measurement was not admissible.

For the defendant it was contended that he was at liberty to give
*693] parol evidence to show that the usage *or custom of the place was, to measure brick and stone work in the way above suggested by him. The evidence was admitted.

Under the direction of the learned judge (the jury having found 3*s.* 2*d.* per superficial yard 9 inches thick to be the fair price), a verdict was taken for the plaintiffs for 28*l.* 15*s.*,—with leave to the defendant to move to enter a verdict for him, if, upon the true construction of the agreement, stone-work was not provided for, but was to be paid for on a quantum meruit, or if 3*s.* was the price for reduced brick-work and unreduced stone-work; and, if the court should think the agreement insensible, to reduce the verdict to 7*l.* 15*s.* 8*d.*

Welsby, accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, "on the ground that the plaintiffs were entitled to be paid only after the rate of 3*s.* per superficial yard of reduced brick-work and of unreduced stone-work."

Beavan (with whom was *Lush*, Q. C.) now showed cause.—The question is whether the stone-work as well as the brick-work is to be reduced to 9 inches. If it is, the verdict for the plaintiff must stand. If, on the other hand, the brick-work only is to be reduced to 9 inches, the defendant will be entitled to the verdict. It is submitted that this question must be determined by the language of the contract itself, without reference to any usage of the place; for, though evidence of usage may be admitted to explain an agreement that is ambiguous, it is not admissible for the purpose of contradicting it where the terms are express and plain. In the notes to Wigglesworth *v.* Dallison (Dougl. 201), in 1 Smith's Leading Cases 467 (4th edit.), the rule of law is thus laid down upon the subject:—"Evidence of usage, though sometimes admissible to add to or *explain, is never so to vary or contradict, either expressly or by implication, the terms of a written [*694 instrument: Magee *v.* Atkinson, 2 M. & W. 440;† Adams *v.* Wordley, 1 M. & W. 374;† Trueman *v.* Loder, 11 Ad. & E. 589 (E. C. L. R. vol. 39). Thus, in Yates *v.* Pym, 6 Taunt. 446 (E. C. L. R. vol. 1), 2 Marsh. 141 (E. C. L. R. vol. 4), Holt 95, in an action on a warranty of *prime singed bacon*, evidence was offered of an usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of *prime bacon*. This evidence was held inadmissible, first at Nisi Prius, by Heath, J., and afterwards by the Court of Common Pleas. In Blackett *v.* Royal Exchange Insurance Company, 2 Tyrwh. 266, which was an action on a policy upon '*ship*, &c., *boat and other furniture*,' evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits on her larboard quarter; but was rejected at Nisi Prius, and the rejection confirmed by the Court of Exchequer. 'The objection,' said Lord Lyndhurst, delivering judgment, 'to the parol evidence, is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, viz. that whereas the policy imported to be upon ship, furniture, and apparel, generally, the usage is to say that it is not upon furniture and apparel, generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain." So, parol evidence has been rejected, when tendered for the purpose of proving that the words 'glass-ware in casks,' contained in the memorandum of excepted articles in a fire-policy, meant,

*695] according to the understanding of insurers and insured, *such ware in open casks only:" Bend *v.* Georgia Insurance Company, Sup. Ct. N. York, 1842, cited 2 Taylor on Evidence, 3d edit. 942. Taking the agreement alone, the words "for the sum of 3*s.* per superficial yard of work 9 inches thick," cover the *whole* work. The agreement in terms provides for all the work to be done under it. The whole is to be measured and reduced to 9 inches, and paid for at the rate of 3*s.* per superficial yard.

Welsby and *M'Intyre*, in support of the rule.—This contract, like all other trading contracts, must be construed according to the intention of the parties as collected from the face of the instrument itself and the surrounding circumstances. One of the surrounding circumstances here was the usage in the neighbourhood, that, for the purpose of charge, *brick-work* is reduced to 9 inches, but that that usage does not apply to stone-work. The result is, that, while the brick-work is specially provided for by the contract, the stone-work is left to a quantum meruit. [WILLIAMS, J.—"Finding all materials" has reference to the whole of the work. It would seem odd, therefore, to provide for the price to be paid for a portion only.] The contract is unintelligible per se. [BYLES, J.—There are three possible constructions,—first, that *all* the work is to be reduced to 9 inches,—secondly, that the 3*s.* per superficial yard applies to the brick-work only, and not to the stone-work,—thirdly, that it applies to the whole, without reduction as to the stone-work.] The second, it is submitted, is the more reasonable construction. [WILLIAMS, J.—Allowing 3*s.* for the brick-work, and a quantum meruit for the stone-work, entitles the defendant to a verdict?] Yes.

*696] WILLIAMS, J.—The difficulty I have felt in arriving at *a conclusion as to the true meaning of this contract has arisen from the circumstance which I pointed out in the course of the argument, viz., the difficulty of adopting the construction which would apply the stipulated price to the brick-work exclusively, inasmuch as the contract provides that the builders shall find all materials, for the stone-work as well as for the brick-work. One would naturally have thought that the obligation to supply the materials and the stipulation for payment of the price would have been co-extensive. My learned Brothers, however, are of opinion,—and I am not disposed to differ from them,—that the true construction is that contended for by the defendant, viz., that, although the defendant contracted to do the whole stone-work and brick-work, and to supply all the materials, there is no provision made beforehand as to the rate of remuneration, beyond the stipulation, that, as to the brick-work, he shall be paid at the rate of 3*s.* per superficial yard of work 9 inches thick. Taking that to be the only provision, it leaves the rest of the work unprovided for as to the remuneration. The case was properly left to the jury, and they have found an amount which entitles the defendant to the verdict. The rule, therefore, must be made absolute.

WILLES, J.—I am of the same opinion. The memorandum in question certainly is not very intelligible. But, upon the whole, I think the preferable construction is that the 3*s.* per superficial yard of work 9 inches thick was intended only to apply to the brick-work. In order to ascertain the intention of the parties, it is necessary to look to that which was the subject of communication at the time, or which was after-

wards done. It appears that the work to be done consisted of the two walls (back and front) of a house, of *which the lower portion to the height of 11 feet was to consist of stone 20 inches thick, and [*697 the upper part of brick-work. The plaintiffs agree to build such walls "for the sum of 3*s.* per superficial yard of work 9 inches thick." That could only be meant to apply to the brick-work. The words "finding all materials" do not, I confess, weigh much on my mind. The result, in my opinion, is, that the parties stipulate that the brick-work is to be paid for at 3*s.* per superficial yard 9 inches thick. And, as that does not provide for the entire payment for the work to be done under the contract, the rest is left to be paid for according to the ordinary price of stone-work. Estimating the brick-work at 3*s.* per superficial yard 9 inches thick, and the stone-work at measure and value, the claim of the plaintiffs is covered by the set-off and the payment into court. The rule must, therefore, be made absolute to enter a verdict for the defendant.

BYLES, J., concurring, Rule absolute.

*GRINDELL *v.* BRENDON. *June* 15. [*698

The 1st section of the 17 & 18 Vict. c. 36, enacts that every bill of sale of personal chattels, or a true copy thereof, *together with* an affidavit of the time of such bill of sale being made, &c., shall be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making of such bill of sale. And by s. 3 the officer is required to keep a book containing particulars of every bill of sale so filed, together with the dates of the execution and filing of the same, &c.:—

Held, that the bill of sale and affidavit must be filed *at the same time;* and that the book kept by the officer is a "public document," and therefore that a certified copy or extract is, by force of the statute 14 & 15 Vict. c. 99, s. 14, evidence of the filing of the bill of sale and affidavit, and of the time of their being filed.

THIS was an interpleader issue which was tried at the last Spring Assizes at Gloucester, when a verdict was found for the plaintiff.

In order to prove a bill of sale under which the plaintiff claimed the property in question, a clerk from the Queen's Bench Office was called to produce the copy bill of sale filed pursuant to the 17 & 18 Vict. c. 36, s. 1, and the affidavit filed therewith, and to prove the date of filing the same.

Upon taxation of the plaintiff's costs, the master disallowed him the expenses of the attendance of this witness, being of opinion that a certified copy of the bill of sale and affidavit, and of the entry in the office book of the filing thereof, would have been sufficient proof, under the 14 & 15 Vict. c. 99, s. 14.

A summons was taken out calling upon the defendant to show cause why the master should not review his taxation. The matter was heard before Willes, J., who referred the parties to the court.

H. James now moved accordingly.—The question turns upon the 1st and 2d sections of the 17 & 18 Vict. c. 36, and the 14th section of the 14 & 15 Vict. c 99. The 1st section of the 17 & 18 Vict. c. 36 enacts that "every bill of sale of personal chattels made after the passing of that act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of

*699] sale or at any future time, to *seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, *together with an affidavit* of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the *700] *debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." The 3d section enacts that "the said officer of the said Court of Queen's Bench shall cause every bill of sale, and every such schedule and inventory as aforesaid, and every such copy filed in his said office under the provisions of this act, to be numbered, and shall keep a book or books in his said office, in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given, together with the number, and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in the schedule to this act, which said book or books, and every bill of sale or copy thereof filed in the said office, may be searched and viewed by all persons at all reasonable times, paying to the officer for every search against one person the sum

of 6*d.* and no more; and that, in addition to the last-mentioned book, the said officer of the said Court of Queen's Bench shall keep another book or index, in which he shall cause to be fairly inserted, as and when such bills of sale are filed *in manner aforesaid, the name, addition, and description of the person making or giving the same, [*701 or of the person against whom such process shall have issued, as the case may be, and also of the persons to whom or in whose favour the same shall have been given, but containing no further particulars thereof; which last-mentioned book or index all persons shall be permitted to search for themselves, paying to the officer for such last-mentioned search the sum of 1*s.*" The only provision in the act for office-copies, or extracts, is s. 5, which provides that "any person shall be entitled to have an office-copy or an extract of every bill of sale, or of the copy thereof filed as aforesaid, upon paying for the same at the like rate as for office-copies of judgments in the said Court of Queen's Bench." No provision is made for office-copies or extracts of affidavits. The 14th section of the 14 & 15 Vict. c. 99, enacts, that, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, &c., provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted," &c. The question is whether the entry in the book is a public act done by the officer, so as to make a certified copy or extract admissible under the last-mentioned statute; and that depends upon the meaning of the words "together with" in the 1st section of the 17 & 18 Vict. c. 36. The words of the old statute 3 G. 4, c. 39, s. 1, were identical: but there is no authority to show that the filing of the affidavit is to be contemporaneous with the filing of the bill of sale. [BYLES, J.—Would not a *man who goes to the office see there everything he wants to see?] Yes; but not everything he wants to prove. [WILLES, [*702 J.—I apprehend the officer would not be justified in receiving the bill of sale without the affidavit.] That depends upon the effect of the words "together with,"—whether it means "simultaneously" or "at the same time." [WILLES, J.—In Richardson *v.* Mellish, 2 Bingh. 229 (E. C. L. R. vol. 9), 9 J. B. Moore 435 (E. C. L. R. vol. 17), books containing lists of passengers, deposited at the India House in pursuance of the 50 G. 3, c. 155, were held to be admissible in evidence as a document of a public nature. Would not the book kept at the Queen's Bench Office pursuant to the 3d section of the 17 and 18 Vict. c. 36, be admissible on the same ground? If so, a certified copy or extract would clearly be receivable under the 14 & 15 Vict. c. 99, s. 14.] No doubt a certified copy of the book would be admissible; and Bath *v.* Sutton, 27 Law J., Exch. 388, shows that the affidavit would be admissible as a public document: but the question is, what it would prove when received,—whether the clerk is to be the judge of whether the act has been complied with or not.

Macnamara showed cause in the first instance.—The book in question is clearly a public document: it consists of entries made by a public officer duly appointed for that purpose, under the authority of the act

of parliament, and for the use of the public, in order to enable them to ascertain what charges exist upon the personal chattels of persons with whom they are dealing. Those entries, therefore, are clearly provable by certified copies or extracts, under the 14 & 15 Vict. c. 99, s. 14. The officer whose duty it is to receive and file the bill of sale has no authority to receive it unless accompanied by the affidavit required by the statute.

*703] *WILLIAMS, J.—We are all of opinion that the statute 17 & 18 Vict. c. 36, s. 1, requires the affidavit to be filed at the same time with the bill of sale, and that the clerk has no authority to receive the one without the other. That which certifies the time of the receipt of the one, therefore, certifies the receipt of the other at the same time.

WILLES, J.—I am of the same opinion.

BYLES, J.—I think we should be astute to defeat the operation of a very beneficial act, if we were to assent to the validity of this objection. The rule must be refused, but without costs. Rule refused.

COOPER and Another *v.* HILL. *June* 15.

Under the table of fees settled by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, the sheriff's officer is entitled to 1*l.* 1*s.* for arresting the defendant on a ca. sa., though within a mile of the officer's residence; but he is not entitled to charge 10*s.* "for conveying the defendant to gaol," or 5*s.* for an assistant, unless the necessity for an assistant is shown: and, where the officer has improperly received such charges, he will be ordered to refund the excess, with costs of the application,—under pain of an attachment.

PRIDEAUX, on a former day in this term, obtained a rule calling upon John Drew, bailiff of the sheriff of Cornwall, to show cause why he should not refund to the plaintiffs or their attorney the sum of 1*l.* 5*s.* 6*d.*, the amount overcharged as such bailiff for fees on the execution of a writ of ca. sa. issued in this cause at the suit of the plaintiffs, with costs; and why a writ of attachment of contempt should not issue against him for demanding and taking from the plaintiffs a greater amount of fees on the execution of the said writ than is allowed by law or by the statute 7 W. 4 & 1 Vict. c. 55.

*704] *It appeared that the defendant was arrested within a mile of Drew's residence, and that the fees charged and received by Drew on the execution of the ca. sa. were as follows:—

	£.	s.	d.
For arresting the defendant	1	1	0
Assistant		5	0
Conducting the defendant to gaol		10	0
Travelling expenses from Truro to Bodmin, 25 miles, at 1*s.* per mile	1	5	0
	£3	1	0

It was contended that there was an excess of 10*s.* 6*d.* in the first item, and that the charges for the assistant and for conducting the defendant to gaol were altogether unwarranted: and the case of Blake *v.* Newburn, 5 D. & L. 601, was referred to, where it was held, that, where a sheriff's officer takes more than the fees allowed under the 7 W. 4 & 1

Vict. 55 for executing a writ, the rule may call upon the sheriff to show cause why he should not return the excess, as well as upon his officer to show cause why a writ of attachment should not issue against him for his contempt in receiving the excess.

Collier, Q. C., now showed cause, upon an affidavit by the officer stating that the fees charged on this occasion were those usually taken in Cornwall. The scale of fees allowed by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55,(*a*) authorizes the charge of 1*l.* 1*s.* for the arrest, and 5*s.* for an assistant, where necessary. [COCKBURN, C. J.—To justify the charge, you must show the necessity.] The third item is according to the scale, which allows "for the bailiff to conduct prisoner to gaol, per diem, 10*s.*" [COCKBURN, C. J.—The *table is divisible into two parts,—the first part applies to mesne process only, the second to process of execution. BYLES, J.—The 10*s.* for conducting the party to gaol clearly applies to mesne process only.] Whether the process be mesne or final, the expense of conveying the defendant to gaol must be the same. Travelling-expenses, at all events, are properly charged. The officer, it seems, has acted with perfect bona fides; and it certainly is not easy to put a sensible construction upon the scale. [*705

Prideaux, in support of the rule.—By the table of fees settled by the judges in pursuance of the statute, the fees allowed for an arrest on mesne process are as follows,—"not exceeding one mile from the officer's residence, 10*s.* 6*d.*; not exceeding seven miles, 1*l.* 1*s.*; exceeding seven miles, 1*l.* 11*s.* 6*d.*:" and the only allowance "for conveying defendant to gaol from the place of arrest," is, 1*s.* per mile. There is, therefore, clearly an overcharge of 10*s.* 6*d.* on the arrest, and 10*s.* for conducting the defendant to gaol, which with the unauthorized charge of 5*s.* for the assistant, makes up the 1*l.* 5*s.* 6*d.* the return of which is sought by this rule. If the officer has 1*l.* 1*s.* for the arrest, he is not entitled to anything for his travelling-expenses.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute as to 15*s.*, part of the excessive charge complained of. Upon looking at the table of fees as settled by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, it seems to me that Mr. *Prideaux* is not justified in asking us to reduce the 1*l.* 1*s.* charged for the arrest to 10*s.* 6*d.*; for, though the first part of the scale, which relates to mesne process, limits the charge for the arrest to 10*s.* 6*d.* where the distance does not exceed one mile from the officer's residence, *yet, in the subsequent part, which deals with arrests upon writs of ca. sa. and other process of execution, the fee allowed to the bailiff for executing the warrant, "if the distance from the sheriff's office or the bailiff's residence do not exceed five miles," is 1*l.* 1*s.* Then it is said, that, if that be so, and both parts of the table are to be looked at, the charge of 1*s.* per mile for travelling expenses is only applicable where the bailiff gets the lower charge for the arrest. But, upon the whole, I do not see why the officer should not have the same allowance for travelling-expenses whether the arrest be on mesne or on final process. I think the true way of construing the table of fees, is, by considering the earlier part as applicable to all writs and warrants except where some special provision is made in the subsequent part. I therefore think the [*706

(*a*) See Scott's Costs, 2d edit. pp. 9, 10.

officer was justified in charging 1*l.* 1*s.* for the arrest, and 1*s.* per mile for travelling-expenses. The other two items of charge, however, must be disallowed, viz. 5*s.* for the assistant, and 10*s.* for conducting the defendant to gaol. All the officer was entitled to charge, was, 1*s.* mileage: nothing for conducting. As this is the case of a public officer who has charged more than he is by law entitled to charge, acting upon the authority of the case referred to, we think the costs must follow; for, the only way in which sheriffs' officers can be kept in check, is, by visiting them with costs where they are found guilty of exacting fees which the law does not justify. The rule will, therefore, be absolute for the return of 15*s.*, with the costs of the application.

WILLES, J.—No attachment will issue if the 15*s.* be returned to the plaintiffs or their attorney within ten days after the taxation of the costs.

The rest of the court concurring, Rule absolute accordingly.

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*707] *BENNETT and Another *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

June 15.

The Railway and Canal Traffic Act, 1854, was designed to afford a remedy against an undue preference or undue prejudice to a particular individual or class in respect of the traffic on the railway or canal; and was not intended to apply to the case of a breach or neglect by the company of a public duty which was already susceptible of redress by mandamus or by indictment.

The Manchester, Sheffield, and Lincolnshire Railway Company were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock communicating with their railway. By act of parliament the company was authorized and required to maintain the Old Dock and the approach thereto of a given depth:—Held, that the failure to perform this duty, so that the dock and its approach became silted up, and the depth of water therein insufficient for vessels to get to the wharfs adjoining, was not the subject of redress under the Railway and Canal Traffic Act, 1854,—although it was suggested that the object of the company was to discourage the traffic to the Old Dock and to divert it to the new one.

And *semble*, that the dock or haven was not a canal or navigation within the statute.

THE Manchester, Sheffield, and Lincolnshire Railway Company, under their various acts of parliament, all consolidated into one act, 12 & 13 Vict. c. lxxxi., intituled "An act to consolidate into one act and to amend the provisions of the several railway and dock acts relating to the Manchester, Sheffield, and Lincolnshire Railway Company, and to amend their canal acts," were the proprietors of a railway, canal, and docks, with warehouses round the docks, at Great Grimsby, in the county of Lincoln.

The 218th section recites and re-enacts a provision of the prior act, 39 G. 3, c. lxx., whereby the Grimsby Haven Company were authorized and required "to make and complete a dock or basin to the extent of 200 yards from or above (a certain) lock, of the width 100 yards, and upon a level with the sills of the floor of the said lock, also to make the said haven from thence upwards to the further extent of 300 yards, and upon the same level, with a bottom of 20 feet wide at the least, and to dispose of the soil to be excavated in such manner that wharfs on each side thereof to the extent of 100 feet in breadth, and beyond the water line of the scouring water next thereinafter mentioned and provided, could or might be made, and from thence to or nearly to both of the

*before-mentioned sluices or bridges, with a bottom of not less width than 28 feet, and so as to afford a depth in water of 14 feet." [*708

Cleasby, on behalf of the proprietor of a wharf adjoining the Grimsby Old Dock, moved for a rule calling upon the Manchester, Sheffield, and Lincolnshire Railway Company to show cause why a writ of injunction should not issue against them under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining them to give the applicant the facilities required to be afforded by the 218th section of their consolidation act.

The affidavits upon which the motion was founded, amongst other things, stated that the complainants were proprietors of a bone-mill, a flour-mill, an oil-mill, and a saw-mill, and two large warehouses, sheds, and yards adjoining the navigation in Great Grimsby, which in the 9th section of The Manchester, Sheffield, and Lincolnshire Railway Act, 1849 (12 & 13 Vict. c. lxxxi.), is called "The Grimsby Haven and Old Dock," and which mills and premises lay on the east side of and adjoin the said Old Dock, and were rendered very valuable to them on account of their contiguity to the Old Dock, and of the complainants' right to take ships with cargoes of merchandise alongside their premises, on payment of certain dock-dues mentioned in the 232d and 233d sections of the act: That, in and prior to the year 1849, vessels drawing 17 feet and 6 inches water could navigate that part of the said Old Dock, the bottom whereof may, as expressed in the 218th section, be made on a level with the sills of the floor of the lock therein mentioned, which are at a depth of 18 feet below the surface of the water; and that vessels drawing 13 feet 6 inches water could navigate that part of the said Old Dock in which the *depth of water is mentioned in the said 218th section as authorized to be made to the depth of 14 feet: That [*709 nearly all the warehouses, yards, quays, wharves, landing-places, and frontages adjoining the said Old Dock belong to private individuals or corporations other than the said Manchester, Sheffield, and Lincolnshire Railway Company; and that a very small portion of such yards, quays, wharves, landing-places, and frontages (only to the extent of about 200 yards) belongs to the said Manchester, Sheffield, and Lincolnshire Railway Company, and that the several owners of the said warehouses, &c., have several rights of landing goods and merchandises in and on the said warehouses, yards, quays, &c., free of quay-rent, wharfage, or any other landing-charges: That, in or about the year 1846, the said Manchester, Sheffield, and Lincolnshire Railway Company commenced making, and they have since made and completed, a new dock of about 28 acres at Great Grimsby, and near the said Old Dock, which new dock was opened in the year 1852; and the said Manchester, Sheffield, and Lincolnshire Railway Company are now the proprietors of the said new dock, and all the warehouses, sheds, yards, quays, wharves, timber-ponds, landing-places, and frontages adjoining the said new dock, and are also the proprietors of a considerable quantity of land around and adjoining the said new dock and the said warehouses, sheds, yards, quays, wharves, timber-ponds, landing-places, and frontages; and no person can hire any of the said warehouses, &c., and land around and adjoining the said new dock, except of the said Manchester, Sheffield, and Lincolnshire Railway Company: That, in the year 1853, the gates, sills, and floor of the lock of

the said Old Dock were dilapidated and defective, and have so continued up to the present time; and that, in consequence of the dilapidated and
*710] *defective state of the said gates, sills, and floor, the water runs out of the said Old Dock so low that even at spring-tides the statutable depths of water cannot be maintained in the said Old Dock: That, since the opening of the said new dock, the said Manchester, Sheffield, and Lincolnshire Railway Company have allowed the mud which accrues from the back or drainage water which runs from four to six miles of the adjoining country into the said Old Dock, and from the tidal water which is let into the said Old Dock at spring-tides, and other matter, to accumulate in the channel or fairway of the said Old Dock; and that, by reason of such accumulations, the same dock is not now navigable for ships drawing less water than the statutable depths: That, by reason of the loss of water occasioned by the said dilapidated and defective state of the said works, and by reason of the said accumulations, no vessel drawing 16 feet water can now navigate that part of the said Old Dock where the bottom, as mentioned in the said 218th section, is authorized [and required] to be made upon a level with the sills of the floor of the said lock, which sills are laid so low as to afford a depth of 18 feet water over them; and that no vessel drawing 12 feet water can now navigate that part of the said Old Dock where the depth of water is authorized [and required] by the said 218th section to be 14 feet: That, in and continuously ever since the year 1855, the complainants and several other merchants who have had vessels drawing less water than the depths of 18 and 14 feet respectively have not been able to get such vessels up to their respective places in the said Old Dock for the discharge of their respective cargoes, but have had in very many instances, and in fact in nearly every instance, to unload and deliver large parts of such cargoes into lighters, carts, and wagons, and then to take
*711] *such parts so unloaded, in such lighters, carts, and wagons, up to the respective places of destination of such cargoes respectively, and have such parts again delivered, instead of delivering the whole of such cargoes at their respective places of destination in the first instance: That, in October, 1857, the Danish schooner Embla, drawing 9 feet 7 inches water forward, and 10 feet 11 inches aft, brought the complainants a cargo of linseed from Cronstadt to Great Grimsby, and the said schooner was brought into the said Old Dock, where she took the ground in that part of the said Old Dock where the statutable depth of water is 18 feet, there being then only 10 feet 8 inches and 10 feet 7 inches water in the middle of the said Old Dock where the said schooner grounded, and a great part of such cargo had to be taken out of the said schooner and put into lighters, and taken thence about half a mile to their mills, which adjoin that part of the said Old Dock where the statutable depth of water is 14 feet; and that, in consideration of there being only 10 feet 8 inches water in the said Old Dock when the last-mentioned cargo was discharged, the complainants were put to an extra expense, in lighterage and labour, of 5*l.* 8*s.* 9*d.* [Several other instances were then given of vessels coming to the complainant's premises grounding in the Old Dock in consequence of the water therein being less than the statutable depth:] That, at spring-tides, the tidal water is taken from the river Humber into the said Old Dock; but that, in consequence of the dilapidated and defective state of the gates, sills,

floor, and walls of the said lock, the additional water so taken into the said Old Dock soon runs out again; and the complainants cannot calculate on having any increase of water in the said Old Dock for more than about four or six days in every fortnight: That nearly the whole of the vessels which bring cargoes from *abroad into the said Old Dock belong to persons who are not interested in the mills, warehouses, [*712 yards, quays, wharves, timber-ponds, and other property adjoining the said Old Dock, or in the town and port of Great Grimsby; and that, in consequence of the depths of water and the present state of the said Old Dock being well known to the shipowners and ship-brokers, the complainants and the other merchants in Great Grimsby have frequently experienced and still continue to experience the greatest difficulty in getting the owners of ships to charter them for the Old Docks, and in very many instances shipowners have positively refused to do so; and, in many cases where vessels drawing from about 13 to 17 feet water have been chartered for the Old Dock, the masters of such vessels have on their arrival at Great Grimsby (sometimes of their own accord, and sometimes acting on the advice and recommendation of the pilots who have taken charge of such vessels to pilot them into the dock), refused to allow their vessels to come into the said Old Dock, alleging, that, in consequence of the accumulation of mud and other matter and the scarcity of water therein, it would not be safe for their vessels to enter it: That the complainants believed that the said Manchester, Sheffield, and Lincolnshire Railway company would not attempt to keep the said Old Dock navigable, unless they could be compelled to do so, as they derived greater profits on vessels discharging cargoes in the new docks than on vessels discharging cargoes in the said Old Dock; and that the want of the statutable depths of water in the said Old Dock gave in respect of traffic an undue preference to the company and their tenants holding premises adjoining or near to the new dock over the complainants and the other holders of wharves and premises adjoining and about the Old Dock, by preventing vessels from using the Old Dock, and thereby increasing the traffic of the *new dock and the business [*713 of the said company and their tenants carried on by them on premises adjoining and near to the new dock, the amount of which business depended on the amount of the traffic of the new dock; and that the want of the statutable depths of water in the Old Dock was a great public inconvenience.

The complaint is, that the company, by omitting to perform the duty cast upon them by the 218th section of their consolidation act, of maintaining the proper depths of water at the entrance of the Old Dock, prevent the proprietors of wharves and premises round the Old Dock from competing with the occupiers of premises adjoining the new dock: and this they do for their own advantage as well as for that of their tenants, inasmuch as their railway communicates with the new dock and not with the Old Dock,—thereby giving an undue preference to the occupiers of premises round the new dock, and imposing undue prejudice and disadvantage upon the complainant and the other proprietors of premises on the Old Dock. [WILLIAMS, J.—Is not that of which you complain rather the subject of a mandamus or an indictment?] It is submitted this Court has power to administer relief under this act. [BYLES, J.—The Grimsby Old Dock is neither a railway nor a canal.]

By the interpretation clause of the 17 & 18 Vict. c. 31 (s. 1), it is provided that "the word 'canal' shall include any navigation whereon tolls are levied by the authority of parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic." [COCKBURN, C. J.—Does the Railway and Canal Traffic Act apply to mere acts of omission?(a)] It is submitted that it does. *[COCKBURN, C. J.—Do you show that any traffic is impeded by something done by the company?] The affidavits disclose serious injury to the proprietors of mills, wharves, and premises round this navigation,—vessels of a certain draught being prevented from coming there. [COCKBURN, C. J.—Why not proceed by the remedies you had before the passing of Mr. Cardwell's act? I cannot think the statute was intended to apply where a remedy before existed. WILLIAMS, J.—You complain that the company are neglecting the performance of a duty cast upon them by the act of parliament: and it is suggested that their motive is, to prefer themselves and their tenants adjoining the new dock to the proprietors of premises abutting upon the Old Dock. But, are those proprietors,—assuming this to be a navigation,—persons who use the docks? Is not this rather like the case of a man having a public-house near a railway? It is perfectly indifferent to the shipowners which dock they go into. COCKBURN, C. J.—It is a public nuisance, not an undue preference or an undue prejudice. BYLES, J.—Why not issue a writ, and apply for a mandamus under the 68th section of the Common Law Procedure Act, 1854?] Possibly that course is open to the complainants: but the question is, whether they have not a right to apply to the Court under this statute. They charter ships which but for the wrongful default of the company would be able to come up to their wharf to unload. [COCKBURN, C. J.—The difficulty is that the act cannot apply as between two navigations,—where one is stopped for the benefit of the other. BYLES, J.—Suppose a company possesses a canal and a railway running the same way,—is it the duty of this Court to see that they do equal justice between the two?] It is impossible to conceive larger words than those used by the *legislature in this statute. [WILLES, J.—You must make out that this is traffic upon some railway, canal, or navigation.] The entrance to this dock is a navigation. [COCKBURN, C. J.—A "navigation" is, water communicating from one place to another.] This is a mile and a half long. [WILLES, J.—Do the company receive toll-traverse, or dock-dues only?] Dock-dues.

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COCKBURN, C. J.—I am of opinion that this is not a case within the act. These are two distinct navigations: and the complaint is, that the company have virtually stopped one, with a view to promote the prosperity of the other. The complainants must be left to the ordinary remedy.

WILLIAMS, J.—Not only do I concur in thinking that this case is not within the Railway and Canal Traffic Act, but I am not satisfied that this is a navigation.

WILLES, J., concurred.

BYLES, J.—I agree with my Lord and my two learned Brothers in

(a) The 3d section enacts that "it shall be lawful for any company or person complaining against any such companies or company of anything done *or of any omission* made in violation or contravention of this act, to apply," &c.

thinking that this case is not within the act. There is no branch of our jurisdiction which has occasioned the court greater labour and anxiety than that conferred upon it by this statute. But certainly we should be straining it very much if we were to hold the complainants to be entitled to the relief they ask. I am by no means satisfied that this Old Dock or Haven is a canal within the meaning of the act. It cannot in any sense be called a navigation. I agree with my Lord that the act refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal. These two navigations, if navigations they be, are not in any sense the same: they start from different termini; and *they enter the Humber at different spots. They are, in fact, as distinct as Liverpool and Birkenhead. It [*716 seems to me, that, if we were to entertain this motion, we should be inundated with applications from competing railways and canals.

Rule refused.

MARSHALL, Clerk, *v.* THE BISHOP OF EXETER and Another.

May 26.

Quare impedit is within the 80th section of the Common Law Procedure Act, 1852.

QUARE IMPEDIT.—The first count of the declaration stated, that Henry Bishop of Exeter and John Henry Coats Borwell, clerk, were summoned to answer Peter Charles Marshall, clerk, of a plea that they permit the said Peter Charles Marshall, clerk, to present a fit person to the parish church of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county of Cornwall, which is vacant, and belongs to his presentation; and thereupon the said Peter Charles Marshall, clerk, by Henry Dupleix, his attorney, complains, For that whereas he the said Peter Charles Marshall, to wit, on the 15th of November, 1855, was seised of the rectory and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, whereunto the advowson of the rectory and vicarage of the church aforesaid did and doth belong, in his demesne as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, *presented to the said church and rectory and vicarage [*717 himself the said Peter Charles Marshall, clerk, as his clerk, who, on the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lady the now Queen of Great Britain and Ireland; and, he the said Peter Charles Marshall, clerk, being so seised of the said rectory and vicarage in the county aforesaid, whereunto the advowson of the said rectory and vicarage of the church aforesaid did and doth belong, the said church and rectory and vicarage, to wit, on the 3d of August, 1857, became vacant by the resignation of the said church and rectory and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter, and ordinary in that behalf, whereby it then

and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said Bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him.

The second count stated, that whereas also he the said Peter Charles Marshall, clerk, to wit, on the 15th of November, 1855, was seised of the advowson of the church, rectory, and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, as of gross by itself, as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Charles Peter Marshall, clerk, as his clerk,
*718] who on *the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lady the now Queen of Great Britain and Ireland: and he the said Peter Charles Marshall, clerk, being so seised of the said advowson as in this count aforesaid, the said church and rectory and vicarage, to wit, on the 3d of August, 1857, became vacant by the resignation of the said church, rectory, and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter, and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid; but the said Bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him: Wherefore he the said Peter Charles Marshall, clerk, saith that he is injured and hath sustained damage to the value of 3000*l.*, and therefore he brings his suit, &c.

Plea,—the said Henry Bishop of Exeter and John Henry Coats Borwell, clerk, by Frederick Sanders, their attorney, come and defend the wrong and injury when, &c.; and the said John Henry Coats Borwell says that he is parson impersonate of the said church in the declaration mentioned, by the collation of the said bishop; and the said bishop says that the said church is in his diocese, and that he hath not and doth not claim to have anything in the said church, except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary: And the defendants further say, that, after the said church became vacant and void by the
*719] resignation of the plaintiff, then and *thence and still being a clerk in Holy Orders, and the acceptance of such resignation by the defendant Henry Bishop of Exeter in the declaration mentioned, to wit, on the 16th of January, 1858, the plaintiff, being so seised as in the declaration mentioned, by writing under his seal, bearing date, to wit, the day and year last aforesaid, presented to the said bishop, so being such ordinary as aforesaid, one John Reid as his clerk, and requested the said bishop to admit, institute, and induct the said John Reid as his clerk to the said church so vacant and void as aforesaid: And the defendants further say that the said John Reid had not been ordained by the said Bishop of Exeter, or by any former or other bishop of the

diocese of Exeter, and that, at the time the said John Reid was so as aforesaid presented to said bishop, and of such presentation so being made, to wit, on the day and year last aforesaid, the said John Reid was a clerk in Holy Orders, and then came from a diocese in England other than the diocese of Exeter, to wit, from the diocese of Manchester, and not elsewhere or from any other diocese, and in which diocese he had then lately been a minister of the Church of England, and had then lately held a benefice and cure of souls; and the said John Reid was then wholly unknown to the said Henry Bishop of Exeter: And thereupon, afterwards, to wit, on the day and year last aforesaid, the said John Reid, so being presented upon such presentation as aforesaid, and so coming from such other diocese as aforesaid, applied to the said Bishop of Exeter to admit, institute, and induct him the said John Reid to the said church, so being vacant and void as aforesaid; but the said John Reid did not bring or produce to the said Henry Bishop of Exeter, from the bishop of the said diocese whence he came, and wherein he had lately held such benefice and cure of souls as aforesaid, and been a minister as aforesaid, *to wit, from the Bishop of Manchester, any sufficient testimony, according to the ecclesiastical laws of [*720 England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony as he the said bishop was bound and ought by the laws ecclesiastical of England to require and have and receive, from the bishop of the diocese from whence the said John Reid had come, and in which he so had lately held a benefice and cure as aforesaid; but the said John Reid then, to wit, on the day and year aforesaid, when he so applied to be admitted, instituted, and inducted as aforesaid, brought testimony from the bishop of the diocese aforesaid, to wit, from the Bishop of Manchester, which he the said Henry Bishop of Exeter held not to be, and which was not, sufficient testimony according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the said diocese from whence the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid; and thereupon then the said Henry Bishop of Exeter, to wit, on the day and year last aforesaid, informed the said John Reid that the testimony so brought by him from the said Bishop of Manchester was not testimony which he the said Henry Bishop of Exeter deemed and adjudged to be, or which was, sufficient testimony of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence he *the said [*721 John Reid had come, and in which he had so lately held a benefice and cure of souls as aforesaid; and the said Bishop of Exeter required further and sufficient testimony from the said Bishop of Manchester according to the ecclesiastical laws in that behalf, to wit, testimony of his the said John Reid's honest conversation, ability, and conformity to the said ecclesiastical laws, of which the said John Reid then had notice, to wit, from the said Henry Bishop of Exeter; and there-

upon, to wit, on the day and year aforesaid, the said John Reid departed and went away from the said Bishop of Exeter, and the said John Reid never returned or came to the said bishop again; and such further and sufficient testimony as aforesaid from the said Bishop of Manchester was never obtained from such bishop, although a long space of time, sufficient to enable the said John Reid to obtain such testimony, and to come again to the said Henry Bishop of Exeter, elapsed before such collation by the said Henry Bishop of Exeter as hereinafter mentioned; and the said Bishop of Exeter, after the said John Reid so departed and went away from him the said bishop as aforesaid, not only never had or obtained or received from the said John Reid, or otherwise, any sufficient testimony from the said Bishop of Manchester or any other testimony whatever, of the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England; but, in fact, he the said Henry Bishop of Exeter, before such collation as hereinafter mentioned, had and received from the said Bishop of Manchester, and otherwise, further testimony, from which he the said Bishop of Exeter was induced to believe, and did believe, and had good and sufficient reason for believing, that the said John Reid had, whilst being a beneficed clergyman and having cure of souls within the diocese of the said
*722] Bishop of *Manchester, been guilty of an attempt to commit the offence of simony, to wit, by soliciting a certain other clerk in Holy Orders, to wit, one Francis Minden Knollis, to enter into a simoniacal contract with the said John Reid touching a certain other benefice then held by the said John Reid, contrary to the ecclesiastical laws of England in that behalf, and that he was not a person of honest conversation, or a person who conformed to the ecclesiastical laws of England, or a fit and proper person to be admitted, instituted, or inducted to the said church,—all which premises he the said John Reid long before the collation hereinafter mentioned well knew; and, by reason of the premises the said Bishop of Exeter, as such ordinary as aforesaid, after the lapse of six months from the avoidance of the said living, and within six months from such lapse, to wit, on the 1st of March, 1858, the said church still being and remaining vacant and void, collated the said church to the said defendant John Henry Coats Borwell, his clerk, and put him in the corporeal possession thereof, as it was lawful for the said bishop as such ordinary to do: And this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them.

Coleridge, in Easter Term last, obtained a rule calling upon the defendants to show cause why the plaintiff should not have leave to reply double and demur to the above plea. Besides joining issue, the plaintiff proposed to plead as follows:

"That, at the time of the presentment to the said bishop of the said John Reid as his the plaintiff's clerk, and of the request of the said bishop to admit, institute, and induct the said John Reid as his the plaintiff's clerk to the said church as in the said plea mentioned, the
*723] said John Reid was, and *theretofore had been, and thenceforth always continued to be, a person of honest conversation and sufficient ability, and one who conformed to the ecclesiastical laws of England, and a fit and proper person to be admitted, instituted, and inducted to the said church, and was not guilty of any attempt to com-

mit the offence of simony as in the said plea mentioned: That the said testimony brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter, when he the said John Reid so applied to be admitted, instituted, and inducted, and which the said Henry Bishop of Exeter held not to be, and which is alleged in the said plea not to have been, sufficient testimony, according to the ecclesiastical laws of England, of his said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the said diocese from which the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid, was and is in the words and figures following, that is to say:—

"To the Right Reverend Henry Lord Bishop of Exeter,—

"We whose names are hereunder written testify and make known that The Rev. John Reid, M. A., clerk, formerly of St. John's College, Cambridge, and late of the rectory of Claughton, in the county of Lancaster, presented to the rectory of Tregony with the vicarage of Cuby annexed, in the county of Cornwall, in your Lordship's diocese, hath been personally known to us for the space of three years last past; that we have had opportunities of observing his conduct; that, during the whole of that time, we *verily believe that he lived piously, [*724
soberly, and honestly, nor have we at any time heard anything to the contrary thereof; nor hath he at any time, as far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland. And, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. In witness whereof, we have hereunto set our hands this 9th day of January, 1858.

"W. B. Grenside, M. A., Vicar of Melling, in the county of Lancaster.

"J. M. Wright, Rector of Tatham, in the county of Lancaster.

"Richard John Shields, Incumbent of Hornby, in the county of Lancaster.

"The subscribers are beneficed in the diocese of Manchester. Mr. Reid was long non-resident on his benefice; but I know no reason why he should be legally hindered from being allowed to take other duty.

"J. P. MANCHESTER."

Which said testimony was duly signed by the said Bishop of Manchester: That, from the time of the said bringing of the said testimony from the said Bishop of Manchester, to the time of the collation by the said Bishop of Exeter of The Rev. John Henry Coats Borwell, as by the said Bishop of Exeter in the said plea alleged (and which is the same and only collation by which the defendant John Henry Coats Borwell became, was, or is parson impersonate of the said church in the declaration mentioned, as by him alleged), the said Bishop of Exeter continued to require from the said John Reid a further testimony from the said Bishop of Manchester, satisfactory to the said Bishop *of [*725
Exeter in those respects wherein the said testimony so brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter was held by him the said Bishop of Exeter not to be, and alleged by him in the said plea not to have been, sufficient; and the

said Bishop of Exeter never gave notice to the said John Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that he the said Bishop of Exeter required the said further testimony to be procured by the said John Reid, or brought by him to the said Bishop of Exeter, within any fixed or specified time, or that he the said Bishop of Exeter would not receive the same after the lapse of six months from the avoidance of the said living, or after any specified time, nor did the said Bishop of Exeter ever at any time or in any way notify to the said John Reid, or to the plaintiff, nor did the said John Reid or the plaintiff ever know, that the said Bishop of Exeter had finally determined not to wait any longer for or to receive any such further testimony from the said Bishop of Manchester, or that the said Bishop of Exeter had finally determined to persist in his objections to the said first testimony as insufficient: That, from the time of the bringing of the said first-mentioned testimony as aforesaid, and thence continually until and at the time of such collation as aforesaid, negotiations between the said Bishop of Exeter and the said John Reid as to whether the said bishop would persist in requiring any further and what testimony to be procured by the said John Reid from the said Bishop of Manchester, in order to the admission, institution, and induction of the said John Reid by the said Bishop of Exeter to the said church, were pending, and neither the said John Reid nor he the plaintiff ever had any notice from the said Bishop of Exeter, nor ever in fact knew, before *726] the said collation, *that he the said Bishop of Exeter would or did claim to collate the said John Henry Coats Borwell, or any clerk of him the said Bishop of Exeter, to the said church: And that, save and except as aforesaid, the said Bishop of Exeter never at any time before the said collation by him of the said John Henry Coats Borwell, clerk, refused to admit, institute, and induct the said John Reid as the plaintiff's clerk to the said church."

The ground of the proposed demurrer was,—"that the facts set forth in the plea do not show any lapse entitling the said bishop to collate the said defendant Borwell."

Karslake now showed cause.—The question is, whether the plaintiff in a quare impedit has a right to avail himself of the 80th section (*a*) of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). By the 14th section of the 2 W. 4, c. 39, which is intituled "An act for uniformity of process in personal actions in His Majesty's courts of law at Westminster," the judges were empowered to make general rules and orders for the effectual execution of the act: and by the 1st section of *727] the 3 & 4 W. 4, c. 42, the judges are *empowered to frame rules for making alterations in the mode of pleading. In Barnes v. Jackson, 3 Dowl. P. C. 404, it was held that the rules made pursuant to the former act only apply to actions in which the courts who have made them have concurrent jurisdiction: and the like was held as to the rules

(*a*) Which provides that "either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law; and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of."

of pleading under the last-mentioned act, in Miller *v.* Miller, 3 Dowl. P. C. 408, 1 Scott 387. So, the powers of amendment under the Common Law Procedure Act, 1852, have been held not to be applicable to quare impedit: Tolson *v.* The Bishop of Carlisle, 3 C. B. 41 (E. C. L. R. vol. 54). The general scope of the Common Law Procedure Act, 1852, applies only to *personal* actions. The title, it is true, is general,—"An act to amend the process, practice, and mode of pleading in the superior courts of common law at Westminster," &c. The language of the 1st section also is general; but the 2d section is expressly confined to "all personal actions brought in Her Majesty's superior courts of common law." [BYLES, J.—What is ejectment?] That is specially provided for by a series of sections, from 168 to 221. Under s. 223, the judges have power to make rules and frame writs and proceedings: the rules and forms made in exercise of that power are all confined to personal actions. The judges could not meet generally to make rules in quare impedit only. [WILLES, J.—The Crown may bring quare impedit in any court.] The last-mentioned section refers to the 13 & 14 Vict. c. 16, which clearly does not apply to real actions. The clauses (down to s. 25) relating to the service of process are applicable exclusively to personal actions; as also are those relating to appearance,—ss. 26 to 33. [BYLES, J.—How did you appear here?] By some proceeding in the petty-bag office. The preambles to the sets of sections commencing respectively with ss. 33 and 41, speak of "joinder of parties to *actions*," and "joinder of causes of *action*," *without any restriction, except that the latter set of clauses are not to apply [*728 to replevin or ejectment. Now, the interpretation clause, s. 227, provides that the word "action" shall be understood to mean any *personal* action brought by writ of summons in any of the superior courts. The clause applicable to the raising of questions without pleadings,—s. 42,—clearly does not embrace real actions. As to the pleading rules,—in ss. 49 to 56 the word "action" does not occur; but it does in s. 57, but that can only refer to personal actions.(*a*) The 70th section enables the defendant to pay money into court in *all actions*, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest, &c., crim. con., or debauching of the plaintiff's daughter or servant. [WILLES, J.—That does not apply to detinue. Money cannot be paid into court in debt on bond under the statute of William: The Bishop of London *v.* M'Niel, 23 Law J., Exch. 111, [9 Exch. 490].(*b*) BYLES, J.—No doubt most of the clauses of the act contemplate personal actions, in the strictest sense of the word. But the language of the preamble to the pleading rules is as wide as possible,—"And, with respect to the language and form of pleadings in general, be it enacted," &c.] The 84th section, which provides what pleas may be pleaded together without leave, in terms applies only to personal actions. The forms of pleading under s. 91, in like manner, are wholly inapplicable to any but personal actions. So, the provisions as to jury process, s. 104 et seq., are applicable only to ordinary actions. [BYLES, J.—Including ejectment. WILLES, J.—The 105th section provides that the *precept issued by the judges of assize to the sheriff to summon jurors for the [*729

(*a*) Section 59 provides that "every declaration shall commence as follows, or to the like effect:" and then it gives a form which is altogether inapplicable to real actions.

(*b*) And see England *v.* Watson, 9 M. & W. 333.†

assizes shall direct that the jurors shall be summoned for the trial of *all* issues, whether civil or criminal, which may come on for trial at the assizes." Suppose this were made a special jury cause, would not the mode of proceeding be regulated by the 108th section?] The power of amendment conferred by s. 222 has never been exercised in any real action, although the words are as general as may be. Doubts having been entertained whether the 52d section was applicable to proceedings in mandamus,—see The Queen *v.* The Saddlers' Company, 22 Law J., Q. B. 451 (20 Eng. L. & Eq. 152),—provision was made for that in the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 68 et seq. It is reasonable to expect that some traces of real actions would have been found in the act if they had been intended to be included in it.

Collier, Q. C., and *Coleridge*, in support of the rule.—It would be a grievous blot in the Common Law Procedure Act if it were not to apply to quare impedit. To sustain the argument on the other side, it must go the length of contending that special demurrers in this form of action are not abolished, and that profert and oyer and the old provisions as to special juries are still applicable. The statute 4 Ann. c. 16, s. 4, the words of which are not so large as those of the Common Law Procedure Act, have been held to apply to real actions. [BYLES, J.—That statute uses the words "defendant or tenant."] The title of the act and the preamble are in very general terms: and it is impossible to read the several provisions of it without seeing that justice cannot be done to the intention of the legislature if it is limited in its operation to personal actions. Some of its provisions apply no doubt to personal actions only: but to others no sensible construction can be given *without holding them to embrace real actions also. The 109th section, for instance, speaks of *any* action *except replevin:* it is clear, therefore, that the interpretation clause is to be taken with some qualification; and its literal construction was departed from by this court in Messiter *v.* Rose, 13 C. B. 162 (E. C. L. R. vol. 76). [BYLES, J.—There the court construed this as a remedial statute. WILLES, J.—I am not at all sure that ejectment was not always a personal action.] The 3 & 4 W. 4, c. 27, s. 36, abolishes all real and mixed actions, except writs of right of dower, dower unde nihil habet, quare impedit, or ejectment. [WILLES, J.—Quare impedit is properly a mixed action: the plaintiff gets the living and damages also.] There can be no reason for confining the operation of the language of the act in the way contended for by the other side. [WILLES, J.—It is quite clear that "action" does not necessarily mean an action commenced by writ of summons. It is very likely that the distinction between real and personal actions was not within the contemplation of the person who drew the bill. But the only question we have to deal with, is, what is the meaning of the words which the legislature have used? There is no one section throughout the act which deals with an ejectment, in which it is not called an action. In form the writ of quare impedit is a writ of summons: Fitz. Nat. Brev. 32 E.; Bracton, fo. 113. The provisions as to view (s. 114), the death of parties (ss. 135—140), and writs of error (ss. 146—166), are all applicable to real as well as to personal actions. [WILLES, J.—In Gomm *v.* Parrott, 3 C. B. N. S. 47 (E. C. L. R. vol. 91), this court entertained no doubt as to its jurisdiction to order an inspection of documents in a writ of dower. It is not pretended that the amendment

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clause (s. 222) does not apply to this form of action. [BYLES, J.—The words of that section are certainly most general,—"in any proceeding in civil causes."] It has been observed that no forms of proceedings in real actions *are given either in the act or by the rules made in pursuance of the act. The same, however, might be said of replevin and account, which are clearly within the statute. [*731

Cur. adv. vult.

WILLES, J., now delivered the opinion of the court:—

This was a rule obtained by the plaintiff in quare impedit, calling upon the defendant to show cause why the plaintiff should not be at liberty to reply to several matters and demur.

The question is whether the 80th and 81st sections of the Common Law Procedure Act, 1852, apply to pleadings in quare impedit. It was argued before my Brother Byles and myself last term; and we took time to consider.

On the part of the defendant, upon the argument, it was pointed out that the act of parliament, as to the greater part, if not all, of its provisions, is expressly confined in its operation to actions over which the courts have a common jurisdiction; that, by the interpretation clause, the word "action" is to be understood to mean "any personal action brought by writ of summons in any of the courts:" that the word "action" in s. 81, so interpreted, would not include quare impedit; and that previous statutes for the amendment of the proceedings of the common law courts (2 W. 4, c. 39, and 3 & 4 W. 4, c. 42), and the rules founded upon them, did not apply to real actions: Barnes *v.* Jackson, 3 Dowl. P. C. 404.

On the other side, it was argued that the words used are general, and therefore, according to the ordinary rules of construction, are to be generally applied, there being no absurdity, and nothing repugnant to any other part of the statute, in so doing; that, with respect to the argument founded upon the general scope of the act, it proves too much, because the provisions as to juries at least are applicable to all actions, whether *real or personal; and that the interpretation clause is inapplicable to restrain the language in question, because it could only do so by restraining the application of the word "action" to actions brought by "writ of summons," which would exclude replevin, and that would be inconsistent with the express mention of pleadings in replevin in the 86th section; and so, that there is "something in the subject or context repugnant to such limited construction." [*732

With respect to decisions upon previous statutes and rules, they were distinguished, by reason of the different object in view and language employed. To this may be added, that the enactments in question are in pari materiâ with, and are introduced by way of extension of the provisions of Lord Somers's Act (4 Ann. c. 16, s. 4), which applies to all actions: see the argument in Davies, dem., Lowndes, ten., 7 M. & G. 762 (E. C. L. R. vol. 49), 7 Scott N. R. 539, and the pleas in the case now under discussion.

Upon full consideration of the statute and the arguments, we have come to the conclusion that the sections in question do apply. No sufficient reason has, in our opinion, been shown for refusing to give the words in question their ordinary meaning and construction. It may, indeed, be conjectured that this question did not suggest itself to the

minds of the framers of the act, and even that they had no formed intention of dealing with actions other than personal: but the words which they have used are capable of, and, not being restrained by the context, ought to receive, the wider application.

The rule must therefore be absolute: but, as the form of the proposed pleadings was not discussed before us, we are not to be understood as expressing any opinion upon their propriety.

Rule absolute.(a)

(a) See the case on demurrer reported post, Vol. VII.

*733] *TOMLINE and Another v. CADMAN. *June* 16.

A protecting order under the 211th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, is not void for want of notice to each creditor.

Neither is it any objection to its validity, in a proceeding in this court, that it professes to give protection until a certain day *and* until further order.

A WRIT of summons issued at the suit of the plaintiffs against the defendant on the 16th of June, 1858, endorsed for 33*l.* 2*s.* 3*d.* This writ was served on the 18th of June. On the 24th, the defendant presented his petition to the Court of Bankruptcy under the arrangement clauses of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and a protection granted both as to the person and property of the defendant, "until the 22d of July or until further order." On the 25th, an appearance was entered in the action. On the 28th, a declaration was delivered. On the 4th of July the plaintiffs received notice of the filing of the petition. On the 8th, the defendant pleaded nunquam indebitatus. The trial took place on the 22d of July, when a verdict was given for the plaintiffs, with immediate execution. On the same day, the defendant's proposal was accepted by the proper proportion of his creditors, and his protection renewed "until the 9th of August *and* until further order;" and on the 24th notice of the renewal of the protection was given to one of the plaintiffs. On the 27th judgment was signed in the action, and the costs taxed. On the 14th of August the plaintiffs issued a fi. fa., under which the sheriff's officer entered on the 16th. He was informed of the protection; but the officer, being indemnified by the plaintiffs, sold the goods seized to them for the sum necessary to cover the amount of the execution and the costs. Shortly afterwards, the sheriff's officer having advertised the goods for public sale, the defendant, supposing that to be a proceeding under the execution, tendered a sum of money, and afterwards brought an action against the sheriff to *recover it back. In that action he was nonsuited, *734] —his proper remedy being (the sheriff having only obeyed the writ) by application calling on the sheriff to refund the money.

An application was afterwards made to Crowder, J., at Chambers; but that learned judge referred the parties to the court.

Manisty, Q. C., accordingly moved for a rule calling upon the sheriff (of Lancashire) or the plaintiffs to show cause why the proceeds of the goods seized under the fi. fa. should not be paid over to the defendant. The application was founded upon the 211th section of the 12 & 13

Vict. c. 106, which enacts "that any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the court of bankruptcy, and of submitting himself to the jurisdiction of the court in manner thereinafter mentioned, may present a petition to the court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court, on such petition, shall have power to grant such protection, and may renew the same from time to time as it shall think fit, and, if the petitioner be in prison or in custody for debt, may,—except in the cases next thereinafter mentioned,—order his immediate release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the court thereinafter mentioned: Provided always that the court shall not order such release where it shall appear by any judgment, order, commitment, or sentence under which such petitioner is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, and the *pleadings or proceedings previously thereto, that he is in prison or in custody [*735 for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Provided also, that such release shall in nowise affect any rights of the creditor at whose suit such petitioner may be in prison or in custody against such petitioner, except the right of detaining him in prison or in custody, whilst protected from imprisonment by order of the court."

Welsby and *M'Intyre* (*a*) showed cause in the first instance.—The first answer to this application is, that it is made too late. The fi. fa. issued on the 14th of August, 1858, and was executed on the 16th; and the defendant obtained his certificate under the 221st section. No application was made to the court or a judge; but the defendant erroneously brought an action against the sheriff (see the case Rideal *v.* Fort, 11 Exch. 849†), and now, when the plaintiffs' position is materially altered, and they are precluded from obtaining a dividend from the estate, he makes this application to the equitable jurisdiction of the court.

The next objection is, that the protecting order of the 22d of July was bad for want of due notice to the creditors. Here, the notice was served upon one only of the two plaintiffs, which is clearly insufficient: *The Queen *v.* Gordon, Dearsley, C. C. 586. [WILLES, J.— That was inter apices. The court were not unanimous. You [*736 have first to establish that there must be notice. The statute requires notice to be given: but the operation of the order of protection is not made conditional on the giving of the notice.] In Levy *v.* Horne, 5 Exch. 257,† it was expressly held that the certificate given to a petitioning trader under the 216th section only protects him from arrest at

(*a*) As to the right of a second counsel to be heard on showing cause in the first instance,—*Quære?*

the suit of persons being creditors at the date of the petition, and who have received the notices required by the act. [BYLES, J.—We are not now on the effect of the certificate, but of the protecting order. The 215th section requires notice of sittings to be personally served on every creditor who was not present at a former sitting: but there is no such provision as to the protecting order. COCKBURN, C. J.—It may be that the Court of Bankruptcy will rescind its order, if it appear that notice has not been given.] It is a benefit given to the party, conditional on his complying with certain provisions. [BYLES, J.—Do you say that the miscarriage of a notice to one of a thousand creditors nullifies all that is done at the meeting?] As to the creditor who has not received notice. [BYLES, J.—This is only an interim order. Levy *v.* Horne was the case of a final certificate. COCKBURN, C. J.—Upon what provisions of the statute do you found your distinction as to the inefficacy of the protecting order quoad the creditor who has not been served?] The 211th. The protecting order is in general terms. [WILLIAMS, J.—The notice is made a condition precedent to the validity of the certificate under s. 216, but not of the protecting order.]

The protecting order of the 22d of July is bad upon the face of it. It professes to give the trader protection till the 19th of August *and* till further order. The proper form of order is, "from the date hereof until the *—— day of —— next, *or* until further order;" see Arch. B. L. Book II., p. 183 (11th edit.) [BYLES, J.—"And" and "or" are precisely synonymous there.] The validity of an order for protection not expressly in accordance with the prescribed form, was discussed in Ex parte Bowers, 1 De Gex, M'N. & G. 460, and in Bellhouse *v.* Mellor, 4 Hurlst. & N. 116.† There, the order was for protection until a certain time. Here, it is indefinite. [COCKBURN, C. J.—It seems to be surplusage to say that the party shall have protection until a certain day and until further order.] The form is part of the code. [COCKBURN, C. J.—It is not to bind parties to a slavish adherence to the words. BYLES, J.—Or to contradict the express terms of the act.]

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Then, the order is not operative as to the costs, which do not constitute a debt until judgment signed, and consequently the sheriff was justified in levying them, no judgment having been signed until after the date of the protecting order. [WILLIAMS, J.—The costs are merely accessory. The certificate in bankruptcy and the final order in insolvency bar actions that are pending. In Southgate *v.* Saunders, 5 Exch. 565,† it was held that the costs are accessory to the principal debt, and the claim for costs would be barred by a certificate under s. 221, as it would by a certificate in bankruptcy, although it could not be proved under the fiat.] Reliance is mainly placed upon the lapse of time. [COCKBURN, C. J.—It may under the circumstances be reasonable that the creditors should retain so much as the amount of the dividend which they might have received. *Manisty*.—That would be offering a premium to a creditor holding out. WILLIAMS, J.—If the defendant had taken the right course and gone before a judge at Chambers, instead of bringing an action against the sheriff, the plaintiffs would have been in time to prove. Their position was prejudiced by the defendant's *erroneous proceeding. It would be better for the plaintiffs to adopt the suggestion of the court. *M'Intyre* submitted that the

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plaintiffs should have half their costs also. [WILLES, J.—They are not entitled to costs. The judgment was not obtained until after the making of the order. The petition is the dividing line. You could not have proved for the costs.]

Manisty, in support of his rule, was stopped by the court.

COCKBURN, C. J.—Bellhouse *v.* Mellor, 4 Hurlst. & N. 116,† is expressly in point to show that this order is not void for defect of form: and all that the Lords Justices say in Ex parte Bowers, 1 De Gex, M'N., & G. 460, is that such an order as that was may be irregular, and may be rescinded by the Court of Bankruptcy. This order does not seem to me to be open even to the complaint of irregularity. The only ground not disposed of on the argument, is, the delay. I think there was good ground to apply to the court, but not to the full extent. The course pursued by the defendant in the first instance was an erroneous one, and operated to the prejudice of the plaintiffs, by diverting them from the course they might otherwise have taken, viz., by proving for their debt. Therefore, if Mr. *M'Intyre* would have acceded to the suggestion thrown out we should have been glad to be relieved from pronouncing a decision. He has, however, elected to stand upon his strict rights. I see no reason why the rule should not be made absolute; but I think it should be without costs.

WILLIAMS, J.—I am of the same opinion. I must confess I have felt somewhat embarrassed by the case of Ex parte Bowers. But the Court of Exchequer in *Bellhouse *v.* Mellor dealt with it in a way to bring it to the very words of this order. I do not think we can do better than follow the Court of Exchequer. [*739

WILLES, J.—The objection in Ex parte Bowers was one of mere irregularity. I do not see how it can be necessary to renew an order made for protection until further order. I should have thought that the order in Ex parte Bowers could only be questioned in the court out of which the process issued. At all events, the case of Bellhouse *v.* Mellor is an authority that this is a valid order. With regard to the costs, they are merely accessory. The rule will be absolute as against the plaintiffs.

BYLES, J.—I am of the same opinion. As to the lapse of time,—it is to be observed that the sheriff has been guilty of a continuing breach of duty from the seizure to the present time.

Rule absolute, without costs.

*BUTLER *v.* ABLEWHITE. *June* 14. [*740

The plaintiff had two permanent places of residence,—one, in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence:—Held, a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54, s. 4.

THIS was an action brought to recover a debt of 17*l.* 10*s.* for rent. After declaration, and before plea pleaded, an application was made to Byles, J., at Chambers, to stay the proceedings upon payment of the debt without costs, on the ground that this was not a case in which the superior courts had a concurrent jurisdiction, under the 128th section

of the County Court Act, 9 & 10 Vict. c. 95. The learned judge referred the matter to the Court.

H. James now moved for a rule to the same effect.—The agreed facts were as follows:—The plaintiff had two residences,—one, in Warwickshire, which was more than twenty miles from the residence of the defendant,—the other, in Grosvenor Place, London, which was less than twenty miles from the defendant's residence; each of these residences being occupied by the plaintiff and his family during certain portions of the year. The defendant permanently resided and carried on business in London. The cause of action arose in London: and the action was commenced in this Court at a time when the plaintiff and his family were residing at his country seat in Warwickshire.

The 128th section of the 9 & 10 Vict. c. 95 enacts that "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant *dwells* or *carries on his business* at the time of the action brought, &c., may be
*741] brought and determined in any such *superior court, at the election of the party suing or proceeding, as if this act had not been passed." The question is whether the plaintiff, at the time of action brought, *dwelt* more than twenty miles from the defendant. The case of Bailey *v.* Bryant, 28 Law J., Q. B. 86, is precisely in point. There, the plaintiff, a member of parliament, had a house in London (within twenty miles of the defendant), in which he resided only for about three months in the year, in order to attend in parliament, and he resided chiefly the rest of the year at his iron-works in the country (more than twenty miles from the defendant), and he was residing there at the time when he brought an action in the Court of Queen's Bench for a cause within the jurisdiction of the City Small Debts Act, 15 & 16 Vict. c. lxxvii., in which he recovered 31*l.* 10*s.* It was held that the plaintiff dwelt in London, and therefore did not dwell more than twenty miles from the defendant, and that the defendant was entitled to enter a suggestion under s. 119, to deprive the plaintiff of costs. Lord Campbell, in giving judgment, said: "Is the residence of the plaintiff Bailey in London for three months in the year, under the circumstances, a sufficiently permanent residence to be a 'dwelling' within the terms of the City Small Debts Act? I think that it is: and the action ought to have been brought in the inferior court." [COCKBURN, C. J.—The question was discussed in this court in a case of Macdougall *v.* Patterson, 11 C. B. 755. It became unnecessary to decide it, because it appeared that the plaintiff had only a temporary place of abode within twenty miles; his only permanent residence being beyond that distance: but, in the course of the argument, Maule, J., says,—"A man may have a house in London, and a house at Richmond, and each may prop-
*742] erly be called his 'dwelling;' but I doubt *whether a man who takes lodgings at a watering-place for two or three months can be said to have a *residence* or to *dwell* there." "Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells

less than twenty miles off. There are no negative words in the act."] The point was not decided there. If a man may avail himself of the concurrent jurisdiction clause by having a second place of abode more than twenty miles from London, the provisions of the act may be easily evaded. [CROWDER, J.—It is for you to make out, that, at the time of the commencement of this action, the plaintiff did *not* dwell more than twenty miles from London. COCKBURN, C. J.—It is a question that is deserving of serious consideration. A man may no doubt have several dwelling-places. But the question is, where did he dwell at a given time?] It is a fallacy to say that a man cannot dwell at two places at the same time. In Vaux *v.* Brooke, 4 Co. Rep. 39 b, Wray, C. J., said that, "if a man has a mansion-house, and he and his whole family upon some accident are part of the night out of the house, and in the meantime one comes and breaks the house to commit felony, that is burglary; for, though neither the owner nor any of his family be in the house, yet it is domus mansionalis." And accordingly it was resolved by Popham, C. J., and all the justices, "that, where a man has two houses, and dwells sometimes in one and sometimes in the other, and has a family and servants in both, and in the night, when his servants are out of the house, the house is broken by thieves, this is burglary for the said reason which Wray, C. J., gave." [COCKBURN, C. J.—All the authorities as to domicil are collected in Story's Conflict of Laws, §§ 39—49.]

* *Watkin Williams* showed cause in the first instance.—The language of the act was not sufficiently adverted to in Bailey *v.* [*743 Bryant. The judgment is very short and unsatisfactory. [WILLES, J.—It was decided on the last day of term; and the court overruled the opinions of Jervis, C. J., and Maule, J., without hearing counsel.] The word "dwell" properly means "abide," or "stay at." [BYLES, J.—If personal residence is necessary to satisfy the word used in the 128th section, the plaintiff did dwell more than twenty miles from the defendant; and, if personal residence is not necessary, he still did dwell more than twenty miles: either way, therefore, he was entitled to sue in the superior court, and entitled to costs under the 15 & 16 Vict. c. 54, s. 4.] Exactly so. Under the 9 & 10 Vict. c. 95, in order to enable the defendant to enter a suggestion to deprive the plaintiff of costs, he was bound to show that the plaintiff did *not* reside more than twenty miles from his residence or place of business. How could such an affidavit have been made in this case?

H. James, in support of his rule.—The court will have regard to the policy of the statute, which was to prevent vexatious and expensive proceedings in the superior courts for a cause of action which might be sued for in the county court. The personal residence of a plaintiff is the place where he usually abides: Dunston *v.* Paterson, 5 C. B. N. S. 267 (E. C. L. R. vol. 94). [CROWDER, J.—All we decided in that case, was, that a temporary or compulsory residence at the time of the commencement of an action, in a gaol, does not constitute the place of detention the "dwelling" of the party, within the 128th section.] Where one of the two plaintiffs dwells within twenty miles, they are not entitled to costs if they sue in the superior court for a debt which might have been sued for in the county court: Hickie **v.* Salamo, 8 Exch. 59.† [*744 [COCKBURN, C. J.—If the law denies the right of suing in the

superior court to one, the action being joint, the right is negatived as to both.] *Cur. adv. vult.*

COCKBURN, C. J.—This rule was argued before my Brothers Crowder, Willes, and Byles, and myself, upon a motion to stay proceedings, upon payment of the debt, without costs. The question had been brought before my Brother Byles at Chambers, and was referred by him to the full court.

The facts, as agreed on both sides, were these:—The plaintiff had two residences,—one at his country-seat in Warwickshire, the other at his town-house in Grosvenor Place; each residence being occupied by the plaintiff and his family during certain portions of the year. The defendant resided and carried on business, permanently, in London. The cause of action,—which was for less than 20*l.*—arose, and the action was brought in this court, at a time when the plaintiff and his family were residing at his country-seat in Warwickshire. It was undisputed, therefore, that the plaintiff had two permanent dwelling-places (as contra-distinguished from lodgings or temporary dwelling-places), one more than twenty miles, the other less than twenty miles from the defendant's residence: and the question raised for our decision, is, whether the superior courts at Westminster had concurrent jurisdiction with the county court to entertain the plaintiff's claim, within the meaning of the 128th section of the 9 & 10 Vict. c. 95; for, if they had, the plaintiff will be entitled to his costs under the 4th section of the 15 & 16 Vict. c. 54.

For the plaintiff, it was contended that he "dwelt," at the time of action brought, more than twenty miles *from the defendant, and so might sue in the superior court. For the defendant, it was contended that the plaintiff "dwelt" within twenty miles of him, and so was bound to sue in the county court. And, in some sense, the admitted facts warrant each assertion. But the argument of the defendant was much strengthened by the authority of the Court of Queen's Bench, in the case of Bailey *v.* Bryant, 28 Law J., Q. B. 86. That case would seem undistinguishable from the present, although it arose upon a different statute, viz., the London Small Debts Act, 15 & 16 Vict. c. lxxvii. There, the Court of Queen's Bench held that there was no concurrent jurisdiction, as the plaintiff had one residence of a permanent character within twenty miles from the defendant, although he had two other residences of an equally permanent character more than twenty miles from the defendant, at one of which he was actually residing with his family at the time of the commencement of the action. In the report of this case, however, the judgment is very short, and no detailed reasons are given by the court for their decision.

*745]

We regret to say, that, after the fullest consideration, and with the greatest deference and respect for the opinion of the Court of Queen's Bench, we find ourselves compelled to arrive at a different conclusion. In the case of Macdougall *v.* Paterson, 11 C. B. 755 (E. C. L. R. vol. 73), the question was brought under the consideration of this court. It became, indeed, unnecessary to decide it; but the inclination of the opinion of the court would appear to have been in favour of the concurrent jurisdiction. Jervis, C. J., in delivering the judgment of the court, says: "The defendant contended, that, at the time of the action brought, the plaintiff dwelt in two places,—in Scotland, and in Golden Square;

and, *perhaps, even if this had been the case*, this court would *have had concurrent jurisdiction, because it could not in that case [*746 have been suggested on the roll that the plaintiff did not dwell more than twenty miles from the defendant." And, in the course of the argument, Mr. Justice Maule made this observation,—"Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act." The impression of that learned judge, therefore, seems to have been, that, if the plaintiff has two permanent residences, one more and one less than twenty miles off, whether he be actually occupying the one or the other at the time of action brought, there is concurrent jurisdiction.(a)

That point it is unnecessary for us to decide; for, in the present case, the plaintiff actually resided with his family, at the time of the commencement of the action, in the dwelling-house situate more than twenty miles from the defendant.

Before the passing of the 9 & 10 Vict. c. 95, the plaintiff would have been entitled to his costs by the Statute of Gloucester, 6 Ed. 1, c. 1; and, since the passing of the act of Victoria, he is equally entitled to them, if he dwelt more than twenty miles from the defendant at the time of the action brought. He is only disentitled to costs where it cannot be truly affirmed that he dwelt more than twenty miles from the defendant at the time of action brought. The Court of Queen's Bench, in Bailey *v.* Bryant, decided that, as the plaintiff had a dwelling-house within twenty miles from the defendant, where he resided three months in the year,—although he clearly dwelt *at Nant-y-glo, in Monmouthshire, during the greater part of the year, and particularly [*747 at the commencement of the action,—he did not dwell more than twenty miles from the defendant, within the meaning of the act. In the present case, although the plaintiff had a dwelling-house in Grosvenor Place, he had equally a dwelling-house in Warwickshire, and actually resided there with his family when the action was brought.

It was admitted in the argument that the plaintiff's residence in Warwickshire and in London at different periods of the year, was of the same character, and of about the same duration. It is plain, therefore, that he "dwelt" at both places,—with this difference only, that his actual residence at the time of action brought was in Warwickshire. And we think, that, in such a case, it is impossible to avoid coming to the conclusion that the plaintiff "dwelt" in Warwickshire, and so more than twenty miles from the defendant, at the time of the action brought. He is, therefore, within the affirmative words of the statute, and was warranted in bringing his action in this court, and is therefore entitled to his costs.

The rule must be discharged: but we think it should be discharged without costs Rule discharged, without costs.

(a) See Walcot *v.* Botfield, Kay 534.

*748] *JORDAN v. ADAMS.

Devise to W. J., for life; and, after his decease, to the "heirs male of his body," for their natural lives, in succession, according to their respective seniorities, "or in such parts and proportions, manner and form, and amongst them, as the said W. J., *their father*, shall by deed or will, duly executed and attested, direct, limit, or appoint:"—Held, that, by "heirs male of his body" (as explained by the context), testator meant "sons," and consequently that W. J. took only an estate for life.

THIS is an action brought by the plaintiff against the defendant, to recover damages for the non-completion of a contract entered into between the plaintiff and Thomas Adams, deceased, for the purchase by the said Thomas Adams, deceased, from the plaintiff, of a certain farm, lands, and hereditaments, situate in Armscott, in the county of Worcester; and by order of Crowder, J., dated the 6th of May, 1859,—according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

On or about the 18th of May, 1825, John Jordan, of Armscott, in the county of Worcester, by his last will and testament in writing, bearing date the day and year last aforesaid, and duly executed and attested as by law required for passing real and personal property, gave and devised as follows:—

"1. I give and devise unto my three friends Jeffery Bevington Lowe, of Eatingdon, in the county of Warwick, Thomas Stanley Hill, of Compton Scorpion, in the same county, and Thomas Davis, of Little Compton, in the county of Gloucester, all and singular my freehold and leasehold estates, lands, tenements, hereditaments, and premises, situate at Armscott aforesaid, Bourton, in the county of Oxford, Barton-on-the-Heath, in the said county of Warwick, and Little Compton aforesaid, or elsewhere, with their several rights, members, and appurtenances, to hold all my said several estates, with their appurtenances, unto the said Jeffery Bevington Lowe, Thomas Stanley Hill, and Thomas Davis, and the survivors and survivor of them, and the heirs, appointees, or assigns
*749] of such survivor, for *ever, to the uses, nevertheless, and upon the various trusts, ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same; and I earnestly entreat my said three friends to accept of such trusteeship, and to put and carry the uses and trusts of this my will into execution and effect:

"2. Therefore, as to that part of my estate at Armscott aforesaid which I purchased of Mr. Pearshouse's trustees, I devise and bequeath the use and occupation of the rents and profits thereof to and for the use of the eldest son of Thomas Partington, of Fodenham, in the county of Gloucester, yeoman, and his assigns, during his life, subject, nevertheless, to, and I do hereby charge the same with, the payment of an annuity of 20*l.* a year, by even and equal half-yearly payments, to his mother, for her life, to whom I devise and bequeath the same accordingly: And, from and immediately after the decease of such eldest son of the said Thomas Partington, then I devise and bequeath the use and occupation of the same estate, or the rents and profits thereof, to the first and every other son and sons of his body severally and successively, according to their respective seniorities, in tail-male: And, in default of such issue male of the eldest son of the said Thomas Partington as

aforesaid, then I devise and bequeath the occupation of the rents and profits of the same estate to the daughters or daughter of such eldest son of the said Thomas Partington, to take as tenants in common if more than one; and, for default of such issue, I direct my said trustees to remain and continue seised and possessed of the said estate, in trust for my kinsman William, the son of my cousin Richard Jordan, his heirs and assigns for ever:

"3. And, as to a certain other estate at Armscott aforesaid, consisting of a messuage or tenement, *homestall, and premises, and three yard lands, with the commons and appurtenances thereunto belonging, formerly Taylor's, except a close called Tubb's Close,—which close I direct shall henceforth for ever be deemed and considered as part and parcel of a certain other estate at Armscott aforesaid heretofore called Mansells, and now, together with other lands, hereditaments, and premises in the tenure or occupation of William Badger,—I do direct and appoint my said trustees to stand and remain seised and possessed thereof to the use of, and to permit and suffer my kinsman George Taylor the younger, the son of George Taylor, late of Stratford-upon-Avon, yeoman, and his assigns, to occupy and enjoy, or to receive the rents and profits thereof, during his natural life, subject nevertheless to, and charged and chargeable with, the payment of a clear annuity of 30*l.* payable thereout by even and equal half-yearly payments, to his said father George Taylor the elder, during his natural life, to whom I devise and bequeath the same accordingly: And, from and after the decease of the said George Taylor the son, then upon trust to permit and suffer the eldest son of the said George Taylor the son to hold and enjoy the same estate, or receive and take the rents and profits thereof, for his natural life, with remainder to his heirs for ever, subject to the payment of the said annuity to the said George Taylor the elder as aforesaid: [*750

"4. And, as to a certain other estate at Armscott aforesaid, consisting of two yard lands and a half, late Lord Wentworth's, now in the occupation of Daniel Bangham, I give, devise, and bequeath the use and occupation or the rents and profits thereof to and for the use of Thomas Jordan, the eldest son of my cousin Robert Jordan, of Little Compton aforesaid, and his assigns, during his life; and, from and immediately *after his decease, then I give, devise, and bequeath the use and occupation thereof, or the rents and profits of the same estate, to the first and every other son and sons of his body severally and successively, according to their respective seniorities, in tail-male; and, in default of such issue male, then I give and devise the occupation or the rents and profits of the same estate to the daughter or daughters of the said Thomas Jordan, to take as tenants in common; and, in default of such issue, I give and devise the same estate to the eldest brother of the said Thomas Jordan, and his heirs for ever: [*751

"5. And, as to all other my freehold and leasehold estates situate at Armscott aforesaid, consisting of various messuages, buildings, homestalls, cottages, and seven yard lands and a half, with right of common thereunto respectively belonging, the said close called Tubb's Close, and all other my freehold and leasehold estates, closes, lands, hereditaments, and premises at Armscott aforesaid, with the commons and other rights, members, and appurtenances thereunto respectively belonging, I direct

and appoint my said trustees, their heirs, executors, administrators, and assigns, to stand and remain seised and possessed of, and to permit and suffer my said kinsman the said William Jordan, son of my said cousin Richard, to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit, during his natural life: And I charge the same several estates with the payment of an annuity of 50*l.* a year to his father the said Richard Jordan, which annuity I direct shall be paid him half-yearly during his natural life, and I devise and bequeath the same to him accordingly: And, after the decease of the said William Jordan, then to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents, *752] issues, *and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan *their father* shall by deed or will, duly executed and attested as by law is required for devising and disposing of real estates, direct, limit, or appoint: And, in default of such issue male of the said William Jordan, then upon trust to and for the use of his brother Richard Jordan, a younger son of my said cousin Richard, and his heirs male, in such parts and proportions, manner and form, as he the said Richard Jordan the younger shall by deed or will duly executed as aforesaid direct or appoint, charged and chargeable nevertheless, and I do accordingly hereby expressly charge the same several estates, lands, tenements, and premises, in case the said Richard Jordan the younger or his heirs should so as aforesaid become seised and possessed thereof, with the payment of the sum of 2000*l.* unto and equally amongst and between the daughters or daughter of the said William Jordan (if any), to whom I give and bequeath the same accordingly, to be paid to them respectively as they shall attain the age of twenty-one years, with interest from the time of the above devise becoming vested in the said Richard Jordan the younger and his heirs as aforesaid: And, from and after the performance of the aforesaid trusts, and subject thereto, then my said trustees shall stand and remain seised and possessed of the said last-mentioned estate, to and for the use and behoof of the right heirs of my cousin Robert Jordan, of Little Compton aforesaid, for ever:

"6. And, as to my said estate at Bourton aforesaid, in the said county of Oxford, I direct my said cousin Richard Jordan may occupy and enjoy the same, or receive and take the rents and profits thereof, *753] until his second son, the said Richard Jordan the younger, *shall attain his age of twenty-five years; and then I give and devise the same estate unto the said Richard Jordan the younger for and during the term of his natural life, charged nevertheless and chargeable with the payment of an annuity of 50*l.* a year to his said father for his natural life, payable half-yearly: And, after the decease of the said Richard Jordan the younger, I give and devise the rents and profits of the same estate to the heirs male of his body lawfully begotten severally and respectively, according to their respective seniorities; and, for default of such issue male, then I devise the same to his brother William and his heirs male lawfully begotten, remainder to his brother Thomas, in tail, remainder to his brother Robert, in tail-male: And, in default of all such issue male as aforesaid, I devise my said last-mentioned

estate to my cousin Robert Jordan and the heirs male of his body lawfully begotten, for ever:

"7. And, as to my leasehold estate at Little Compton aforesaid, and I direct my said trustees to remain and continue seised and possessed thereof, and to pay the rents and profits thereof to or for the use of, or to permit and suffer my said cousin Robert Jordan, son of my uncle Jonathan, to hold and enjoy, or to receive and take the rents and profits thereof, to his own use and benefit during the term of his natural life: And, from and immediately after the decease of the said Robert Jordan, then I direct my said trustees to pay the rents and profits thereof to the issue male lawfully begotten, severally and respectively, according to their respective seniorities: And, for default of such issue male as aforesaid, I devise the same to the use of the eldest and all other the daughters and daughter of my said uncle Jonathan, according to their respective seniorities; and, in default of such issue of my said uncle Jonathan, then I devise the same to the eldest daughter of *my said cousin Robert, for all my estate and interest therein." [*754

After giving directions for the renewal of the said leasehold estate at Little Compton, the testator by his said will further gave and devised as follows,—

"8. And, as to my estate at Barton-on-the-Heath aforesaid, called Wheelbarrow Castle, I direct my said trustees to remain seised and possessed thereof, and to permit and suffer my cousin Thomas Jordan, son of my late uncle Jonathan Jordan, deceased, to hold and enjoy the same, or to receive and take the rents and profits thereof, during his natural life; and, after his decease, I devise the same estate, and every part thereof, with the appurtenances, unto the heirs male of his body lawfully begotten, according to their respective seniorities; and, for want and in default of such issue male, then I devise the same to all and every his daughters and daughter according to their respective seniorities; remainder to my said cousin Robert Jordan and his heirs, for ever."

Several legacies and bequests were then given by the said testator; and his said will then proceeded as follows,—

"9. And, with respect to all the aforesaid legacies and bequests by this my will so given and bequeathed as aforesaid, and to be paid as aforesaid out of my personal estate, and which shall not be so paid, or become due and payable within one year after my decease, shall be raised and within such year be laid out and invested on some good and effectual securities or security to the satisfaction and approbation of my said trustees, and be respectively appropriated and declared to be for the discharge and payment of such respective legacies, annuities, and bequests so as aforesaid respectively given and bequeathed,—for which purpose I hereby expressly order and direct my said trustees *forthwith, or so soon as conveniently may be after my decease, to cause a particular inventory, account, and valuation of all my said personal estate and effects to be made out, stated, and ascertained; and, should it so happen that the whole of my said residuary personal estate so as aforesaid made subject and liable to the payment of my said debts, legacies, and funeral expenses, prove insufficient and inadequate for such several purposes, then I hereby charge all such deficiencies upon and to be paid out of my said estate at Armscott aforesaid here [*755

inbefore given and devised to and for the use of my said kinsman William Jordan:

"10. Provided also, and I do hereby further order, declare, and appoint that my said trustees shall have power by all necessary deeds and conveyances by their joint natural lives, and the survivors and survivor of them, and the heirs of such survivor, from time to time to nominate, elect, and appoint, and I earnestly entreat and recommend, as often as any one of them, or their successors, appointees, or assigns, may happen to die, that the survivors or survivor do forthwith proceed to such election and appointment of some respectable, discreet, and intelligent persons or person as their or his successors or successor; and then I direct that they such persons or person so appointed, shall have the like power again to nominate and appoint others to be trustees for the purpose of continuing the uses and trusts, and carrying into effect this my will, and so from time to time as may be requisite and necessary; and I declare that the said estates so as aforesaid hereby vested in the said trustees, and by such appointments from time to time to be and become vested in such new trustees as aforesaid to be elected, are so now vested in them, and hereafter to become vested in manner aforesaid in their successors, heirs, executors, administrators, and assigns, for the
*756] various and *particular purposes, and to support the several and respective contingent and other uses and trusts hereinbefore expressed and declared, and to prevent the same from being diverted, changed, varied, defeated, prevented, extinguished, or in any way destroyed; and, for that purpose, and in order effectually to carry the meaning and intention of this my will into complete operation and effect, my said trustees and their successors, heirs, executors, administrators, and assigns, shall and may from time to time make entries and bring actions as each particular case may require; and, in order my said several messuages, buildings, estates, farms, lands, hereditaments, and premises may not be in any way deteriorated or injured by any of the devisees thereof and parties for the time being interested therein respectively, I hereby authorize, impower, and request my said trustees, from time to time, when they may deem it requisite and necessary, to enter into and upon the said hereditaments and premises, and every or any part or parts thereof, to view and inspect the state and condition of the repair thereof, and to order and direct all necessary reparations to be made and effected by and at the costs and charges of the respective tenants or parties interested therein for life or otherwise, and, in default of such requisite repairs being forthwith made and effected according to the direction of my said trustees, then I direct my said trustees to cause the same to be made, and to levy the costs and expenses thereof by distress and sale of the stock and effects of the defaulter which shall be found in and upon the said estate and premises, in like manner as for rent reserved in arrear, or recover the same by action at law.

"11. And moreover my further will and meaning is, that, upon the failure and extinction of such issue male in either of any of the respec-
*757] tive families and *devisees above mentioned, and on all occasions when failure of such issue male shall happen, and as ultimate disposition of the estate and interest in remainder is devised, then and in all such cases I direct my said trustees, their successors, heirs, executors, administrators, and assigns, shall stand, remain, and continue seised

and possessed of all such respective estates in remainder or reversion, and, where no such remainder or reversion is hereinbefore devised and disposed of, to and for the use of the eldest daughter of my said uncle Jonathan for her life; and, after her decease, then to the eldest son and heir male of the body of such eldest daughter and his heir male lawfully begotten; and, in default of such issue of the said eldest daughter of my said uncle Jonathan, to his other and younger daughters severally and successively, according to their respective seniorities, and their respective issue male, the eldest being always preferred, and to their heirs for ever."

The said testator afterwards made and published seven several codicils to his said will, all duly executed and attested as by law required for passing real and personal estate; but the only one of them material to the questions intended to be raised for the opinion of the court is the first, which was made on or about the day it bears date, viz. the 10th of June, 1826, and was as follows:—

"This is a codicil to the will of me the above-named testator, John Jordan: Whereas, by my said will I have devised to my trustees therein named three yard lands, and a homestall thereunto belonging, and in the occupation of William Badger, for the use of George Taylor, and as therein is mentioned: Now, I do hereby revoke the whole of the said devise, and in lieu and instead thereof I devise to them my said trustees, for the use of the said George Taylor, and as in my *said will [*758 is mentioned, and charged with the like annuity to his father, all that messuage or tenement, homestall, and premises, wherein I now live, and the two yard lands and a half thereunto belonging, formerly Taylor's, with all the appurtenances, except the four cottages and gardens, all which premises were by my said will given and devised to my kinsman William Jordan; and I devise to him my said kinsman William Jordan the said messuage, three yard lands and cottages, and also a close that late belonged to Lord Wentworth, adjoining Bacon's estate, and devised by my will to Thomas Jordan, which devise, so far as it relates to the same close, I hereby all revoke; to hold to him my said kinsman William Jordan and his heirs, as in my said will is mentioned."

The testator died on or about the 1st of December, 1830, without having revoked (so far as the questions for the opinion of the court are concerned) his said will and first codicil.

The plaintiff is the William Jordan mentioned in the said will and codicil; and the defendant is the executor of the said Thomas Adams, deceased.

The testator at the time of making his said will, and from thence until and at the time of his death, remained and was seised in his demesne as of fee of and in the farm, lands, and hereditaments in respect of which this action is brought; and such farm, lands, and hereditaments are part of the testator's estate at Armscott, and were comprised in the devise set out in the fifth paragraph of the extracts of the said will set out in this case, but are not part of the lands first devised by his said will to George Taylor the younger, and afterwards by his said first codicil to the plaintiff, as in the said will and codicil respectively mentioned.

The said will and the several codicils thereto are to be referred to if necessary, and to be taken as part of this case.

*759] *The questions for the opinion of the court are,—first, whether the plaintiff took under the said will and codicil a legal estate tail in the property in respect of which the action is brought,—secondly, whether he took under such will and codicil an equitable estate tail in the said property.

If the court shall be of opinion that the first or second question ought to be answered in the affirmative, then judgment shall be entered for the plaintiff for 1*s.* and costs of suit. If the court shall be of opinion that both the said questions ought to be answered in the negative, then judgment of nolle prosequi, with costs of defence, shall be entered for the defendant.

The case was twice argued. The first argument took place in Michaelmas Term, 1859, before Erle, C. J., Crowder, J., and Byles, J.

Atherton, Q. C. (with whom was *Kemplay*), for the plaintiff, submitted, that, under the terms of the devise contained in the fifth paragraph of the will, William Jordan took an estate tail; and he referred to the following authorities:—Shelley's Case, 2 Co. Rep. 88 b, 93 a, Jesson *v.* Wright, 2 Bligh 1, Featherston *v.* Featherston, 3 Clark & F. 67, Roddy *v.* Fitzgerald, 6 House of Lords Cases 823, Toller *v.* Attwood, 15 Q. B. 929 (E. C. L. R. vol. 69), Lowe *v.* Davies, 2 Ld. Raym. 1561, 2 Stra. 849, 1 Barnard. B. R. 238, and 2 Jarman on Wills, pp. 203, 303, 231.

Bovill, Q. C. (with whom was *Charles*), for the defendant, submitted that William Jordan, under the devise in question, took only an estate for life,—citing the following authorities: Sibley *v.* Perry, 7 Ves. 522, *760] Clay *v.* Pennington, 7 Simons 370, Fruen *v.* Osborne, *11 Simons 132, Pope *v.* Pope, 14 Beavan 591, Smith *v.* Horsfall, 25 Beavan 628, Goodtitle d. Sweet *v.* Herring, 1 East 264, North *v.* Martin, 6 Simons 266, Gummoe *v.* Howes, 23 Beavan 184, The King *v.* The Marquis of Stafford, 7 East 521, Sugden on Powers, 7th edit. 480, 483, Fearne's Contingent Remainders, 9th edit. 188, and 2 Jarman on Wills 310. He also relied upon the eleventh clause of the will as throwing some light upon the construction of the fifth clause.

The court took time to consider; and Crowder, J., having died, and there being some difference of opinion amongst the other learned judges, a second argument was directed. The case was accordingly argued again in Hilary Term, 1860, before Erle, C. J., Williams, J., Willes, J., and Keating, J.

Kemplay (with whom was *Atherton*, S. G.), for the plaintiff, in addition to the authorities referred to upon the former argument, cited the following:—Jones *v.* Morgan, 1 Bro. C. C. 206, Poole *v.* Poole, 3 Bos. & P. 320, Woodhouse *v.* Herrick, 1 Kay & J. 352, 2 Jarman on Wills 267, 268, 312, 313, 323, 371, and Hayes's Inquiry 227, n.

Bovill, Q. C. (with whom were *Archibald Smith* and *Charles*), for the defendant, besides the authorities he before referred to, cited White *v.* Collins, 1 Com. R. 289, Perrin *v.* Blake, 4 Burr. 2579, 1 Sir W. Bl. 672, and Hargreave's Tracts 505. *Cur. adv. vult.*

Erle, C. J., now delivered the judgment of the majority of the court:—

In this case the plaintiff contends that the devise to him for life, with *761] remainder to the heirs male of his *body, has created an estate in tail-male in him; and it is clear that it does create that estate

"unless a judicial mind sees with reasonable certainty from other parts of the will the testator's intention" (to use the words of Lord Wensleydale in Roddy *v.* Fitzgerald, 6 House of Lords Cases 823, 877), that those words should not operate as words of limitation of the inheritance, but should be words of purchase creating an estate in remainder in the persons coming within the designation of heirs male of the body, and also within the further description contained in the will. We proceed, therefore, to examine the other parts of the will for the purpose of ascertaining that intention; and for this purpose all the parts of the will should be considered together, and effect given to every part, unless there should be absolute inconsistency. Now, every part of the devise here has effect according to the ordinary meaning of the words, if heirs male of the body of William are construed to be words of purchase, and to mean sons. First, the devise is to William for life; and, although this is of no avail where the rule in Shelley's Case, 1 Co. Rep. 93 a, applies, still, until it is ascertained that the testator intended by the word "heirs" to pass the inheritance, that rule has no application. Here, that intention is the point in dispute; and, in weighing both sides, the express intention to devise to William for life operates against inferring an intention to give him an estate tail.

Secondly, the devise is to the heirs male of the body for their natural lives. Now, the question being whether the intention was to pass an estate of inheritance by the use of the word "heirs," the testator, who has shown by the will that he knew the difference between estates for life and estates of inheritance, has excluded the notion of passing the inheritance, by directing that the persons designated as heirs male of the body should take life-estates only.

*In Archer's Case, 1 Co. Rep. 66 b, a devise to A. for life, remainder to the next heir male of A. and the heirs male of the [*762 body of such heir male, was construed to be an estate for life in A., and an estate tail by purchase in the person who might be the next heir male of his body. The superadded words of limitation "to the heirs male of the next heir male" were held to negative the intention to pass the inheritance to the heirs of A. by descent, which would otherwise be presumed from the word "heir." In the present case, the words superadded are more inconsistent with intending to pass the inheritance. In White *v.* Collins, 1 Com. 289, the gift was to A. for life, remainder to the heir male of his body for life, remainder over. There is a most elaborate argument by Comyns, to show that A. took an estate tail, and that the limitation for life to the heir male of his body should be rejected: but the court decided to the contrary, and construed the gift to be a gift of an estate for life to the son of A. This case is in point for the present defendant.

Thirdly, the devise is to them for their lives, either in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as William Jordan, *their father*, shall appoint. If the first alternative is taken, then, upon the plaintiff's supposition that an estate tail was intended, the words "in succession according to seniority" are wholly inoperative; but, on the defendant's supposition, that estates for life were intended, every word has effect. If the other alternative is taken, viz., that the estate should pass to the appointees, as *their father* should appoint, upon the supposition of an

estate tail in the father, these words must be rejected; upon the supposition of life-estates by purchase, every word has full effect. Furthermore, not only is an estate by appointment inconsistent with an estate
*763] tail by descent, *but also this alternative brings the case within the rule, that heirs male of the body shall be construed to be sons, where the testator has so interpreted them in his will: for, if the power of appointment is exercised, the appointor must stand in the relation of father to the appointees; it follows that the testator meant to designate sons as the heirs male of the body who might be appointees.

The devise proceeds to dispose of the remainder by the words "In default of *such* issue male of William Jordan, then to Richard and his male heirs." If this provision had been in default of issue male of William, the plaintiff would have had a strong support: but the words are, in default of *such* issue male; and this default must be construed by reference to the issue male before described; and, as above stated, the testator has explained issue male of William to mean sons.

The devise to Richard was contended by the plaintiff to be a contingent remainder after an estate tail, and not a vested remainder after estates for life, because it provides *in case* the said Richard or his heirs male should become seised and possessed thereof, that the estate should be charged with 2000*l.* legacy to the daughters of William. But the words of contingency have a clear application without assuming an estate tail in William; for, if the devise is to William for life, remainder to his sons for life in succession, remainder to Richard in tail male, then it is a contingency whether Richard will have any son, and whether he or his son will ever have the estate in their actual possession; and it is only in that event that the 2000*l.* are given to the daughters of William. This is clear, because the testator provides for the failure of the heirs male of Richard, and in that event gives the fee to the heirs of Robert, without the charge of this sum on their estate.

*764] *Other parts of the will confirm this construction. There are seven distinct devises. In making them, the testator shows that he well knew how to create either an estate for years, or for life, or in tail, or in fee; and, though he may not have known the rule in Shelley's Case, he shows that he knew the distinction between these estates, and has given them by appropriate legal language; and he has invariably used the word heirs to pass the inheritance, except in the devise in question, where the heirs are directed to take for life.

The relation of the testator to the devisees respectively which appears in the will, is a further confirmation of this construction. The objects of the testator's bounty were all collateral relations, and therefore the usual argument against an intention to disinherit his own lineal descendants has no relevancy.

It should also be observed that he has, among the other devises, more than once given an estate to the father for life, remainder to his sons in tail, remainder to his daughters as tenants in common, remainder over. But, in the devise in question, he purposely omitted the daughters of William, and preferred Richard to them; giving them instead a contingent legacy charged on the estate. As he preferred Richard to the daughters of William in this instance, he may have had the same reason for preferring Richard's sons to the grandsons of William.

Though we are well aware of the importance of adhering to the doctrine laid down in Jesson *v.* Wright, 2 Bligh 1, where it applies, we think, for the reasons above assigned, it does not apply here; and that the authorities cited by Mr. *Bevill* require us to hold that the meaning of the words "heirs male of the body" in the devise in question, is explained by the testator to be "sons."

Our judgment, therefore, is for the defendant, to the effect agreed on in the special case.

*WILLIAMS, J.—I concur with the judgment of the rest of the Court in this case; but I am induced so to do, solely on the ground of the use of the words "their father" in the power of appointment. I agree, though with no little doubt remaining on my mind, that those words may be taken to demonstrate, that, by "heirs male of the body," the testator meant "sons." But for those words, I should have thought an estate in tail male passed by such a gift, notwithstanding the inconsistent limitations and the other obstacles pointed out in the judgment, just delivered by my Lord, both because of the known legal import of the words employed, and also because of the apparent intention that the estate should go over to Richard Jordan and his heirs male upon failure of the issue male of William Jordan, and not until such failure. The language, perhaps, of Vice-Chancellor Shadwell's judgment in North *v.* Martin, 6 Sim. 266, 270, justifies us in thus controlling the words "heirs male of the body," by the interpretative words "their father." But the decision in itself cannot properly be said to govern the present, because in that case words of inheritance were superadded to the words "heirs of the body," which are not to be found in this. In truth, that gives rise to the difficulty which has mainly caused the hesitation I feel in concurring with the rest of the Court. [*765

Judgment for the defendant.(*a*)

(*a*) An appeal is pending.

Where, after a devise to one for life, there is a limitation of the estate to his heirs or the heirs of his body, coupled with other expressions, which show clearly that the testator used these words as words of designation of persons who were to take as a new stock of inheritance, as, for instance, where from the context it is plain that he used them by mistake for, or as equivalent to "children," "sons," or the like, this has generally been considered as an exception to the rule in Shelley's Case. See Rogers *v.* Rogers, 3 Wend. 503. The operation of this exception has, however, of late years been much restricted. Thus, it was at one time held, that words importing a division or distribution among the heirs, being inconsistent with the common law course of descent, as where the limitation was to the heirs, or issue of the first taker, as "tenants in common," or "share and share alike," would fall within the exception: Doe *v.* Laming, 2 Burrows 1100; Doe *v.* Goff, 13 East 668; Findlay's Lessee *v.* Riddle, 3 Binn. 139; Neburger *v.* Upp, 13 Serg. & R. 65; Stump *v.* Findlay, 2 Rawle 160. But, it is now definitely settled in England, at least, that no force is to be given to such expressions standing alone, so as to control the technical effect of the words heirs or heirs of the body: Jesson *v.* Wright, 2 Bligh 16. See Sisson *v.* Matthews, 1 Sumn. 251; Kingsland *v.* Rapelye, 3 Edw. Ch. 1. That mere superadded words of limitation, as where the limitation over is to the heirs or heirs of the body of the

first taker, and to their heirs and assigns, will not produce that effect, may now be taken as clear: Carter *v.* McMichael, 10 Serg. & R. 429; Paxson *v.* Lefferts, 3 Rawle 59; Hileman *v.* Bonslaugh, 13 Penn. St. 344; George *v.* Morgan, 16 Penn. St. 105; Kingsland *v.* Rapelye, 3 Edw. Ch. 1; Wright *v.* Thayer, 1 Gray 284.

*766] *LEVI *v.* LEWIS. *June* 15.

A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet to C. for the whole of his term. The term having expired, C. applied to A. to accept him as his tenant for a further term, which A. refused to do, saying that B. was his tenant. C. continued in possession till after Michaelmas, 1858, when B. sued him for the half-year's rent, and *afterwards* paid A. (who received the same) the rent which would have become due from him (B.) to A., assuming his tenancy to be still subsisting:—Held, that the action was maintainable.

THIS was an action for use and occupation of premises in Fetter Lane. The plaintiff claimed a half-year's rent from the 25th of March to the 29th of September, 1858. The defendant pleaded never indebted, whereupon issue was joined.

The facts which appeared in evidence at the trial before Willes, J., at the sittings in Middlesex after last Michaelmas Term, were as follows:—One John Knight, the superior landlord of the premises in question, had let them to the plaintiff, Levi, for a term which expired at Lady-Day, 1858. Levi had underlet the premises to the defendant, Lewis, for the whole of his term. The term for which the premises had been so let by Knight to Levi, and by Levi to Lewis, having expired, Lewis, the undertenant, applied to Knight to accept him as his tenant for a further term; but Knight declined to do so, referring to Levi as being still his tenant. Lewis continued to occupy the premises; and, a half-year's rent becoming due at Michaelmas, 1858, Levi brought this action for use and occupation. After the commencement of the action Levi paid to Knight, and the latter accepted, the half-year's rent which would have become due from Levi to Knight, assuming that there was a tenancy subsisting between them.

On the part of the defendant it was submitted that there was no evidence to go to the jury of a use and occupation of the premises by Lewis as tenant to Levi; and the learned judge, being of this opinion, directed a nonsuit.

H. James, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection.

*767] *Huddleston*, Q. C., and *G. Francis*, on a subsequent day, showed cause.—There was no evidence to support the plaintiff's claim. To entitle him to sue for use and occupation, he was bound to show the subsistence of a contract of tenancy, express or implied, between himself and the defendant. Express contract there was none; for, his term had expired: and no contract can be implied from the circumstance of the defendant continuing to occupy the premises. [COCKBURN, C. J.—In what character did he so continue to occupy?] As tenant on sufferance. [COCKBURN, C. J.—To whom?] To Knight. [COCKBURN, C. J.—The evidence is that Knight repudiated him, and treated Levi as his continuing tenant, and afterwards received the half-year's rent from

Levi.] In Woodfall's Landlord and Tenant, 7th edit. p. 193, it is said: "A tenant on sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession; as, if tenant pur autre vie continues in possession after the death of the cestui que vie: so, any one who continues in possession without agreement, after a particular estate is ended: so, if a tenant for years surrender, and then hold over, he will be either tenant on sufferance or a disseisor, at the election of the landlord. An under-tenant who is in possession at the determination of the original lease, *and is permitted by the reversioner to hold over*, is quasi a tenant at sufferance." And the authorities cited support these positions. In Burne *v.* Richardson, 4 Taunt. 720, it was held that a termor who lets to an under-tenant cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress, although the under-tenant still retains the possession: and, according to the opinion of Sir James Mansfield, the under-tenant so retaining the possession after the expiration *of the term, and not the termor, would be the person liable for mesne profits. [*768 [WILLES, J.—That dictum of Sir James Mansfield has since been overruled: see Doe *v.* Harlow, 12 Ad. & E. 40 (E. C. L. R. vol. 40). COCKBURN, C. J.—In Burne *v.* Richardson, the party claiming was the superior landlord.] Ibbs *v.* Richardson, 9 Ad. & E. 849 (E. C. L. R. vol. 36), 1 P. & D. 618, will probably be relied on by the other side; but the ground of the decision there was, that there was a continuing tenancy.

H. James, in support of the rule.—The only question is, whether there was any evidence at all that Levi, with Knight's concurrence, remained tenant of these premises. Actual personal possession was not necessary. Ibbs *v.* Richardson is precisely in point. There, lessees for a term ending on the 11th of October, underlet to C. from year to year, subject to the determination of their own interest. Upon the expiration of the term C. refused to quit, and held over against the will of the lessees. On the 16th of October the lessees distrained on C. for rent due before the 11th. On the 14th of December, C. quitted; and the lessees then tendered possession to the original landlord, who refused to accept it. It was held that the lessee was liable, in an action for use and occupation, for the period between the 11th of October and the 14th of December. Lord Denman there says: "If the defendants, after the expiration of their lease, had let the premises anew to C., the case would have been a very clear one. Here they distrained, as upon a continuance of their own interest, and did not offer to deliver up the key or the possession until the 14th of December. When C. held over, there was a sufficient reversion, as between them and C., to enable them to distrain if they pleased." And Littledale, J., said: "No doubt, the ordinary course under these circumstances *would be to bring ejectment; but the plaintiff may waive the tort, and sue for use and [*769 occupation; or he might have maintained an action for not delivering up possession. After a recovery in ejectment, he might have recovered mesne profits until the day when the possession was tendered to him: so, here, he may recover rent for that period. C.'s possession, being obtained by and through the defendants, is to be taken as their possession." The acceptance by Knight of the half-year's rent from Levi,

though after the commencement of the action, was a clear recognition by him of the continuance of Levi's tenancy: and the defendant could not set up the jus tertii without showing an actual exercise of that right: Delaney v. Fox, 2 C. B. N. S. 768 (E. C. L. R. vol. 89).

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court.(a)

The facts of this case seem to be these:—Knight, the superior landlord, had let the subject of occupation to Levi, the plaintiff. Levi had underlet to Lewis, the defendant, for the whole of his term, leaving no reversion in himself. Levi's interest and Lewis's having thus expired together, Lewis applies to Knight to be allowed to become tenant to him, Knight: but Knight refuses, and refers to Levi as still tenant. Lewis continues to occupy. Levi thereupon sues Lewis in this action for use and occupation after the expiration of his term. Levi, after action brought, pays rent to Knight for the time during which Lewis had occupied after the expiration of the term, which rent Knight accepts as due to him from Levi:

*770] *The question is, whether there was any evidence to go to the jury of an implied contract by Lewis to pay Levi for the occupation of the premises.

We think there was. Conceding that the relative position of the parties would not alone have enabled Levi to bring the action, yet the conduct of the parties was such that we think there was evidence from which a jury might infer an understanding or implied contract between Levi and Lewis, that Lewis should pay Levi for the occupation of the premises. Knight insists on holding Levi still liable; and Lewis knows it. Indeed, Levi pays Knight rent. It is true that was after action brought: but it may, nevertheless, in the opinion of the jury, reflect light on the original understanding of the parties, and help to show that the tenancy between Knight and Levi still continued, and was treated by all the parties as continuing. The jury might have thought that Lewis must have known that he was not considered as tenant to Knight, but that he was considered as tenant to Levi, and that Knight and Levi severally show by their conduct that they each took the same view of the case.

We, however, give no opinion as to the conclusion to which the jury ought to come, but only decide that there was evidence to go to the jury. The rule, therefore, must be made absolute.

The above is to be considered as the judgment of my Brothers Crowder and Byles. I retain the opinion I expressed at the trial, but do not think it necessary, this being a motion against my ruling, to deliver a formal judgment. Rule discharged.

(a) The case was argued before Cockburn, C. J., Crowder, J., Willes, J., and Byles, J., but the Lord Chief Justice was translated before the judgment was prepared.

*SMITH *v.* SCOTT. *June* 15. [*771

The declaration stated, that, by deed,—reciting that the plaintiff had obtained a grant of letters patent for his invention of certain improvements in manufacturing and getting up wire rope,—*it was witnessed* that the plaintiff did thereby grant to the defendant full and exclusive license and authority to use, exercise, and put in practice the said invention, and to sell the wire rope so to be made by him, within a given district in England: And the defendant covenanted, amongst other things, "that he would well and truly pay to the plaintiff 1*l.* per ton for all wire rope manufactured by him by the aid of the machinery of the plaintiff under and by virtue of the said patent process," at the end of every three months; "that he would make and deliver to the plaintiff at the expiration of every three months a true statement in writing of the number of tons of rope so manufactured by him as aforesaid; and also should and would permit and suffer the plaintiff at all reasonable times to examine his books and accounts, for the purpose of ascertaining the accuracy of the statement thereby covenanted to be delivered:" And the plaintiff by the said deed also covenanted with the defendant, that, during the continuance of the grant thereby made, he would not, without the consent in writing of the defendant, use, exercise, or put in practice, or vend, or grant to any other person or persons license or authority to use, exercise, or vend wire rope manufactured as aforesaid within the district thereinbefore mentioned, but "that within such limits the defendant should have and be entitled to *the exclusive right*, liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process."

The breaches assigned were,—first, non-payment of the stipulated 1*l.* per ton,—secondly, non-delivery of tri-monthly accounts,—thirdly, refusal to permit the plaintiff to examine the defendant's books and accounts.

The defendant pleaded,—fifthly, that the plaintiff did not give, nor did the defendant take or have, such exclusive license within such district, as by the said deed provided for,—eleventhly, that the said invention was worthless and of no public utility or advantage, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof; that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention; and that, at the time of the making of the said deed, the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof:—

Held, that the fifth plea was bad, as traversing the effect of the deed; and that the eleventh plea was also bad as a plea of failure of consideration, the license being by *deed*, and not amounting to a plea of fraud.

THIS was an action for the breach of an agreement under seal for a license for the exclusive use of a patent invention.

The declaration stated, that, by deed,—reciting, among other things, that the plaintiff had obtained a grant of letters patent, bearing date the 24th of May, 1849, for his invention of certain improvements in manufacturing and getting up wire rope, for the term of years therein mentioned,—*it was witnessed* that the plaintiff did thereby grant unto the defendant full and exclusive license and authority to use, exercise, and put in practice, at any work or works belonging to him, the said invention, and to vend, sell, and dispose of the wire rope so thereby allowed to be made and provided at such works, to any person or persons, *company or companies, within the county of Lancaster (except only the town of Liverpool), and within the counties of York and [*772 Derby, and the northern division of the county of Stafford, for and during and unto the full end and term granted by the said letters patent: And the plaintiff thereby covenanted with the defendant, that he would supply to and erect and put up at the works of the defendant, situate at Knutsford Vale, near Manchester, all the machinery, fittings, and apparatus necessary for the completion of four machines for the purposes of the said manufacture, and would well and effectually set up and finish the same in complete working order, and in full accordance with the

said letters patent, on or before the 25th of December, 1854, and would make charges to the defendant for the same at such prime cost prices only as he should have paid or expended for the same,—such charges under no circumstances to exceed on the whole the principal sum of 400*l.*; and would, when required by the defendant, deliver in writing a true and just account of such charges: And the defendant covenanted with the plaintiff that he would, on the execution of the said deed, pay into the hands of the plaintiff the sum of 133*l.* 6*s.* 8*d.* in part discharge of the costs of supplying and erecting the said four machines as aforesaid; and that he would also pay into the hands of the plaintiff the further sum of 133*l.* 6*s.* 8*d.* on the complete erection to the satisfaction of the defendant of two of the said machines in manner aforesaid; and that, on the erection and fitting up of the whole of the said four machines in complete working order and condition in manner aforesaid to the entire satisfaction of the defendant, the defendant would, on a delivery to him of a true and just statement of the entire cost and charges expended in erecting the same, pay into the hands of the plaintiff the *773] residue of such costs and charges, *provided the same did not on the whole exceed the sum of 400*l.*; but, if such costs and charges should exceed in amount that sum, then that he would pay the same costs to the amount of 400*l.* and no more, inclusive of the two several sums of 133*l.* 6*s.* 8*d.* covenanted to be paid as aforesaid: And the defendant did further covenant that he the defendant would well and truly pay to the plaintiff the sum of 1*l.* sterling per ton for every ton weight of wire rope manufactured and provided by the defendant by the aid of the said machinery under and by virtue of the said patent process, such payment to be made at the end of three calendar months, and the first payment thereof to be made at the expiration of the first three calendar months after the defendant should have commenced working the said machinery; and, further, that he the defendant would make and deliver to the plaintiff, at the expiration of every three calendar months as aforesaid, a true statement in writing of the number of tons weight of rope so manufactured and produced by him as aforesaid, the first statement thereof to be delivered at the expiration of the first three calendar months after the defendant should have commenced working the said machinery; and also should and would, within one calendar month after each of the said days or times up to which the said statement should be prepared, certify the same either on oath or by solemn declaration as the law should permit and direct, if and when required by the plaintiff so to do; and also should and would permit and suffer the plaintiff at all reasonable times in the day time to examine the books and accounts of the defendant for the purpose of ascertaining the accuracy of the said statement thereby covenanted to be delivered as aforesaid: And the plaintiff by the said deed also covenanted with the defendant, that, *774] during the continuance of the grant thereby *made, he the plaintiff would not, without the consent in writing of the defendant first obtained for that purpose, use, exercise, or put in practice, or vend or dispose of, or grant to any other person or persons, company or companies, license or authority to use, exercise, and put in practice, or vend and dispose of, wire rope manufactured as aforesaid within the counties and parts of counties thereinbefore mentioned, but that within such limits the defendant should have and be entitled to the exclusive right,

liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process, in the manner and subject to the covenants and provisoes in the said deed mentioned and contained: Averment, that the plaintiff did, in pursuance of the covenants contained in the said deed, supply, erect, and put up at the works of the defendant situate at Knutsford Vale aforesaid, the said four machines according to his said covenant, and that the defendant commenced working the said machinery, and that all things had been done and happened which ought to have been done and happened to entitle the plaintiff to the performance by the defendant of the said several covenants by him to be performed according to the said deed; and that, although the defendant manufactured and produced, by aid of the said machinery, under and by virtue of the said process, divers, to wit, 10,000 tons weight of wire rope; yet the defendant did not nor would pay to the plaintiff the said sum of 1*l.* per ton upon the said quantity of wire rope so manufactured, or any part thereof; and that, although divers, to wit, ten periods of three calendar months each had expired since the defendant commenced working the said machinery, the defendant did not nor would at or after the expiration of any of the said periods make and deliver to the plaintiff a true statement in writing *of the number of tons weight of wire rope so manufactured and produced by him; and that, although the defendant had been [*775 oftentimes requested by the plaintiff at reasonable times in the day in that behalf to permit and suffer the plaintiff to examine the books and accounts of the defendant for the purpose of ascertaining the accuracy of the statement by the defendant covenanted to be made as aforesaid, yet the defendant did not nor would permit or suffer the plaintiff so to do.

Fifth plea,—that the plaintiff did not give, nor did the defendant take or have, such exclusive license within such district, as by the said deed provided for.

Eleventh plea,—that the said invention was worthless and of no public utility or advantage whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof; and that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention, and at the time of the making of the said deed the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof.

The plaintiff demurred to the fifth plea, the ground of demurrer stated in the margin being, "that the matter therein pleaded does not go to the whole consideration for the covenants of the defendant for the breach of which the action is brought."

He also demurred to the eleventh plea, on the ground, "that there is no warranty in the deed of the utility or novelty of the invention, or of the validity of the patent which the defendant by the deed obtained a license to use." Joinder.

W. S. Cross, in support of the demurrer.—The fifth plea shows a partial failure of consideration only. The declaration alleges a grant of an exclusive license to *use the patent. The defendant [*776 pleads that the plaintiff did not give, nor did he the defendant take or have, such exclusive license as by the deed provided for. He admits, therefore, that he took *some* benefit from the license. This plea

seems to be founded upon Chanter v. Leese, 4 Exch. 295.† There, by agreement, *not under seal*, between the plaintiff and A., B., and C., of the one part, and the defendant of the other part,—reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B. for another, and the plaintiff and C. for another,—it was agreed between the said parties, that, for the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, and sell any or all of the said patent inventions, within certain limits, during the continuance of the several patents, on certain terms, viz. that an office and warehouse should be prepared for the sale of articles connected with the inventions, and that books of account of the sale of each of the inventions should be kept there by the defendants, and be open at all times to the inspection of the parties thereto of the first part; that the defendants should pay to the plaintiff 400*l.* a year as a consideration for the license for the sale, &c., of all the aforesaid patents, and that such sum should be charged as a payment by the defendants in their books of account; that they should pay A. a certain rateable sum on all machines used, &c., on his patent principle; that they should also pay the plaintiff a moiety of the net profit to arise from all the said inventions (except those in which B. & C. were interested),—to the plaintiff and B. two-thirds of the net profit to arise from theirs,—and to the plaintiff and C. two-thirds of the *net profit to arise from theirs: and it was agreed that either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff above, to recover a half-yearly payment of the 400*l.*, the defendants set out the plaintiff's patent for the improvement in furnaces, and pleaded that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff at the time of the making of the agreement well knew. It was held, on demurrer, that the plea was a bar to the action. But in that case the contract was altogether executory. Lord Abinger, in giving judgment, said: "In the present case it does not appear to the court that the defendants ever accepted or enjoyed any part of the patents which were the consideration of their agreeing to pay 400*l.* a year to the plaintiff, nor that the sum they so agreed to pay can in any manner be apportioned amongst the different patents which they might have had, the possession of all and each being an entire consideration." [WILLES, J.—Is not this plea bad on another ground, viz., that the defendant is estopped from denying that which is witnessed by *the deed?* The plea is non est factum or nothing. It is like a plea of non demisit, when the declaration shows a demise by indenture.] The estoppel appears upon the record. [WILLIAMS, J.—The fifth plea only seems to deny that there was such a deed. Proceed to the eleventh plea.] The eleventh plea contains an allegation which is not found in the second plea in Hall v. Conder, 2 C. B. N. S. 22 (E. C. L. R. vol. 89), viz., that the plaintiffs knew the matters aforesaid, and the defendant did not: but, in the absence of fraud, that clearly makes no difference,—Smith v. Neale, 2 C. B. N. S. 67; Lawes v. Purser, 6 Ad. & E. 930 (E. C. L. R. vol. 33). [WILLIAMS, J.—The plea does not aver that the plaintiff

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knew that the defendant *had no notice or knowledge that the [*778
invention was worthless and not new.] And it contains no averment of fraud or misrepresentation. The plaintiff contracted to grant a license to use the invention such as it was. He was not bound to reveal all he knew.

Milward, contrà.—Chanter *v.* Leese is a distinct authority for the validity of the eleventh plea, which alleges that the plaintiff, at the time of the grant, knew that the thing the exclusive license to use which he professed to grant to the defendant was worthless and not the subject of a patent. In Hall *v.* Conder, Smith *v.* Neale, and Lawes *v.* Purser, the plaintiff bonâ fide believed he had a valid patent. In giving the judgment of the Exchequer Chamber in Chanter *v.* Leese, 5 M. & W. 698, 700,† Tindal, C. J., says: "The defendant is not in a situation with respect to the plaintiff similar to that of a tenant towards his landlord, and is in no way estopped from showing any failure of the consideration for his promise to pay the annuity to the plaintiff, which may be sufficient to bar the plaintiff of his action. It is admitted by the demurrer that a partial failure of the consideration has taken place, viz., that one of the six patents is void. The learned counsel for the plaintiff argued, that, as no fraud is alleged, the defendant may have known that it was so void, and yet have entered into the agreement. We dissent, however, altogether from this reasoning. The patent being void, no benefit in respect of it could accrue to the defendants; and we think we are not to presume that any such improvident bargain took place." And in Lawes *v.* Purser, Erle, J., says,—"I am decidedly of opinion, that, *if the plaintiff had known that the patent was void*, this would prove fraud on his part:" and the judgment proceeded upon the ground of the want of any such allegation. [WILLES, J.—That shows that it is *matter of evidence only. WILLIAMS, J.—If you want [*779
to allege fraud, why not plead it?(*a*) Would it be competent to the lessee, in an action upon the indenture, the lease being granted by a mortgagor, to plead that the plaintiff had no title? In the case of Chanter *v.* Leese, the contract was not under seal.] The plaintiff starts with the assumption that his patent is a valid one, and that it was competent to him to exclude all others from making and selling the patent article, and to convey to the defendant the exclusive right of making and selling it. As to the fifth plea, there is no estoppel. The declaration does not allege affirmatively that the plaintiff made the grant, but merely that *it was witnessed* that he made it. [WILLIAMS, J.—That is quite sufficient in a declaration, though not in a plea.]

Cross, in reply.—In Chanter *v.* Leese, the agreement had not been acted upon. Here, the plaintiff is merely suing for the royalty agreed to be paid for that which the defendant has actually manufactured under the patent. At the most the allegation can only amount to a partial failure of consideration. Both pleas are equally bad.

WILLIAMS, J.—I am of opinion that the plaintiff is entitled to judgment on these demurrers. The fifth plea is clearly bad. It is not a plea of non est factum, but simply a plea denying the effect of the deed as stated in the declaration. The proper mode of taking advantage of a variance between the alleged and the real effect of a deed, is, by a plea of non est factum, and not by such a plea as this. Then, as to the

(*a*) There was a plea of fraud upon the record.

eleventh plea. That may be divided into two parts. The first part of that plea states that the said invention was worthless and of no public
*780] utility or advantage *whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof. So far the plea is clearly bad, upon the authority of Hall *v.* Conder, 2 C. B. N. S. 22 (E. C. L. R. vol. 89), Smith *v.* Neale, 2 C. B. N. S. 67, and Lawes *v.* Purser, 6 Ellis & B. 930 (E. C. L. R. vol. 88). But then it is said that that, coupled with the latter part of the plea,—which alleges that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention, and at the time of the making of the said deed the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof,—amounts to an averment that the plaintiff at the time of the making of the deed knew that the patent was a nullity, and the defendant did not, and therefore the case ought to be governed by Chanter *v.* Leese, 4 M. & W. 295,† 5 M. & W. 698,† where, the plaintiff having contracted, that, in consideration of a certain yearly payment, the defendant should have the exclusive right to manufacture a certain patent article, it was held to be a good answer to an action for the annual payment to show that by reason of the invalidity of the patent the consideration wholly failed. It is also said, that, besides failure of consideration, the plea imports knowledge on the plaintiff's part of the worthlessness of that the exclusive use of which he contracted to grant. This, however, being a contract under seal, the defendant is estopped from going into the consideration; and the allegation of knowledge in the plaintiff and absence of knowledge in the defendant does not amount to an allegation of fraud. The agreement being under seal, and no fraud being alleged, the parties are bound by it, and the plea is bad.

WILLES, J.—I am of the same opinion. The fifth plea, which denies
*781] that the plaintiff gave and that the *defendant took or had such exclusive license within such district as by the deed provided for, is plainly a bad plea, on the ground that it traverses the effect of the deed: see Com. Dig. *Estoppel* (A. 3.); Co. Litt. 352 a. The reason is obvious: a party who executes a deed is estopped from denying that which the deed upon the face of it expresses. If he wishes to allege that the deed is not truly set out in the declaration, he must deny that it is his deed. If he admits that it is his deed, he cannot deny the effect of it. For this there is abundant authority. If a defendant were allowed so to plead, he would be going into matters of fact dehors the deed for the purpose of showing that its effect was not as stated in the declaration. Thus, in the case of a demise not under seal, where there has been no entry,—if debt were brought on such a demise, the tenant might plead nil habuit in tenementis; and, if he showed that the plaintiff had no title, he would succeed. But, if the demise were by indenture, the tenant would be estopped from pleading nil habuit in tenementis, or that the landlord did not demise, for then he would be allowed to show that the deed had not the effect alleged. That is a familar illustration of the law. Here, the way the plea would operate, if it were allowed to stand, would be this,—We are to assume that the patent is a valid patent, and that a license for the exclusive manufacture has been granted. Then

comes the plea, denying that the plaintiff gave or that the defendant took or had such exclusive license. Now, that plea would be proved by showing that an agent of the plaintiff had granted a license to some small dealer in the district, and so, if allowed, it might defeat the deed altogether. In Bowman *v.* Taylor, 2 Ad. & E. 278 (E. C. L. R. vol. 29), 4 N. & M. 264 (E. C. L. R. vol. 30), the same point arose, except that the deed there did not grant an exclusive license. Taunton, J., there says that the case comes *within the rule that a party shall not [*782 deny what he has asserted by his solemn instrument under hand and seal: and he distinguishes the case from Hayne *v.* Maltby, 3 T. R. 438, by saying,—"Here, there is an express averment in the deed that the plaintiff is the inventor of the improvements; there, the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been, though the assignor was not the original inventor." The law of estoppel as thus applied is a most just and equitable one. It appears to me that the eleventh plea is also a bad plea. Considered as a plea of fraud, it is consistent with all that is alleged therein that the plaintiff may have been under the impression that the defendant knew as much of the invention as he himself did. Clearly, therefore, it is not good as a plea of fraud. As a plea of want of consideration, it is equally bad, no consideration being necessary in the case of a contract under seal. And, considered as a plea denying the validity of the patent, the case falls within Hall *v.* Conder, Smith *v.* Neale, and Lawes *v.* Purser, which show such a plea to be invalid; for that, in such cases, the contract is for the use of the patent such as it is. The case of Chanter *v.* Leese falls within the rule as to failure of consideration, which is not applicable to an action upon an instrument under seal. For these reasons, I am of opinion that the plaintiff is entitled to judgment on both pleas.

Byles, J.—I am of the same opinion. In addition to the technical reasons given by my two learned Brothers, the fifth plea is obviously bad, inasmuch as it does not show an entire failure of consideration. It is quite consistent with what is there alleged, that the defendant may have had nearly the whole consideration *for which he bargained. The [*783 eleventh plea does go on to allege a total failure of consideration. To this it seems to me that there are two answers: in the first place, the contract being by deed, failure of consideration is immaterial: and in the next place, it is not competent to a defendant by plea to deny the effect of a deed which he has executed. He may plead non est factum; or he may allege fraud. Now, here, the plea does not allege fraud: it states merely that which may be evidence of fraud, viz., that at the time of the making of the deed the plaintiff knew that the alleged invention was not new or useful, and that the defendant had no notice or knowledge; but the plea omits to add that the plaintiff was aware of the defendant's want of knowledge. Independently, therefore, of the technical grounds of objection, it seems to me that the two pleas are clearly bad in substance.

Williams, J.—I forgot to advert to the argument as to the testatum existit. It has long been established that it is allowable to the plaintiff to use that form of declaring. The rule as stated in 1 Wms. Saund. 274, n. (1), is as follows,—"In declarations, whether in debt or cove-

nant, it is sufficient to say testatum existit, for it is only inducement to the action; but, in pleas and advowries, &c., it is the substance of the answer, and therefore the operation of the deed or instrument must be expressly averred, and not stated by way of recital or argument,"—citing Stephenson *v.* Stephenson, Cro. Eliz. 195, 1 Siderf. 375, Batchelour *v.* Gage, Cro. Car. 188, Penning *v.* Plat, Cro. Jac. 383, Boswall *v.* Rawstorne, Cro. Jac. 537, 1 Lutw. 535, Cooker *v.* Child, 2 Lev. 75, Comyns's Digest, *Pleader* (E. 3). Judgment for the plaintiff.

*784] *WIGENS *v.* COOK. *June* 15.

The declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds. By an order of Nisi Prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have "all the powers as to certifying of a judge at Nisi Prius," the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favour of the plaintiff as to the two authorities referred to in the count in trover, with one farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award:—Held, that, as the event of the award was in favour of the plaintiff, he was entitled to the costs of the cause,—the 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no *verdict*.

THE first count of the declaration stated, that, before the making of the promise thereinafter next mentioned, to wit, on the 3d of November, 1857, a certain person, to wit, one M. W. M'Ghee, had applied to the plaintiff to advance and lend a sum of money, and as a security for the repayment of such advance, and interest thereon, at a future day, had proposed to deposit with the plaintiff certain title-deeds then in the custody of the defendant, relating to hereditaments, tenements, and premises situate in the city of Bath, and known, &c., and to convey the said property to the plaintiff, by way of mortgage,—and of all which the defendant had due notice; and thereupon, in consideration that the plaintiff would make the said advance to the said M. W. M'Ghee, the defendant promised the plaintiff that he had authority to deliver, and that he would deliver, the said deeds to the plaintiff within a reasonable time then next following the making of the said advance; and although the plaintiff duly made the said advance, and all things necessary to entitle the plaintiff to have the said deeds delivered to him as aforesaid existed, and had happened before suit, yet the defendant had not delivered the said deeds or any of them to the plaintiff, nor had he at any time lawful authority to deliver the said deeds as aforesaid, whereby the plaintiff had wholly lost his said money so advanced, and the interest thereof.

The second count stated that, theretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendant, had retained and employed the *defendant as his attorney and solicitor, for *785] fees and reward to him in that behalf, to prepare a transfer and conveyance by way of mortgage, to wit, from the said M. W. M'Ghee to the plaintiff, of the said hereditaments, tenements, and premises, and to ascertain whether the plaintiff might safely advance the said person, to wit, the said M. W. M'Ghee, the money in the first count mentioned,

on the security of the promise and agreement of the said M. W. M'Ghee thereafter to execute a good and effectual transfer or conveyance by way of mortgage of the said hereditaments, tenements, and premises to the plaintiff; and the defendant accepted the said retainer and employment: yet the defendant afterwards, without using due or any care in the premises, as such attorney and solicitor, wrongfully represented and stated to the plaintiff that he might safely make the said advance upon the security aforesaid, whereby the plaintiff was induced to make the said advance on the security aforesaid, when in truth and in fact the plaintiff could not safely make any such advance as aforesaid, that is to say, by reason that the said M. W. M'Ghee had no power, authority, or title to transfer or convey the said hereditaments, tenements, and premises as aforesaid, as the defendant might by the exercise of reasonable care and diligence in the premises have known; and by means of the premises the plaintiff had lost the amount of his said advance, and the interest.

The third count stated that the defendant, by falsely and fraudulently representing to the plaintiff that he might safely make the advance of money in the second count mentioned, on the security of the promise and agreement therein mentioned, induced the plaintiff to make such advance as therein mentioned, when in truth and in fact, as the defendant always well knew, the plaintiff could not safely make the said advance; *whereby the plaintiff had wholly lost his said money, [*786 and the interest thereof.

The fourth count stated that the defendant, by falsely and fraudulently representing to the plaintiff that he had power and authority to deliver over to the plaintiff, upon his making the advance in the first count mentioned, the deeds therein mentioned, induced the plaintiff to make the advance of money therein mentioned, whereas in truth and in fact the defendant had not, as he always well knew, any such power or authority as aforesaid; and by reason thereof, and that the said deeds had never been delivered to the plaintiff, he the plaintiff had wholly lost the said money so advanced, and the interest thereof.

The fifth count was trover for "the aforesaid title-deeds, and the authorities for the delivery thereof to the plaintiff."

The sixth count stated that theretofore, to wit, on the 1st of January, 1858, the said M. W. M'Ghee had committed an offence punishable by law, that is to say, the offence of obtaining from the plaintiff money or valuable security under false pretences, contrary to the statute in that behalf; and the plaintiff had thereupon duly and according to law obtained from one of Her Majesty's justices having authority and jurisdiction in that behalf a warrant for the apprehension and arrest of the said M. W. M'Ghee, in order that she might be dealt with according to law for her said offence,—of all which the defendant had due notice; yet the defendant, without any reasonable cause, wrongfully and maliciously caused and procured and counselled the said M. W. M'Ghee to, and she did accordingly, go and depart from her ordinary place of abode, and conceal herself from the plaintiff, in order to prevent her arrest under the said warrant, and to defeat the ends of justice, and to injure the plaintiff, as thereinafter *mentioned, whereby the [*787 arrest of the said M. W. M'Ghee was delayed and hindered for a long time, and the plaintiff was put to great expense in and about

searching for and causing to be arrested under the said warrant the said M. W. M'Ghee.

The seventh count stated that theretofore, to wit, on the 8th of December, 1857, and after the said M. W. M'Ghee had been apprehended under the warrant in the sixth count mentioned, and whilst she was in custody thereunder in order that she might be dealt with according to law for her said offence, the plaintiff duly and according to law caused to be issued out of the proper office in that behalf two of Her Majesty's writs of subpœna, whereby our Lady the Queen commanded one Adele M'Ghee to appear before certain of Her Majesty's justices having jurisdiction in the premises, at a time and place therein respectively named, as a witness to give evidence on behalf of our Lady the Queen against the said M. W. M'Ghee touching and relating to the said offence, she the said Adele M'Ghee being a material and necessary witness for the plaintiff to support the charge so made against the said M. W. M'Ghee; and the plaintiff was desirous, for the purpose aforesaid, to serve a copy of the said writs of subpœna respectively upon the said Adele M'Ghee,—of all which the defendant had due notice; yet the defendant, without any reasonable cause, wrongfully and maliciously, and in order to defeat the ends of justice, and to hinder the plaintiff from so serving the said Adele M'Ghee with a copy of the said writs of subpœna, and to prevent her attendance as such witness as aforesaid, and to injure the plaintiff as thereinafter mentioned, caused and procured the said Adele M'Ghee to go and depart from her ordinary place of abode, and to conceal herself from the plaintiff, so that he could not serve or cause to be served on her any copy of the said writs of
*788] *subpœna; whereby the plaintiff was hindered in and altogether prevented from effecting the said service, and was put to great expense in searching for and endeavouring to find the said Adele M'Ghee; and the plaintiff said that all things necessary to entitle him to maintain the action existed and had happened before suit.

The defendant pleaded,—first, that he did not promise as alleged.

Secondly, to the first count, so far as the same related to the alleged breach of promise in the defendant not having authority to deliver the said deeds to the plaintiff,—that he had authority, to wit, from the said M. W. M'Ghee.

Thirdly,—to the first count,—that, before and at the time of the making of the said promise in that count mentioned, the said deeds and the property to which the same related belonged to a certain person, to wit, one Charlotte M'Dowell, for whom and as whose agent the defendant had the custody thereof, and not otherwise, and the defendant was induced to make and made the said promise at the request of the plaintiff and of the said M. W. M'Ghee, by reason of and in reliance upon a supposed authority in writing produced to him, purporting to be signed by the said person, authorizing and directing the defendant to deliver the said deeds to or for the said M. W. M'Ghee,—of all which the plaintiff then had notice; and that the said authority was not in fact signed by the said person by whom the same so purported to be signed as aforesaid, but had been and was forged, and that there was not nor ever had been any authority or direction from or by the said Charlotte M'Dowell to deliver the said deeds to or for the said M. W. M'Ghee, whereof the plaintiff and the defendant afterwards, and before any

breach by the defendant of the said promise, had *notice, where- [*789
fore the defendant refused to deliver the said deeds to the plaintiff, as he lawfully might for the cause aforesaid.

Fourthly,—to the first count, that the plaintiff did not make the said advance in that count mentioned to the said M. W. M'Ghee, as in that count alleged.

Fifthly,—to the second and subsequent counts, not guilty.

Sixthly,—to the second count,—a denial of the alleged retainer and employment in that count mentioned.

Seventhly,—to the fifth count,—that the goods in that count mentioned were not, nor were any of them, the plaintiff's, as alleged.

The defendant demurred to the sixth and seventh counts, on the ground that those counts showed no legal damage to the plaintiff in respect of which an action would lie.

The plaintiff joined and took issue upon all the pleas, joined in demurrer to the sixth and seventh counts, and demurred to the second and third pleas, on the ground that the second plea raised an issue only upon an unimportant and immaterial allegation which had no bearing on the merits, and raised an issue on matter not alleged by the plaintiff; and that the third plea was bad because the defendant's promise was absolute, and not conditional on the authority being genuine, and because such plea did not affect the plaintiff with notice until after the contract and after the plaintiff's advance of the money. Joinder.

By a judge's order made at the Bristol Assizes, dated the 26th of August, 1858, the record was withdrawn, and the cause and all matters in difference between the parties referred to a barrister, who was to have all the powers as to certifying of a judge at Nisi Prius,—*the costs of the cause to abide the event of the *award*, and the costs of the [*790
reference and award to be in the discretion of the arbitrator; and the arbitrator to have full power and authority to dispose of the demurrers.

The arbitrator awarded as follows:—"Whereas the declaration in the said action consists of seven counts, and the pleas of seven pleas, and the sixth and seventh counts and third and fourth pleas have been demurred to as well as pleaded and replied to respectively; and it was upon the hearing of the said reference before me expressly agreed between the said parties that I should have power to deal with the said several counts and pleas demurred to, and with the demurrers, pleas, replications, and subsequent pleadings, &c., relating thereto respectively in any way which I might think right: And whereas there were no other matters in difference between the said parties: Now, I the said arbitrator, having duly weighed and considered the several allegations and proofs brought before me by and on behalf of the said G. C. Wigens and R. A. Cook respectively in pursuance of the said reference, do make and publish this my award in writing of and concerning the premises, that is to say, I order and award that the said several counts and pleas demurred to, and the demurrers, pleas, replications, and subsequent pleadings, &c., relating thereto respectively, be struck out of the record; and, so far as I have authority in the matter, I further order that each party do pay his own costs of and occasioned by the said several pleadings and demurrers, &c., so ordered to be struck out as aforesaid: And I do further award and determine as follows,—As to

the issue raised by the first plea I award and determine that the defendant did not promise as in the first count alleged,—As to the issue raised *791] by the fourth plea, I award and determine that *the plaintiff did make the said advance as in the first count alleged,—As to the issues raised by the fifth plea, I award and determine that the defendant is not guilty of committing the grievances alleged in the second, third, and fourth counts, or any or either of them; that he is not guilty of the alleged conversion of the title-deeds in the fifth count complained of; but that the defendant is guilty of the conversion of the two authorities in the fifth count mentioned, as in that count alleged,—As to the issue raised by the sixth plea, I award and determine that the plaintiff did not employ and retain the defendant as in the second count alleged,—And, as to the issue raised by the seventh plea, I award and determine that one of the said authorities in the fifth count mentioned, that is to say, the authority from the said M. W. M'Ghee to deliver the said title-deeds to the plaintiff, was the plaintiff's, as in that count alleged, and that the remainder of the said goods were not, nor was any of them, the plaintiff's, as alleged; and I assess the damages of the plaintiff in respect of the said conversion by the defendant of the plaintiff's said authority, at one farthing: And, lastly, I order and award that the plaintiff do pay to the defendant the defendant's costs of the reference, to be taxed by the master, and that the plaintiff and the defendant do pay the costs of this my award in equal moieties, and, if either of the said parties shall upon the taking up of this my award, or otherwise, have paid none, that a moiety of the said last-named costs, the sum so paid by him beyond the said moiety, shall be forthwith repaid him by the other party."

Upon taxation, the master ruled that the defendant was not entitled to the costs of the cause, because the plaintiff had recovered damages upon one issue; and that the plaintiff was entitled to no costs, because *792] he had only obtained a farthing damages, and the *arbitrator had declined to certify for costs. The plaintiff having obtained an order to review the taxation,

Cole, in Easter Term last, moved to set aside the order. He submitted that the master was right in holding that neither party was entitled to the costs of the cause; that there could have been no doubt, if the plaintiff had obtained a verdict; and that the arbitrator being by the assent of the parties placed in the position of a jury, the result must be the same as if a verdict had been taken. [BYLES, J.—Lord Denman's Act (3 & 4 Vict. c. 24, s. 2) only applies where there has been a recovery "by the verdict of a jury." These are not mere words of form, because "the judge or presiding officer before whom such verdict is obtained" is to certify.] The arbitrator here had all the powers of a judge as to certifying; and he has declined to exercise his power in this respect. [BYLES, J.—Griffiths *v.* Thomas, 4 D. & L. 109, seems to be very much against you. There, after issue joined in an action on the case for diverting a watercourse, "all matters in difference in the cause" were referred by a judge's order to arbitration; "the costs of the said suit to abide *the event of the award*," but no power was given to the arbitrator to certify under the 3 & 4 Vict. c. 24, s. 2. The arbitrator found for the plaintiff on all the issues, and assessed his damages at 6*d*.; and the master thereupon allowed the plaintiff his full costs: and the

court held that he was right. Coleridge, J., says,—"It is plain that the statute of 3 & 4 Vict. c. 24, s. 2, does not apply in terms, for the plaintiff does not recover his 6*d.* by the verdict of a jury. But it was contended, and I think properly, that the true question turns on the meaning of the submission. It was said, that, as the parties must be taken to have contemplated the bringing themselves within the statute of Gloucester, *so must they also within the recent statute above mentioned, and then, by its operation, the costs were taken away. [*793 There is some difficulty, however, in supposing this, when the action was clearly brought, not for real damages, but to try a right, and yet no power was given to the arbitrator to certify to that effect. It seems to me that the true meaning of the submission is what its words import, that costs, *i. e.* the payment of costs, should follow the event,—*i. e.* the legal event,—of the award; that he in whose favour the decision was should be paid by the other party the costs of the suit. The master, therefore, was right." Your difficulty is, that here there is no verdict, nor anything that is equivalent to a verdict.] It is clear that the parties intended the arbitrator to be in the position of a jury, and to have all the powers of a judge as to certifying. [BYLES, J.—A judge could only certify on the back of the record. The record here is withdrawn.] There is a specific finding of the arbitrator upon each issue. [BYLES, J.—These findings could not be entered upon the record.] In Swinglehurst *v.* Altham, 3 T. R. 138, it was held, that, where a cause has been referred by an order of Nisi Prius, and the costs directed to abide *the event*, that must be taken to mean the *legal event*. Therefore, where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants justified to all the counts except one, under different rights of way, and pleaded not guilty to the whole; and the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found 5*s.* damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator,—it was held that the plaintiff was entitled to no more costs than damages; for, that the arbitrator's award was not tantamount to *a judge's certificate under the 22 & 23 Car. 2, c. 9. In Reid *v.* Ashby, [*794 13 C. B. 897, the first count charged the defendants with injury to the plaintiff's party-wall, by excavating by the side of it, and raising and overloading it. The defendants pleaded,—first, as to the raising and overloading, not guilty by statute,—secondly, as to the residue, payment into court of 30*l.* The plaintiff joined issue on the first plea, and replied damages ultrà to the second. At the trial, a verdict was taken for the plaintiff subject to an award, but no power was reserved to the arbitrator to certify for costs, under the 3 & 4 Vict. c. 24, s. 2. The arbitrator having directed a verdict to be entered for the plaintiff on the first issue, damages 20*s.*, and for the defendant on the second issue,—it was held that the plaintiff was not entitled to costs, having "recovered by the verdict of a jury less damages than 40*s.*" [BYLES, J.—The obvious distinction between that case and the present, is, that there a verdict was taken.]

The court took time to consider; and, on a subsequent day, WILLES, J., observed that they were inclined to let the rule go, but with a strong intimation of opinion that it was not likely to be successful.

Montague Smith, Q. C., and *T. W. Saunders*, now showed cause.—The plaintiff is clearly entitled to costs, unless the statute 3 & 4 Vict. c. 24, s. 2, deprives him of them. That statute, however, only applies where there has been a verdict of a jury or judgment by default. Here, the record was withdrawn; and by the order of reference the costs of the cause were to abide the event of the award, which is in favour of the plaintiff. Griffiths *v.* Thomas is precisely in point. In Cooper *v.* Pegg, 16 C. B. 454 (E. C. L. R. vol. 81), the distinction now contended for was taken by the court. The plaintiff *claims costs here by virtue of the agreement he has entered into. *795]

Cole, in support of his rule.—If there had been a verdict here, it is plain that the plaintiff would not have been entitled to costs. [COCKBURN, C. J.—The plaintiff is only deprived of costs by the statute 3 & 4 Vict. c. 24, s. 2. How do you bring the case within that statute?] Having put the arbitrator in the place of a jury, the plaintiff is estopped from saying there is no verdict. In Spain *v.* Cadell, 9 Dowl. P. C. 745, an action of trespass was referred to arbitration: and by the order of reference the arbitrator was to have the same power to certify as a judge at Nisi Prius: the arbitrator found for the plaintiff with 1*s.* damages, and certified in his award, under the 3 & 4 Vict. c. 24, that the action was brought to try a right besides the mere right to recover damages: and it was held that the certificate was valid, and that it need not be endorsed on the back of the record. Here, the arbitrator is by agreement of the parties put in the place of jury as well as judge: as jury he gives a farthing damages, and as judge he refuses to certify to enable the plaintiff to get costs. [COCKBURN, C. J.—You have made an agreement as to the costs.] For what was the power of certifying given? [BYLES, J.—It might be for many purposes besides that of giving costs. For instance, that a document was proved, which the other side had refused to admit.] If it be put on the ground of agreement, the defendant has succeeded upon six counts and upon a material part of the seventh. He has, therefore, substantially succeeded in the action. [BYLES, J.—I think not: there must be a judgment for the plaintiff, notwithstanding your success.]

COCKBURN, C. J.—I am of opinion that this rule must *be discharged. But for the statute 3 & 4 Vict. c. 24, s. 2, a plaintiff who recovers any damages however small is by the statute of Gloucester (6 Ed. 1, c. 1) entitled to costs. It is urged on the part of the defendant that the effect of the first-mentioned statute is to deprive the plaintiff of costs because he has recovered less than 40*s.* damages, and there is no certificate. The answer given on the part of the plaintiff is, that he rests his claim to costs, not upon the statute, but upon the agreement contained in the order of reference,—that the costs of the cause should abide the event of the award. Now, the "event" must be taken to mean such a finding in favour of one party as will entitle him to a judgment in the cause. The plaintiff has such a finding in his favour here; and, by the agreement into which the parties have entered, the costs must follow. Mr. *Cole* suggests that the clause giving the arbitrator all the powers as to certifying of a judge of Nisi Prius, will be nugatory, unless it is held to include the power of certifying for costs. But, in all probability, this order of reference being in a printed form, that clause was inadvertently left in: or, as my Brother Byles has suggested, there *796]

are other certificates to which the clause might apply, besides the certificate for costs. Independently, however, of this technical view, it is not impossible that the arbitrator may have had in his mind the consequence of awarding the plaintiff a farthing damages, as he gave the costs of the reference and award to the defendant. He might have intended thus to make it a drawn battle as to the costs. This, however, is mere speculation. Having no means of knowing what the learned arbitrator's view was, we should very likely to be running counter to his intentions if we were to interfere. It has been suggested that it might be advisable to refer to the arbitrator. We cannot refer back an award except upon a ground *which we should hold sufficient to set [*797
aside the award for. We must deal with the arbitrator's decision as we find it. The agreement of the parties is, that the costs of the cause shall abide the event of the award; and the event is in favour of the plaintiff. The consequence must necessarily follow.

WILLIAMS, J.—I am of the same opinion. With respect to the case of Griffiths *v.* Thomas, I will only observe, that, although my Brother Coleridge gave an additional reason for his decision which is not applicable here, yet the general ground upon which he proceeded is applicable, viz. that, inasmuch as the reference was before verdict, the case was not within the 3 & 4 Vict. c. 24, s. 2. It is so treated in Cooper *v.* Pegg, 16 C. B. 264, 274 (E. C. L. R. vol. 81). With regard to the power of certifying reserved to the arbitrator, unless it means some different sort of certificate, it is impossible that it could apply to the 3 & 4 Vict. c. 24, s. 2, there being no verdict.

WILLES, J., concurred.

BYLES, J.—I am entirely of the same opinion. The only effect of sending the matter back to the arbitrator would be in all probability to induce him to do that which I am clearly of opinion he has no power to do, viz. to certify. Rule discharged, without costs.

*THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY, LIMITED, *v.* DRAKE. *June* 16. [*798

A lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant:—Held, that the mortgagees had a right to enter and sever the fixtures,—it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender.

THE first count of the declaration was trover for goods; the second was for wrongfully depriving the plaintiffs of the use and possession of divers goods and fixtures of the plaintiffs in and affixed and fastened to a certain dwelling-house and premises in St. Mary Axe; and the third was for seizing and taking certain goods and fixtures of the plaintiffs in and affixed and fastened to the said house and premises in the said second count mentioned.

The defendant pleaded, not guilty, and a traverse that the several goods and fixtures in the several counts mentioned were the goods and fixtures of the plaintiffs. Issue thereon.

The cause was tried before Crowder, J., at the sittings in London

after last Trinity Term, when the following facts appeared in evidence:—One Robinson, who was tenant of the premises in question (an eating-house in St. Mary Axe) under a lease of which seven years were unexpired, on the 4th of September, 1857, borrowed a sum of money of the plaintiffs, giving them by way of collateral security a bill of sale upon all his furniture and effects upon the premises, including certain tenant's fixtures. The bill of sale contained an absolute assignment of all the goods and effects therein comprised, subject to a proviso making the same void if Robinson should repay the money borrowed by certain instalments; and also an agreement, that, in case default should be made in payment of the money, or if, amongst other things, the said goods and effects should be distrained for rent, it should be lawful for the *799] plaintiffs to enter into and upon the premises, or *wherever else the said goods and effects should be, and to receive and take into their possession and thenceforth to hold to the same, &c. Default having been made by Robinson, the plaintiffs, by one Priest, on the 30th of March, 1858, entered upon the premises for the purpose of making a seizure, but found that the landlord had already distrained for arrears of rent, and that his broker was in possession. Priest, however, claiming the fixtures, left a man also in possession; but the fixtures were not severed.

On the 8th of March, 1858, Robinson had given his landlord an authority to distrain the fixtures; and on the 5th of April he made a formal surrender of the term to him. A fresh lease was afterwards granted by the landlord to Drake,—the tenant's fixtures which had formerly belonged to Robinson still remaining upon the premises unsevered from the freehold. The plaintiffs made a formal demand of the fixtures upon the defendant, who declined to give them up, saying that he had purchased them from Robinson.

Upon these facts being proved, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for 23*l.* 2*s.*, if the court should be of opinion that they were under the circumstances entitled to recover in respect of the fixtures.

Atherton, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.—He submitted that it was not competent to Robinson by surrendering his term to his landlord to derogate from the grant he had previously made to the plaintiffs.

Day showed cause.—Fixtures have no legal independent existence whilst attached to the freehold: consequently, the defendant, who is in *800] possession of *the premises as tenant, and has bonâ fide purchased the fixtures without notice of the plaintiffs' claim, is entitled to retain them: Colegrave *v.* Dias Santos, 2 B. & C. 76 (E. C. L. R. vol. 9), 3 D. & R. 255 (E. C. L. R. vol. 16); Ex parte Gawan, in re Barclay, 25 Law J., Bankrupt y, 1. There is no such thing known to the law as a grant of fixtures independently of the possession of the premises to which they are annexed. The only way such an instrument could operate would be by way of license to enter and remove them. [COCKBURN, C. J.—The tenant assigns the fixtures to the plaintiffs before he surrenders his lease to the landlord. Supposing he had not surrendered, he would have had an undoubted right to remove the fixtures, and so would his assignees. It may be that it was not competent to the grantor

by the surrender to derogate from his grant.] The first count is clearly not sustainable, because it will be conceded that trover will not lie for fixtures.(*a*) The second count is also in substance a count in trover. And there is no evidence to sustain the third count, which is trespass. [CROWDER, J.—The evidence was that the defendant was using the fixtures every day in his business of an eating-house keeper.] At the date of the execution of the conveyance, it was contemplated that the fixtures should for a time remain parcel of the soil, to be removed only upon a contingency. [WILLIAMS, J.—Suppose tenant for years sells growing crops, and then surrenders his term, would not the vendee be entitled to go upon the land and take the crops?] Growing crops are subject to very different incidents from fixtures: the tenant has a right to go in and sever them after the expiration of his term. [WILLIAMS, J., referred to Hallen *v.* Runder, 1 C. M. & R. 266.†] That was put on the ground of a sale of a right to remove the fixtures. Here, there is no count for preventing the plaintiffs from removing *these fixtures. [WILLES, J.—You say there is a grant here of a right to go in and take the fixtures. The tenant, having granted that right, surrenders his term. Why should not the right remain? In Co. Litt. 338 b, it is said, that, "if tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he cometh in under the charge." If that law be applicable here, the plaintiffs would have a right to come in at any time and take the fixtures.] This is a mere personal license, like that in Howes *v.* Ball, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288 (E. C. L. R. vol. 17). [WILLES, J.—Roffey *v.* Henderson, 17 Q. B. 574, seems to show that such an authority if by deed would be good.] There is no authority to show that it is competent to a tenant for years to confer on a third party an estate in the fixtures independent of the soil. The case of Keppell *v.* Bailey, 2 Mylne & K. 517, is a strong authority to show the disinclination of the courts to countenance the annexation of such burthens as these to estates. The Monmouthshire Canal Act provided, that, upon auxiliary railroads made by private individuals under the authority of the act, the tolls should not exceed the rate charged by the canal company, which, for the articles of limestone and iron-stone, was restricted to 2½*d.* a ton per mile; and it also empowered the canal company, by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5*d.* a ton per mile might be charged. Certain landowners and owners of iron-works, and, among others, the lessees of the Beaufort Works, formed a joint stock company, and, under the powers given by the act, constructed a railroad connecting a lime-quarry called the Trevil Quarry with the several iron-works and with the railroads of the canal company. In the partnership deed of the railroad company, the lessees of the Beaufort Works covenanted, for themselves, their *heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns, should occupy the Beaufort Works, to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also all the iron-stone from the said mines to the said works, along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same. Upon a bill filed by the shareholders of the railroad

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(*a*) Roffey *v.* Henderson, 17 Q. B. 574 (E. C. L. R. vol. 79).

to enforce this covenant against a person who had purchased the Beaufort Works, with notice of the partnership-deed,—it was held that the covenant did not run with the land, so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected with the notice, give the covenant a more extensive operation than the law allowed to it. The Lord Chancellor (Lord Brougham), in delivering the judgment of the court, said,—"There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. In respect of possession, the property may be in one, while the reversion is in another; in respect of interest, the life-estate in one, the remainder in tail in a second, and the fee in reversion in a third. So, in respect of enjoyment, one may have the possession and the fee-simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as, a right of way upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was *afterwards granted by
*803] him with the benefit, while the other was left subject to the burthen. All these kinds of property, however, all these holdings, are well known to the law, and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow: but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But, if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for, there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised." And *this dictum is quoted with approbation in Day-
*804] rell *v.* Hoare, 12 Ad. & E. 356 (E. C. L. R. vol. 40). [WILLES, J.—And also in a more recent case in this court,—Ackroyd *v.* Smith, 10 C. B. 164 (E. C. L. R. vol. 70).]

J. Brown (with whom was *Lush*, Q. C.), in support of the rule.—The

property in these fixtures vested in the plaintiffs from the moment default was made by Robinson: and the surrender of the term by him does not affect them; but, so far as they are concerned, the original term has continuance for the purpose of supporting the grant or assignment to them. In Doe d. Beadon *v.* Pyke, 5 M. & Selw. 146, it was held, that, although a surrender of a life-estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it. Therefore, where J. B. C., having a lease for three lives of a manor where by the custom the copyholds were demisable by copy, made a lease for years by indenture of a copyhold tenement to the defendant's father, and afterwards the estate of J. B. C. was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff,—it was held, that, inasmuch as the lease to the defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid the same during the continuance of one of the three lives in the lease to J. B. C., notwithstanding the surrender of that estate. Lord Ellenborough, in giving judgment, there says: "The conveyance to the bishop, as between him and the conveying parties, operated as a surrender of the lease of 1751; and it was urged that such a surrender would annihilate all interests derived under that lease. No authority, however, which goes the *length of that position was adduced; and we consider it as clear law, that, though a sur- [*805 render operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons who at the time of the surrender had rights which such extinguishment would destroy, and that as to them the surrender operates only as a grant, subject to their right, and the interest surrendered still has for the preservation of their right continuance. This is established by the plain and unequivocal language of Co. Litt. 338 b, and other authorities; and the law would work great injustice were it otherwise. Lord Coke, after noticing, that, as between the parties to a surrender, the estate is absolutely drowned, says, 'But, having regard to strangers who were not parties or privies thereunto (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender), the estate surrendered hath in consideration of law a continuance:' and, amongst other instances, he puts this,—'If tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he (that is, the surrenderee), cometh in under the charge.' So that, though the life-estate out of which the rent is granted, is, as between the surrenderor and surrenderee, extinct and gone, yet, as between the surrenderee and the grantee of the rent-charge, it has continuance so as to support the rent-charge till the original tenant for life dies. Davenport's Case, 8 Co. Rep. 144 b, supplies another instance still nearer the present case. Tenant for fifteen years of a rectory, to which the advowson of a vicarage was appendant, granted to the plaintiff the next presentation to the vicarage, if it should become vacant during the term of years which the grantor then had in the rectory. The grantor afterwards surrendered his term to the reversioner, after which the vicarage *became void; and in quare impedit the ques- [*806 tion was whether the surrender, which, as between the parties

had put an end to the term of years, had extinguished the plaintiff's right, and it was resolved that it had not; because the term for the benefit of the grantee has to some respect continuance, although in rei veritate it is determined. There are other authorities to the same effect; and none the other way." That is undoubted law to this hour. Pleasant d. Hayton *v.* Benson, 14 East 234, lays down the same principle. It was there held, that, where tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that anything short of a regular notice to quit from the landlord to his immediate tenant would after such sub-letting have determined the tenancy in the whole); yet the landlord could not entitle himself to recover against the sub-lessee (there being no privity of contract between them), upon giving half a year's notice to quit in his own name, and not in the name of the first lessee; for, as to the part so underlet, the original tenancy still continued undetermined. Bayley, J., says: "Hayton made Wilkes tenant from year to year, by which Wilkes acquired a legal interest in the premises, not determinable by Hayton except upon giving him six months' notice to quit. But, so long as that term continued, the lessee had a right to act on it, and to grant to third persons the interest which he himself had in it. And I take it that the surrender of the lessee would not destroy any interest which a stranger claiming under him had acquired in the term in the mean time." And he refers to the passages in Co. Litt. 338 b, already cited. And see note (*m*) to Thursby *v.* *Plant, 1 Wms. Saund. 235 *c*, and Pike *v.* Eyre, 9 B. & C. 909 (E. C. L. R. vol. 17), 4 M. & R. 661. [CROWDER, J.—Does the right or interest spoken of in these cases refer to anything but a term?] There is no authority for so limiting it. Fixtures are often of infinitely greater value than the premises to which they are attached: and they are frequently made the subject of mortgage,—as, for instance, salt-pans and mining machinery. [COCKBURN, C. J.—It may be that the grant here is of the right to take away the fixtures at the end of the term. The question is whether a mere tenant for years can by assigning the fixtures prevent himself from afterwards bonâ fide surrendering his term to his landlord.] The grant is of the property in the fixtures, coupled with a right of removal. It is said that this is not a grant, but a mere license,—a *personal* license. But Robinson professes to assign all his interest in these fixtures to the plaintiffs. [COCKBURN, C. J.—Has the tenant a *property* in these fixtures whilst they are attached to the soil? WILLIAMS, J., referred to the 14 & 15 Vict. c. 25, s. 3, which enacts, "that, if any tenant of a farm or lands shall, after the passing of the act, with the consent in writing of the landlord for the time being, at his own costs and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in or permanently fixed to the soil, so as the tenant making any

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such removal do not in anywise injure the land or buildings belonging to the landlord, *or otherwise do put the same in like plight and [*808
condition, or as good plight and condition, as the same were in before the erection of anything so removed: Provided nevertheless that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same." That seems to treat the tenant's interest as a mere right of removal, and not as property. It is difficult to say that the decision in Hallen *v.* Runder, 1 C. M. & R. 266,† is law, if the tenant has a property in fixtures.] The expression which is found in some of the older cases, that fixtures unsevered at the end of the term become "a gift in law to the landlord," is certainly inconsistent with the absence of property in the tenant. [COCKBURN, C. J.—It may mean a gift of the right of removal. CROWDER, J.—Suppose the tenant (Robinson) had been guilty of a forfeiture the day after the assignment to the plaintiffs, what would have been the position of the latter?] It is not contended that the plaintiffs have an absolute indefeasible title; but that the surrender, as against them, operates no further than if the tenant had assigned his interest in the term to a third person. The subject was much discussed in Muskett *v.* Hill, 5 N. C. 694 (E. C. L. R. vol. 35), 7 Scott 855, *where it was held that a license to [*809
search for and raise metals, and also to carry them away and convert them to the licensee's own use, passed an interest which was capable of being assigned. [CROWDER, J.—Gibbs, C. J., in Lee *v.* Risdon, 7 Taunt. 188 (E. C. L. R. vol. 2), 2 Marsh. 495 (E. C. L. R. vol. 4), treats the tenant's right as a simple privilege to remove the fixtures during the term: WILLIAMS, J.—With the qualification mentioned by Parke, B., in Hallen *v.* Runder. COCKBURN, C. J.—The question is whether the grant is not subject to the contingency of the grantor's term being determined quâcunquo modo.] It surely cannot be subject to the contingency of his making a subsequent grant, or a surrender to his landlord, in derogation of his former grant. It is impossible in principle to distinguish a grant or assignment of fixtures by a tenant from any other interest which he has by grant carved out of his term. In Sheppard's Touchstone, 7th edit., by Preston, it is said, that, "If one that hath a lease for life or years of the manor to which an advowson is appendant, grant the next avoidance that shall happen during the lease, or grant a rent out of the manor, and then surrender the manor, so that his estate is gone; in this case, notwithstanding, the grant of the next avoidance and of the rent doth continue good; and the grantee shall enjoy it according to the grant, as long as the estate that is surrendered should have had continuance [if not surrendered: 3 Prest. Convey. 574. For, the grantor cannot by his act prejudice those who claim under him, though he may think proper to give up his own estate. So, if the lessor

had made an underlease, reserving rent, and had afterwards surrendered the original lease, or there had been a merger of his estate, the underlease should continue in force; but, as the reversion is gone, the remedy for the rent, conditions, covenants, &c., is extinguished: Webb *v.* Russell, 3 T. R. 409; 3 Prest. Convey. 129. And it may be observed
*810] that the rule cessante statu primitivo cessat et derivativus applies only when the original estate determines by limitation, or is defeated by a condition. It does not apply when the owner of the estate does any act which amounts to an alienation or transfer, though such alienation or transfer produces an extinguishment of the original estate"]. [WILLES, J.—Mr. Preston is there speaking of a surrender of an *estate*.] If any difficulty arises from the form of action, that may be obviated by an amendment. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the court:—

The question in this case is, whether, if a lessee mortgages tenants' fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them.

The principles of law applicable to this point are well settled: the difficulty lies in the application of them. It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant: and it is plain that the right of his assignee can extend no further. On the other hand, it is laid down, as to a surrender, in Co. Litt. 338 b, that, "having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching *any right or interest* they had before the surrender) the estate surrendered hath in consideration of law a continuance." This doctrine has been fully adopted and acted on in modern cases,—as, in Pleasant *v.* Benson, 14 East 234; Doe d. Beadon *v.* Pyke, 5 M. & Selw. 146; Pike *v.* Eyre, 9 B. & C. 909 (E. C. L. R. vol. 17), 4 M. & R. 661.(*a*)

*811] *The question is thus reduced to the inquiry whether the mortgagee's right to sever the fixtures from the freehold is a "right or interest" within the meaning of this rule of law. And we are of opinion that it is. Certainly it is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. But we think that it is so far connected with the land that it may be considered a right or interest in it, which if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender.

We are, therefore, of opinion that the plaintiffs may maintain an action against the defendant for preventing them from exercising their right to sever, and may in such action recover the value of the fixtures as severed. Rule absolute.

(*a*) And see Ex parte Bentley, 2 M. D. & De Gex 591.

The surrender by a tenant to his landlord of his lease, will not defeat or annul the previously acquired rights of his sub-tenants: McKenzie *v.* The City of Lexington, 4 Dana 130. See Baker *v.* Pratt, 15 Illinois 571; Pigott *v.* Stratton, 29 L. J. Ch. 1; 1 Law Times N. S. 111; 6 Jur. N. S. 1290; affirming S. C. 1 Johnson 341: and in such a case, when necessary for the protection of the sub-tenant, he may obtain an injunction: Pigott *v.* Stratton, *ut supra*.

PHILLIPS *v.* BALL and Others. *May* 27.

According to the custom of a manor, a grant by copy of court-roll "to A., B., and C., for their lives and the life of the longest liver of them, successively, according to the custom of the manor," gave the first taker an absolute power of disposing of the estate in his lifetime:—Held, a good custom; and that it was sufficiently proved by showing four instances of surrender and admittance of the person first named, in exclusion of the others.

An alienation of the fee by the lord of a manor does not affect the rights of the copyhold tenants.

Therefore, where the lord had granted the inheritance of a portion of the manor to A.,—Held, that it was competent to a copyhold tenant to dispose of his interest to the grantee by an ordinary common-law conveyance; the customary mode of conveyance being rendered impossible by the act of the lord.

THIS was an ejectment brought for the recovery of three messuages and three closes of land in the parish of St. Austell, in the county of Cornwall, formerly copyholds of the manor of Treverbyn Courtenay, and parcel of the possessions of the Duchy of Cornwall.

The cause was tried before Channell, B., at the last *Summer Assizes at Bodmin. It appeared that down to the year 1799, [*812 the premises in question formed part of the copyhold tenements of the manor of Treverbyn Courtenay; that, by the custom of the manor, the copyhold tenements were held by grant from the lord for the lives of three persons, who take successively in the order in which their names appear on the court-rolls and admittance: and that the widow of any person dying tenant for his life of any tenement, is entitled to hold the same during her widowhood, or so long as she shall continue chaste.

The following entries appeared upon the court-rolls of the manor, which are in the custody of the Duchy of Cornwall:—

"At a court held of the said manor on the 11th of November, 1762, came Ann Wallis and Richard Williams the younger, by the nomination of John Wallis, and took of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in the possession or occupation of the said John Wallis or his under-tenants, To hold to Ann Wallis and Richard Williams the younger for the lives of the longest liver of them successively in reversion of the said John Wallis, according to the custom of the said manor, at the old yearly rent of 8*s.* 6*d.*; and they gave to the lord for such estate and entry in the premises to be had the sum of 15*l.*: and thereon Ann Wallis and Richard Williams the younger were admitted tenants in reversion, according to the custom of the said manor; and their fealties were respited until their particular estates happen."

By a warrant under the hand of Lord North, dated the 26th of February, 1779, duly enrolled,—reciting that Richard Williams, by his petition, set forth that he holdeth for his own life by the aforesaid copy of *court-roll of the 11th of November, 1762, the two small tenements, with the appurtenances, in Austell, containing three acres [*813 and a quarter of land, part of the manor of Treverbyn Courtenay, and parcel of the annexed Duchy of Cornwall, in the county of Cornwall, at the yearly rent of 8*s.* 6*d.*, and pray that the same may be granted by copy of court-roll for two such lives as the petitioner, Richard Williams, should name, in reversion of himself, for a moderate fine, at the same old rent; which petition was referred to the surveyor-general of the

Duchy of Cornwall, who had reported that he was of opinion a copy for two lives to be named by the said Richard Williams in reversion of himself might be granted of the said two tenements in Austell for a fine of 17*l.* 10*s.*, reserving the old rent of 8*s.* 6*d.* per annum,—Upon consideration of such petition and report, the said Lord North did authorize the steward of the said manor to grant, by copy of court-roll of the said manor, the said two tenements in Austell, with the appurtenances thereto belonging, "to the said Richard Williams, for two such lives as he should name," to hold to such two persons so by him to be nominated, for their lives successively, according to the custom of the said manor, in reversion of the said Richard Williams, for a fine of 17*l.* 10*s.*, reserving the yearly rent of 8*s.* 6*d.*

"At a court held of the said manor on the 6th of August, 1779, came Richard Williams and took of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in possession of Tristram Carlyon, gentleman, since of John Wallis, and now of Richard Williams, or his under-tenants, for the lives of Richard, son of Richard Williams, aged about nine months, and Mary, daughter of said Richard
*814] Williams, aged about three years, by nomination *of him the said Richard Williams the father, To hold to the said Richard Williams and Mary Williams for their lives and the life of the longest liver of them, successively, in reversion of him the said Richard Williams, according to the custom of the said manor, by and under the old yearly rent of 8*s.* 6*d.*; and they gave for such estate and entry on the said premises to be held the sum of 17*l.* 10*s.*"

In 1784, Richard Williams died, having by his will devised the copyhold tenement to his widow, who duly surrendered, and took a re-grant from the lord. This surrender and admittance were as follows:—

"At a court held of the said manor on the 19th of January, 1786, came Elizabeth Williams, widow of Richard Williams, deceased, one of the copyhold tenants of said manor, and surrendered into the hands of the lord two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, formerly in the possession of Tristram Carlyon, gentleman, deceased, afterwards of John Wallis, also deceased, since of Richard Williams, deceased, and then of the said Elizabeth Williams, his widow, and which she is entitled to hold for a widowhood, and a copy of court-roll thereof, dated the 10th of November, 1762, granted to said Richard Williams, deceased, and Ann Wallis, also deceased, for their lives, and one other copy of court-roll of 6th August, 1779, granted to Richard Williams, deceased, for the lives of Richard Williams, his son, then aged about nine months, and Mary Williams, his daughter, then aged about three years, by the nomination of Richard Williams the father; and all the estate, &c., of the said Elizabeth Williams: And whereupon, at same court came Elizabeth Williams, and took of the lord of said manor, by delivery of the steward, by virtue of a warrant under the hands of Henry Lyte, Thomas Erskine, and Arthur Piggott,
*815] *Esquires, bearing date the 27th of July, 1785, to the steward directed, the said two small tenements or cottages, with the appurtenances, in Austell, containing about three acres and a quarter of land, part of the said manor, then in possession of the said Elizabeth

Williams or her under-tenants, for the lives of Joseph Phillips, late of Redruth, in the said county, but then of St. Austell, aged about thirty years, Richard Williams, then aged about seven years, and Mary Williams, then aged about ten years, son and daughter of said Richard Williams, deceased, successively, according to the custom of said manor, To hold the said tenements, with the appurtenances, to the said Joseph Phillips, Richard Williams, and Mary Williams, for their lives and the life of the longest liver of them, successively, according to the custom of the said manor, by and under the old yearly rent of 8*s.* 6*d.*: And *she* gives to the lord of the said manor for such estate and entry in the said premises to be had the sum of 24*l.* 7*s.*; and thereupon the said Elizabeth Williams is admitted tenant; and the said Richard Williams and Mary Williams are admitted tenants for their lives successively, according to the custom of the said manor; and their fealties are respited until their particular estates shall respectively happen."

Shortly after this, viz. on the 29th of January, 1786, Mary Williams married Joseph Phillips. She died in 1792. The following entry appears on the court-rolls under the date of 27th September, 1792:—

"At a court held of the said manor on the 27th of September, 1792, the homage present the death of Elizabeth Phillips, wife of Joseph Phillips, who died tenant for her own life of two small tenements or cottages, with the appurtenances, in St. Austell, containing about three acres and a quarter of land, part of said manor, and that the said Joseph is entitled to the *same for his own life, being the next life named in the court-roll of this manor; and he is admitted and taken tenant for the same." [*816

The next entry which appeared upon the court-rolls with reference to these premises, was as follows:—

"At a special court held of the manor of Treverbyn Courtenay, in the county of Cornwall, on the 15th of April, 1797, Joseph Phillips, of St. Ewe, in the county of Cornwall, one of the copyhold tenants of the said manor, surrendered into the hands of the Prince of Wales and Duke of Cornwall, lord of the said manor, All that dwelling-house and bricklet, then in the occupation of Thomas Towsey, together with one field in Kiln Lane, containing about half an acre of land, then also in the occupation of Thomas Towsey, All that other dwelling-house adjoining the said first-mentioned dwelling-house, then in the occupation of Edward Hennah, One other field in Kiln Lane, then in the occupation of Richard Hennah, containing about an acre and a quarter, And one other field in Tregonissey Lane, and then in the occupation of William Dawe, containing about one acre,—all which said premises are situate in the parish of St. Austell aforesaid, and are parcels of the said manor, and held by the said Joseph Phillips by copy of court-roll thereof of the 19th of January, 1786, granted to Elizabeth Williams, widow, then deceased, for the lives of the said Joseph Phillips, Richard Williams, and Mary the wife of Alexander Truscott the younger, late Mary Williams, spinster, And all the estate, &c., which the said Joseph Phillips then had or could have in said premises by virtue of said copy court-roll, or by any other ways or means whatever: And, thereupon, at the same court came again the said Joseph Phillips, and took of the said lord of the said manor, by delivery of the steward of the said manor, all and singular the *aforesaid premises, with the appurtenances, for the lives of the said Joseph [*817

Phillips, Joseph Phillips, his son, and Eliza Phillips, his daughter, successively, according to the custom of the said manor, To hold said premises to said Joseph Phillips, Joseph Phillips, his son, and Eliza Phillips, his daughter, for their lives and the longest liver of them, successively, according to the custom of the said manor, by and under the rent therein mentioned, and by all heriots, customs, and services due and of right accustomed; and he gave to the lord of the said manor for such estate and entry in the said premises to be had the sum of 80*l.*; and thereupon said Joseph Phillips was admitted tenant and did his fealty; and the said Joseph Phillips, his son, and Eliza Phillips, his daughter, were admitted tenants for their lives, successively, according to the custom of the said manor, and their fealties were respited until their respective estates should respectively happen."

The plaintiff, Joseph Phillips, the son, claimed under this last-mentioned admittance.

By the certificate of the surveyor-general of the Duchy of Cornwall, bearing date the 6th of July, 1799, it is certified, that, by virtue of a warrant from the council of His Royal Highness the Prince of Wales and Duke of Cornwall, the said surveyor-general had contracted and agreed with William Flamank for the sale to the said William Flamank of (inter alia) All those two houses situate in the market-place in the town of St. Austell, then or late in the occupation of Thomas Towsey and George Tullach, and all that field, containing one rood or thereabouts, situate in Kiln Lane, then or late in the occupation of the said Thomas Towsey, And all that other field in Kiln Lane aforesaid, containing 1*a.* 2*r.* 18*p.*, or thereabouts, then or late in the occupation of Richard Hennah, clerk, And all that field lying in Tregonissey Lane, *818] then or *late in the occupation of William Dacre, and containing 1*a.* 0*r.* 23*p.*, or thereabouts, which said two houses and three several fields are parcel of the said manor of Treverbyn Courtenay, and were then held by copy of court-roll, bearing date the 15th of April, 1797, for the lives of Joseph Phillips, Joseph Phillips the younger, his son, and Eliza Phillips, his daughter, under the yearly rent of 5*s.* 10*d.*, except as therein excepted, at or for the price of 1130*l.*, to be paid by the said William Flamank within forty days from the date of the now certificate of contract into the Bank of England, and carried to the account of the Duchy of Cornwall; and from and immediately after the payment of the said sum in manner aforesaid, and the enrolment of the now stating certificate, the receipt for the said purchase-money, in the office of the auditor of the Duchy of Cornwall, and thenceforth for ever, the said William Flamank, and his heirs, successors, or assigns, should be adjudged, deemed, and taken to be in the actual seisin and possession of the said dwelling-houses or tenements, lands, and premises so by him purchased (except as before excepted), and should hold and enjoy the same peaceably and quietly in as full and ample manner to all intents and purposes as His said Royal Highness the Prince of Wales, his heirs or successors, Dukes of Cornwall, might or could have held and enjoyed the same, by force and virtue of an act of parliament passed in the 38 G. 3, intituled "An act for making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money then charged in Great Britain as a land-tax for one year from the 25th of March, 1798."

By indenture dated the 30th of December, 1803, between Joseph Phillips of the one part, and the said William Flamank of the other part,—reciting the before-stated copy of court-roll of the 15th of April, 1797; *also reciting that the reversion, freehold, and inheritance [*819 of the said dwelling-houses, fields, closes, or parcels of land and premises so granted to the said Joseph Phillips as aforesaid, together with other hereditaments, were, on or about the 6th of July, 1799, purchased by the said William Flamank under and by virtue of the 38 G. 3, c. 60, and the same had been accordingly conveyed to the said William Flamank and his heirs, pursuant to the directions of the said act; also reciting that the said William Flamank had contracted and agreed with the said Joseph Phillips (party thereto) for the absolute purchase and surrender of the said dwelling-houses, fields, or closes of land and premises so granted to him as aforesaid for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor, at or for the price or sum of 1000*l.*,—it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of 1000*l.* to the said Joseph Phillips paid by the said William Flamank, he the said Joseph Phillips did surrender and yield up unto the said William Flamank and his heirs, all and singular the aforesaid dwelling-houses, fields, closes, or parcels of land, and all and singular other the premises so granted to the said Joseph Phillips for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor as aforesaid, together with the aforesaid copy of court-roll, and all the estate, right, title, use, trust, benefit, property, claim, and demand whatsoever, as well legal as equitable, of him the said Joseph Phillips of, in, to, or out of the said dwelling-houses, fields, closes, or parcels of land and premises, and every or any of them, and every or any part thereof respectively. To hold unto the said William Flamank and his heirs, *to the end and intent that the aforesaid estate and [*820 interest therein granted to the said Joseph Phillips for the lives of himself and the said Joseph Phillips and Eliza Phillips, his children, and the life of the longest liver of them, successively, according to the custom of the said manor as aforesaid, might be merged and extinguished in the reversion, freehold, and inheritance thereof: And the said Joseph Phillips did thereby covenant that he had in himself good right, full power, and lawful and absolute authority to surrender the said dwelling-houses, fields, closes, or parcels of land and premises mentioned and intended to be thereby surrendered unto the said William Flamank and his heirs in manner aforesaid, and according to the true intent and meaning of that indenture; and also that he the said William Flamank and his heirs should or lawfully might from time to time and at all times thereafter peaceably and quietly enter into, have, use, occupy, possess, and enjoy the said dwelling-houses, fields, closes, or parcels of land and premises mentioned and intended to be thereby surrendered, and receive and take the rents, issues, and profits thereof to and for his and their own proper use and benefit, without the lawful denial, eviction, suit, trouble, interruption, disturbance, claim, or demand of the said Joseph Phillips, and Joseph Phillips and Eliza Phillips, his children, or either of them, or any person or persons lawfully claiming by, from, under, or

in trust for him or them respectively; And further, that he the said Joseph Phillips, his executors and administrators, and also the said Joseph Phillips and Eliza Phillips, his children, and each or either of them, and all and every other person or persons having or lawfully claiming any estate, right, title, trust, or interest, either at law or in equity, of, in, to, or out of the said dwelling-houses, fields, closes, or
*821] parcels of land, hereditaments, and premises *mentioned and intended to be thereby surrendered, or either of them, or any part thereof respectively, by, from or under, or in trust for them respectively, should and would from time to time and at all times thereafter, at the request and expense of the said William Flamank or his heirs, make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, conveyances, and assurances in the law whatsoever for the further, better, more perfect, and absolute surrendering and assuring of the same dwelling-houses, fields, closes, or parcels of land and premises, and every or any of them, and every or any part thereof respectively, unto the said William Flamank or his heirs.

Flamank continued in possession of the premises under this conveyance until his death in 1810; and the defendants claimed under his devisees.

Joseph Phillips died in 1825. Mary Williams (one of the lives mentioned in the admittance of 1786) died in 1809; the other, Richard Williams, died in 1826, leaving a widow, Catharine Williams, who died in March, 1857.

The plaintiff, Joseph Phillips, the son, claimed to be entitled in remainder under the admittance of the 15th of April, 1797,—insisting that his title did not accrue until the death of Catherine Williams in 1857.

On the part of the defendants, it was contended, that, according to the custom of the manor of Treverbyn Courtenay, a grant by copy of court-roll "to A., B., and C., for their lives and the life of the longest liver of them, successively, according to the custom of the said manor," gave the first taker an absolute power of disposing of the estate in his lifetime; that, in the absence of an exercise of this power by the first taker, the other cestui qui vies would take in succession, as a kind of
*822] special occupant; and that Joseph Phillips, *the father, the first taker under the admittance of the 15th of April, 1797, had duly exercised this power by the conveyance which he made to Flamank in 1803.

The following instances, taken from the court-rolls of the manor (which commenced in the year 1600), were adduced by the defendants as evidence of the custom relied on by them, of a right in the first taker to deal with the estate:—

16th June, 1709. Admittance of Thomas Hext and Francis John Hext, to the reversion of a tenement called Grieth, otherwise Grey, then in the tenure of Samuel Hext during his life, To hold the said reversion to the said Thomas Hext and Francis John Hext for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor, when (after the death, surrender, or forfeiture of the estate of the aforesaid Samuel) the same reversion should happen.

14th August, 1725. Surrender by Henry Hawkins of a tenement

held by him "during his life, with the widowhood incident," and admittance of the said Henry Hawkins, Thomas Hext, and John Michell, To hold to the said Henry Hawkins, Thomas Hext, and John Michell, "for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor."

20th September, 1734. Surrender by Thomas Hext of a messuage in St. Austell, held by him by copy of court-roll of the 16th of June, 1709, for his life and the life of Francis John Hext, and the life of the longest liver of them, successively, according to the custom of the manor; and admittance of Thomas Hext, Francis John Hext, and John Hext, To hold to them "for the term of their lives and the life of the longest liver of them, successively, according to the custom of the manor."

*28th August, 1761. Surrender by Grace Tremayne, widow, who was stated to hold by copy of court-roll of the 14th August, 1725, "for the lives of Thomas Hext and John Michell, and the life of the longest liver of them, successively, according to the custom of the manor;" and admittance of her eldest son Lewis Tremayne, Henry Hawkins Tremayne, her youngest son, and Grace Tremayne, her daughter, To hold to them "for their lives and the life of the longest liver of them, successively, according to the custom of the manor." [*823

Same date. Surrender by Grace Tremayne of other tenements, and admittance of the same parties.

11th May, 1782. Admittance of Francis Polkinhorne(a) to a tenement in St. Austell, containing about an acre and a half of land, formerly in the possession of John Williams, afterwards of Phillipa Williams, his widow, and then of the said Francis Polkinhorne or his under-tenants, for the lives of Arthur Kempe, then aged 38 years, and Charles Trevanion Kempe, his son, then aged 4 years, successively, according to the custom of the said manor, "To hold said tenement and premises, with their appurtenances, to said Arthur Kempe and Charles Trevanion Kempe, by the nomination as aforesaid of the said Francis Polkinhorne, for their joint lives successively, in reversion of the said Francis Polkinhorne, according to the custom of the said manor."

14th February, 1785. Surrender by William Flamank of a tenement in St. Austell, containing about an acre and a half of land, "formerly in the possession of John Williams, deceased, afterwards of Francis Polkinhorne, then of Arthur Kempe, and now of the said *William Flamank or his under-tenants, and which he was entitled to hold for the lives of Francis Polkinhorne, Arthur Kempe, and Charles Trevanion Kempe, his son, and the life of the longest liver of them, successively, according to the custom of the said manor, by virtue of a copy of court-roll of the 11th May, 1782, granted to the said Arthur Kempe, and by him conveyed to the said William Flamank;" and admittance of William Flamank "for the lives of the said William Flamank, then aged about 46 years, Arthur Kempe, then aged about 41 years, and Charles Trevanion Kempe, son of the said Arthur Kempe, then aged about 7 years, successively, according to the custom of the said manor, To hold the said tenement and premises, with the appurtenances, to the said William Flamank for his life and the lives of the said Arthur Kempe and Charles Trevanion Kempe, and the life of the [*824

(a) Francis Polkinhorne appears to have been deputy-steward of the manor.

longest liver of them, successively, according to the custom of the said manor."

It was further contended on the part of the defendants, that, assuming the evidence not to be sufficient to establish the custom relied on, the plaintiff's title, if any, accrued on the death of Richard Williams in 1826; and consequently that his claim was barred by the statute of limitations.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendants to move to enter a verdict for them if the court should be of opinion that the evidence established their case,—the court to be at liberty to draw inferences of fact as a jury.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi accordingly.

*825] *Montague Smith*, Q. C., and *Karslake*, now showed *cause.—The question is, whether the surrender of the first tenant for life operates upon the estates of those who are designated to take in succession. The habendum is not to Joseph Phillips for his life and the lives of the other two persons named, but "to Joseph Phillips, Joseph Phillips his son, and Eliza Phillips his daughter, for their lives and the life of the longest liver of them, successively, according to the custom of the said manor." In Smartle *v.* Penhallow, 1 Salk. 188, by the custom lands were demisable by copy of court-roll to two or three persons for their lives and the life of the survivor, habendum successive sicut nominantur in charta, et non aliter; and it was held good. So, in Right *v.* Bawden, 3 East 260, the form of the grant was, habendum to A. for the lives of B. & C., his grandsons, during the life of either of them longest living, successively, according to the custom, &c. Lord Ellenborough there said: "Without any custom appearing in this manor for the cestui que vies to take the legal estate in reversion, to be sure the words granting the estate to William Bawden, *to hold to him for the lives of Robert and William Bawden*, his grandsons, and the life of the longest liver of them, successively, only conveyed the estate to William Bawden, the grandfather, during the lives of the persons so named. Had such a custom been stated, it might have had the effect of passing the estate to the other persons named: but without it I cannot say that they took the reversionary estate under the words of the copy." In Doe d. Nepean *v.* Goddard, 1 B. & C. 522 (E. C. L. R. vol. 8), 2 D. & R. 773 (E. C. L. R. vol. 16), the custom was in much the same terms as in the case of Right *v.* Bawden, viz. that, when a copyhold tenement is granted by copy of court-roll to any person, to hold the same to *such person* for the lives of two or more other persons, and the life of the

*826] longest liver of such other persons, *successively*, and *the grantee dies during the life or lives of any one or more of such other persons, without having devised the said copyhold tenement, such other person or persons shall be entitled, by virtue of such grant, to take and hold the copyhold tenement, *successively*, as they are respectively named in the grant, during his or their life or lives respectively; but, if the grantee devises the copyhold tenement, the devisee shall take and hold it during the life or lives of the cestui que vies: and it was held that the custom was good. "The word 'successively,'" said Abbott, C. J., "in this grant is not, as it appears to me, an idle word. It is applicable to a holding by several, one after another, and would be unnecessary,

and indeed unintelligible, if applied to S. Goddard alone." Here, the habendum is to the three successively; and the three are admitted tenants. [WILLES, J.—Everything you have said will be satisfied by a special occupancy.] There can be no occupant of a copyhold: Smartle *v.* Penhallow, 1 Salk. 188. In Sheppard's Touchstone, by Atherley, p. 75, speaking of the habendum, it is said,—"The office hereof, is, to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use." So, in 2 Bl. Com. 298, it is said,—"The office of the habendum is properly to determine what estate or interest is granted by the deed; though this may be performed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises." An instance of this is given by Mr. Atherley in the note to Sheppard, p. 76,—"If a lease be made to two persons, the one moiety to one and the other moiety to the other, the habendum qualifies the premises and makes the lessees tenants in common, whereas by the premises *they were joint tenants." [WILLES, J.—In Comyns's Digest *Fait* (E. 9), it is said that "the habendum may abridge or alter the generality of the premises: Hob. 171." But (E. 10), "the habendum cannot enlarge the premises; and therefore, if A. leases land to B. for years, habendum to B. and C. for life, nothing passes to C., nor shall B. have an estate but for his own life: Jon. 310."] Where the granting part is ambiguous, the habendum may explain it. [WILLIAMS, J.—In Doe d. Timmis *v.* Steele, 4 Q. B. 663 (E. C. L. R. vol. 45), 3 G. & D. 622, tenant in fee conveyed lands "to H., her heirs and assigns, to hold to H. and her assigns during the life of G." G. was H.'s heir-at-law. It was held, that, after H.'s death, G. was entitled to hold for his life as special occupant, and that the land did not pass to H.'s executors by the words in the habendum. Lord Denman, in giving judgment, said: "The proper office of the habendum being to limit, explain, or qualify the words in the premises, provided it be not contradictory or repugnant to them, no doubt can be entertained but that the words 'for and during the natural life of George Timmis' must be allowed to limit the duration of the estate, and to explain and qualify the meaning of the word 'heirs' in the premises, so as to make the person designated by that word take as special occupant, and not as heir by descent."] In Mr. Preston's edition of Sheppard's Touchstone, pp. 75, 76, it is said: "If the name of the grantee be not contained in the premises, yet, if it be in the habendum, it may be good enough. As, if one give or grant land, habendum to B. and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee-simple. And yet, if the thing granted be only in the habendum, and not in the premises of the deed, the deed will not pass it." ["Probably," says Mr. Preston, "this proposition is too general."] *"And therefore, if a man grant Blackacre only, in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed." [WILLIAMS, J.—I do not understand it to be disputed here that the second succeeds to the tenement if the first does not dispose of the estate.] That brings us to the second point. Assuming that the persons named take in succession, unless the first has surrendered, there having been

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no surrender here, the plaintiff is entitled to recover. [WILLIAMS, J.—If there be a custom for the first taker to deal with the estate, your argument is worth nothing.] If a part of the inheritance is severed from the manor, all the customs of the manor as regards it are ended. In Scriven on Copyhold, 4th edit. 12, it is said,—"If one grant away any part of the demesne in fee, they are severed from the manor, and can never be part of it again, Sir Moyle Finch's Case, 6 Co. Rep. 65, though it be but for an instant. Then the question will be, whether the manor can be divided. It cannot by act of the party; and the reason will be the same of freehold and copyhold, for, a manor must be time out of mind, and cannot be created at this day: Per Holt, in Lemon and Blackwell's Case, Skin. 191. And in the case of The Queen *v.* The Duchess of Bucklew, 6 Mod. 151, the fifth resolution by the whole court was, that 'a manor is an entire thing, and not severable.' It is quite clear from the above authorities, that, since the statute of quia emptores, a manor cannot be divided by the act of the party, not even as between joint tenants; Per Periam, J., in Marshe and Smith, 1 Leon. 27; and the better opinion is, that, after a severance of a copyhold tenement of a manor, either under a conveyance of the freehold interest of the lord, or a conveyance of the manor itself, with an exception of the particular copyhold, without, perhaps, the sanction or even the knowledge of the *829] copyholder, the *court is lost, as far as respects such copyhold tenement, and that, as no admittance could be compelled, so no fine could afterwards be recoverable." In Murrel *v.* Smith, 4 Co. Rep. 24 b, it was laid down that a copyhold is not destroyed by severance of the inheritance of the copyhold from the manor: but, after such severance, the copyholder cannot devise, for the grantee cannot take a surrender; nor can the copyholder alien otherwise than by decree in Chancery, by which the interest in the land is not bound, but the person only.

Kinglake, Serjt., and *Kingdon*, in support of the rule.—The true effect of the grant of the 15th of April, 1797, is, that it grants the tenements to Joseph Phillips for three lives, which, by the custom of this manor, entitles the first taker in his lifetime to dispose of the whole estate, to the exclusion of the other two. The evidence adduced clearly establishes the existence of this custom; for, though the instances are not numerous, there is abundant authority to show that much less evidence is necessary to establish a copyhold custom than would be required in the case of other customs, which, in general, are encroachments on the rights of the public. And there are many cases to show that such a custom is good and valid. [WILLES, J.—In Scriven on Copyhold, p. 99, it is said,—"It is sufficient to create an estate, if the person intended to take is named in the habendum of a copy, though not in the grant, for, in many manors, it is customary to insert the words of grant and limitation in the habendum only: Brooks *v.* Brooks, Cro. Jac. 434, Poph. 125."] No one was named in the premises there: here Joseph Phillips *is* named. [COCKBURN, C. J.—We must look at the whole instrument.] In Cruise's Digest, Vol. 4, title 32, *Deed*, Ch. 21, §§ 67, 68, it is said,—"With respect to the habendum, its office is only to limit *830] the *certainty of the estate granted; therefore, no person can take an immediate estate by the habendum of a deed, where he is not named in the premises; for, it is in the premises of a deed that

the thing is really granted. If land be given to J. S., habendum to him and a stranger, for a certain estate, this is void as to the stranger, because he was not mentioned in the premises; and, when J. S. dies, there will be no occupancy; for, the grant to the stranger in the habendum was intended an estate to him, and not as a limitation of the estate of J. S." In Doe d. Foster *v.* Scott, 4 B. & C. 706 (E. C. L. R. vol. 10), 7 D. & R. 190 (E. C. L. R. vol. 16), copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered, and kept possession for more than twenty years. On his death, C. brought ejectment: and it was held that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. [WILLES, J.—The case of Doe d. Nepean *v.* Goddard, 1 B. & C. 522 (E. C. L. R. vol. 8), 2 D. & R. 773 (E. C. L. R. vol. 16), is clearer. Bayley, J., there says: "The meaning of the custom, as stated, plainly is, that, if the grantee shall not, by surrender during his life, or by will, dispose of the estate, then the cestui que vies shall take it; and the word 'successively' shows how they are to take. It is clear, that, if a copyhold be given to A. and his heirs during the life of B., the heir of A. will be a special occupant. But there is no general occupancy of copyholds. Of freeholds there is, by the common law, a general occupancy; and the question is, whether by custom that may not extend to copyholds, and whether the same custom may not point out who shall be occupants." WILLIAMS, J.—In Swift d. Farr *v.* Davis, H. 39 G. 3, cited in a note to Doe d. Burrough *v.* Reade, 8 East 354, it was held, *that, where three lives in a copy are to take successive, and a father, who is sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as, in that case, by taking at the same court a license from the lord to himself and his mother (who had her widowhood right in the copyhold) to lease for seventy years; in which case, if the father afterwards grant a lease by way of mortgage pursuant to such license to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee.] In Roe d. Bendall *v.* Summerset, 2 Sir W. Bl. 694, the court say, that, "in the West, it is usual upon copyholds for lives, that the cestuy que vies take in the order they stand in the copy; but the person who puts in the lives, and pays the fine, has a power of disposing of the estate." [WILLIAMS, J.—In Burton's Compendium (which I have always found to be a very accurate book), 6th edit. 517 n., 7th edit. 419 n., it is said, that, "If a copyhold be limited to A. for the life of B., and A. die first, the estate will go to the surrenderor or grantor (see Harg. Co. Litt. 59 b, n. (2),) for, there can be no general occupant of copyholds, nor is the statute 29 Car. 2, c. 3, s. 12, applicable to them: Zouch *v.* Forse, 7 East 186. But there may be a special occupant named in the surrender or grant: Doe d. Lempriere *v.* Martin, 2 Sir W. Bl. 1148. In many manors, the custom is only to grant copyholds for lives; and, in some, to grant them to three persons for their lives successively as they are named, but so that the first has an absolute power of alienation,"—

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citing Swift d. Farr v. Davis, and Doe d. Nepean v. Goddard.] Zinzan
*832] v. Talmage, T. Raym. 402, is a distinct authority. There, *the grant was "to Henry Zinzan, sen., habendum to him and to Henry Zinzan, jun., and Peter Zinzan, sons of the said Henry Zinzan, sen., for their lives, successively, as they are named in the grant, at the will of the lord, according to the custom of the manor:" and it was held a good custom. [WILLIAMS, J.—The reason given for the custom, in the report in Sir T. Jones 142, is, "because the first is intended to be the purchaser."] A similar custom is stated in Salisbury v. Hurd, 2 Cowp. 481, and also in Prankerd v. Prankerd, 1 Sim. & Stu. 1: and in Scriven on Copyhold, 411 n. (g), it is said that such a custom exists in the manor of Iffley, in Oxfordshire. [BYLES, J.—The instances brought from the court-rolls are all calculated to show that there is a custom in this manor conformable to the authorities cited by you and by my Brother Williams, and tend to show that Joseph Phillips did what he had a right to do in displacing the two lives placed after him in the admittance, and, consequently, that the plaintiff's title accrued at least as early as 1826. But, assuming the custom to exist and to be a good one, the custom must be pursued strictly: whereas, here, the alienation is by an ordinary common-law conveyance.] It is true, that, as between the copyhold tenant and a stranger, the tenant can only convey in the customary mode, viz., by surrender and admittance. But that does not apply as between the copyhold tenant and the lord or a person who stands in his place. In Scriven on Copyhold, 3d edit. 151, it is said: "There can be no substitution of a person into the tenancy, but by a surrender,—Knight v. Cooke, 2 Ch. Ca. 43; nor is such a substitution complete until admittance. So, if two copyholders are desirous of exchanging their copyhold lands, it can only be effected by surrendering to the use of each other, and each being admitted under such respective
*833] surrenders: Kitch. 171; Co. Cop. § 36, Tr. 83; Earl of Carlisle *v. Armstrong, 1 Burr. 333. The word 'surrender' is said by C. J. Coke to be vocabulum artis, and to admit of no qualified term; but this rule does not extend to the lord, for, between the tenant and him, the conveyance need not be according to the custom, but may be made by bargain and sale, or other less formal act: and in Blemmerhasset v. Humberstone, Hutt. 65, Sir W. Jones 41, Lord Hobart thought that a copyholder, declaring himself weary of his copyhold, and *requesting the lord to take it*, was equal to a surrender. Mr. Watkins contends that the rule does not extend even to a return of the copyhold into the lord's hands, for the purpose of being conveyed to a stranger, unless the rights of a third person are prejudiced, as was the case in Zinzan v. Talmage (or Talmash), Pollexf. 564, Sir T. Raym. 402, 2 Show. 130, T. Jones 142, 1 Freem. 263, where the first cestui que vie was allowed by the custom to destroy the whole estate by surrendering into the lord's hands, and it was held that his joining with the lord in levying a fine of the lands did not operate as a surrender within the custom. When the act is such as amounts to an absolute relinquishment of the estate to the lord, it would certainly seem that the above rule is not applicable, although the lord subsequently grant the estate out again to the nominee of the copyholder: but, when the lord is merely the conduit-pipe of assurance to a third party, it may be doubtful whether the word 'surrender' is not essential to conclude the interest of the cus-

tomary heir." In Cruise's Digest, Vol. 1, 325, it is said: "If a copyholder releases all his estate and interest to the lord of the manor, it will operate as an extinguishment of his copyhold. For, although a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's intention to hold the lands no longer; and the rule is, that everything amounting to a *determination of the copyholder's will to hold no longer, extinguishes [*834 the copyhold. So, if the lord conveys away the freehold of a copyhold to a stranger, and the copyholder releases to the stranger, this will also extinguish the copyhold:" citing Wakeford's Case, 1 Leon. 102, Wilson *v.* Allen, 1 Jac. & W. 611, and Mortimer's Case, Hetley 150. And this is adopted by Serjeant Scriven, Vol. I., p. 625,—"When a copyholder conveys his interest to the lord, whether by surrender or release, or bargain and sale, or does any other act indicatory of an intention to relinquish his tenancy, the copyhold interest is for ever extinguished. And it has been decided that a release of copyholds to the grantor of the freehold, operates as an extinguishment of the copyhold interest, the same as a conveyance to the lord of the manor, when there has been no severance of the freehold:" Wakeford's Case. [WILLIAMS, J.—Zinzan *v.* Talmash, 2 Show. 130, is rather against you on this. The court there say: "It is by a custom that this remainder only can be barred, and that custom ought to be strictly pursued, therefore a surrender by implication will not suffice: and Mr. Pollexfen's construction would take away the assurance of the copyhold titles which is accounted the best, because none can have a title but that which may be seen on the court-rolls." It is still more strongly put in the report of the case in Freeman 263, under the name of Talmarsh *v.* Zinzay,—"For, this being a custom against common right, that one man should destroy the right of another, it ought to be pursued strictly; and, the custom being found to do it by surrender, a fine shall not have that operation within the custom."] Wakeford's Case, 1 Leon. 102, shows that the present mode of conveyance is valid. There, the lord of the manor sold the freehold interest of a copyholder of inheritance unto another, so as it is now no part, but divided from the manor, and *afterwards the [*835 copyholder doth release to the purchaser. It was holden by the court "that by this release the copyhold interest is extinguished and utterly gone. But it was holden, that, if a copyholder be ousted, so as the lord of the manor is disseised, and the copyholder releaseth to the disseisor, nihil operatur." If an estate pur autre vie be given to A. and the heirs of his body, with remainders over, A. may dispose of the whole, and defeat the remainders, by any conveyance during his lifetime: Doe d. Blake *v.* Luxton, 6 T. R. 289. [WILLIAMS, J.—That is a case of special occupancy.]

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. It is unnecessary, in the view I take, to consider whether Joseph Phillips, the first taker under the admittance of the 15th of April, 1797, and the other two persons named therein, Joseph and Eliza, his son and daughter, were to take successive estates for life, or whether the two latter were put in as special occupants only; for, if by the custom of this manor, the first taker under such a form of admission has an absolute power to alienate, so as to bar the interests of the other two, that would be equally applicable whether these were successive estates, or

the first taker has an estate for the three lives, the two last named being merely special occupants. The first question, therefore, which we have to determine, is, whether there was evidence of the custom, viz. that the person first named in the admission, and who puts in the other two lives, has power to bar their interest. I am of opinion that there was abundant evidence of such a custom. It is plain from the authorities cited that this is by no means an unusual custom, especially in the west of England, and that it has been several times recognised as a good and valid custom. Four instances, besides the somewhat doubtful one of
*836] 1786, *were shown in the court-rolls of this manor,—not very ancient certainly, the earlier court-rolls having been lost,—where the first tenant for life has surrendered the copyhold and taken a fresh estate, ousting the lives mentioned in the previous admittance. Being, then, of opinion that there is sufficient evidence of such a custom in this manor, the next question is, whether by the conveyance of 1803, Joseph Phillips, the first tenant under the admittance of 1797, did effectually convey his interest in the tenement in question so as to bar the other two lives. The only difficulty that occurs in this part of the case, is, that he did not make over his interest by the ordinary form of surrender to the lord. But that, I think, is satisfactorily accounted for by the new state of things which had arisen since the last admittance. The lord had conveyed away a portion of the freehold of the manor, including the property now in dispute, to William Flamank. The land so conveyed, consequently, ceased to be part of the manor, except for the maintenance of the interests of the copyhold tenants. The law seems to be well ascertained, that the lord cannot by alienating work any prejudice to the interests of his tenants: and it also seems to be clear, that, where a portion of the freehold has been severed from the manor, the copyhold tenant may release to the lord by a common law conveyance. That appears to be a sound view, because otherwise, the customary mode of alienation having become impossible, unless the tenant was at liberty to resort to the ordinary common law conveyance, his power of alienation would be gone altogether. That being so as to the lord himself, there is authority that the tenant may in like manner release to one to whom the lord has alienated a portion of the freehold of the manor. Here, it appears that Joseph Phillips in 1803, by indenture,
*837] conveyed *all his estate and interest in the premises in question to William Flamank, who had already acquired the freehold by purchase from the lord. The question is, what did that conveyance comprehend? Not the right of possession for his life only; but, according to the custom of the manor, also the right and power to oust those named after him in the admittance of 1797 under which he held. I am, therefore, of opinion that Joseph Phillips, by the indenture of 1803, conveyed to William Flamank not only his own life interest, but also the rights, such as they were, of his son and daughter, Joseph and Eliza, whether of succession or special occupancy; and consequently that the defendants, who claim under William Flamank, are entitled to succeed in this ejectment.

It is not necessary to give any opinion,—though I must confess I entertain a very strong one,—whether the statute of limitations would have afforded an answer to the plaintiff's claim.

WILLES, J.—I am of the same opinion. The reasoning in Bell and

Langley's Case, 4 Leon. 230, seems to me to be conclusive. There, "A., the lord of a manor of which B. held Blackacre by copy of court-roll in fee according to the custom, made a feoffment of Blackacre to a stranger. B. died. The point was, if now the customary interest be determined against the heir of B.; for it was moved because that the feoffee had not any court, the heir of B. could not be admitted, nor the death of his ancestor presented, because but one copyholder. But all the court held the contrary, and that the copy should bind the feoffee, and the ceremony of admittance was not necessary; for, *otherwise every copyholder in England might be defeated by the sole act of the lord*, viz., *by his feoffment.* But the lord by his own act, which shall be accounted his folly, hath lost *his advantages, viz., fines, heriots, and such other casualties." That decision is in strict accordance with the [*838 principle of law that a man's rights are not to be prejudiced by the acts of others to which he is no party: and it is exceedingly important, as showing the opinion of the court that the interests of the copyhold tenants are not to be affected by the severance of the inheritance of the copyhold from the manor. Applying that here, the rights of Joseph Phillips as copyhold tenant remained notwithstanding the conveyance of the fee by the lord of the manor to Flamank in 1799. One of those rights was, not only the right of disposing of his own life-estate, but also to dispose of the estates of the other two persons named in the admittance, to a purchaser from him. The instances produced as proof of the custom were all, it is true, instances where the alienation had been by surrender to the lord, and re-grant from him. But I do not think the form of conveyance is part of the custom, because the persons to take were strangers, who could take by no other mode. It appears to me that it would be an extraordinary thing that a copyholder having that power of conveying to a stranger, should not be capable of conveying to the lord by another and an equally appropriate mode of conveyance. I should have thought the evidence established the right to aliene by any appropriate form of conveyance, to whomsoever the conveyance was made. There is no doubt that the conveyance in question would have been a perfectly valid one if made before the execution of the deed of 1799, conveying the fee to Flamank. And, if Joseph Phillips could by the same sort of conveyance aliene to the person who by that deed obtained the inheritance of the copyhold,—which I think he could,—it appears to me that he has done this by the conveyance of 1803.

*Byles, J.—I also am of opinion that the defendants are [*839 entitled to have the verdict entered for them. It is unnecessary to decide whether or not the claim of the plaintiff was barred by the statute of limitations: but, as far as I understand the title, I cannot help saying that I feel great difficulty in seeing what has estopped the plaintiff from entering for the last thirty-four years, if he had any title at all. I do not, however, desire to give any positive opinion upon this point.

But, upon the other point it seems to me to be clear, from the numerous authorities which have been cited, that the custom relied upon by the defendants is a reasonable and a good one. I agree with Mr. *Kingdon* that a small number of instances shown by the court-rolls of the manor kept by the steward, who is always present, and must know of the custom, affords cogent evidence of its existence. And I agree also

with my Lord Chief Justice, that abundant evidence of the custom was given,—a custom which it seems is very common in the West of England. The custom, then, being reasonable and good, and proved to be an existing custom in this manor, it is clear, that, if Joseph Phillips had, before the severance of the copyhold in question from the manor in 1799, surrendered to the lord, the whole interest, including the successive estates, created by the admittance of 1797, would have been barred and extinguished. The lord having alienated the inheritance, it has now become impossible to have recourse to the customary mode of conveyance. Are we, then, to look at the form or the substance? Good sense and sound law clearly require us to look to the substance of the thing,—especially when we see the reason given for the custom in the case of Zinzan v. Talmage, Sir T. Jones 142, viz., "because the first [taker] is intended to be the purchaser." If, *therefore, we were to regard the form and neglect the substance, we should be preferring the interests of a stranger to those of the real purchaser, who, as appears by the indenture of 1803, gave a valuable consideration for the property in question.

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WILLIAMS, J., who had left the court, previously intimated his concurrence in the above judgment. Rule absolute.

END OF TRINITY TERM.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

Trinity Vacation,

IN THE

XXIII. VICTORIA. 1859.

The Judges who usually sat in Banc in this vacation, were:

WILLIAMS, J. WILLES, J.
CROWDER, J.

SANTOS *v.* ILLIDGE and Others. *July* 9.

A sale of slaves by a British subject to a Brazilian subject, in the Brazils, where slavery is by law permitted, for the purpose of being used and employed as slaves in that empire, is rendered illegal by the 6 & 7 Vict. c. 98, though such slaves were acquired and were in the possession of the seller before the passing of that Act.

THIS was an action upon a contract for the sale by the defendants, British subjects, to the plaintiff, a Brazilian, of certain slaves in the Brazils.

The declaration stated that the defendants, being the directors of an association or copartnership established for carrying on mining operations within the dominions of the Emperor of Brazil, under the name and style of The Imperial Brazilian Mining Association, agreed in *writing to sell to the plaintiff, who then agreed to purchase and take from them, certain slaves belonging to and in the possession [*842
of the said association or copartnership in the Empire of Brazil, at and for the price or sum of 32,000*l.*, and to deliver the said slaves to the plaintiff in Brazil aforesaid on a certain day which elapsed before the

breach hereinafter set forth; and that, although the plaintiff had done all things on his part, and all things had happened and been done, to entitle him to have the said slaves sold and delivered to him according to the said agreement, and had paid to the defendants the sum of 1000*l.* as a deposit in part payment of the said price, yet the defendants had broken their agreement, and had wholly refused to sell or deliver, and had not delivered to the plaintiff the said slaves, or any of them, whereby the plaintiff had lost and been wholly deprived of the use and benefit of the said slaves, and of the said sum of 1000*l.*, and had been otherwise damnified.

The defendants pleaded, that the said association or copartnership was and is an association or copartnership consisting of the defendants and others, all of whom were and are British subjects, and resident and domiciled in Great Britain, and that the said agreement was made after the coming into operation and effect of an act of parliament made and passed in the session of parliament holden in the 6 & 7 Vict. (c. 98), intituled "An Act for the more effectual suppression of the slave-trade," and that the said agreement was and is illegal and void.

The plaintiff replied that the said slaves so agreed to be sold and delivered by the defendants to the plaintiff were and are, as to some of them, slaves lawfully acquired and purchased by the said association or
*843] copartnership in the said empire of Brazil before *the coming into effect of the said act in the plea of the defendants mentioned, for the lawful purpose of being employed and used as slaves within the said empire of Brazil, and not otherwise, and, as to the residue of them, were and are respectively the children and offspring of the slaves so lawfully acquired and used and employed as aforesaid; and that the said slaves were, and each of them was, lawfully in the possession of the said association or copartnership at the time of the coming into effect of the said act; and that the acquiring, purchasing, and holding of slaves within the said empire of Brazil was and is, by the laws in force within the said empire, lawful and permitted; and that the plaintiff, at the time of the said agreement, was, and from thence hitherto has been and still is, a subject of the Emperor of Brazil, and domiciled within the said empire, and amenable to the laws thereof, and was not nor is a British subject, or amenable to the laws and jurisdiction of this realm; and that the said slaves were so agreed to be sold and delivered for the bonâ fide purpose of their being used and employed by the plaintiff in the said empire of Brazil, and not elsewhere.

The defendants rejoined, that the said slaves in the replication mentioned to have been acquired and purchased by the said association and copartnership, were acquired and purchased by them after the coming into operation of an act passed in the 5 G. 4 (c. 113), intituled "An Act to amend and consolidate the laws relating to the abolition of the slave-trade."

To this rejoinder the defendants demurred,—the grounds of demurrer stated in the margin, being, "that the rejoinder confesses, without avoiding, the plaintiff's replication, inasmuch as by the act 5 G. 4, c. 113, the acquiring and purchasing of slaves by British subjects in a foreign state
*844] where slavery was not unlawful, for *the purpose of being used and employed in such state, was not prohibited or made or declared to be an offence; and that, by force of the proviso in the 5th

section of the 6 & 7 Vict. c. 98, the sale by British subjects of slaves lawfully acquired by them and in their lawful possession at the coming into operation of that act, and of the children of such slaves, to a subject of Brazil, not being a British subject, was and is lawful." Joinder.

Bovill, Q. C. (with whom was *Malcolm*), in support of the demurrer.(*a*)—There is nothing illegal in this contract. The plaintiff is a Brazilian and there is no act of parliament which makes the purchase or the possession of slaves by a Brazilian in the Brazils illegal. The defendants are the directors of a company called The Brazilian Mining Association, formed for the *working of mines in the Brazils,—an English company. The company being in course of winding up in the [*845 Court of Chancery, an order was made in the suit for the sale of their property and effects, including a number of slaves of which they had become possessed; and one of the directors proceeded to the Brazils for the purpose of effecting a sale. On his arrival at Rio de Janeiro, the director contracted for the sale of the slaves to the plaintiff, but was prevented by the interposition of the British consul there from carrying it into effect. For this breach of contract the present action is brought: and the question for the opinion of the court upon this demurrer, is, whether the contract can be enforced in a court of law. At common law, the traffic in slaves was legal. [WILLES, J.—Not so in Lord Coke's time. Trover would not lie for slaves: Smith *v.* Gould, 2 Salk. 666, 2 Lord Raym. 1274.] Smith *v.* Brown, 2 Salk. 666, 2 Lord Raym. 1274, seems to show that indebitatus assumpsit would at that time lie for a negro sold in a country where the possession of slaves was not illegal. There, the plaintiff declared in an indebitatus assumpsit for 20*l.* for a negro sold by the plaintiff to the defendant, viz. in parochia beatæ Mariæ de Arcubus in warda de Cheape, and verdict for the plaintiff; and, on motion in arrest of judgment, Holt, C. J., held, that, as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave. Et per Powell, J.—"In a villein the owner has a property, but it is an inheritance: in a ward he has a property, but it is a chattel real; the law took no notice of a negro." Holt, C. J.—"You should have averred in the declaration that the sale was in Virginia, and, by the laws of that country, negroes are saleable; for, the laws of England do not extend to Virginia; being a conquered country, their law is what the King pleases; and we cannot take notice of it but as set forth:" therefore he *directed the plaintiff should amend, [*846 and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at London, but that the said

(*a*) The points marked for argument on the part of the plaintiff, were,—"That the rejoinder is insufficient and discloses no material fact in answer to the replication; that the facts stated in the replication bring the case within the provisoes in the 5th and 6th sections of the 6 & 7 Vict. c. 98; that the holding of slaves by British subjects in a state in which slavery is by the law of such state permitted and legalized, is not prohibited either by the 6 & 7 Vict. c. 98, or by the 5 Geo. 4, c. 113, or by any other act of parliament anterior to the passing of the first-mentioned act, and was and is lawful, and that, consequently, by virtue of the proviso in the 5th section of the 6 & 7 Vict., it was lawful for the defendants to sell and transfer the slaves so lawfully held by them, and to enter into a contract for such sale and transfer; that the same result would follow from the proviso in the 6th section, which authorizes the selling of slaves which were lawfully in the possession of the seller at the time of the passing of the act, except that this might not apply to slave-children born since the passing of the act; and that the provisions of the 5 G. 4, c. 113, did not, before the passing of the 6 & 7 Vict. c. 98, apply to sales and transfers of slaves by British subjects in foreign states not amenable to the laws of England."

negro at the time of sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable as chattels. In Madrazo v. Willes, 3 B. & Ald. 353 (E. C. L. R. vol. 5), it was held that a foreigner who is not prohibited from carrying on the slave-trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure by a British subject of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade. Abbott, C. J., there says: "I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British legislature, in such strong language,(a) to be unlawful. But I am now satisfied that the words used by the legislature, although large and extensive, can only be taken to be applicable to British subjects." And Best, J., says: "Most of the states of Christendom have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade: but Spain has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption. These principles are *847] *confirmed by the decisions of the Court of Admiralty, and also by a judgment of Sir W. Grant pronounced at the Cock-pit. The cases to which I allude, are, The Fortuna, The Donna Marianna, and the Diana, in the Admiralty Court, and The Amelie, before the Privy Council,—Dodson's Adm. Rep. 81, 91, 95. These cases establish this rule, that ships which belong to countries that have prohibited the slave-trade are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations." The subject was much discussed in the case of Le Louis, 2 Dodson's Adm. Rep. 210, where Sir W. Scott goes very fully into the general law. Parke, B., in his summing up in the case of Buron v. Denman, 2 Exch. 167, 186,† thus states the substance of that very learned judgment:—"The law on the subject of slaves has been settled by the case of Le Louis, which has been referred to. That case was decided in the year 1817, by Sir William Scott, who went fully into the question of the legality of the slave-trade, and laid down certain positions which have since been acquiesced in both in this country and abroad. Those positions are,—first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave-trade,—secondly, that trading in slaves is not a crime by the law of nations,—thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong,—and fourthly, that, if there be a law in a particular country prohibiting

(a) 47 G. 3, c. 36, and 51 G. 3, c. 23.

the slave-trade, it is not open to every one *to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. These propositions being clear, a question arises whether the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, *where it was lawful to possess slaves.*" In Somerset *v.* Stewart, Lofft 1, 17, which came before the court upon a return to a habeas corpus to bring up a negro, from which it appeared that the negro had been a slave to Mr. Stewart, in Virginia, and had been purchased from the African coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to England by his master, who, intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by order of his master, in the custody of Captain Knowles, detained against his consent, until returned in obedience to the writ,—Lord Mansfield said: "Contract for sale of a slave is good here: the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of the inquiry; which makes a very material difference." The statutes more immediately affecting the question are, the 5 G. 4, c. 113, and the 6 & 7 Vict. c. 98, and the decision will mainly turn upon the construction of the 1st section of the latter act. The 5 G. 4, c. 113, is very general in its terms; and it is an extremely penal act. The 6 & 7 Vict. c. 98 shows that the former act only applied to British subjects in British possessions; and the statute of Victoria extends to British subjects in *all parts of the world. The 1st section recites the 5 G. 4, c. 113, whereby it was enacted (among other things), "that it shall not be lawful (except in such special cases as are hereinafter mentioned) for any persons to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves or persons intended to be dealt with as slaves; or to carry away or remove, or to contract for the carrying away or removing of slaves or other persons as or in order to their being dealt with as slaves; or to import or bring, or to contract for the importing or bringing into any place whatsoever slaves or other persons as or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transhipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, slaves or other persons for the purpose of their being carried away or removed as or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transhipping, embark, ing, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons for the purpose of their being imported or brought into any place whatsoever as or in order to their being dealt with as slaves; or to fit out, man, navigate, equip, despatch, use, employ, let or take to freight or on hire, or to contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting or taking to freight or on hire, any ship, vessel, or boat, in order to accom-

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plish any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to lend or advance, or become security for the loan or advance, or to con-
*850] tract for the lending or advancing, or *becoming security, for the loan or advance of money, goods, or effects employed or to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to become guarantee or security, or to contract for the becoming guarantee or security, for agents employed or to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or in any other manner to engage or to contract to engage, directly or indirectly, therein as a partner, agent, or otherwise; or to ship, tranship, lade, receive, or put on board, or to contract for the shipping, transhipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to take the charge or command, or to navigate or enter and embark on board, or to contract for the taking the charge or command or for the navigating or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, petty officer, surgeon, supercargo, seaman, marine, or servant, or in any other capacity, knowing that such ship, vessel, or boat is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful; or to insure or to contract for the insuring of any slaves, or any property, or
*851] other subject-matter engaged or *employed or intended to be engaged or employed in accomplishing any of the objects or the contracts in relation to the objects which objects and contracts have hereinbefore been declared unlawful: and it is expedient that from and after the commencement of this act the provisions of the said act hereinbefore recited shall be deemed to apply to, and extend to render unlawful and to prohibit the several acts, matters, and things therein mentioned when committed by British subjects in foreign countries and settlements not belonging to the British Crown, in like manner and to all intents and purposes as if the same were done or committed by such persons within the British dominions, colonies, or settlements; and it is expedient that further provisions should be made for the more effectual suppression of the slave-trade, and of certain practices tending to promote and encourage it." It then enacts "that all the provisions of the said Consolidated Slave-trade Act hereinbefore recited and of this present act shall, from and after the coming into operation of this act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country; and all the several matters and things prohibited by the said Consolidated Slave-trade Act, or by this present act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter

excepted, shall be deemed and taken to be offences committed against the said several acts respectively, and shall be dealt with and punished accordingly." That section, it is to be observed, is enacting, and not declaratory. The 5th section provides and enacts, "that, in all the cases in which the holding or taking of slaves shall not be prohibited by this or any other act of parliament, it shall be lawful to sell or *transfer such slaves, anything in this or any other act contained notwithstanding." And the 6th section provides and enacts [*852 "that nothing in this act contained shall be taken to subject to any forfeiture, punishment, or penalty any person for transferring or receiving any share in any joint stock company established before the passing of this act, in respect of any slave or slaves in the possession of such company before such time, or *for selling any such slave or slaves which were lawfully in his possession at the time of passing this act*, or which such person shall or may have become possessed of or entitled unto bonâ fide prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law." Here, the Imperial Brazilian Mining Association were in possession of the parent slaves before the passing of the act, and therefore come within the true meaning of that section. And it is to be borne in mind that this contract was made under an order of the Lords Justices. The only other question is as to the offspring. These,—like the ordinary increase of sheep and cattle,—must follow the parents. [BYLES, J.—According to the old maxim, "Partus sequitur ventrem."]

Lush, Q. C. (with whom was *The Common Serjeant*), contrà.(*a*)—The question, which turns entirely upon the 6 & 7 Vict. c. 98, is twofold,—first, as to the slaves in existence at the time of the passing of that act,—secondly, as to those who were born since. The 1st section seems to extend the provisions of the 5 G. 4, c. 113, to British subjects in all parts of the world. That which is prohibited is found in the 1st section of *that act. The words of that section are very general,— [*853 making it illegal to sell or to contract for or be in any way concerned in the selling of slaves. The 6th section of the 6 & 7 Vict. c. 98 merely exonerates the parties under certain circumstances from penalties: the prohibition was absolute. [WILLES, J.—The 39th section of the 5 G. 4, c. 113, expressly enacts "that every mortgage, bond, bill, note, or other security made in or to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have by this act been declared unlawful, shall,—except in the case of a bonâ fide purchaser or holder of any such of the said securities as are in their nature negotiable, who may have purchased or obtained the same without

(*a*) The points marked for argument on the part of the defendants, were,—

"That the contract for the sale by British subjects of slaves, though in a state where slavery is not unlawful, and for the purpose of being used as slaves in such state, is nevertheless unlawful and void:

"That trafficking in slaves is by the law of England unlawful, as contrary to morality:

"That the provisions of the 5 G. 4, c. 113, are of general application to all British subjects, and, except where otherwise expressly declared and provided in that act, any trafficking in slaves by British subjects, in any place or country, was by that act expressly forbidden, and declared to be illegal:

"That the holding by British subjects of slaves in any state or country, is, and at the time of the passing of the 6 & 7 Vict. c. 98 was, unlawful:

"And that, consequently, upon the plea, or upon the re-rejoinder, the defendants are entitled to judgment."

notice that the same were made or given for any such unlawful purpose,—be void."] The 6th section says that the party shall not be subject to any penalty or forfeiture for selling any such slaves as were lawfully in his possession at the time of the passing of the act; but it does not say that the contract shall be in force. [WILLIAMS, J.—Before the statute of Victoria, was there any statute which prohibited a British subject from possessing or selling slaves in a country where slavery was not declared unlawful? WILLES, J.—The 5 G. 4, c. 113, makes the carrying on of the slave-trade piracy.] It applies to the trafficking in, and not to the holding of slaves.

*854] *Bovill*, in reply.—The 13th, 14th, and 15th sections show by implication that the 5 G. 4, c. 113, was not intended to extend beyond the dominions of the British Crown; and the provisions of the statute 6 & 7 Vict. c. 98 must be read in connection with that act. There is, prior to the last-mentioned act, none which prohibits the holding of slaves, except the Emancipation Act, 3 & 4 W. 4, c. 73; and that clearly applies only to the British dominions. [WILLES, J.—It does not follow, that, because the holding of slaves was lawful, their sale would be so.] The 6th section of the 6 & 7 Vict. c. 98 evidently pointed at the possession of slaves by associations like the present.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This case arises upon demurrer, and was argued at the sittings after last term, before my Brothers Williams and Byles and myself.

It appears by the pleadings that the plaintiff is a Brazilian, and that the defendants are British subjects domiciled in Great Britain, who were members of a partnership consisting of themselves and other British subjects, called The Imperial Brazilian Mining Association, and that, after the coming into operation of the 5 G. 4, c. 113, intituled "An act to amend and consolidate the acts relating to the abolition of the slave-trade," but before the 6 & 7 Vict. c. 98, intituled "An act for the more effectual suppression of the slave trade," they purchased slaves in Brazil, for the purpose of being used and employed in that empire, and retained those slaves and their offspring until and after the passing of the 6 & 7 Vict., when they contracted to sell them, together with their offspring born subsequent to that statute, to the plaintiff. All that was *855] *done was valid according to the law of Brazil; and, the defendants having refused to deliver the slaves to the plaintiff as agreed, the plaintiff brings this action to recover damages for that breach of contract.

The question thus raised, is, whether the contract of sale was or was not contrary to the law of England. We are of opinion that it was.

The legislature having rendered trade in slaves by British subjects generally illegal, as being contrary to justice, humanity, and sound policy, it is for the plaintiff to establish that the alleged sale of slaves by British subjects was in the particular instance valid. For this purpose he relies upon the act 6th & 7th of the Queen, above referred to, ss. 5 and 6. Unless these sections, or one of them, authorized the sale, it was illegal. The 5th section enacts, that, "in all cases in which the holding or taking of slaves shall not be prohibited by this or any other act of parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other act contained notwithstanding." This section

is inapplicable, if the holding or taking of the slaves was prohibited by act of parliament. The 6th section enacts that "nothing in this act contained shall be taken to subject to any forfeiture, punishment, or penalty, any person for transferring or receiving any share in any joint stock company established before the passing of this act, in respect of any slave or slaves in the possession of such company before such time, or for selling any slave or slaves which were lawfully in his possession at the time of passing this act, or which such person shall or may have become possessed of or entitled unto bonâ fide prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law."

It is unnecessary for us to consider how these two sections are reconcilable, so far as they relate to slaves *possessed at the time of the passing of the act. It is enough to say that the 6th section, so far as it affects the present case, only applies to the sale of slaves which were "lawfully" in the possession of the seller at the time of the passing of the act. And we are of opinion that the holding and taking of the slaves in question by the defendants was prohibited by the act of 5 G. 4, c. 113, ss. 2 and 10; and that, by reason of the provisions of that act, the slaves were not lawfully in the defendants' possession at the time of the passing of the 6th and 7th of the Queen, and, consequently, that the alleged sale was illegal and void. [*856

The 2d section of the 5 G. 4 enacts, in the most general language, and in a context expressly applicable to parts beyond the seas, that "it shall not be lawful (except in such special cases as are hereinafter mentioned) for any persons to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves, or persons intended to be dealt with as slaves; or to carry away or remove, or to contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves; or to import or bring, or to contract for the importing or bringing into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transhipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves, or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transhipping, embarking, receiving, detaining, or confining on board of any ship, vessel, *or boat, slaves or other persons for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves; or to fit out, man, navigate, equip, despatch, use, employ, let or take to freight or on hire, or to contract for the fitting out, manning, navigating, equipping, and despatching, using, employing, letting or taking to freight or on hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to lend or advance, or become security for the loan or advance, or to contract for the lending or advancing, or becoming security for the loan or advance of money, goods, or effects, employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have [*857

hereinbefore been declared unlawful; or to become guarantee or security, or to contract for the becoming guarantee or security for agents employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or in any other manner to engage or to contract to engage directly or indirectly therein as a partner, agent, or otherwise; or to ship, tranship, lade, receive, or put on board, or to contract for the shipping, transhipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to take the charge or command, or to navigate or enter and embark on board, or to contract for the taking the charge or command, or for the navigating or entering and embarking on board of any
*858] ship, vessel, or boat, as *captain, master, mate, petty officer, surgeon, supercargo, seaman, marine, or servant, or in any other capacity, knowing that such vessel, ship, or boat is actually employed, or is in the same voyage, or upon the same occasion in respect of which they shall so take the charge or command, or navigate or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or to insure or to contract for the insuring of any slaves, or any property or other subject-matter engaged or employed, or intended to be engaged or employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful."

The 10th section makes the committing an act within the 2d felony, punishable with transportation or imprisonment.

The exceptions in the above acts no longer exist: see the 3 & 4 W. 4, c. 73, and 1 Vict. c. 191; and this case did not come within any of them.

The question, in the point of view in which we are considering it, turns upon the construction of the act of George the 4th; and it is, whether that act was confined in its operation to acts done within the British dominions. The trial of offences against this act, if committed abroad, is provided for by sections 48, 49, 50, and 51. The treaties therein confirmed are foreign: s. 52. Upon this question we cannot bring ourselves to entertain any doubt. One of the principal objects of the act was, to strike at the root of the slave-trade at that time in Africa, out of the British dominions. The acts which it was passed to amend and consolidate, in terms referred to foreign parts, and mentioned the British dominions when they only were intended; and it would be
*859] strange if this act, *which makes the law more stringent, were to limit its field of operation: see 46 G. 3, c. 52, 46 G. 3, c. 119, 47 G. 3, sess. 1, c. 36, 47 G. 3, sess. 2, c. 44, s. 4, 51 G. 3, c. 23, 53 G. 3, c. 112, 55 G. 3, c. 172, 58 G. 3, c. 49, 58 G. 3, c. 98, 5 G. 4, c. 17. If this question had been raised before the passing of the 6th & 7th of the Queen, or without reference thereto, it would have been difficult to advance a plausible argument in favour of the more limited construction. Indeed, the very point was decided in the case of The Queen v. Zulueta, 1 Car. & K. 215 (E. C. L. R. vol. 47), where the prisoner

was indicted upon the same sections of the act of 5 G. 4, upon which the present case depends, for a felony in fitting out a ship for the African slave-trade. At the trial at the Old Bailey, before Maule and Wightman, J.J., it was argued for the prisoner that the case was not within the statute, because it did not apply to foreign parts, but only to the British dominions. The learned judges were of opinion that the case was within the statute, and overruled the point; Maule, J., saying,—"I cannot help thinking that the legislature had the intention, among other things, of preventing Englishmen from dealing in slaves on the coast of Africa." If on the coast of Africa out of the British dominions, of course also, as the words are general, elsewhere out of the British dominions. And, upon the defendant's counsel requesting the judges to reserve the point, Maule, J., said that they did not entertain any doubt upon the subject, and therefore should decline to do so.

Now, the alleged offence in that case was committed before the passing of the 6th & 7th of the Queen, and although the case was tried more than two months after the passing of that act, it does not appear from the report in Car. & K. to have been referred to in the argument. The case is, however, at least a strong authority for construing the 5 G. 4, c. 113, ss. 2 and 10, according to the plain and obvious sense of the *general language used, construed with a due regard to the subject-matter as applicable generally; unless, indeed, the 6 & 7 [*860 Vict. c. 98, s. 1, establishes the contrary. That section,—after reciting the 2d section of the 5 G. 4, c. 113, and that it was expedient, that, from and after the commencement of that act the provisions of the said act thereinbefore recited should be deemed to apply to, and extend to render unlawful, and to prohibit, the several acts, matters, and things therein mentioned, when committed by British subjects in foreign countries and settlements not belonging to the British Crown, in like manner and to all intents and purposes as if the same were done or committed by such persons within the British dominions, colonies, or settlements; and that it was expedient that further provisions should be made for the more effectual suppression of the slave-trade, and of certain practices tending to promote and encourage it,—enacts "that all the provisions of the Consolidated Slave-trade Act hereinbefore recited, and of this present act, shall, from and after the coming into operation of this act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country; and all the several matters and things prohibited by the said Consolidated Slave-trade Act, or by this present act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is hereinafter excepted, shall be deemed and taken to be offences committed against the said several acts respectively, and shall be dealt with and punished accordingly: Provided, nevertheless, that nothing herein contained shall repeal or alter any of the provisions of the said act."

It appears from this section that some doubt had *been raised, [*861 possibly in the consideration of the very case above referred to before the trial, whether the 5 G. 4 was sufficient to reach such a case, however clearly within the intention of the legislature: and the 1st section of the 6 & 7 Vict. may have been introduced to preclude any

such doubt for the future. The section seems to have been most carefully framed, and the most guarded language to have been used, not to enact that the 5 G. 4 should be extended to foreign parts, but that, after the passing of the act, whatever might be the case with regard to prior transactions, the former act should be deemed to extend to British subjects and their acts, wheresoever being or committed; and at the end it is carefully provided that "nothing therein contained should repeal or alter any of the provisions of the 5 G. 4."

It was contended, however, that, as the section purports to be enacting, and not merely declaratory, it amounts to a legislative adjudication binding upon us, that what was so enacted to be, was not previously the true construction of the 5 G. 4. The proviso already referred to is a sufficient answer to this argument; and, although, if the construction of the former act were open to doubt, the enactment of the latter might be a considerable make-weight towards a decision, yet, as we consider the construction of the former act clear, we are bound by the proviso in the latter act to act upon that construction, notwithstanding it may follow as a consequence that the latter act was unnecessary, except to remove for the future the possibility of a doubt. Nor is this the first instance of an enactment extending, or professing to extend, the construction of a former act to cases which the unaided course of judicial decision might have brought within it. Another instance will be found in the 9 G. 4, c. 14, s. 7, and the case of Pierce *v.* Arnold, 2 C. M. & R. 613.†

*862] *The true meaning of the 5 G. 4 appears to us to be to prohibit the trade in slaves by all persons within the control of the legislature, including British subjects all over the world.

Upon this construction of the act, the purchase of slaves by the defendants after it passed, though before the 6th and 7th of the Queen, was rendered illegal by the 2d and 10th sections of the former act; which, therefore, prohibited the holding of slaves, and rendered the possession of them unlawful: consequently, neither the 5th nor 6th section of the latter act authorized the sale, and it was a violation of the law of England.

It is hardly necessary to add that the fact of the plaintiff being a foreigner does not authorize him to sue in the courts of this country for the breach of a contract entered into by a subject, in violation of our laws: see Esposito *v.* Bowden, 7 Ellis & B. 763 (E. C. L. R. vol. 90).

It has been strongly urged upon us, for the plaintiff, that this contract of sale was entered into under an order of the Lords Justices, for whose authority we entertain unfeigned respect: but it does not appear that the matter was discussed before those learned judges, nor that the order had the sanction of their deliberate opinion. And the order in itself is no justification for an illegal act.

For the above reasons, without saying that there are not others, we are of opinion that the contract of sale was unlawful both as to the parents and as to their offspring, and that no action for its breach can be maintained.

Our judgment, therefore, is for the defendants.

Judgment for the defendants.(*a*)

(*a*) An appeal is pending.

*HALE, Appellant; THE GUARDIANS OF THE POOR OF THE CITY OF LONDON UNION, Respondents. [*863

July 9.

By the 81st article of the Consolidated Order of the Poor Law Commissioners, 1837, it is provided that "the clerk shall, four weeks at least before the 25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half-year of the last year corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year, *and he shall also estimate the probable balance due to or from the parish at the end of the current half-year*, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year," &c.

And the 82d article provides that "the guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish," &c.

The guardians of the London Union made a contribution-order pursuant to the 82d article; but the clerk, in preparing it, disregarded the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. M. B. was to be ordered to contribute to the expenses of the union, he omitted to estimate "the probable balance due to that parish;" for, if he had taken that balance into account, it was so largely in its favour that no sum whatever would have been needed to meet the cost of the maintenance of its poor, and the other charges for which the order was made.

The reason for this omission was, that the balances in favour of that and several other parishes in the hands of the treasurer of the union had been fraudulently appropriated by an officer of the union who was employed to collect the rates for certain of the parishes forming the union, of which the parish of St. M. B. was not one:—

Held, that, as the guardians might by taking the proper steps,—either by orders apportioning the amount of the loss amongst the various parishes of the union, or by orders apportioning it exclusively amongst those parishes for which the defaulting officer was collector,—realize the balance due to the parish of St. M. B., they had no right to treat it as non-existing, and, consequently, that the order was illegally made, and could not be enforced.

THIS was a case stated by justices for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43.

On the 19th of February, 1859, at a special session of the peace for the city of London, a complaint was preferred by the respondents against the appellant, one of the overseers of the parish of St. Mary Bothaw, for non-compliance with a contribution-order made by the respondents upon the overseers of the poor of the said parish, dated the 31st of August, 1858, requiring them to pay to the treasurer of the said union, towards the relief of the poor of the said parish, and to the contribution of the said parish to the common fund of the union, and such other expenses as were chargeable by the respondents on the said parish, the sum of 65*l.* on *the 10th of October then next. The justices [*864 determined the said complaint against the appellant, and issued a warrant for levying and recovering the amount of the said contribution, but suspended its execution. The appellant being dissatisfied with such determination, the justices, with the consent of the parties, stated the following case:—

Upon the hearing of the said complaint, it was proved, that, on the 31st of August, 1858, the respondents made the contribution-order or call already mentioned upon the appellant's parish, for the sum of 65*l.* The following is a copy of the order,—

"City of London Union.

"To Ford Hale, Frederick Barry, Daniel Judson, and John Baird Cooper, Charles Milner, and William Hayward, overseers of the parish of St. Mary Bothaw, Dowgate.

"You are hereby ordered and directed to pay to Samuel George Smith, Esq., of No. 1, Lombard Street, on behalf of the guardians of the poor of the City of London Union, on the 12th day of October next, at No. 1, Lombard Street aforesaid, the sum of 65*l.* towards the relief of the poor thereof, and to the contribution of the parish to the common fund of the union, and such other expenses as are chargeable by the said guardians on the said parish, and to take the receipt of the said Samuel George Smith endorsed upon this paper for the said sum of 65*l.*

"Given under our hands, at a meeting of the guardians of the poor of the said City of London Union, held on the 31st day of August, 1858.

(Signed) "JAMES ABBIS, Presiding Chairman.
"J. C. DIX
"JOHN FINLAY } Guardians.

(Counter-signed) "JOHN BOWRING,
"Clerk to the Guardians.

*865] *"*Note.*—The overseers are requested to be punctual in making the above payments: see 2 & 3 Vict. c. 84, s. 1. They are also requested to pay no more than the sum ordered.

"See back hereof for treasurer's receipt. The treasurer can give no other receipt.

"This order is only for a portion of the estimated contribution for the half-year ending Lady-Day, 1859: the order for the remaining portion will be made when the accounts for the several parishes to Michaelmas next shall have been balanced in the parochial ledger."

It was admitted by the appellant that the proceedings had before the justices were legal and regular, and that, if the said call was legally and properly made, and the appellant's parish was legally liable to pay to the respondents the sum of money so demanded, the said warrant had been properly issued.

The appellant, however, objected to the liability of the said parish to pay the sum of money thus required to be paid by the said parish, on the ground that it appeared by entries in the parochial ledger of the union, in the union accounts made up to Lady-Day, 1858, and also in the accounts made up to Michaelmas, 1858, and duly audited, that there was a balance in favour of the parish exceeding the amount of the said call.

To this objection it was answered, on behalf of the respondents, that, although it was true that it did appear by the parochial ledger of the union that there were balances in favour of the appellant's parish, both at Lady-Day and at Michaelmas-Day, 1858, as alleged, in the hands of the treasurer of the union, to an amount exceeding the amount of the call, yet that in fact the respondents had no balance at all in the hands of the treasurer: and it was further stated on behalf of the respondents,

*866] and admitted by the said appellant, that seventy-five parishes *of the union, the appellant's parish being one, appeared by the said parochial ledger to have had balances in their favour at Lady-Day, 1857, amounting in the whole to 11,000*l.*, and that the respondents thereby

also appeared to have a balance in their favour at the said time, to the same amount, in the hands of their treasurer, entered to the credit of the said respective parishes; but that, in fact, instead of there being at the said time a balance in favour of the respondents in the hands of their treasurer to the credit of the said several parishes, the respondents' account had at Lady-Day, 1857, been overdrawn with their treasurer to the extent of 4200*l.*, and that this discrepancy was occasioned by the fact that one Manini, a collector for certain of the parishes of the union, with the assistance of one Paul, a clerk of the respondents, had for a series of years preceding Lady-Day, 1857, embezzled the funds of the said parishes intrusted to him, instead of paying them into the treasurer's hands, and had caused the copies of accounts of the said treasurer rendered to the said respondents to be falsified, so as to make it appear therefrom that the respondents had received credit in the books of the treasurer for the sums of money which he had embezzled.

It was then contended, on behalf of the appellant, that, notwithstanding these facts, inasmuch as the said appellant's parish had in fact paid into the hands of the treasurer all the sums of money appearing to the credit of the parish, as well in the parochial ledger of the union as in the treasurer's books, the said appellant's parish was entitled to take credit for the said balance appearing in their favour at Michaelmas, 1858: and, for the purpose of enabling the court to determine the said questions raised between the parties, the following further facts were stated and agreed upon between the parties:—

*The respondents are a corporation constituted by an order of the poor-law commissioners, dated the 10th of March, 1837. [*867

The City of London Union consists of ninety-eight parishes, of which the appellant's parish is one. The respondents have the management of the relief of the poor of the various parishes; and the course of practice with regard to the contribution of the said parishes towards the expenses of the union, is as follows:—

The clerk of the respondents four weeks at least before the 25th of March and the 29th of September respectively in each year refers to and ascertains the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half-year next coming, and estimates, and, as near as may be, divides amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year; and he also estimates the probable balance due to or from the parish at the end of the current half-year, and then prepares the orders on the several parishes for the sums which upon such computation it appears necessary for them to contribute to the expenses of the union for the coming half year; and the orders so prepared are laid before the respondents for their consideration three weeks at least before the expiration of the current half-year.

The respondents make orders on the overseers and other proper authorities of every parish of the union, from time to time, for the payment to the respondents of all such sums as are required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the respondents on the parish; and in such orders the contributions are *directed to be paid in one sum, or by instalments on days specified, as to the respondents seems fit. [*868

The overseers or other proper officers of the various parishes make rates upon their respective parishes for the purpose of meeting the said calls of the respondents, and also for the purpose of defraying other parochial expenses with which the union has no concern.

The various parishes on or before the day mentioned in the said calls of the respondents pay the amounts of the said calls to the treasurer of the union. The treasurer places the whole amount of the moneys thus paid into his hands to the credit of the respondents generally; at the same time distinguishing the several amounts paid in by each parish respectively, and entering the same in an account in which credit is given to each parish for the sums of money actually paid in by such parish to the account of the respondents. A clerk of the respondents, whose special duty it is to do so, makes out from time to time, for the use of the respondents, copies of the above-mentioned accounts of the treasurer, showing the total amounts standing to the credit of the respondents in the treasurer's books, and also showing the particular amounts paid in by each parish making up these totals.

The respondents have a book called the Parochial Ledger of the union, in which every parish is credited with the sums of money paid in by such parish from time to time to the treasurer of the union, to the account of the respondents; and this portion of the ledger is made up in the first instance from the returns made to the respondents by their clerk as aforesaid.

The account of every individual parish is made up and balanced in this ledger by the respondents every half-year, at Michaelmas and Lady-Day; and the balance appearing in favour of or against any given parish is carried over to the account of the succeeding half-year.

*869] *Annexed is a copy of the account of the appellant's parish so made up in the union parochial ledger for the year ending Lady-Day, 1857 (see next page):—

Copies of accounts for the half-years ending Michaelmas, 1857, Lady-Day, 1858, and Michaelmas, 1858, were set out in the case, and were in form similar to the above; and each of them showed a balance in favour of the parish.

The appellant's parish had in fact paid to the treasurer of the union all the sums of money for which credit is given to the said parish in the respondents' accounts; and all the accounts stated by the respondents with the appellant's parish by which the above balances are arrived at are correct, so far as the charges of the respondents against the appellant's parish, and the payments made by the said parish to the treasurer of the union, are concerned

The half-yearly statements of accounts in the said ledger at Lady-Day, 1857, showed balances in favour of seventy-five parishes, including the appellant's parish, amounting in the whole to 11,000*l.*: and it also appeared by the said ledger that a sum of 11,000*l.* was standing to the credit generally of the respondents in their account with the treasurer of the union, and entered in the treasurer's books to the credit of the said seventy-five parishes, in the several particular and respective amounts of the said balances appearing in favour of each parish respectively in the said parochial ledger.

It was also an admitted fact that all the accounts of the respondents with the whole of the seventy-five parishes were correct, and that every

City of London Union.

Parish of St. Mary Bothaw, for the year ending Lady-Day, 1857.

Dr.	£	s.	d.	£	s.	d.
In maintenance						
Workhouse, Bow	36	13	4			
Ditto ditto, funerals	1	2	0	37	15	4
Out relief, as per relief lists	31	3	6			
Clothing	1	16	6	33	0	0
Maintenance of lunatics in asylum				61	2	0
Collector's poundage				7	19	11
Common charges						
Instalment of workhouse loan	1	10	8			
Interest	2	8	10	3	19	6
Salaries of officers, and other common charges, share of	37	5	0			
Central London district school, share of	9	12	0	46	17	0
				£190	13	9
Balance in favour of the parish				457	9	8½
				£648	3	5½

Cr.	£	s.	d.
By balance in favour of the parish, brought forward	36	19	2½
Treasurer of the union	60	0	0
... ...	144	0	0
... ...	16	11	6
... ...	5	15	6
... ...	12	0	0
... ...	15	0	0
... ...	10	0	0
... ...	147	11	6
... ...	150	0	0
... ...	48	4	6
... ...	2	1	3
	£648	3	5½

one of these parishes had in fact paid to the treasurer of the union the sums of money with which they were respectively credited in the said ledger; and it so appears by the treasurer's book: and the accounts
*871] showing the said balances, *amounting to 11,000*l.* as aforesaid, were, as between the respondents and the said parishes, correct.

It was also an admitted fact, that, at the very time that the said ledger account showed a balance of 11,000*l.* in favour of the respondents in the account with the treasurer as aforesaid, the respondents had not only no balance in their favour in the hands of their treasurer, but there was a balance against them to the amount of 4200*l.*

The circumstances which gave rise to this deficiency and to the discrepancy in the accounts, were as follows:—Several years previously to 1856, one Charles Guerrino Manini was duly appointed by the board of guardians, with the approval of the poor-law board, pursuant to the statute and the orders of the poor-law commissioners made by virtue of the same in that behalf, the paid collector of poor-rates for eight of the parishes in the said union; and one John Paul had been appointed the clerk to the respondents, whose duty it was to make the copies of the treasurer's books, and return the same to the respondents as aforesaid.

It was the uniform practice for the overseers of the said eight parishes to permit their collector Manini to pay over directly into the hands of the treasurer of the union, not only the amount of calls from time to time made upon them by the respondents, but the whole amount of all rates collected by him on behalf of the said parishes; and when, as was in fact usually the case, the amount of rates collected by Manini exceeded the amount of the said call, the overseers of each parish were in the habit of obtaining from the respondents, from time to time as they required, their checks on account of the difference between the amount of rate collected by Manini and the amount of the call made upon them.

*872] For a series of years Manini was in the habit of *keeping back large portions of the rates so collected by him, instead of paying them into the hands of the treasurer: and, in order to prevent detection, he induced the said John Paul to falsify the copies of accounts returned by him to the respondents, and to make it appear by the said returns that Manini had in fact paid to the treasurer the whole amount of the rates collected by him, and to make it appear also that the respondents and the said eight parishes had credit respectively, in the manner hereinbefore explained, in the books of the treasurer, to the full amount of all the rates collected by him.

The accounts of the said eight parishes in the parochial ledger of the union were made up from these false returns; and in this manner the said eight parishes had credit given to them in the said ledger for moneys which were never in fact paid by them into the hands of the treasurer of the union, and for which they never were in fact credited in the books of the treasurer.

Manini, the more effectually to carry out his embezzlements, induced the said John Paul to intercept the checks drawn by the respondents upon the treasurer of the union upon the faith of the balance in their favour to the amount appearing in the parochial ledger as aforesaid, in the following manner:—The respondents were in the habit of drawing checks in favour of the creditors of the union, and handing them to

their said clerk Paul to be paid over. A large quantity of these checks were not paid to the creditors in whose favour they were drawn.

Up to Lady-Day, 1857 (after which no embezzlement was committed), Manini had, in the manner described, embezzled moneys to the amount of 22,407*l.* 8*s.* 2*d.* John Paul had also embezzled the sum of 4404*l.* 15*s.* 8*d.*, which however was reduced by 500*l.* recovered from his sureties, leaving a net loss by Paul of 3904*l.* 15*s.* 8*d.*; *making the total amount embezzled 26,312*l.* 3*s.* 10*d.* This amount is represented in the accounts by the three following classes of deficiencies,—the said surplus moneys, amounting to 11,000*l.*, paid by the seventy-five parishes to the treasurer of the union as above mentioned,—the sum of 4200*l.*, the amount to which the respondents had overdrawn their account with the treasurer of the union as aforesaid,—and the residue, 11,112*l.* 3*s.* 10*d.*, the amount to which creditors of the union had been improperly left unpaid. [*873

In consequence of the loss of their funds as aforesaid, by the embezzlements and frauds before mentioned, the guardians of the said union were without the means of providing for the maintenance and support of the poor, and for the other payments which the said guardians were and are bound to make.

The order on the appellant's parish was made for the said sum of 65*l.*, which amount was the sum required to be contributed by the said parish towards the relief of the poor thereof, and to the contribution of the said parish to the common fund of the said union, and such other expenses as were chargeable by the said guardians on the said parish.

It was agreed, that, if either party should wish to refer to any order or orders of the poor-law commissioners not set out in the body of this case, such party should be at liberty so to do, and that, for that purpose, the orders should be taken to be as set out in the book intituled "The Consolidated and other Orders of the Poor-Law Commissioners, and of the Poor-Law Board, &c.," by William Cunningham Glen,—a copy of which accompanied the case.

The questions for the opinion of the court were,—first, whether the said contribution-order of the 31st of August, 1858, was legally and properly made,—secondly, whether the appellant was liable to pay, on *behalf of the said parish of St. Mary Bothaw, to the respondents the said sum of 65*l.*, or whether the appellant was not entitled to have credit for the said balance appearing in favour of the said parish in the union parochial ledger at Michaelmas, 1858, although neither at that time nor at Lady-Day, 1857, was there any balance actually in the hands of the treasurer of the said union. [*874

If the court should be of opinion that the said order was legally and properly made, and the appellant liable as aforesaid, and not entitled to have credit for the said balance, or any part thereof, then the said warrant was to be executed: but, if the court should be of opinion otherwise, then the determination of the justices was to be reversed, and the said complaint dismissed.

Watkin Williams (with whom was *Bovill*, Q. C.), for the appellant. —The question in this case turns upon the construction to be put upon the 81st and 82d articles of the Consolidated Orders of the Poor-Law Commissioners, made pursuant to the 4 & 5 W. 4, c. 76. The 81st article provides that "The clerk shall four weeks at least before the

25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half-year of the last year corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any extraordinary charges to which the union may be liable in the coming half-year, and he shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several *875] parishes for the sums which upon such *computation it shall appear necessary for them to contribute to the expenses of the union for the coming half-year; and the orders so prepared shall be laid before the guardians for their consideration three weeks at least before the expiration of the current half-year." And the 82d article provides that "the guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish; and in such orders the contributions shall be directed to be paid in one sum, or by instalments, on days specified, as to the guardians may seem fit." In consequence of the fraud of a collector employed by *nine* of the parishes which compose the union, a large deficiency having occurred in the funds, the guardians in February, 1857, made an order charging each parish in the union (*ninety-eight* in number) with its quota of the deficiency thus occasioned. Upon an appeal against this order, the Court of Queen's Bench held, that, as the defaulting collector was appointed by the guardians, and was to be considered as the officer of the union, the deficiency was properly charged upon all the parishes constituting the union: but the Court of Exchequer Chamber, upon appeal, reversed that decision,—holding that the loss thus occasioned was not properly chargeable upon a parish not being one for which the officer making default acted as collector: see Waddington *v.* The Guardians of the London Union, 28 Law J., M. C. 113. In this case, the guardians have made a call upon the parish of St. Mary Bothaw, Dowgate, to contribute a sum towards the collector's deficiencies, although he was not *their* collector, and *876] *although there was at the end of the preceding half-year a balance in their favour in the treasurer's account of upwards of 450*l.* The balance in favour of the appellant's parish is not the less due to them, because the guardians have by their carelessness lost it, no negligence in the appellant being shown.

Le Breton (with whom was *Huddleston*, Q. C.), contrà.—The order in question was properly made under the 82d article of the Consolidated Orders. The 81st is merely directory. There is nothing on the face of the order to show that it was made for any other purpose than that for which the guardians are bound to provide funds, viz. the prospective relief of the poor of the several parishes constituting the union. To entitle the appellant to set off any balance, it must be shown to be an available balance. Christie, App., The Guardians of the Poor of St. Luke, Chelsea, Resp., 27 Law J., M. C. 153, was referred to.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

The question in this case arises on the 81st and 82d articles of the consolidated order of the poor-law commissioners.

The facts show that the clerk, in preparing the order in dispute, had not conformed with the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. Mary Bothaw, Dowgate, was to be ordered to contribute to the expenses of the union, he omitted to estimate the probable balance due to that parish; for, if he had taken that balance into account, it was so largely in favour of the parish that no sum whatever would have been needed to meet the *cost of the maintenance of its poor and the other charges for which the order was made. It was, therefore, argued on behalf of the appellant, that the order was invalid and not enforceable; and that it would be most unjust to make the parish pay over again the sums which they had already duly paid to the treasurer of the respondents, and which had been lost or misapplied while in his hands, without any fault or neglect whatever on the part of the parish. [*877

On the other hand, it was argued on behalf of the respondents that the order itself does not in any respect go beyond the terms of the 82d article (under which it was made), it being simply an order for the payment of such a sum as was needed prospectively for the relief of the poor of the parish, and for its contribution to the common fund of the union, and for other lawful expenses chargeable by the guardians on the parish. And it was further urged, that, as, in point of fact, there was no balance or available fund whatever in the hands of the guardians, and since it is plain that no order could legally be made on any of the other parishes of the union for contribution to the maintenance or relief of the poor of the particular parish, there would be no means whatever of maintaining or relieving them, if this order could not be made.

The question thus raised is certainly one of difficulty. But, after much consideration, we are of opinion that the arguments for the appellant ought to prevail.

It appears to us that the balance which the respondents have lost by the defalcations of Manini ought to be made good in their hands, either, according to the opinion of the Court of Queen's Bench in Waddington *v.* The Guardians of the Poor of the City of London, 28 Law J., M. C. 113, by orders apportioning the amount amongst the various parishes of the union, or, *according to the course suggested by the Court of Exchequer Chamber in the same case, by throwing the whole loss on those parishes exclusively for which Manini was collector. If the former course be the proper one, the parish of the appellant would, of course, contribute its just proportion. But the order in question, in effect, makes that parish contribute to Manini's defalcation, by arbitrarily confiscating the whole amount of the balance which happens to be due to it. [*878

As the guardians may, by taking the proper steps, realize that balance, they had, we think, no right to treat it as non-existing; and they ought to have taken it into account before making any order on this parish.

For these reasons, we think this order was illegally made, and cannot be enforced. Judgment for the appellant.(*a*)

(*a*) See the 22 & 23 Vict. c. 49.

The Governors and Directors of the Poor of the Parish of ST. JAMES, WESTMINSTER, Appellants; The Overseers of the Poor of the Parish of ST. MARY, BATTERSEA, Respondents. *July* 9.

The 158th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts that "every vestry and board shall distinguish in their orders sums required for defraying expenses connected with sewerage, and also, where the Lighting Act, 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this act, distinguish, as regards such parish or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this act."

The board of works of the Wandsworth district made an order upon the overseers of the parish of Battersea, under the above section, to levy a certain sum for lighting one of the four districts into which that parish was divided, called the "out district," and also to levy certain other distinct sums for lighting the three other districts.

Neither the 3 & 4 W. 4, c. 90, nor any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was in force in the "out district" at the time of the passing of the 18 & 19 Vict. c. 120, though the first-mentioned act was in force at that time in two of the other districts, and a private lighting act in the fourth district: and for these three districts a similar order for the levying of distinct sums for lighting expenses was at the same time made:—

Held, that the order, and the rate made in pursuance thereof, were valid.

THIS was a case stated by justices for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43.

*879] On the 2d of November, 1858, a summons issued at *the instance of the overseers of the poor of the parish of St. Mary, Battersea, in the county of Surrey (hereinafter called "the respondents"), calling on the governors and directors of the poor of the parish of St. James, Westminster, in the county of Middlesex (hereinafter called "the appellants"), to show cause why they had not paid, and refused to pay, the sum of 25*l.* at which they had been rated and assessed in and by a certain lighting-rate, for the lighting part of the said parish styled "the remainder of the said parish," known or called the out district, made on the 8th of April, 1857, came on for hearing before the undersigned, one of the magistrates of the police courts of the Metropolis, sitting at the Wandsworth police court, within the metropolitan police district.

The respondents produced a rate of which the title was in the following words:—"A rate or assessment, called a lighting-rate, made the 8th of April, in the year of our Lord 1857, for the carrying into effect the purposes of the act of the 18th and 19th years of the reign of Her present Majesty Queen Victoria, cap. 120, intituled 'An act for the better local management of the Metropolis,' and also under and by virtue of an act of parliament made and passed in the 9th year of the reign of Her present Majesty Queen Victoria, intituled "An act for the better ascertaining and collecting the poor and other rates in the parish of Battersea, in the county of Surrey,' for the remainder of the parish of St. Mary, Battersea, in the county of Surrey (including Battersea Fields

*880] and Wandsworth Common, known or *called the out district), being a rate or assessment made upon owners and occupiers of houses, buildings, property, and land in that part of the said parish of St. Mary, Battersea, in the county of Surrey, hereinafter set forth and

written, and rateable and rated, according to the last valuation made and acted upon for the relief of the poor in the said parish of St. Mary, Battersea, in the said county of Surrey, at the rate of 2*s.* in the pound."

No objection was raised to the title of the rate; and the fact of its having been properly and regularly made and duly allowed and published, was not questioned: the sole object of the parties being, and being stated to be, to obtain a decision of the question hereinafter mentioned.

By the rate the appellants appeared to be duly rated and assessed in respect of a certain building with land adjoining belonging to and occupied by them, known as "St. James's Industrial School," and hereinafter called "the premises," at 2*s.* in the pound on a rateable value of 250*l.*: whereupon the counsel for the appellants stated that the statute 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was not in force in and throughout the whole of the said parish of Battersea at the time of the passing of the statute 18 & 19 Vict. c. 120; that the 3 & 4 W. 4, c. 90, was at the said time in force in certain several parts or districts of the said parish of Battersea; but that the premises were situate wholly without every of such parts or district. This statement was admitted to be true by the counsel for the respondents, subject to the more specific and minute account of it hereinafter set forth.

Upon this admission, the counsel for the appellants *contended [*881 that the appellants were not liable to be assessed to a lighting-rate in respect of the premises, inasmuch as by the 158th section of the 18 & 19 Vict. c. 120, the power and duty of vestries and district boards to distinguish sums required for defraying expenses of lighting, from sums required for defraying other expenses of executing that act, only existed when the act of 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, was in force in any parish or a part of a parish at the time of the passing of the 18 & 19 Vict. c. 120, and then only as regards such parish or part of parish; and therefore that the district board of works had not authority by law to order the respondents to make any separate rate for defraying the expense of lighting, to be called a lighting-rate, whereby the appellants should be assessed in respect of the premises; that any order of the district board of works purporting so to order the respondents, was either bad so far as the appellants and the premises were concerned, or ought to have been understood and carried out by the respondents in such wise that the appellants should not be assessed thereby in respect of the premises; and therefore that the appellants were no more liable to the rate in question in respect of the premises than they were in respect of premises belonging to them in another parish altogether.

The counsel for the respondents thereupon made the following statement:—At the time of passing the act for the better local management of the Metropolis, 18 & 19 Vict. c 120, the 3 & 4 W. 4, c. 90, was in force in a district of the said parish called the North Western District, also in a second district of the said parish called the South Eastern Dis-

*882] trict; and an act to repeal *an act of the 52d year of the reign of King George the 3d [c. 112] for lighting and watching the road leading from Newington Butts to the Nag's Head, in the Wandsworth Road, and other places communicating therewith, in Lambeth, Clapham, and Battersea, in Surrey, and for making other provisions for lighting and improving the said road and other places adjacent or near thereto (the 9 & 10 Vict. c. 350, local and personal),—and which said act was to form part of this case, and might be referred to by either party,—was at the time of the passing of the said act for the better local management of the Metropolis in force in a third district of the said parish, called the Wandsworth Road District. The remainder of the parish is called the Out District. There was no lighting act in force within the said Out District or any part thereof at the time of the passing of the said act for the better local management of the Metropolis. The rate mentioned in the summons was made by the overseers of the said parish of Battersea on the persons and in respect of the property by law rateable to the relief of the poor in the said Out District, in compliance with an order of the board of works for the Wandsworth District, within which district the said parish of Battersea is situated, duly made under their seal, whereby they required the overseers of the poor of the said parish of Battersea to levy and pay into the Southwark branch of the London and Westminster Bank, Wellington Street, Borough, to the credit of the board of works for the Wandsworth District, a sum in the said order named, for expenses of lighting the said Out District, by the instalments and at the times in the said order mentioned; and the appellants, who were the beneficial occupiers of the said lands and buildings called "The St. James's Industrial School," situate within the *883] said Out District, were rated in the said rate in *respect of the said land and buildings at the said sum of 25*l*. By the same order, the said board of works for the Wandsworth District had required the said overseers of the parish of Battersea to levy in like manner the several sums therein respectively mentioned, for expenses of lighting the North Western District, the South Eastern District, and the Wandsworth Road District of the said parish of Battersea respectively; and rates had accordingly been made for this purpose on the said districts respectively.

The counsel for the appellants admitted this statement to be true.

The counsel for the respondents thereupon contended, that, as the statute 3 & 4 W. 4, c. 90, was in force in certain parts of the said parish, and the statute 9 & 10 Vict. c. 350 in another part of the said parish, at the time of the passing of the act for the better local management of the Metropolis, the said district board of works were not only justified in ordering, but were bound to order, the expenses of lighting the said parish to be defrayed by a lighting-rate, as distinct from a general rate; and that the appellants were liable to be assessed to the said rate so ordered to be made on the Out District, in respect of the premises, although the same were not situate within any district in which the lighting act was in force at the time of the passing of the said act for the better local management of the Metropolis; and that, if they were not, they would be exempt altogether from contributing towards the expense of the lighting the said parish, as the same could not be defrayed out of a general rate.

The counsel for the appellants, in reply, contended that by law they were only liable to a general rate and a sewer-rate; and that, if the law did not provide the means for making them liable to a lighting-rate, neither the district board of works nor the respondents had authority to supply the defect.

*As both parties were desirous of having the question of law settled by the opinion of one of the superior courts of law, on a case setting out the facts, the undersigned, with their consent (given for the purpose only of enabling them to bring the said question in that form before such court), determined that the appellants, for the reasons of the respondents above set forth, were liable to the said rate, and ordered the amount thereof to be levied on them by his distress-warrant. And thereupon, the appellants, being dissatisfied with the said determination as being erroneous in point of law, duly complied with the requisitions of the statute 20 & 21 Vict. c. 43, and applied to the undersigned to state and sign a case setting forth the facts and grounds of his determination, in the form of a special case for the opinion thereon of the Court of Common Pleas. The statements above set forth are such special case. [*884

The land in respect of which the appellants are assessed in and by the said rate consists of fifteen acres of land adjoining and belonging to the said house and within the said curtilage, which are cultivated for culinary produce by the spade-labour of the boys in the establishment. A part of the produce is consumed for the purposes of the establishment; another part is consumed for the purposes of the workhouse of St. James, Westminster, which is situate within that parish; and the remainder is sent to market and sold, the proceeds being applied in aid of the poor-rate of that parish.

The appellants claim, under the 165th section of the Metropolis Local Management Act, to be assessed in respect of these fifteen acres at one-third only of the rate at which houses, buildings, and property other than land, are assessed in and by the said rate.

It is agreed between the parties, that, if the appellants are liable to be assessed to the said rate in respect of the said premises, but are nevertheless entitled to *have the said fifteen acres rated, as land, at one-third only of the rate at which houses, buildings, and property other than land, are rated in and by the said rate, the sum of 3*l.* 6*s.* 8*d.* shall be deducted from the sum which the applicants are to pay, and for which my distress-warrant is if necessary to issue. [*885

The questions for the opinion of the court, are,—first, whether the appellants were by law liable to be assessed to the said rate in respect of the premises,—secondly, if the court will indulge the parties by deciding it, whether the appellants are entitled to have the said fifteen acres rated as land within the meaning of the 165th section of the Metropolis Local Management Act.

Lush, Q. C. (with whom was *David Keane*), for the appellants.(*a*)—

(*a*) The points marked for argument on the part of the appellants, were as follows:—

"1. That, as it is admitted that the premises in respect of which the appellants are rated are situated in the Out District, and also that at the time of the passing of the Metropolis Local Management Act, 1855, no lighting act was in force for the whole parish, or in the Out District, a lighting-rate on them in respect of their occupation of their said premises, is not warranted by law:

"2. That, by the 161st section of the Metropolis Local Management Act, 1855, the power of

*886] The parish of St. Mary Battersea is *divided, for lighting purposes, into three districts: in two of these, the lighting act 3 & 4 W. 4, c. 90, has been applied; in the third there is a private lighting act, 52 G. 3, c. 112: as to the fourth, or "out district" (where the property sought to be charged with the rate in question is situate), it had no lighting act at all, and in point of fact was not lighted. The question is whether the board of works had any power to make a lighting-rate for that out district. The 71st section of the general lighting act, *887] 3 & 4 W. 4, c. 90, enacts that *the provisions of that act may be adopted in any parish either as to lighting or as to watching, or as to lighting and watching, as may be deemed expedient: and the 73d section enacts that it shall be lawful for the inhabitants of *part of any parish* to hold a meeting of the inhabitants of such part, to be convened in manner therein directed, and to be composed of such inhabitants only, for the purpose of determining whether the provisions in that act contained, or any of them, shall be adopted and carried into execution in such part of the said parish; and that the overseers of the poor of the said parish, or of any township or division of the said parish, shall be amenable to the provisions of this act, so far as they may relate to the part of such parish situate within or partly within the division or district for which such overseers shall act, for the purpose of levying, raising, and paying the rates within the part of such parish adopting the provisions of this act, in the same manner as they would be if the whole parish, township, or place for which they act had adopted the provisions of that act. The rate in question was made under the authority of the 158th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which enacts that "every vestry and district board shall from time to time, by order under their seal, require the overseers

the overseers to make a lighting-rate depends on the existence of an order of the district board of works for levying a separate sum for defraying expenses of lighting; that such order must be one which the district board of works is by law entitled to make; and that, by the 158th section of the same act, such an order can only be made 'where the act of the session holden in the 3d and 4th years of King William the 4th, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish or part of any parish,' and then only 'as regards such parish or part;' that neither the act of the 3 & 4 W. 4, or any other act of the kind described in the 159th section, extends to the whole parish of Battersea or to the Out District; and yet that the order relied on is one for making a separate lighting-rate for the Out District:

"3. That the intention of the legislature was, as is shown by the 158th and 165th sections of the Metropolis Local Management Act, 1855, that no separate rate should be made for defraying the expenses of lighting, unless some act was in force in the parish or part rated directing that land should be rated less in proportion than houses, or be wholly exempt; and that the imposition of a lighting-rate on the Out District, or the inclusion of it in a lighting-rate extending over a large area, will defeat such intentions, inasmuch as, if the rate be imposed on the Out District only, there would be no authority by law to rate land at an amount less in proportion than houses, or to exempt land, and if a lighting-rate be imposed upon a district including the Out District and some other part of the parish, the rate would press unequally on land in the Out District, in comparison with land in the other part so included:

"4. That the Out District is subject only to a general rate and a sewer-rate, in the former of which the expenses of lighting the Out District are to be included; and the case of the parish of Battersea is one not provided for by the act, and an omission of the legislature which the court will not supply:

"5. That the land cultivated as in the second part of the case mentioned, if rateable to a lighting-rate at all, is only rateable at an amount one-third less in proportion than property other than land is rated at."

of their parish, or of the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this act (and such orders may be made wholly or in part in respect of expenses already incurred or of expenses to be thereafter incurred); and every such vestry and board shall distinguish in their orders sums required for defraying expenses of constructing, *altering, maintaining, and cleansing the sewers, or otherwise connected with sewerage, and also, where the 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this act, distinguish, as regards such parish or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this act; but every such vestry and board may cause to be raised as expenses connected with sewerage such portion of the expenses incident to the conduct of their business in relation to sewerage, in common with the conduct of their other business under this act, as to such vestry or board may seem just; and the overseers or collectors, in the receipts to be given for the sums levied or collected by them, shall distinguish the rate in the pound required for sewerage expenses, and the rate required for the other expenses of this act." The parish of St. Mary Battersea forms part of the Wandsworth District. The object of the 158th section was, to transfer to the vestry or the district board the powers of lighting, but not to alter the ratio in which the parishes were liable to be rated under the act. The 161st section provides that the rate so ordered shall be collected by the overseers in the same manner as the poor-rate: and the 165th section enacts, "that, in every parish or part of a parish in which, at the time of the passing of this act, the 3 & 4 W. 4, c. 90, is in force, the owners and occupiers of houses, buildings, and property other than land, shall be rated to every lighting-rate made under this act at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated *in such lighting-rate; and, in every parish or part of a parish in which, under any other act, land is now rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is now wholly exempted from being rated in respect of such expenses, such land shall continue to be rated to every lighting-rate made under this act at such less amount, or, where such land is now wholly exempted as aforesaid, shall be wholly exempted from such rate." The lighting act having never been applied to this district, the only rates which the board of works could order, are, the sewer-rate and the general rate. The overseers can only levy a lighting-rate where it has been duly ordered to be levied; and it could only legally be ordered to be levied where the lighting act had been applied. [WILLES, J., referred to s. 159, which enables vestries and boards to exempt from payment any particular part of the parish or district not benefited by the expenditure. BYLES, J.—How is the lighting to be paid for?] Out of the general

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rate, if at all. But this particular district, it appears, is not lighted at all.

Prideaux (with whom was *Jackson*), for the respondents.(*a*)—No gene-
*890] ral rate can be made on the whole *parish which contains anything for lighting. The 3 & 4 W. 4, c. 90, is impliedly repealed by the 19 & 20 Vict. c. 120, s. 158; therefore that act cannot now be adopted as suggested. The 159th section is conclusive, and seems to have been framed for the very purpose of meeting a case like the present. It enacts, that, "where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied as aforesaid, have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may, by any such order, direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require; and any such board may refrain, where any entire parish ought in their judgment to be so exempt, from issuing an order for levying any money thereon, notwithstanding they may issue an order or orders for levying sums upon any other parish or parishes in their district." Here the
*891] *rate is made upon the out district under the order of the board of works, for the express purpose of lighting that district: and the court will assume that the order was rightly made, if a state of circumstances existed to justify the making of it. The second question is not one submitted by the magistrates: but it would be desirable for the parties to have the opinion of the court upon that also. [WILLES, J.—I for one am not disposed to indulge the parties with an opinion upon that question.]

Lush, in reply.—The order is a general order to levy a rate upon the whole parish. The board therefore have not exercised the power supposed to have been conferred upon them by the 159th section of the 18 & 19 Vict. c. 120. Neither the order nor the rate is warranted by the act. [WILLIAMS, J.—There certainly are difficulties in the way of applying the 159th section to this case.]

There was a second case between the same parties, involving the same question in respect of a rate made on the 13th of October, 1857.

Cur. adv. vult.

(*a*) The points marked for argument on the part of the respondents were as follows:—

"That, under the circumstances set forth in the case, the district board of works were bound to order the expenses of lighting the said parish, and the several districts thereof, to be defrayed by lighting-rates: That, even if they were not bound so to do, they were justified in so doing: That the said order of the district board of works was authorized by the provisions of the Metropolis Local Management Act, and that the overseers of the poor of the said parish of St. Mary, Battorsea, were by virtue thereof authorized and bound to make and levy a lighting-rate on the said Out District, for defraying the said expenses of the said Out District: That the appellants were liable to be assessed to the said rate, in respect of the premises: That land within the said Out District is not entitled to the benefit of the provisions of the 165th section of the Metropolis Local Management Act, the 3 & 4 W. 4, c. 90, not having been in force in the said district at the time of the passing of the Metropolis Local Management Act: That the said fifteen acres of land appurtenant to the said house, and within the said curtilage, cannot be deemed 'land,' within the meaning of the 165th section of the Metropolis Local Management Act: And that the appellants are not entitled to have the said fifteen acres rated as 'land,' within the meaning of the said last-named section."

WILLIAMS, J., now delivered the judgment of the court:—

In these two cases, the questions submitted for our consideration respectively are, whether the lighting-rates which are the subject of dispute are valid and enforceable. And we are of opinion in the affirmative.

The validity of the rates is dependent on the validity of the orders made on the respondents by the board of works of the Wandsworth district. As to one of the rates, that of April 8th, 1857, the order is, to levy a certain sum for lighting one of the four districts into *which the parish of the respondents is divided, called "the out district," in which the premises of the appellants are situate, and [*892 also to levy certain other distinct sums for lighting the three other districts. As to the other rate, that of October 13th, 1857, the order is, to levy a single sum for lighting the parish of Battersea generally.

These rates and six others were made under the 158th and 161st sections of the statute 18 & 19 Vict. c. 120: and the question turns entirely on the construction of that act.

The appellants contend that the 158th section, in ordinary cases, prescribes that the board shall (except as to sewerage expenses) order, generally, the overseers of the several parishes in the district to levy the sum required for the expenses incurred in the execution of the act, and only allows the board to order a distinct sum for lighting to be levied in cases where the statute 3 & 4 W. 4, c. 90, or some other act by virtue whereof land is rated, as to lighting expenses, at a lower amount than houses, is in force in the parish *or any part thereof*. And in such cases the board is to distinguish, "as regards such parish or part," the sum required for lighting, from the sum required for the general expenses of executing the act. The argument, then, is, that the board, by this enactment, is directed in this instance to order a distinct sum for lighting only as regards the three other districts, in which, by virtue respectively of the statute 3 & 4 W. 4, c. 90, and a local act, land is rateable at a lower amount than houses; and that the expenses of lighting the remaining district, *i. e.* the out district, must be defrayed under a general order, and a general rate founded thereon, and not by a distinct order for lighting, and a lighting-rate such as those in question. But, if this were the construction, it is plain that the three other districts would have *to contribute to the general [*893 rate, as well as to their own special lighting-rate: in other words, besides paying for their own lighting, they would have to pay a very great proportion of the expenses of lighting the out district.

It is impossible to suppose that the legislature intended anything so unreasonable and unjust: and we think, that, when the board is directed to distinguish, as regards any particular part of any parish, the sums required for defraying the expenses of lighting the parish from the sums required for the general expenses, they are, by implication, directed to distinguish the sum required for lighting the whole parish, which must be levied by a lighting-rate over the whole parish, having regard, in making the rate, according to s. 165, to those particular parts of the parish wherein by reason of the statute 3 & 4 W. 4, or other act, land is rateable at a lower amount than houses.

Substantially, we think the rates and orders in dispute have been

made in conformity with this construction of the statute, and are therefore valid and enforceable.

We have been requested to answer another question in dispute between these parties: but, as it has not been submitted to us by the special case, we think we are bound to decline giving any opinion with respect to it.

Appeal dismissed.

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*894] *SIR THOMAS BLAIKIE, Knight, and Others, *v.* STEMBRIDGE. *July* 9.

Semble, that a merchant sending goods to be loaded on board a general ship is not entitled to assume, without inquiry, that they are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with the master, or wrong done by him or the crew, to insist upon holding the master liable for damage done to the goods in the loading thereof.

In the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner of a ship, to receive and properly stow on board the goods to be carried; and, for any damage to the goods occasioned by negligence in the performance of this duty, the owner (and probably also the master, if the damage result from the neglect or misconduct of himself or of those for whose acts he is responsible) is liable to the shipper.

A ship was chartered by the owner to one A. for a voyage with cargo to Port Louis and back, for a stipulated rate of freight per ton on the homeward cargo,—the cargo to be taken to and tendered alongside at the charterer's risk and expense, the ship to be consigned to charterer's agents at ports of loading and discharge, and *a stevedore for the outward cargo to be appointed by the charterer, but to be paid by and to act under the captain's orders.* The charterer put up the ship as a general ship for Port Louis, and appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. The plaintiffs' agent arranged with the broker of the charterer for the freight and carriage to Port Louis of certain sugar-pans, and sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter *by the stevedore and his men*, two of them were by their negligence damaged:—

Held, that, under these circumstances, the stevedore was not the servant or agent of the master, so as to render him responsible.

THIS was an action brought by the plaintiffs, who are iron-founders, against the master of a vessel called the Gundreda, for alleged negligence in loading certain sugar-pans on board that vessel.

The declaration stated that theretofore, and before the commencement of the suit, the plaintiffs, at the request of the defendant, caused to be delivered to the defendant in London, alongside a certain ship called, to wit, the Gundreda, divers goods and merchandise of the plaintiffs, to wit, fourteen sugar-pans, of great value, to be loaded by the defendant on board the said ship, and in and on board the said ship to be carried and conveyed by the defendant from London aforesaid to Port Louis, in the island of Mauritius, and there to be delivered, to wit, to the plaintiffs, for freight and reward to the defendant in that behalf; the act of God and the Queen's enemies, and dangers of the seas, excepted: and the defendant then took and received the same accordingly for the purpose and on the terms aforesaid: yet the defendant so *895] negligently, carelessly, *and improperly conducted himself in and about the said loading of the said pans on board the said ship, that, by and through the carelessness, negligence, and improper conduct of the defendant and his servants in that behalf, and not by

reason of any dangers of the seas, or the Queen's enemies, or the act of God, divers, to wit, two of the said pans were much damaged and broken, and the same became and were and are of no use or value to the plaintiffs.

The defendant pleaded,—first, that the plaintiffs did not cause to be delivered, nor did the defendant take or receive the said sugar-pans for the purpose and on the terms alleged,—secondly, not guilty. Issue thereon.

The cause was tried before Wightman, J., at the last Spring Assizes for Surrey. It appeared that the defendant was master of a ship called the Gundreda, belonging to one John Hillman; and that, on the 5th of May, 1857, the ship was lying in the port of London, and she was chartered by one Gallard for a voyage to Port Louis and back. The following is a copy of the charter-party:—

"London, 7th of May, 1857.

"It is this day mutually agreed between John Hillman, owner of the good ship or vessel called the Gundreda, A. 1, thirteen years, of the measurement of 444 tons or thereabouts, now in London, whereof Edward Stembridge is master, of the one part, and J. R. Gallard, of London, merchant and freighter, of the other part,—That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall in the London Docks load such lawful merchandise as the charterer may tender alongside, and therewith, with all convenient speed, sail and proceed to Port Louis, Mauritius, and discharge the same agreeably to bills of lading; after which she shall there load from the charterer's agents a full and *complete cargo of sugar in bags. Cargoes to [*896 be brought to and taken from alongside at merchants' risk and expense, which the said charterer binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to a safe port of discharge in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, excluding Amsterdam; calling at Queenstown or Falmouth for orders, which are to be given by return of post from London, or so near thereto as she may safely get, and deliver the same, on being paid freight at and after the rate of, for the voyage out and home, 4*l.* 5*s.* sterling per ton of 20 cwt. delivered at the Queen's beam, net, in full, for the United Kingdom; if ordered to the Continent, as above, 10*s.* per like ton additional (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted): The freight to be paid on unloading and right delivery of the homeward cargo, by approved bill on London at two months' date, or cash equal thereto, at merchant's option: £700 to be advanced on sailing from London, in cash, less two months' interest, or by bill at two months, at owner's option: Thirty-five running days are to be allowed the said charterer (if the said ship be not sooner despatched) for unloading and reloading at Mauritius; and to be discharged on her return, with all despatch, as customary: Forty-five running days for loading in London; and ten days on demurrage, over and above the said laying days, at 8*l.* per day.

"Money for ship's ordinary disbursements to be advanced by the

charterer's agents, free of interest and commission, but subject to insur-
*897] ance: The captain to *sign bills of lading at any rate of freight, not under the current rate, without prejudice to this charter-party.

"The ship to be consigned to charterer's agents at ports of loading and discharge, paying one commission of 2½ per cent: *Stevedore for outward cargo, to be appointed by charterer, but to be paid by and to act under captain's orders:* Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) "JOHN HILLMAN.
"J. R. GALLARD."

The charterer appointed one George Locke to be the stevedore; and he and his men thereupon went on board for the purpose of loading and stowing the cargo, according to ordinary usage. The master was aware of the terms of the charter-party, and that the stevedore was to be paid by him, and act under his orders; but he gave the stevedore no orders, and in no way interfered, but looked occasionally into the hold to see how the cargo was stowed, for the safety of the ship.

The master was not on board when the plaintiffs' goods came alongside of and were loaded on board the ship, nor did he in any way interfere with them: the mate was at that time on board in charge of the ship, but did not interfere in the loading. No crew was on board, nor had any been procured at the time the injury took place.

The pans were sent to London, and the plaintiffs' agent saw the brokers of the charterer and arranged with him for the carriage of the pans on board the ship, and paid him for freight of the same about 250*l.* The pans, twenty in number, were sent alongside the ship by the plaintiff's agent, in a lighter. The ship's people do the loading; the lighterman does not. The pans were then hoisted on board *by the stevedore and his men*, by hooks put into the lugs of the pans: and, by the pans
*898] being so lifted, or by the hoist being out of *the perpendicular, two of the pans were injured; and this action was brought for the damage thereto. The other pans, together with two afterwards sent to replace those damaged, were safely loaded and stowed on board by the stevedore, and the master signed the bill of lading for them.

At the trial, the judge left the question of negligence of the stevedore to the jury, who found for the plaintiffs as to one of the pans, with 14*l.* damages: but the counsel for the defendant contended, that, assuming the stevedore to have been negligent, the master was not liable for his negligence; and the judge reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion that there was no evidence to charge the master.

Bovill, Q. C., accordingly, in Easter Term last, obtained a rule to enter a verdict for the defendant, on the ground "that he was not shown to be responsible for the negligence of the stevedore."

Holl and *Jacob* showed cause.—The grounds upon which it is sought to establish the non-liability of the defendant, the master, for the injury complained of, are, that he was not personally present, and that a stevedore had been appointed by the charterer to superintend the stowing of the cargo. Now, it is the master's duty to see to the loading of the vessel: and, though the stevedore in this case was appointed by the charterer, it is expressly stipulated by the charter-party that he was to

be paid by and to act under the orders of the captain. [WILLES, J.—By some of the foreign ordinances and codes, the master is responsible for the negligence of those acting under him: but is that so here? In the case of a stage-coachman, the liability for the loss by negligence of a parcel attached *not to him, but to the proprietors.] If there had been no charter and no stevedore, the master clearly would [*899 have been responsible: Morse *v.* Slue, 1 Ventr. 190, 238, Sir T. Raym. 220, 1 Mod. 85, 2 Keble 806, 3 Keble 72, 112, 135, 2 Lev. 69. And there is nothing in this charter-party to alter his position. In the report of that case in 1 Ventr. 238, Hale, C. J., says,—"By the admiral civil law, the master is not chargeable pro damno fatali, as, in case of pirates, storm, &c.; but *where there is any negligence in him, he is.*" Again,—"'Tis objected that the master is but a servant to the owners. Answer: The law takes notice of him as no more than a servant. 'Tis known that he may impawn the ship, if occasion be, and sell bona peritura. He is rather an officer than a servant. In an escape, the gaoler may be charged, though the sheriff is also liable; for, respondeat superior. But the turnkey cannot be sued, for he is but a mere servant. By civil law, *the master or owner is chargeable, at the election of the merchant.*" [WILLIAMS, J.—Morse *v.* Slue is a very obscure case: the great question there was whether the common-law liability of a carrier extended to a carrying beyond seas. You have to make out that the master is liable for misfeasance as between him and the owner of the goods. Generally speaking, the only duty owing from an agent or servant is to his principal or master. BYLES, J.—There has been no misfeasance, no personal negligence here: all that is charged, is, that an intermediate agent has failed in exercising due vigilance in the stowage of goods.] The master of a ship stands in a very different position from an ordinary intermediate agent. Morse *v.* Slue is treated in the text-books,—Abbott on Shipping, and Maule & Pollock on Shipping,—as an authority for the liability of the master where he has been guilty of negligence. In Abbott on Shipping, 7th edit. 167, it *is said: [*900 "The great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part, and for his own sake, not less than for the interest of his employers, the utmost fidelity and attention. For, if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, *he is personally responsible for it.*" Again, p. 346,—"It is in all cases the duty of the master to provide ropes, &c., proper for the actual reception of the goods into the ship; Laws of Oleron, art. 10; Laws of Wisbuy, art. 22; Wellwood, tit. 9. And, *if a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss:*" Goff *v.* Clinkard, cited 1 Wils. 288. [WILLIAMS, J.—The authorities seem to show, that, for public convenience, the master may be treated as a common carrier. But you want to show that that principle is applicable where there is an express contract as to the stowing between the merchant and the owner.] The goods were not received under the charter. The ship was put up as a general ship: the receipt of the goods was the only evidence of the contract. [WILLES, J.—If any one is liable, it must be the owner.] It does not follow that the master may not be liable also. The appointment of a stevedore can make no difference. [BYLES, J.—Suppose the master were to depute one of the crew

to execute his duties, would the person so deputed be liable for negligence?] Clearly not. [BYLES, J.—You would say that that would be the case of the sheriff, the gaoler, and the turnkey?] Exactly so. The position of the master is an exceptional one. In Story on Agency, § 314, the law is thus laid down:—"There is one important exception to the rule already stated, as to the non-liability of agents to third persons for the negligences and omissions of duty of themselves and of
*901] their sub-agents, founded upon *the principles of the maritime law. In the case of masters of ships, who, although they are the agents or servants of the owners, are also in many respects deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but also for the negligences, nonfeasances, and misfeasances of the subordinate officers and others employed by and under them. We have already seen that the master of the ship is responsible upon contracts made by him in regard to the usual employment of the ship, and also upon contracts made by him for the repairs and necessaries supplied for the ship, as well as for the wages of the seamen employed in navigating the ship. This liability is founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as in some sort a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the exercitorial power, for the time being. And his liability, founded upon this consideration, extends not merely to his contracts, but to his own negligences and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, and negligences, or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board,
*902] who are under his command, and are *subjected to his authority." [BYLES, J.—In Boson v. Sandford, 1 Show. 101, for the loss of goods by his neglect, Lord Holt says "The master is liable, and may be sued alone."] All the authorities show, that, for damage resulting from his negligence, the master is equally liable with the owners. And he is clearly not relieved from that responsibility by the fact of a stevedore being appointed by the charterer. It being stipulated that the stevedore should act under his orders, the master was as much responsible for his acts as for those of any other of the crew.

Bovill, Q. C., and *C. Pollock*, in support of the rule.—The case of Morse v. Slue has no application here. To render the present defendant liable, the plaintiffs must show that he did some act or gave some command which operated to make the acts of the stevedore his acts, or that there was some contract to make him chargeable. Contract there was none: there was no bill of lading, not even a mate's receipt, given for these pans. The facts put the plaintiffs out of court. The owners of the ship charter her to one Gallard, who puts her up as a general ship, and engages a stevedore to superintend the loading, the stevedore being

paid by the ship's broker, for the owners. The plaintiffs contract with the charterer for the carriage of certain sugar-pans; and, whilst these pans are in the act of being hoisted on board for the purpose of stowage by the stevedore and his men, an accident happens whereby two of them are injured. There is no case to be found where the master of a vessel has been held liable, except as for a tort qua common carrier, or, where the vessel is at sea, by reason of some negligence on the part of the crew. [WILLIAMS, J.—The case of Morse *v.* Slue seems to establish that the master and the owner may be treated alike. WILLES, J.—How do you get over *the case put in Abbott,—"If a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss?"] [*903 The master may be responsible for an injury occurring in the receiving of the goods in the ordinary course, he himself remaining on board as exercitor navis. But, how can he be liable for the acts of an independent agent of the owner or the charterer, with respect to whom no relation of master and servant ever existed? [WILLES, J.—It is the master's duty to receive goods on board; the stevedore's duty to stow them in the hold. In practice, the master is seldom present at the loading; but he takes the risk of his duty being properly performed by the mate and the crew.] The evidence shows that the injury complained of happened whilst the pans were being got out of the lighter *by the stevedore and his men.* The stevedore, as well as the master, may be the agent of the charterer, and not of the owner: Marquand *v.* Banner, 6 Ellis & B. 232 (E. C. L. R. vol. 88). The old doctrine of Bush *v.* Steinman, 1 Bos. & P. 404, is not now sustainable: Cessante ratio cessat et ipsa lex. The business of a stevedore is as familiarly known as that of a drover. If he has a superior who is responsible for his nonfeasance or misfeasance, it must be the owner or the charterer, not the master. Wherever the doctrine of respondeat superior applies, the superior has a remedy over against the agent for his negligence. Here, the master could have no recourse to the stevedore, who was merely the servant of the charterer. [WILLES, J.—Is it not part of the ordinary duty of the master to provide the means and to employ those means for getting the goods on board?] The practice in the city of London is to employ a stevedore. [WILLES, J.—No such usage was proved or found here.] It was in evidence that the stevedore and his men went on board for the purpose of loading and stowing the cargo, *according to the ordinary usage.* *[WILLIAMS, J.—That means as between the owners and the charterer. There was no [*904 privity between the owners of the ship and the merchants here.] None: nor between the owners and the stevedore. Is the captain responsible for the negligence of every seaman on board? [WILLIAMS, J.—Yes. He is responsible for the consequences of the negligence of any one who is employed under him to perform any duty which the law casts upon him. If goods are lost by the negligence of one of the crew, the master is liable.] The master never had charge of these goods.

WILLIAMS, J.—This being a case of very general application, we will take time to consider and give our reasons; though I must say, that, as at present advised, I feel no difficulty as to the conclusion we ought to arrive at. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:(*a*)

(*a*) The case was argued before Williams, J., Willes, J., and Byles, J.

This was an action brought by the plaintiffs, who are ironmongers, against the master of a vessel, for alleged negligence in loading some sugar-pans aboard his ship The Gundreda.

The declaration alleged that the plaintiffs, at the defendant's request, delivered the pans to the defendant in London alongside, to be loaded by the defendant on board the ship, and carried therein by him from London to Port Louis, in the Mauritius, and there delivered to the plaintiffs for freight, the act of God and the Queen's enemies, and dangers of the seas, excepted; that the defendant received the pans accordingly; and that two of them were broken by the negligence of himself and his servants in loading them.

*905] *The defendant pleaded,—first, a denial that the plaintiffs delivered and the defendant received the pans for the purpose and on the terms alleged,—secondly, not guilty. On these pleas the plaintiffs took issue.

At the trial, before Wightman, J., at the last Surrey Assizes, it appeared that the defendant was master of the ship Gundreda, belonging to John Hillman, and that, on the 7th of May, 1857, she was lying in the port of London, and was then chartered by the owner to J. K. Gallard for a voyage with cargo to Port Louis and back, for a certain specified rate of freight per ton on the homeward cargo, 700*l.* whereof was to be advanced on the vessel's sailing from London. The cargo was to be taken to and tendered alongside at the charterer's risk and expense: the captain to sign bills of lading at any rate of freight, not under the current rate. "The ship to be consigned to charterer's agents at ports of loading and discharge." "Stevedore for outward cargo to be appointed by charterer, but to be paid by and to act under the captain's orders."

The charterer, being thus entitled to take a cargo to Port Louis, put the Gundreda up as a general ship, through his agent David Thomas At that time no crew was on board, nor had any been procured at the time the injury complained of took place; and this was not alleged to have been unusual or improper. The charterer appointed George Locke as stevedore, and he and his men went on board for the purpose of loading and stowing the vessel in the usual course of his business. The master was aware of the terms of the charter-party, but gave the stevedore no orders, and in no way interfered with him, contenting himself, according to his view of his duty, with occasionally looking into the hold to see how the cargo was being stowed, for the safety of the ship. The master

*906] was not on board when *the plaintiffs' pans came alongside; and he in no way interfered with them, unless indeed the stevedore is to be considered as his agent. The mate was on board in charge of the ship, but did not interfere with the loading. The pans in question were sent to London, to go by the ship. The plaintiffs' agent saw the broker of the charterer, and arranged with him the freight and carriage of the pans, and paid him the freight, 250*l.*

From the evidence of the agent, it should seem that he was aware of the ship being chartered: but it is unnecessary to rely upon that circumstance, because, if he did not know it, that was no fault of the owner's or master's. If he did, and there was no other ground upon which to dispose of the case, we might have had to consider how far the ruling

of Lord Wensleydale in Major *v.* White, 7 C. & P. 41 (E. C. L. R. vol. 32), bore upon it.

To return to the facts:—The pans were sent alongside in a barge, and they were thence hoisted on board by means of hooks in the lugs. During this operation, either by reason of the pans being lifted by the lugs, or by the purchase not being perpendicular, two of the pans were broken: and to recover damages for this injury this action was brought. The other pans were safely loaded and stowed, and bills of lading given for them by the mate.

At the trial, counsel for the defendant contended, that, upon this evidence, assuming that the stevedore was guilty of negligence, the master was not answerable. The learned judge reserved this question for the opinion of the court, and left to the jury the question of negligence only, which they found for the plaintiffs, who accordingly had a verdict.

In Easter Term last, the defendant obtained a rule to enter a verdict for him upon the point reserved at the trial: and the case was argued before my Brothers *Williams and Byles and myself during the last term, when we took time to consider our judgment, which I now proceed to deliver. [*907]

By the maritime law, in the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board the goods to be carried; which, ordinarily, are to be delivered to him alongside. For any damage to the goods occasioned by negligence in the performance of such duty, the owner is liable to the shipper. If the damage result from misconduct of the master, he is answerable to the owners, and probably also directly to the shipper. Where it happened through the misconduct of the mate or others of the crew, without fault on the part of the master, it was held by the majority of the Court of Session, in Petrie's Executors *v.* Aitchison, 15 Faculty Decisions 493 (6th of February, 1841), that the master is not answerable to the owners, though it appears to have been there taken for granted, perhaps upon the principle asserted by Story, J., in the passage cited, that the master would in such case have been answerable to the shipper.

This duty of the master has, however, in many cases been modified by custom or contract. In some, the cargo has been receivable at a distance from the ship's side,—see Cobban *v.* Donne, 5 Esp. N. P. C. 41; and in others his liability has been postponed until the goods have been actually stowed on board. In the latter class of cases, a stevedore appointed by the shipper is employed to perform that part of the ordinary duty of the master for the owner, which consists in loading and stowing the goods; and the employment of such an intermediate agent appears to be of early origin. In The Consulate of the Sea, Ch. cxcii. of the edition of Pardessus, to be found in the 2d volume of his great work (*Collection des Lois Maritimes*), *p. 220, a stevedore (in the original Catalan "stibador,") appointed by the shipper is familiarly spoken of; and it is there laid down, that, when the stevedore is so appointed, the master is absolved from liability: and the master, in another clause, is advised, for his own indemnity, to stipulate that such an agent should be present on the part of the shipper to attend to the stowage [*908

It appears, therefore, that a stevedore has from early times been known as an agent distinct from the crew, and that for his conduct when appointed by the shipper the master is not responsible. This was decided to be the law in Swainston v. Garrick, 2 Law J. (N. S.) Exch. 225 (25th of May, 1833), where the ship was hired by a charter-party stipulating that a stevedore should be appointed by the charterer, and it was held that the master was not answerable even to the owner for damage occasioned to the latter, the appointment of the stevedore having entirely relieved the master from liability for bad stowage: and Bayley, B., in that case made a suggestion which probably led to the introduction in this and other cases, for the security of the owner, of the clause providing that the stevedore should "act under the captain's orders." If that stipulation had not been introduced, the authorities referred to show that the master would not have been liable; and for this reason, viz., that the negligence which caused the damage was not that of himself, or of his agent or servant. Nor, in our opinion, does the clause as framed in the present case create any liability on the part of the master for the acts of the stevedore, not done in pursuance of his orders. The stevedore was to be appointed by the charterer, and therefore to act for him and represent his interests. For this purpose, he had the charge and custody of the goods until they were laden and stowed on board. *909] The master, on the *part of the owners, with a view to the trim and safety of the ship, had control over the stevedore; but there was no stipulation that he should in any other way assist the latter.

The payment of the stevedore was merely matter of bargain between the owner and the charterer, and did not make the stevedore the servant of the master: See Quarman v. Burnett, 6 M. & W. 499.†

The true construction of the charter-party appears to be, that the cargo is to be brought alongside at the risk and expense of the charterer, and that it is to be shipped and stowed by his stevedore, consequently at his risk, though at the expense of the shipowner, and subject to the control of the master on behalf of the shipowner, with a view to protect his interests.

Upon these grounds, it appears to us, that, unless the plaintiffs can establish some peculiar and exceptional rule of liability with respect to the master of a ship, the defendant is entitled to the verdict: and, indeed, upon the argument, it was contended that such a rule did exist. The authorities relied upon are, however, in our opinion, inapplicable. With respect to the case of Morse v. Slue, 1 Vent. 238, &c., it was founded upon a contract to carry goods actually delivered to and in the custody of the master on board the ship; and he was bound, as he would have been here if a bill of lading had been given for the injured pans, to deliver the goods in the state in which he received them, except prevented by the act of God or the Queen's enemies, or other expressly excepted peril. Accordingly, in Abbott on Shipping, Part 2, Ch. 2 (10th edit.), p. 91, referring to Morse v. Slue, the law is laid down as follows:—"It is true that the master also is answerable for his own *contract;* for, in favour of commerce, the law will not compel the merchant to seek after the owners and sue them, although it gives him *910] *the power to do so, but leaves him a twofold remedy, against the one or the other." Another authority relied upon was Story on Agency, §§ 314–318, in which it is stated that the case of masters

of ships is an exception to the rule previously laid down as to the non-liability of agents to third persons for the negligences and omissions of duty of themselves and their sub-agents. And it is there laid down that "this liability is founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as, in some sort, a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being. And his liability founded upon this consideration extends not merely to his contracts, but to his own negligences and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, negligences, or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority."

However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision (upon which latter subject the American decisions seem to have gone farther than ours); and, after a diligent search, *we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with or wrong done by the master or crew, to insist upon holding the master liable. [*911

The rule to enter a verdict for the defendant is therefore made absolute.

Rule absolute.

Feb. 4, 1860. The plaintiffs, pursuant to the Common Law Procedure Act, 1854, appealed against this decision.

The question for the decision of the court of appeal was,—whether or not the defendant was entitled to have the verdict entered for him on the issue upon the first plea.

If the court should be of opinion in the negative, then the verdict for the plaintiffs was to stand, and judgment to be entered for them, for the damages assessed by the jury, with costs of suit. If the court should be of opinion in the affirmative, the verdict for the plaintiffs on the said issue was to be set aside, and entered thereon for the defendant, with judgment for the defendant accordingly.

The case was argued in the Exchequer Chamber on the 3d and 4th of February, 1860, before Pollock, C B., Wightman, J., Bramwell, B., Channell, B., Hill, J., and Blackburn, J.

Lush, Q. C. (with whom was *Manisty*, Q. C.), for the plaintiffs.—The plaintiffs rest their right to recover *upon two propositions,— first, that, assuming that by the terms of the charter-party the [*912

stevedore is made the agent of the charterer and not of the master, still the master is liable to the shipper, who had no notice of that arrangement,—secondly, that the charter-party does not make the stevedore the agent of the charterer, it only gives him authority to appoint a person, who is to become the servant of the master as soon as appointed. It is clear, that, unless the shippers knew of this stipulation in the charter-party, they were entitled to assume that the stevedore was the agent of the master. [BLACKBURN, J.—It does not appear from the case that the plaintiffs knew that the ship was chartered. POLLOCK, C. B.—It does appear that the plaintiffs' agent arranged with the brokers of the charterer for the carriage of the pans.] It is part of the ordinary duty of the master to superintend the shipment and stowage of the cargo: he does not stand in the ordinary position of a servant, but rather in that of owner, because he has the custody of the goods: and it is upon that ground that he is held responsible for negligence,—Morse *v.* Slue, 1 Ventr. 190, 238, Sir T. Raym. 220, 1 Mod. 85, 2 Keble 806, 3 Keble 72, 112, 135, 2 Lev. 69; Abbott on Shipping, 10th edit. 259. And the master cannot absolve himself from this liability, unless by usage or agreement his duty in that respect is to be performed by some person appointed by the merchant. [BRAMWELL, B.—As the contract was with the charterer only, is not *he* solely liable?] The master, it is submitted, would still be liable, even if he could be considered as the agent or servant of the charterer. [BLACKBURN, J.—I think you must make out that there was a contract with the master.] The master's liability rests not upon contract, but upon the footing of his duty. In Story on *Agency, § 116, it is said: *^13] "The master of a ship has various incidental powers, resulting from his official capacity, which have been long recognised in the maritime law, and are not now open to judicial controversy. Thus, for example, he has an incidental authority to make all contracts belonging to the ordinary employment of the ship; as, for example, to let the ship on a charter-party, and to take shipments on freight, if such is the usual employment of the ship, but not otherwise; to hire seamen for the voyage; to contract for necessary repairs and equipments for the voyage: and to hypothecate the ship in foreign ports for moneys advanced to supply the necessities of the ship, if they cannot otherwise be supplied. In these cases, and in others of the like nature, he often enters (as he may well do) into the contract in his own name; and he may thus become personally liable, as well as his principal, to fulfil the same; for, he is treated, not as an ordinary agent, but as, in some sort and to some extent, clothed with the character of a special employer or owner of the ship, and representing, not merely the absolute owner (dominus navis), but also the temporary owner, or charterer for the voyage (exercitor navis). In short, our laws treat him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it as a servant. On this account he may bring an action of trespass for a violation of that possession; and, where the freight has been earned under a contract to which he is a party, or under a bill of lading signed by himself, he may bring a suit for the freight due on the delivery of the goods." And, in § 319, after speaking of the authority of the master in a foreign port, it is said,—"Even in the home port, however, there are many acts which are so invariably

confided to *the master as to amount to a positive delegation of authority. Thus, the master is ordinarily intrusted with the [*914 authority of shipping the officers and crew, of superintending the ordinary outfit, equipments, repairs, and other preparations, of the vessel for the voyage, *of lading and unlading the cargo*, and, in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading for the same." In Major *v.* White, 7 C. & P. 41 (E. C. L. R. vol. 32), it was laid down by Parke, B., that, if a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the *owner* of the ship if the goods be injured by bad stowage. But, unless he has notice to the contrary, the shipper has a right to assume that the persons he sees stowing goods on board the ship are the servants of the master. In Swainston *v.* Garrick, 2 Law Journ., N. S., Exch. 255, Lord Lyndhurst says: "The master, as servant of the owner, is bound to superintend the stowage; and if, in consequence of improper stowage, the owner has been called upon, and has satisfied any claim for damage, the master is liable to him. But, where the master is told by the owner some one will come to superintend and do that which would otherwise be his duty, he is exonerated." Here, the plaintiffs were no parties to any contract by which the master could be relieved from any of the responsibilities which the law casts upon him. Story, § 315, says,—"The master of a general or carrier ship, as well as the owner, is treated as a common carrier. He is responsible for the goods in the like manner as any other common carrier: and nothing will discharge him from his responsibility to the owners of the goods, but a loss by some act of Providence, or by some inevitable casualty, or by some public enemy. If the goods, therefore, are injured, or perish, by the negligence or misfeasance of the crew, or if they are stolen, *the master, as well as the *owner, is severally liable therefor.*" And see Colvin *v.* New- [*915 berry, 1 Clark & Fin. 283.

Bovill (with whom was *C. Pollock*), for the defendant.—If a shipper who contracts with a charterer does not inquire into the charterer's interest, he takes the risk. The stevedore here was not in fact, nor was he held out as, the servant of the master. The circumstance that the stevedore was to be subject to the orders of the master makes no difference. [POLLOCK, C. B.—I attach no importance to the fact that the stevedore was to obey the orders of the master. Without any such stipulation, it would have been the duty and the right of the master to direct the stevedore where to place the goods, for the safety of the vessel. BRAMWELL, B.—Though the stevedore is appointed by the charterer, he is to be paid by the master, and to act under the master's orders. I am not at all sure that he is not to be considered as the master's servant.] He has an independent employment. For any injury resulting from the negligence of the stevedore, the rule respondeat superior would make the charterer liable, not the master. Major *v.* White, 7 C. & P. 41 (E. C. L. R. vol. 32), is a distinct authority to show that the shipper of goods cannot sue the owner for negligence,—and, of course, not the master,—where he knows that the ship is chartered, and contracts with the charterer.

Manisty was heard in reply.

POLLOCK, C. B.—We are all of opinion that the judgment of the

court below should be affirmed. The true principle is that which is stated in the latter part of that judgment, where it is said that the master is not liable except in the case of a contract made with him, or some act done by him or the crew, for which he is *responsible. *916] Here, there is no contract made by the master, and no act done by him or the crew which led to the damage. He, therefore, is not liable at all. Judgment affirmed.

The loading or stowing of a cargo, has none of the elements of a maritime service, and a stevedore, at least in the eye of a Court of Admiralty, does not differ from an ordinary shore labourer. He is not considered as one of the crew, and is not entitled to any lien for his services: The Amstel, 1 Blatch. & How. 215; Cox *v.* Murray, Abbott Adm. 343; The Joseph Cunard, Olcott 123; McDermott *v.* The Susan G. Owens, 1 Wall. jr. 370.

END OF TRINITY VACATION.

MEMORANDA.

In Trinity Term last, John Hinde Palmer, Esq., of Lincoln's Inn, Archibald John Stephens, Esq., of Gray's Inn, and William David Lewis, Esq., of Lincoln's Inn, were respectively appointed Her Majesty's Counsel learned in the Law, and took their seats within the Bar accordingly.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

THE GREAT WESTERN RAILWAY COMPANY, Appellants, *v.* RIMELL, Respondent. *June* 10, 1857.(*a*)

In cases within the Carriers' Notice the carrier is not liable for the felonious acts of his servants, without gross negligence on his part; but felony by his servants is alone a good answer to a defence by him under the Carriers' Act, 1 W. 4, c. 68.—Butt *v.* The Great Western Railway Company, 11 Com. B. Rep. 140, explained.

A mere suspicion that the loss arose from felony by the carrier's servants is not sufficient: it must be proved.

APPEAL from the decision of the judge of the Gloucestershire county court.

The following case was stated by the judge:—The plaintiff (Rimell) claimed 39*l.* 9*s.* for the loss of a parcel containing watches of that value, which had been delivered to The Great Western Railway Company, by the plaintiff, to be carried by them from Gloucester to London, and which were alleged to have been lost through their carelessness and negligence.

The following evidence was given at the trial, on the 7th of February, 1856:—

"Mr. *Helps*, for the defendants, pleaded not guilty, and referred to the Land Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, ss. 1, 2, 3, 4, and 8.

"Samuel Rimell, the brother to plaintiff; in his employment. Recollected taking a parcel to the station at Gloucester for Mr. Lutiger, on the 18th of January, 1855. Delivered it to Bossom, a porter at the Great Western Railway, who signed for it. Compared the address on the parcel with the book produced.

"Cross-examined.—The book was filled up at the shop, ready for signature. It was about eight o'clock at night when he delivered the parcel. Gave no notice of the contents, and nothing passed, except the delivery of the parcel and the signing of the book.

"Re-examination.—The direction was, 'J. H. Lutiger, Great St. Helen's, Bishopsgate Street, London.'

(*a*) 27 L. J., C. P. 201.

"James H. Lutiger.—I am agent for the Swiss Watch Manufactory, and live in London. I received a letter from the plaintiff, stating he had forwarded a parcel to me by the Great Western Railway, and I have the letter. I never received that parcel. I went to the Great Western Railway Station at Paddington, and saw an entry of the parcel having been received in Gloucester; but I was told it was not received in London.

"Cross-examined.—I saw the clerk at the parcel-office. I did not see the chief inspector of police. I do not know of a robbery having been advertised in the papers. They promised to make every inquiry.

"Re-examined.—They promised to inquire where it had been left, or if lost. I received the letter from Rimell on the 19th, and inquired at the station about two days afterwards.

"George Rimell, plaintiff.—I am a silversmith. I received from Lutiger, between the 11th and 16th of January, 1855, a quantity of goods, in value about 120*l.* I selected about 80*l.* worth, and returned the rest to him. They were packed in a small box, with partitions for each watch. The value of them was 39*l.* 9*s.* The value of the box is about 1*s.* 3*d.*

"Mr. *Carter* here applied to introduce the box into the particulars.

"Mr. *Helps* objected.

"The judge ruled against it, as justice did not require him to substitute that which the parties did not come there to try, to save a verdict. He would not amend.

"Examination continued.—I wrote the same day to Lutiger, and received a letter from him, that he had not received the parcel. I addressed the parcel myself with the full address.

"Cross-examined.—I made up the parcel myself. I either addressed it, or stood by when it was addressed. I cannot say whether I was in the shop when my brother went with the parcel. I know he took it to the railway. Several days after the parcel was lost I went to Mr. Ashbee, at the station. I sent to the station as soon as I heard the parcel was not received; and, some time after Mr. Collard, the chief inspector of police, and Mr. Giles, the local inspector, called at my house, and represented that the company were very anxious to find out if they had been robbed. I do not dispute that the company issued hand-bills about it. When I was asked, I gave Mr. Collard the particulars of the watches; and this is an exact copy now produced. I wrote letters to them afterwards; and Mr. Collard said he had found a watch with my name on, but it turned out it was not one of the watches lost. I have no doubt I told them the way-bill was wrong. I called at the Great Western Station a few days after the parcel was lost, and went into Mr. Ashbee's private office; and, while there, Mr. Helps came in, and Ashbee said, 'Here's Mr. Rimell has lost a valuable parcel;' and it was asked what it was. Mr. Helps asked if it was insured, and Ashbee said, 'No.' They then walked to the end of the office from me; and Mr. Ashbee said to Mr. Helps something to this effect:—'The worst of it is, something is wrong as to the way-bill.' That caused me to make further inquiry, which resulted in this action being brought. I gave some particulars on the 7th of March to Mr. Potter, one of the directors of the company, to the effect that something was wrong in the way-bill.—[A letter written to Mr. Potter was read.]—I made

inquiries before I wrote to Mr. Potter.—[A letter was produced by Mr. Helps for the witness to read, dated the 8th of October, directed to Mr. Ashbee, wherein it was stated that the witness was in a position to prove beyond doubt that the parcel was stolen by one of the company's servants.]—I have not yet had the chance of proving it. I believe it now, unless I am mistaken, on the production of the books. As far as my own judgment goes, I believe the parcel was not lost, but stolen. The charge for the parcel to London was 9*d*. I think the parcel was sent down after tea.

"John Ashbee, superintendent, produced the parcel-book and way-bill for the night mail-train of the 18th of January, 1855. The first entry in the way-bill relates to this parcel. The office porter takes the parcels out on a barrow, and delivers them to a guard, and calls them over to see if they are all correct; and, if so, checks them with the way-bill. The guard's book and the way-bill will correspond, if correct. The parcels are checked in London with the way-bill. A memorandum book is supplied by the company to the guard. The way-bills are not made out in the same way now: the addresses are added, and there has been an alteration since; the small parcels are locked in a bag; the guard has no key. I dare say that is in consequence of repeated losses. I never heard on this occasion instead of eleven parcels going up there were twelve. I heard of a parcel coming very late that evening. I cannot say whether that was omitted from the guard's book.—[A leaf from the guard's book produced.]—The number received on the bill at Gloucester was eleven, and on the guard's book, only ten.

"Cross-examined.—On receiving information of the parcel being missing, we instantly made every inquiry. The parcel-book was produced, and corresponded with the way-bill, and eleven parcels found to be going that night to London. I made inquiries about the eleventh parcel and found it came in late, after the guard had received his parcels, was entered on the way-bill and in the parcels-book, and was duly delivered in London. I know Price, the guard. I never knew him to lose a parcel. No suspicion attached to him. He is now in the company's employ. Bossom has been in the company's employ three years, and is so still. No suspicion attached to him. Every exertion was made to recover the parcel, and every information searched for in every direction. There is a notice stuck up in the parcels office, under the 11 Geo. 4 & Will. 4, c. 68.—[Notice produced.]—Had the parcel been insured, it would have been specially taken care of; but, brought as an ordinary parcel, it would be chucked down in the London corner.

"Re-examined.—The parcels are thrown down. They are not left to take care of themselves. There is always some one in the office, unless the door is locked; the clerk or porter going out locks the door. These are the instructions. They ought not to leave the office without locking the door; they would not do so. The name Lutiger on the way-bill and the parcels-book appear in different handwritings. There are two guards by the mail-train. They lock the parcels in the train in which they ride—in the adjoining compartment. One guard, the chief guard, has charge of the parcels, and receives and delivers them at the different stations as he goes along the line.

"Thomas Bossom, in the employ of the railway company.—I remember receiving the parcel from the plaintiff, and I signed a receipt. I

made the entry in the parcel book. I remember receiving a parcel from Mr. Smallridge's clerk very late in the evening, addressed to 'Blackland.' I at first objected to forward it, but I did so, and fetched the way-bill from the guard's box and entered it, and put it in the compartment of the carriage with the other parcels. The guard was not there at that time. By the 'box,' I mean a box in the passengers' compartment of the carriage. I did not see the guard. I had no opportunity of telling him of the parcel. He might be going to the Cheltenham train to see after the parcels from Cheltenham.

"Cross-examined.—I have received parcels for some years. Smallridge's parcel was the last entered on the way-bill that came to me after I had delivered to the guard the ten parcels. The word 'Lutiger' on the way-bill and in the parcel-book is in my handwriting. I delivered ten parcels to Price, and we went over them together, and they agreed as stated on the way-bill. If I had been told the parcel had been of great value, the guard could have taken it with him in his pocket, or in the box he rides in.

"Re-examined.—The guard could put a small parcel in his jacket-pocket. The insured and uninsured parcels do not go in the same box. The insured parcels go in the same box with the guard, and the others in the next box. I believe other valuable parcels have been lost. When Mr. Smallridge's parcel arrived, the way-bill was in the guard's box. I unlocked the box and took out the way-bill. I took it to the office. There I entered the parcel. Nobody was near the box when this took place. No guard or other person. There is the same lock to one box as to another. Other persons have keys that open the box. Other persons might have unlocked the box as well as me. I am quite sure I locked the box when I took away the way-bill. At that time a house was kept by one Dale, 'The Wellington.' If one guard went there, the other would remain at the platform. It is now lately the practice to put on the way-bill the full address on the parcel. I believe that is in consequence of the loss of parcels.

"To the judge.—There are other persons who have access to the carriages. A good many workmen in the company's service who repair carriages have keys which open the parcel-box; and passengers also have keys, that is, keys of the boots of dog-carts are similar, and I have seen passengers open the carriages. On the night the parcel was lost there were three porters on the platform who had such keys and the two guards, and that would be the case all along the line. Where the guard keeps his parcels is like a passenger box; but passengers do not ride in it.

"George Blamford proved seeing Bossom take Smallridge's parcel to the train. Could not see if either of the guards was present."

This closed the plaintiff's case; whereupon

Helps, for the defendants, applied to the judge for a nonsuit.—Mr. *Helps* cited the cases of Hinton *v.* Dibdin, 2 Q. B. Rep. 663; S. C. 11 Law J. Rep. (N. S.) Q. B. 113, Baxendale *v.* Hart, 6 Exch. Rep. 769; S. C. 21 Law J. Rep. (N. S.) Exch. 121, and Butt *v.* The Great Western Railway Company, and contended that the parcel not being declared, it was not a question of negligence, and it was clear law that even gross negligence would not make the defendants liable; and in order to make the defendants liable on a felonious act of their servants, the onus to

prove an act of felony rested with the plaintiff; that there was no evidence beyond the receipt of the parcel and its non-arrival, no proof of any felony having been committed by any one, still less by any one of the defendants' servants.

The judge declined to nonsuit, considering there was some evidence to go to the jury of the loss being occasioned by the felony of some of the company's servants, and negligence on the part of the company.

The defendants then called the following witnesses:—"Joseph Collard, chief inspector of police of the Great Western Railway. In consequence of the loss of the parcel, I took every possible means to trace it. I searched the houses of all the porters at Gloucester and Swindon, who were on duty that night. No suspicion rested on any one of the company's servants in consequence of the investigation. I had no reason to suspect any one. I applied to the guard, and took a leaf from his book. There were losses at the same time from Swindon and other places."

"Edwin Gayler, inspector at Gloucester. I assisted Mr. Collard at Gloucester in making inquiries and searching houses. No suspicion attached to any of the railway servants."

"John Price.—Was guard on the evening of the 18th of January, 1855. I remember having received ten parcels from Bossom; the parcel for Lutiger was not one of them. After the train had started I found eleven parcels entered on the way-bill, but I only received ten, which I reported at Paddington. The way-bill shows eleven parcels. I reported at Paddington I was one short. I have never lost a parcel before nor since. I have carried hundreds of thousands of parcels. I have been a parcel guard from two months after my employment. I put it along with the ordinary parcels. I did not go off the platform that night at Gloucester.

"Cross-examined.—I received ten parcels. I never found out there were eleven parcels in. I knew nothing of the eleventh parcel being put in. There were eleven parcels in the way-bill; and I never made out the eleventh. I have had no orders about parcels lately.

"Re-examined.—Bossom brought me the barrow with the parcels and the bill, and I counted ten parcels. As soon as the train was in motion, I saw the bill had been moved, and I took it up, and saw an eleventh parcel had been entered. I noticed in my book ten parcels received, and the eleventh in the bill. I could not then count the parcels, because they were in the next box.

"To the judge.—I did not count the parcels till I got to London. I remember I had only received ten parcels. I have no recollection of this particular parcel. When we receive the parcels we only count them.

"Thomas Graham, Superintendent of the Western District of the Great Western Railway, resident at Bristol.—I put Collard and the other parties in motion immediately on hearing of the loss. The result of the investigation did not throw any suspicion on either of the company's servants."

The judge, in summing up, told the jury, that, to entitle the plaintiff, they must be satisfied of both of two facts: first, that a felony had been committed with the parcel in question by some one of the company's servants; and, secondly, that such felony was caused or facilitated by the negligence of the company or their servants; and that, if they were

satisfied that the parcel had been stolen by some one of the company's servants, but were not of opinion that such felony was occasioned or facilitated by the negligence of the company; or, if they were of opinion that the parcel had been lost by the negligence of the company, but were not satisfied that a felony had been committed by some one of the company's servants; in either case the defendants were entitled to their verdict. The jury gave their verdict for the plaintiff for the full amount claimed.

The defendants appealed, on the ground that there was no case for the jury, on the plaintiff's evidence, of the parcel in question having been stolen by the defendants' servants, or of the said loss by theft having been facilitated by the defendants' negligence; and that the plaintiff should have been nonsuited at the close of his case, as insisted on by the defendants.

Phipson appeared for the appellants.—[JERVIS, C. J.—This evidence ought not to have been left to the jury. There is not a tittle of evidence that a felony had been committed by any one.]

Powell, for the respondent.—The defendants cannot now ask for a nonsuit after having called witnesses and taken their chance with the jury. [JERVIS, C. J.—That does not get rid of the misdirection in leaving this evidence to the jury.] There was some evidence that the parcel had been stolen by the company's servants. It was shown to have been delivered to them at Gloucester, and had not been delivered at any intermediate station, for if it had the company could have proved it. It was placed with the other parcels by Bossom the porter, and the box locked. The presumption therefore is, that the box was opened in the ordinary way by some person having a key, that is, by one of the company's servants, and not by a stranger. [CRESSWELL, J.—There is evidence that other persons had keys besides the company's servants. But it might very well be that the parcel was mis-delivered, and not stolen by any one.]

JERVIS, C. J.—I am of opinion that the judge of the county court was wrong in two respects.—[His Lordship read the summing up.]—First, in leaving the question, whether a felony had been committed by the company's servants to the jury at all, for there was no evidence that a felony had been committed by any one of them. Unless the judge in cases of this sort takes the matter into his own hands, the statute, which was passed for the protection of carriers, will become a dead letter, for juries are always ready to find a verdict against a railway company. It is the duty of the judge to withdraw the question altogether from the jury where there is no evidence; to prevent them, if I may so say, from misconducting themselves by finding against a company, which they are always ready to do. Secondly, I think the judge has entirely misconceived the judgment of this court in the case of Butt *v.* The Great Western Railway Company, because, when the defendants rely upon the statute for their defence, negligence has nothing to do with the question. The rule is this: under the statute felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has no effect one way or the other. Where the defence is independent of the statute negligence alone is a sufficient answer. Under the statute felony is an answer; under the Carriers' Notice negligence is an answer. That is the result of the decision in Butt *v.*

The Great Western Railway Company; we only decided that felony by the defendants' servants without negligence on their part was not a good answer to a defence that the value of the goods was not declared according to the notice.

CRESSWELL, J.—I am of the same opinion. The statute protects the company unless the loss has occurred by the felonious act of their servants. The words of the 8th section of the Carriers' Act, 1 Will. 4, c. 68, are, "That nothing in this act shall be deemed to protect, &c., from liability to answer for loss arising from the felonious acts," &c. A mere suspicion that the loss has arisen by felony is not sufficient; it must be proved that it actually did so arise. In this case there is no evidence of any loss arising from the felonious act of any one.

WILLIAMS, J.—I agree entirely with what has fallen from the Lord Chief Justice. The protection intended to be given by the statute will be denied altogether to railway companies, if evidence of this sort is to be left to a jury as establishing a case of felony.

WILLES, J.—I am of the same opinion. This is a striking instance of the abuse of the rule as to the effect of circumstantial evidence. Where it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory; that is so here; but there must also be some one substantial credible fact inconsistent with the contrary, and that is wanting here. I am glad the Lord Chief Justice has explained the case of Butt *v.* The Great Western Railway Company, for the case is cited in modern text-books as an authority under the statute with which it had nothing whatever to do.

Judgment of nonsuit.

BURGESS *v.* THE GREAT WESTERN RAILWAY COMPANY.(*a*)

A railway company is bound so to fence a station that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest, to the station.

THIS action was tried before Byles, J., at Guildhall: verdict for the plaintiff, damages 350*l.* It appeared that the plaintiff was a passenger upon the branch railway from Henley to Twyford, at which station it was necessary that he should change carriages. While waiting at the station for that purpose he went in search of a refreshment-room. There was none; and he asked a porter the way to a public-house, which was on the opposite side of a highway which passed by the station. The porter showed him the way out of the station with his lantern. While he was in the public-house he heard the bell ring, and instead of going back to the station the way he came, he went back direct from the public-house over some ground which was not fenced towards the engine, the light from which he mistook for the light from the station. In doing so he fell down a place three feet deep and was injured. It did not appear that there was anything to show that he was not to go that way.

James, Q. C., moved for a new trial, on the ground that the verdict was against the evidence, and for a misdirection. The plaintiff was

(*a*) 32 Law Times 76.

shown the proper way to and from the station, and he ought to have returned the way he went. [COCKBURN, C. J.—The way he went being the shortest, is it not negligence in the company to leave it unfenced?] The company are no more responsible for the place he went through than any other part of the line. There was no road there of any kind. There were lights at the proper entrance.

BYLES, J.—That was denied, and the fact of the porter having shown the plaintiff out with his lantern goes to show that it was not lighted.

Rule refused.

JONES v. WILLIAMSON. *Feb.* 5, 1859.(a)

It is the duty of a judge to tell the jury what allegations in a plea setting up the defence of reasonable and probable cause are sufficient to constitute such defence; and where evidence has been given in proof of allegations sufficient to constitute a good plea, but no evidence has been given in proof of other allegations in the plea, the case should be left to the jury upon those allegations in the plea of which evidence has been given, and which are by themselves sufficient to make a good plea.

DECLARATION.—First count, that the defendant assaulted the plaintiff, and gave him into custody to a policeman, and caused him to be imprisoned.

Second count, that the defendant falsely and maliciously, and without reasonable and probable cause, prosecuted the plaintiff upon a charge of felony.

Pleas: 1. Not guilty. 2. To the first count, that shortly before the giving into custody hereinafter mentioned, a certain person, to the defendant unknown, had feloniously stolen, taken, and carried away from the house, offices, and premises of the defendant a certain cash-box and 108*l.* in money of the moneys, goods, and chattels of the defendant and other persons; that the plaintiff was in the said house, offices, and premises at or about the time when the said felony was committed, and then had the opportunity of committing the said felony; that immediately after the time when the said felony was committed a certain person, to the defendant unknown, greatly resembling the plaintiff, and whom at the time of the trespasses mentioned in the declaration the defendant bonâ fide believed to have been the plaintiff, was seen coming from the said house, offices, and premises of the defendant by a back way and in a clandestine manner, carrying with him some article or thing of the size and appearance of the said cash-box, and which the defendant at the time of, &c., believed to have been the said cash-box; and that the plaintiff, on the day after the committing of the said felony, on being examined and questioned by the defendant and others with reference to the time at which he left the said house and premises of the defendant, and as to the dress which he then wore, and as to other matters connected therewith, gave untrue and unsatisfactory answers; wherefore he (the defendant) knowing the premises, and having reasonable and probable cause for suspecting, and actually suspecting, the plaintiff," &c., gave the plaintiff into custody.

The action was tried at the last summer assizes at Chester, before

(a) 32 Law Times, 317.

Crowder, J. It appeared that a cash-box was stolen from an office of the defendaat about six o'clock on the evening of the 28th January, 1858, the office having been left for a few minutes without any one in it. The plaintiff was a gardener in the defendant's employ, and, according to his own evidence, left the garden in which he had been at work about a quarter-past six, and proceeded towards home past the office and along a road called the Cinder-road. About that time one Vigors saw a man in the Cinder-road with a cap like the plaintiff's pulled over his eyes, carrying something which, he said, appeared to him like a family Bible. The man had a pecular gait like the plaintiff, and was walking by the wall. The next day Vigors gave a description of the man he had seen, and was told to look at the plaintiff, and he did so, and, after telling him to pull his cap over one eye as he said the man he had seen wore his, said he was certain the plaintiff was the man he had seen. A policeman gave it as his opinion that the cash-box must have been taken by some one acquainted with the premises, and the plaintiff was taken into custody. There was no evidence of any false statement made by the plaintiff, as alleged in the plea. The learned judge directed the jury that there was evidence of reasonable and probable cause for the prosecution; but his attention being called to the second plea to the count for false imprisonment, he directed the jury that, there being no evidence of any false statement, the plea was not proved. The jury found a verdict for the plaintiff, damages 40*s*. A rule having been obtained, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the ground that the ruling of the learned judge as to the second plea was erroneous,

Morgan Lloyd showed cause.—This plea was not proved. There was no proof of the plaintiff having been in the office so as to have an opportunity of taking the box. There was no proof of his coming from the offices and premises, the road on which the man described as a person unknown and resembling the plaintiff was seen leading from the garden as well as the offices. There was nothing clandestine in it, and what the man was seen conveying was described as looking like a family Bible, not like a cash-box. In the absence of any evidence of a false statement, there was no evidence to go to the jury in support of the plea.

Welsby and *McIntyre*, in support of the rule.—If the allegation of false statements were struck out of the plea, there would be enough left to make a good plea; and there was evidence in proof of such plea. House, offices, and premises include all the premises of the defendant, and there was evidence to go to the jury that the plaintiff had the opportunity alleged in the plea. There was evidence that Vigors saw a person very much resembling the plaintiff going from the direction of the premises just after the time when the cash-box must have been stolen; and that the defendant, upon Vigor's description, bonâ fide believed that the plaintiff was the man who stole it. The plea would have been good if it had only stated that a cash-box was stolen, and that the defendant had reasonable and probable cause for believing that the plaintiff stole it.

COCKBURN, C. J.—I think there was evidence of allegations in the plea which would be a defence, and that the rule must therefore be made absolute.

WILLIAMS, J.—There was proof of sufficient facts in the case to constitute a justification; proof of facts which, if they stood alone, would be a justification.

WILLES, J.—I am of the same opinion. I know no more difficult duty that a judge has to perform than to select what allegations in a plea, if proved, constitute a sufficient defence. West *v.* Baxendale shows that it is the duty of a judge to tell the jury what facts are sufficient to constitute a defence. I think there was here evidence of facts which, if proved to the satisfaction of the jury, would be a defence, and that it should have been left to the jury.

CROWDER, J.—I also am of opinion that the plea, as proved, ought to have been left to the jury. A great many facts were proved tending to raise suspicion, so as to justify the prosecution. I thought there was ample ground for that, and ruled that there was for that reasonable and probable cause. When the case was put to the jury Mr. *Welsby* referred to this plea, and I was called upon to rule that there was probable cause for this. I looked at the plea, and found that there were several things not alleged in the plea which had been proved, and several things alleged which had not been proved, and I thought that it did not at all follow, from my having ruled that there was reasonable and probable cause for the prosecution, that I must also rule that there was reasonable and probable cause for the arrest. But, upon more closely looking at the plea, I think it does allege enough of what was proved to make it a good plea, and that I ought to have left it to the jury. Rule absolute.

NORTH *v.* THE GREAT NORTHERN RAILWAY COMPANY.

April 19, 1859.(*a*)

A railway company enters into an agreement with A. for the delivery to them, during a certain period, of a certain quantity of coals, to be carried by them for hire, to be paid by A., and in A.'s wagons; the company to have the right to detain any wagons of A. on certain defaults on his part. In order to complete this agreement, A. agrees with B. to supply a portion of the quantity of coals to be sent on to the line, in wagons which had been hired, for a term, from A. by B., but now relet for hire, by him to A., for this purpose. A. having made default, the company seize and detain the wagons then on the line as being A.'s, but they are, in fact, wagons sent on by B., under his agreement with A. The company cannot retain them against B.

TROVER and detinue for fifty-four coal wagons or trucks converted and detained by the defendants. Fourth plea, as to the detaining of the said goods, &c., that, before the detaining, &c., an agreement had been made between the defendants and E. S. Prior, and A. S. Prior, whereby it was agreed that the said Messrs. Prior should deliver to the defendants a certain large quantity of coals, to be carried by the defendants on their railway for hire, to be paid by Messrs. Prior to the defendants, and that Messrs. Prior should find and provide wagons for the said carrying of the said coals; and that, in the event of any moneys payable by Messrs. Prior to the defendants, under the agreement, not being duly paid, the defendants were to be at liberty to retain, as security for such payment, the wagons to be so found and provided as aforesaid, until

(*a*) 6 Jurist N. S. 98.

such moneys should be paid; and after the making of the said agreement, and before the detaining in the second count mentioned, under and by virtue of a certain agreement between Messrs. Prior and the plaintiff, Messrs. Prior purchased of the plaintiff divers quantities of coals, and hired of the plaintiff the railway trucks and railway wagons in the second count mentioned, the same being such wagons as in the said first-mentioned agreement mentioned, for the purpose of being delivered to the defendants as part of the said coals so to be carried by the defendants, and part of the said wagons so to be found and provided by Messrs. Prior for the defendants, on the terms aforesaid; and Messrs. Prior afterwards, and before the said detaining, &c., delivered the said wagons and trucks, loaded with the said coal so purchased from the plaintiff, to the defendants on their said railway, to be so carried by the defendants on the terms aforesaid; and the defendants became and were possessed of the same for the purpose and on the terms aforesaid; and afterwards, and during the continuance of the *said two agreements*, and whilst Messrs. Prior were such hirers of the said railway wagons and trucks as aforesaid, and during the continuance of the term of the said hiring, and whilst Messrs. Prior were entitled to retain and were retaining the same, and the possession thereof, from the plaintiff, as such hirers thereof, and whilst the same were upon the defendants' railway, and delivered by Messrs. Prior to the defendants for the purpose and on the terms aforesaid, certain moneys became so due and payable from and by Messrs. Prior to the defendants, under and by virtue of the said first-mentioned agreement; and the defendants then became and were entitled to retain the said railway wagons and trucks as security for the payment thereof, according to the true intent and meaning of the said first-mentioned agreement; and the said moneys being so due and payable, and the Messrs. Prior being so possessed of the said railway wagons and trucks as such hirers, and so entitled to retain the same and the possession thereof, and whilst the same were so on the said railway, and delivered to the defendants as aforesaid, and in the possession of the defendants under and by virtue of that delivery, and whilst the defendants were so entitled to retain the same, the defendants retained the same as such security as aforesaid for such payment as aforesaid, and by way and in the name of such lien as aforesaid, according to the intent and meaning of the said first-mentioned agreement, and thereby detained the same as in the second count mentioned. [There were other pleas, and also a new assignment, &c., which it is not material to state.] The cause came on to be tried, before Crowder, J., at the last Sittings in London (Feb. 21, 1859), when a verdict was found for the plaintiff for nominal damages, subject to a reference, as to the amount he should be entitled to recover, if he should be in that position at all.

Phipson (*Rochfort Clarke* with him) now moved for a rule for a new trial, on the following grounds:—The action is brought for the detention of certain coal wagons or trucks which the company have detained against certain coal-merchants named Prior. The plaintiff is the owner of collieries at Babbington. By an agreement of the 27th July, 1857, between Messrs. Prior and the defendants, which was to be in force for twelve calendar months from that date, and within which period Messrs. Prior were to deliver to the defendants 50,000 tons of coal, it was provided that Messrs. Prior should also find such a number of wagons as

should be sufficient for carrying these coals to London. On the 27th July, 1858, there were standing the above-mentioned number of wagons on the company's premises at King's-cross, which had been supplied and provided by Messrs. Prior under their contract above mentioned, and had come up to London loaded with coal; and instructions had been given by Messrs. Prior, at seven o'clock in the evening of that day (being the day on which their agreement with the defendants expired), to forward these wagons empty to Messrs. Prior's collieries. But it appearing, on making up the accounts between the company and Messrs. Prior, that 33,362 tons of coals only had been carried in the course of the twelve months under the agreement, instead of 50,000 tons, leaving a deficiency, at the rate of carriage of 5*s.* 6*d.* per ton stipulated in the agreement, of 4575*l.* 7*s.* 11*d.*, the company proceeded to detain the wagons, as they were empowered to do in such circumstances by a clause in the agreement; there being also arrears of payments due from Messrs. Prior to a large amount for coals actually carried for them by the company. On the 29th July, 1858, the company gave notice to Messrs. Prior, that unless the above sum of 4575*l.* 7*s.* 11*d.* were paid within twenty-one days, the wagons would be sold, and the proceeds retained toward the reimbursement of all moneys due to the company under the agreement. Messrs. Prior subsequently discharged the said arrears of payments for coal actually carried. On the 31st July, 1858, the defendants were served with notice, on behalf of the plaintiff, claiming the wagons as owner or lessee, and intimating that unless the notice of sale of the wagons were withdrawn, an application would be made for an injunction; and this was followed, on the 17th November, 1858, by a further notice from the plaintiff, stating the trucks to be his, and not the property of Messrs. Prior, and requiring the delivery to him of the wagons. The defendants, however, did not comply with this demand, and the question is, whether the plaintiff is entitled to the immediate possession of these trucks or wagons, which he had let to Messrs. Prior. This was under an agreement of the 23d July, 1857, by which the plaintiff agreed to supply 30,000 tons of coal during twelve months, commencing from the 1st August, 1857, the Messrs. Prior to carry the whole quantity of 30,000 tons in their own trucks, should they require to do so; but should they only carry part of the quantity, such part was to be subject to arrangements not material to mention. The plaintiff agreed to hire 100 of Messrs. Prior's eight-ton wagons, at 13*l.* per annum, to be kept in repair by Messrs. Prior, who agreed to allow the plaintiff to paint out the present lettering and numbers on the trucks, and to substitute such name or names and numbers as he should think proper. The company allege that they have a right, under their agreement with Messrs. Prior, to detain these trucks; and that, no doubt, they had a right to do; the agreement is express to that purpose. Messrs. Prior's breach of contract was manifest; it lay in not sending the stipulated quantity of coal to the extent they had promised by the contract. Then, the first that the defendants hear of the plaintiff is the notice of the 31st July. The special plea, above set out, alleged that the plaintiff had not a right, as against Messrs. Prior, at the time we seized; we say that the plaintiff had never determined his contract with them, and that, therefore, he had no right to the possession of the wagons as against Messrs. Prior. It is not denied, on the part of the defend-

ants, that if the bailee does some things perfectly inconsistent with the bailment, then something may follow from that which is not within the agreement of bailment. But a party can convey no more property than he possesses in a thing; thus a sale of furniture for a month, by a person who was bailee of it for a week, would only operate as a sale for a week: Gordon *v.* Harper, 7 T. R. 9; Cooper *v.* Willomatt, 9 Jur. 508.

COCKBURN, C. J.—The question is, whether a bailee, by his own wrongful act in dealing with the goods bailed to him, in doing something which he has not a right to do, puts an end to the bailment—where, for instance, he treats them as if they were his own; and this question must be answered in the negative; and therefore I think there ought to be no rule.

CROWDER, J.—The plaintiff says, "I never put an end to the agreement between me and Messrs. Prior;" then it is just as much in force as ever. Therefore I am of the same opinion, that there ought to be no rule.

WILLES and BYLES, JJ., concurred. Rule refused.

LECAAN *v.* KIRKMAN. *April* 21, 1859.(*a*)

If a promissory note, made payable to the order of A., is backed by B. with his name, at the request of A., and then she places her name on the back under B.'s, but afterwards erases her name, and places it above B.'s, this is not such an endorsement of the note by B. to A. as makes him liable as endorser to her.

Notice of dishonour by the maker of a promissory note having been omitted to be given to the endorser, if he writes, in answer to an application for payment, pointing out the hopelessness of suing him, as he had nothing but 7*s.* 6*d.* a day, and saying, "Had circumstances been different, you may rest assured no application would have been needed," this is not evidence of waiver of notice.

THE declaration stated, that one C. F. Kirkman, by his promissory note, promised to pay to the order of the plaintiff 87*l.* 8*s.* two months after date; and the plaintiff endorsed the same to the defendant, and the defendant endorsed the same to the plaintiff; and the note was duly presented for payment, and was dishonoured, &c. Pleas—first, traverse of the plaintiff's endorsement to the defendant; secondly, traverse of the defendant's endorsement to the plaintiff; thirdly, no consideration for the endorsement by the defendant to the plaintiff; fourthly, no notice of dishonour. Issues. The cause was tried on the 3d December, 1858, before Cockburn, C. J., when a verdict was returned for the plaintiff, but leave was reserved to move to enter a verdict for the defendant, on the grounds that there was no evidence of the endorsement of the note by the defendant, and that the transaction was complete before the alleged endorsement by him, and therefore there was no consideration for his endorsement.

Edward James, Q. C. (*Holl*-with him), having obtained a rule accordingly in Hilary Term,

Griffiths now showed cause.—The defendant's father being indebted to the plaintiff, and the plaintiff being desirous of getting security for his money, it was arranged that the son should endorse the father's pro-

(*a*) 6 Jurist N. S. 17.

missory note as a surety for the father; and so there was a good consideration for the defendant's endorsement. The jury found that it was part of the transaction that the son (the present defendant) should endorse, as surety, to his father, the maker of the note. This is a case within the principle of Gwinnell v. Herbert 5 Ad. & El. 436, that the endorser of a promissory note does not stand in the situation of maker relatively to his endorsee. This case was not cited or regarded in Ex parte Yates, 27 L. J., Bank., 9. The mode in which the endorsement took place is to be looked to. When the defendant put his name on the note, there was then no endorsement by the payee (the plaintiff), though the note was payable to her order; she then put her name on the note, below the defendant's name. After the note became due, her name was struck out, and then again written on the note, but above the defendant's name. Now, it being part of the transaction, as found, that he was to endorse as surety, he is to be taken as having given, in the course of the transaction, authority to her to put his name on the note at any time afterwards, so as to make his endorsement of significance. In Morris v. Walker, 15 Q. B. 589, the declaration was on a promissory note payable to the order of M., endorsed by M. to the defendant, and by the defendant to the plaintiff. Plea, that M., the payee of the note, and the endorser to the defendant, is the same person as the plaintiff. Replication, that the defendant endorsed for the maker; and the replication was held good. If here the plaintiff had, in the first instance, put her name on the note, and then asked the defendant to put his name below hers, the cases would have been alike. There are similar cases of bills of exchange. (Smith v. Marsack, 6 C. B. 486; Wilders v. Stevens, 15 M. & W. 208.)† [BYLES, J.—There is this difficulty: before the plaintiff put her name on the back, there was merely the name of the defendant on it: now, on that he would not be liable. Then the plaintiff puts her name under his; still he is not liable on that, because, if she sues him, he has his recourse to her.] That would have been so in Morris v. Walker; and the objection seems to be there anticipated. In fact, the question comes to this—what was the true intention of the parties? The Court will give effect to that. (Story on Promis. Notes, ss. 138, 479, p. 614.) [WILLES, J.—In the case of Ex parte Yates, the Lords Justices, on overruling the case in the Queen's Bench, seem to have altogether overlooked the distinction between a bill of exchange and a promissory note. They lay down what is contrary to the common law, without hearing argument on the point, and apparently without thinking of the point at all, although they are overruling a decision of a Court of law on a point of law. BYLES, J.—The passage in Story treats of a regular endorsement.] The Court is to draw inferences, by the terms of the leave reserved. Why should they infer this not to be a good endorsement, and that the intention was not that he should be a surety? The jury have found that there was an agreement that he should be surety, and the defendant in substance authorized the plaintiff to do what was necessary to make him a surety. His acknowledgment of his signature, though in the first instance put on at the wrong time, must be taken to give it the effect which it would have had if put on at the right time. [BYLES, J.—He might, if he had told the innocent person that, have been estopped from denying it; but here he is not liable at common law as a surety, because of the Statute of Frauds; and

he is not liable by the law merchant, because he has not followed the law merchant.] The intent of the parties, that there should be a binding promissory note, must govern. As to bills of exchange, the Court has decided that. (Montague *v.* Perkins, 17 Jur. 557; Schutz *v.* Astley, 2 Bing. N. C. 554.) [COCKBURN, C. J.—The plaintiff at the time had not present to her mind the difference between a bill of exchange and a promissory note.] Then, as to the notice of dishonour, it is true that the promissory note was dated the 2d December, 1857; that it was made at two months; and that the first notice of dishonour the defendant had was in October, 1858, when he was applied to by the plaintiff's attorney for payment; but then, on the 14th October, he wrote to the plaintiff, saying, "Had circumstances been different, you may rest assured no application would have been necessary." That amounts to a waiver or dispensation with want of a notice; for the consequences of neglect to give notice may be waived. (Chit. Bills Exch. 310; Metcalfe *v.* Richardson, 11 C. B. 1011; Jackson *v.* Collins, 17 L. J., Q. B., 142; Whitaker *v.* Morris, 1 Esp. 58.) [WILLES, J.—When it appears that notice of dishonour has not been given, can you rely on the promise at all? Is it quite clear that a promise, after omission of notice of dishonour, is of greater effect than evidence of notice? (Lundie *v.* Robertson, 7 East 231.) CROWDER, J., referred to Brownell *v.* Bonney, 1 Q. B. 39.] The right to notice is given for the defendant's advantage; he may therefore renounce it if he chooses. Here, in his letter, he goes into explanations as to his position; living at 7*s.* 6*d.* a day; that, if sued, he must go into the Insolvent Court; but that, if circumstances had been different, no application from the plaintiff would have been necessary; thus admitting his liability.

COCKBURN, C. J.—The rule must be absolute. There are two questions:—First, whether there was an implied authority to the plaintiff to put her name above the name of the defendant on the back of the note, so as to constitute him an endorsee from her, thereby enabling him to endorse to her, and thus to make him liable to her as endorser. Now, I do not think it is necessary to decide whether there were not here such circumstances as made in favour of the payee in this respect—whether, the payee not having first placed her name on the instrument, there can be such an authority as has been suggested; that, I think, it is not necessary to decide in this case, because there is no authority expressly given, and it cannot be implied from the facts of the case; for the defendant, by the plaintiff's request, simply puts his name on this instrument valeat quantum; and we think we should not be justified, from these facts, in implying that she had any authority, when there is no express authority. Therefore, in the absence of any express authority, it is not necessary to inquire what was sufficient to imply authority. Secondly, with regard to the waiver of notice of dishonour, clearly there was no notice here given in the prescribed time. But then the defendant writes a letter to the plaintiff, which amounts, it is said, to a waiver of notice of dishonour. Now, it is extremely doubtful whether such an interpretation can be put upon the words; but if they are strained into notice of dishonour, then the fact can only, it seems, be rendered available by means of an amendment of the declaration. But as the first objection is fatal to the plaintiff's claim, it would be idle to amend the declaration in order that the Court might construe this letter

CROWDER, J.—I am of the same opinion. It is not necessary to go into the first question, for the reasons given. On the second point, I must say there is no waiver to my mind. There seems to be no intent, no conclusion to be discovered in the defendant's letter, that he intends to waive the irregularity in the notice of dishonour.

WILLES and BYLES, J.J., concurred.

Holl, for the defendant, was not heard.

Rule absolute to enter a nonsuit.

HOLMAR v. STEVENS. *May* 12, 1859.(a)

An attorney's letter, claiming payment of a debt due to his client with the costs of the letter, does not prevent the tender of the debt without any costs. And if, after such tender, the attorney issues a writ for the debt, the court will set it aside with costs.

THIS was a rule calling upon the defendant to show cause why an order of Byles, J., by which the writ of summons was set aside with costs, should not be set aside. On the 9th April, 1859, the plaintiff's attorneys wrote a letter to the defendant in these words:—

"Sir,—Two bills of exchange drawn by you having been dishonoured, we are instructed by the holders thereof to apply to you for payment; and unless we are paid the amount, and 13*s.* 4*d.*, our charge for this application, on Monday next, we shall commence legal proceedings."

The affidavits on which the writ was set aside stated that a clerk of the defendant's attorney tendered the principal and interest on the day named in the letter, but refused to pay anything for the letter. On the same day another clerk of the defendant's attorney tendered to the plaintiff's attorneys the principal and interest, with 5*s.* for the letter. The plaintiff's attorney claimed the 13*s.* 4*d.*, on the ground that, although only one letter was written, the two bills were in the hands of different holders, so that there were two clients, and two applications. When the 5*s.* were tendered, they said if that had been offered they would have accepted it, but that then the forms for the writs were made out, and the clerk was just then going to issue them. The writs were accordingly issued, and the one now in question was set aside by order of Byles, J.

Petersdorff, Serjt., now showed cause.—An attorney who applies for payment of a debt cannot interpose a claim of his own: Curton *v.* Braithwaite, 1 M. & W. 310.† Even where a writ is issued only one letter is allowed: Capel *v.* Staines, 2 M. & W. 850.†

Prentice, in support of the rule.—When the 5*s.* was tendered on the second occasion, the plaintiff's attorneys were very much annoyed at the defendant's attorney, on account of his refusal to pay anything for the letter. Then there is no breach of good faith. The plaintiff is not to lose his right of action.

WILLES, J.—I am of opinion that this rule must be discharged. [His Lordship stated the facts as above set out.] It is said by the attorneys for the plaintiff that no objection was in the first instance made to the amount of 13*s.* 4*d.* charged for the letter, that they made out the form

(a) 33 Law Times 148.

of a writ, but before it was issued the defendant's attorney came and offered to pay the amount of the two bills of exchange with 5*s.* for the letter. Then they say that although they would have received the 5*s.* in the first instance, they would not do so after the præcipes had been made out. It appears, then, that this writ was issued, not for the purpose of enforcing payment of the client's claim, but for the purpose of exacting payment of what the attorneys had no legal right to. The writ is the commencement of the action, and an attorney has no claim for any letter until a writ is issued. At the time of the Common Law Commission, it was proposed that a simple letter claiming payment should be the commencement of the action; but it was thought that the commencement of an action should be a more solemn proceeding, and the writ was continued. The attorneys having no legal right to charge for the letter, the issuing of the writ for the purpose of exacting payment for it is merely an abuse of legal process. These courts have power over their own process, and the order of my brother Byles is a valid order, and one he was bound to make.

BYLES, J.—I can't help saying that the point made by brother *Petersdorff* satisfactorily disposes of this case. The attorney's letter does not prevent the tender of the principal without any costs.

Rule discharged with costs.

AN

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TO

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return premium, or had any intimation from the broker that the policy had been cancelled, the assured wrote as follows:—"Not having received any reply to our note of the 15th instant, requesting you to send us a credit-note for unexpired time on policy on ship J. B., we hereby withdraw our said note and the request therein contained." To this the broker replied,—"We beg to say, that, in accordance with your request of the 15th instant, we cancelled the policy per J. B. in usual course, and we cannot therefore recognise any withdrawal on your part:"—

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3. Notice of dishonour by the maker of a promissory note having been omitted to be given to the endorser, if he writes, in answer to an application for payment, pointing out the hopelessness of suing him, as he had nothing but 7*s.* 6*d.* a day, and saying, "Had circumstances been different, you may rest assured no application would have been needed," this is not evidence of waiver of notice. *Id.*]

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The 1st section of the 17 & 18 Vict. c. 36, enacts that every bill of sale of personal chattels, or a true copy thereof, *together with* an affidavit of the time of such bill of sale being made, &c., shall be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making of such bill of sale. And by s. 3 the officer is required to keep a book containing particulars of every bill of sale so filed, together with the date of the execution and filing of the same, &c —

Held, that the bill of sale and affidavit must be filed *at the same time*; and that the book kept by the officer is a "public document," and therefore that a certified copy or extract is, by force of the statute 14 & 15 Vict. c. 99, s. 14, evidence of the filing of the bill of sale and affidavit, and of the time of their being filed. *Grindell* v. *Brendon*, 698

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2. A., in consideration of a debt due from him to B., granted and assigned to B., for securing that or any future debts, "all the fixtures and fittings, household furniture, stock-in-trade, chattels and effects in and about the premises of A., and which were more particularly mentioned in the schedule thereto, and all the right and interest of A. thereto;" and, for the more effectually securing the payment of the said debt and other moneys and interest, A. thereby authorized and empowered B., his executors, &c., to enter into and upon the said premises of A., whether acquired subsequently to the date of the deed, and not legally passing under it, or previously thereto, which before the satisfaction of that security should at any time be upon the said premises, in the name or names of A., his executors or administrators, or otherwise, to make and perfect any assignment, transfer, or delivery thereof to any agent or trustee for B., his executors, &c., or to a purchaser, or otherwise:"—

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2. But, *semble*, that the closest approximation is this,—that they must be articles of *mere ornament*, or, if *ornament* and *utility* be combined, the former must be the predominating quality. *Id.*

3. For instance, *bracelets*, *shirtpins*, *rings*, *brooches*, and *ornamented tortoise-shell* and *pearl port-monnaies*, however small their intrinsic value, are "trinkets." *Id.*

4. So, *silk watch-guards* are "silks in a manufactured state," within the act. *Id.*

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See PRACTICE, 8, 9.

COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

Construction of ss. 21, *&c.,—See* JOINT STOCK COMPANY, 3, 4.

COMPENSATION.

See RAILWAY COMPANY, 1.

CONDITION PRECEDENT.

What amounts to.

By an indenture of the 15th of May, 1855, the plaintiff covenanted that he would forthwith, at his own expense, procure a suitable vessel, and stow on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, &c., the said ship, and would have her fully equipped at the Nore, ready for sea, on or before the 15th of July then next, and proceed forthwith to Cape T., and there lay down the cable, &c. And the defendant covenanted to pay the defendant 5000*l.* by certain instalments, viz., 1000*l.* on or before the expiration of *seven days* after the arrival of the vessel alongside Morden's Wharf, 2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside Morden's Wharf, and 2000*l.* when and so soon as the ship should put to sea from the Nore: "And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff (and the defendant respectively) thereinbefore contained, &c., the plaintiff (and the defendant) should, *within ten days from the execution of these presents*, give and execute to the defendant (or the plaintiff), &c., a bond in the penal sum of 5000*l.*:"—Held, that the giving of the bond by the plaintiff to the defendant was a condition precedent to his right to sue the defendant for a breach of his contract in refusing to allow the plaintiff to stow the cable on board a suitable vessel. *Roberts* v. *Brett*, 611

And see AGREEMENT, 1. ESTATE ACT, 3.

CONSIDERATION.

See ILLEGITIMATE CHILD.

CONTRACT.

See AGREEMENT.

CONVERSION.

See LIEN.

CONVEYANCE.

See COPYHOLD.

COPYHOLD.

Evidence of Custom.

1. According to the custom of a manor, a grant by copy of court-roll "to A., B., and C., for their lives and the life of the longest liver of them, successively, according to the custom of the manor," gave the first taker an absolute power of disposing of the estate in his lifetime:—Held, a good custom; and that it was sufficiently proved by showing four instances of surrenders and admittances of the person first named, in exclusion of the others. *Phillips* v. *Ball*, 811

Effect of Alienation of the Fee by the Lord.

2. An alienation of the fee by the lord of a manor does not affect the rights of the copyhold tenants. *Phillips* v. *Ball*, 811

3. Therefore, where the lord had granted the inheritance of a portion of the manor to A., —Held, that it was competent to a copyhold tenant to dispose of his interest to the grantee by an ordinary common-law conveyance; the customary mode of conveyance being rendered impossible by the act of the lord. *Id.*

Surrender and Admittance. *Id.*

COST-BOOK MINE.

See MINING COMPANY, 1, 2.

COSTS.

Under 3 & 4 Vict. c. 24, s. 2.

1. The declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds. By an order of Nisi Prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have "all the powers as to certifying of a judge at Nisi Prius," the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favour of the plaintiff as to the two authorities referred to in the count in trover, with one farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award:—Held, that, as the event of the award was in favour of the plaintiff, he was entitled to the costs of the cause,—the 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no *verdict*. *Wigens* v. *Cook*, 784

Right to before Issue of Writ.

An attorney's letter, claiming payment of a debt due to his client with the costs of the letter, does not prevent the tender of the debt without any costs. And if, after such tender, the attorney issues a writ for the debt, the court will set it aside with costs. *Holmar* v. *Stevens*, 932]

Concurrent Jurisdiction,—See COUNTY COURT.

COUNTY COURT.

Concurrent Jurisdiction.

The plaintiff had two permanent places of residence,—one in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence:—Held, a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54, s. 4. *Butler* v. *Ablewhite*, 740

CUSTOM.

See COPYHOLD.

DEBT "OWING OR ACCRUING."

See PRACTICE, 8, 9.

DEED.

Traverse of effect of,—See LETTERS PATENT.

DEMURRAGE.

See SHIPPING.

DEVISE.

Construction of.

Estate for life.—Devise to W. J., for life; and after his decease, to the "heirs male of his body," for their natural lives, in succession, according to their respective seniorities, "or in such parts and proportions, manner and form, and amongst them, as the said W. J., *their father*, shall by deed or will, duly executed and attested, direct, limit, or appoint:" —Held, that, by "heirs male of his body" (as explained by the context), testator meant "sons," and consequently that W. J. took only an estate for life. *Jordan* v. *Adams*, 748

DISABILITIES.

See ESTATE ACT.

DISHONOUR.

Notice of,—See BILL OF EXCHANGE.

ESTATE ACT.

Construction of.

1. The Duke of S., in 1700, settled lands to certain uses. After his death, viz. in 1718, his heir,—by a settlement, which was confirmed by a private act of 6 G. 1, c. 29, intituled "An act for annexing the late Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned," whereby the settled estates were rendered inalienable by any future tenant in tail, but with a proviso that any issue male taking under the act might alienc, on his making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing a Protestant,—conveyed the same lands to uses

in some respects different from and inconsistent with those of the settlement of 1700:—

Held, that, assuming the settlement of 1700 to have been left as a subsisting settlement so far as its provisions were reconcileable with those of the settlement of 1718, the latter (in conjunction with the act) must be considered as the dominant settlement; and, consequently, that the removal of the disabilities of Roman Catholics by subsequent public statutes did not destroy the efficacy of the parliamentary settlement, so as to enable a tenant in tail under the first settlement to bar the entail and dispose of the estate without complying with the conditions imposed by the private act. *The Earl of Shrewsbury* v. *Scott*, 1

2. Held also, that the acts of parliament imposing disabilities upon Roman Catholics, did not prevent persons of that persuasion who were legally in possession of land from alienating it; and therefore that the enactments of the estate act of 6 G. 1, c. 29, were not to be considered as intended to enforce the general law of the realm, and consequently were not affected by the subsequent acts which removed the disabilities which the general law had formerly imposed upon Roman Catholics. *Id.*

3. Where the performance of an act is made a condition precedent to the exercise of a power, and such performance subsequently becomes by act of the law impossible,—it does not follow that the power may be exercised without performance of the condition.

Where, therefore, a tenant in tail had, under a proviso in an estate act, power to aliene lands on condition of making the declaration and taking the oaths prescribed by the 30 Car. 2, c. 2, and 11 & 12 W. 3, c. 4, within six months after attaining the age of eighteen, and continuing Protestant, and the statutes requiring the declaration and oaths were afterwards repealed:—Held that the only effect of such repeal was, that the power enabling the issue in tail to aliene could not take effect. *Id.*

4. An estate act must be carried into effect according to the intention plainly and clearly expressed therein, and cannot be impeached after the estates have been dealt with for a century and a half under it, by a suggestion that the proper parties were not before the legislature, or that the legislature were imposed upon. *Id.*

5. Judgment affirmed in the Exchequer Chamber, 221

ESTATE FOR LIFE.

See DEVISE.

EVIDENCE.

Of Usage to explain a Contract.

1. The plaintiffs contracted (in writing) to build for the defendant the front and back walls of a house "*for the sum of 3s. per superficial yard of work 9 inches thick*, and finding all materials, deducting all lights." The lower part of the walls to the height of 11 feet were of *stone* two feet thick, the remainder of brick 14 inches thick:—

Held, that evidence of the usage of builders at the place to reduce brick-work for the purpose of measurement to 9 inches, but not to reduce stone-work unless exceeding 2 feet in thickness, was admissible; and that the proper construction of the contract was, that it provided only for the price of the brick-work, leaving the stone-work to be paid for on a quantum meruit. *Symonds* v. *Lloyd*, 691

Public Documents.

2. Evidence of filing bill of sale,—*See* BILL OF SALE, 1.

Parish Books.

3. Admissible to show the usage of the parish as to the application of church-rates. *Cooper* v. *Law*, 502

Admissibility of Wife.

4. In an action against a husband for necessaries supplied to his wife (living apart from him), the wife is a competent witness to prove her adultery. *Cooper* v. *Lloyd*, 519

EXTORTION.

See SHERIFF.

FALSE REPRESENTATION.

In Prospectus of a Mining Company.

1. An action will lie against a director of a mining company for false and fraudulent representations contained in a prospectus issued with his sanction, although the language *might* be susceptible of a meaning which would make it not literally untrue: and it is not necessary that the representations should have been made directly by the defendant to the plaintiff; it is enough that they are contained in a document which is meant to be circulated amongst the class of persons who are likely to be deceived by it. *Clarke* v. *Dickson*, 453

2. Nor is it any defence to such an action, that the false representations contained in the prospectus were not the *sole* inducement to the plaintiff to buy shares in the concern. *Id.*

FIXTURES.

Right of Mortgagee to remove.

A lessee mortgaged tenant's fixtures, and after-

wards surrendered his lease to the lessor, who granted a fresh term to the defendant:—Held, that the mortgagees had a right to enter and sever the fixtures,—it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender. *The London and Westminster Loan and Discount Company* v. *Drake*, 798

FORFEITURE.

See JOINT STOCK COMPANY.

FRAUDULENT STATEMENT.

See LIFE ASSURANCE.

GAS COMPANY.

Supply of Gas by.

There is no obligation upon a gas company registered under the 19 & 20 Vict. c. 47, to continue to supply a customer with gas for any particular period: nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the company being the only one in the neighbourhood, afford any ground for implying a contract to that effect. *The Hoddesdon Gas and Coke Company*, app., *Haselwood*, resp., 239

GLASS.

See CARRIER, 5.

GRIMSBY DOCK.

See RAILWAY COMPANY, 6, 7.

HUSBAND AND WIFE.

Acknowledgment by the Wife under 3 & 4 W. 4, c. 74.

1. *Erasure in jurat.*—The court permitted an affidavit verifying the notarial certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be received, notwithstanding an erasure in the jurat,—being satisfied that there had been a substantial compliance with the statute, and the erasure arising from circumstances over which the parties had no control. *Re Jane Denton*, 287

Liability of Husband for Necessaries supplied to the Wife.

2. The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries. *Cooper* v. *Lloyd*, 519

3. And, in such a case, the wife herself is an admissible witness to prove the adultery. *Id.*

ILLEGITIMATE CHILD.

Contract for Maintenance of.

1. The declaration stated that the plaintiff was the mother of two illegitimate children of which the defendant was the father, that the plaintiff, having relinquished all immoral intercourse with the defendant, had at his request undertaken and then had the care and nurture of the said children, and that, in consideration of the premises, and that the plaintiff would, at the request of the defendant, continue to take charge of the said children, and to supply them with such things as should be necessary for their use and benefit, he the defendant promised the plaintiff to pay her the sum of 50*l.* a year for and during a time not yet expired:—Held, that the declaration disclosed a sufficient consideration for the defendant's promise. *Smith* v. *Roche*, 223

3. The third plea stated, that, after the making of the promise and before any part of the money claimed by the plaintiff began to accrue or become due or payable, *one of the said children died*:—Held, no answer to the action. *Id.*

INDIAN INSOLVENT DEBTORS ACT.

Plea of Discharge under.

An action having been brought in this court for goods sold by the plaintiffs in England, and delivered to the defendant in India, the court refused to stay the proceedings under the 61st section of the Indian Insolvent Debtors Act, 11 & 12 Vict. c. 21, under which act the defendant had duly obtained his discharge; but left him to any remedy the statute gave him, by plea. *Reynolds* v. *Goodwin*, 370

INFANT.

Liability of Parent for Necessaries.

The plaintiff, a tailor, having furnished goods to the defendant's son (an infant) while at Addiscombe, the defendant, repudiating all liability on his part, on the ground that the goods were not necessaries, wrote to the plaintiff as follows:—"Should you think fit to keep entirely from him, by yourself or agent, and not trust him any further sum, or molest him in any way, and he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, and try to provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper; but, in case you do, I wish to have the account sent to him here per return of post."

The plaintiff sent the account, but did not in terms accept the proposal contained in the above letter, though he did not in fact molest the son: and some months afterwards he caused his attorney to write to the defendant intimating his willingness to accept from him

one half his claim, but reserving to himself his rights against the son for the remaining half:—

Held, that these letters did not constitute such an agreement as to entitle the plaintiff to sue the father for the moiety of the account. *Andrews* v. *Garrett*, 262

INSOLVENT DEBTOR.

See INDIAN INSOLVENT DEBTORS ACT.

INSPECTION OF DOCUMENTS.

See PRACTICE, 1, 2.

INSURANCE.

See LIFE ASSURANCE.

INSURANCE-BROKER.

Custom as to Return of Premiums.

See AGREEMENT, 2.

JETTY.

See THAMES CONSERVANCY ACT.

JOINT STOCK COMPANY.

Registration under 7 & 8 Vict. c. 110.

1. A company consisting of more than twenty-five members, was formed under a deed of settlement which contained, inter alia, the following provisions,—2. That *the object and purpose of the company* shall be to enable each member to become the possessor of a freehold, copyhold, or leasehold house, of the estimated value of 150*l.* in respect of every share, &c. 4. That the sum of money necessary for carrying the object of the company into effect shall be raised by means of the monthly subscriptions of the members, and of rents, &c., and by the sale of superfluous houses and land, and of houses and land which may not be immediately wanted for the purposes of the company, and *by such other ways and means as are hereinafter provided.* 5. That *the business of the company shall be*, to take on lease or to purchase, either for years or in fee, land or ground within the distance of twenty miles from St. Paul's, of freehold, copyhold or customary, and leasehold tenure, and to erect houses thereon, and to finish and complete any houses which may have been begun to be erected on the land so taken or purchased, and to take down and rebuild, or to repair, any existing houses or buildings on the land or ground so taken or purchased; and *to make and sell bricks, and to purchase and sell all kinds of building materials, and to contract for and perform all kinds of work in the building business, and in relation thereto.* 32. That the directors may employ as many servants and *workmen* as the business of the company may require. 34. That the directors may authorize the trustees to make and buy bricks and tiles, and purchase all kinds of building materials, and erect, finish, and repair houses and other buildings, *and generally to do all such acts, matters, and things as are usually done by builders.* 36. That the directors may authorize the trustees to enter into and make contracts for erecting, completing, or carrying on all or any erections and buildings and other works, or for the supply of any articles or materials necessary for the purpose of carrying the object of the company into effect, as they may think expedient. 50, 51. The erection of houses, and the number, size, and description thereof, to be in the discretion of the directors. 63. That the company should be finally wound up when all the members have received allotments of houses:—

Held, that, notwithstanding the general words of the 5th and 34th clauses, it being apparent on the whole deed that the powers thereby given to the directors and trustees were only ancillary to the main object and purpose of the association, viz. the enabling each member to become the possessor of a freehold, copyhold, or leasehold house, and not the carrying on the building business "for any purpose of profit,"—the company was not one which required registration under the 7 & 8 Vict. c. 110. *Moore* v. *Rawlins*, 289

Forfeiture of Shares.

2. The 45th clause provided, that, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares, and all moneys paid in respect thereof, shall, at the expiration of such six months, become absolutely forfeited to the company:—Held, that the neglect of a member to pay his subscriptions and fines for six months, operated a forfeiture of his share or shares, *at the option of the directors.* *Id.*

Who are "Shareholders."

3. The 21st and subsequent sections of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), do not authorize an action against a "subscriber to the undertaking" for calls. *The Wolverhampton New Waterworks Company* v. *Hawkesford*, 336
4. Whether a party may be a "shareholder," without being on the register,—*quære?* *Id.*
5. A count alleged that the defendant *subscribed* a certain sum to the undertaking, and that certain portions thereof were called for, and places and times appointed for the payment

thereof, and that the defendant had due notice of the premises, and that the plaintiffs (the company) did all things necessary to entitle them to have the calls paid, but that the defendant made default:—Held, that the count disclosed no cause of action,—inasmuch as it did not show that the defendant was a "shareholder" within the act. *Waterworks Company* v. *Hawkesford*, 336

LANDING-STAGE.

See THAMES CONSERVANCY ACT.

LANDLORD AND TENANT.

Contract of Tenancy.

A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet to C. for the whole of his term. The term having expired, C. applied to A. to accept him as his tenant for a further term, which A. refused to do, saying that B. was his tenant. C. continued in possession till after Michaelmas, 1858, when B. sued him for the half-year's rent, and *afterwards* paid A. (who received the same) the rent which would have become due from him (B.) to A., assuming his tenancy to be still subsisting:—Held, that the action was maintainable. *Levi* v. *Lewis*, 766

And see FIXTURES.

LANDS CLAUSES CONSOLIDATION ACT, 1845.

Construction of ss. 54, 68,—*See* RAILWAY COMPANY, 1.

LETTERS PATENT.

Grant of License to use Invention.

The declaration stated, that, by deed,—reciting that the plaintiff had obtained a grant of letters patent for his invention of certain improvements in manufacturing and getting up wire rope,—*it was witnessed* that the plaintiff did thereby grant to the defendant full and exclusive license and authority to use, exercise, and put in practice the said invention, and to sell the wire rope so to be made by him, within a given district in England: And the defendant covenanted, amongst other things, "that he would well and truly pay to the plaintiff 1*l.* per ton for all wire rope manufactured by him by the aid of the machinery of the plaintiff under and by virtue of the said patent process," at the end of every three months: "that he would make and deliver to the plaintiff at the expiration of every three months a true statement in writing of the number of tons of rope so manufactured by him as aforesaid; and also should and would permit and suffer the plaintiff at all reasonable times to examine his books and accounts, for the purpose of ascertaining the accuracy of the statement thereby covenanted to be delivered:" And the plaintiff by the said deed also covenanted with the defendant, that, during the continuance of the grant thereby made, he would not, without the consent in writing of the defendant, use, exercise, or put in practice, or vend, or grant to any other person or persons license or authority to use, exercise, or vend wire rope manufactured as aforesaid within the district thereinbefore mentioned, but "that within such limits the defendant should have and be entitled to *the exclusive right*, liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process."

The breaches assigned were,—first, non-payment of the stipulated 1*l.* per ton,—secondly, non-delivery of tri-monthly accounts,—thirdly, refusal to permit the plaintiff to examine the defendant's books and accounts.

The defendant pleaded,—fifthly, that the plaintiff did not give, nor did the defendant take or have, such exclusive license within such district, as by the said deed provided for,—eleventhly, that the said invention was worthless and of no public utility or advantage, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof; that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention; and that, at the time of the making of the said deed, the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof:—

Held, that the fifth plea was bad, as traversing the effect of the deed; and that the eleventh plea was also bad as a plea of failure of consideration, the license being by *deed*, and not amounting to a plea of fraud. *Smith* v. *Scott*, 771

LIBEL.

Privileged Communication.

The plaintiff's attorney having at his desire written to the defendant demanding payment of an alleged debt, the latter sent a letter to the attorney containing gross imputations upon the plaintiff's character, wholly unconnected with the demand made upon him:—Held, not a privileged communication, although the jury found that the letter was written bonâ fide, and negatived malice in fact. *Huntley* v. *Ward*, 514

LIEN.

Waiver of.

1. A lien may be waived by the party's setting

up a claim to retain the chattel upon a different ground, and making no mention of the lien. *Weeks* v. *Goode*, 367

2. In trover against A. and B. for a lease, the evidence of conversion was as follows:—A demand having been made upon A., he declined to give up the lease until certain rent due to B. was paid; but he added that it was more B.'s business than his own, and, as he was not in, he (A.) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff, receiving neither lease nor letter, issued his writ on the following morning:—Held,—affirming the doctrine of Boardman v. Sill, 1 Camp. 410, n.,—that this amounted to an absolute refusal, notwithstanding the defendants had at the time (though it was not mentioned) a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff. *Id.*

[*On Property of a Bailor for Default of Bailee.*

3. A railway company enters into an agreement with A. for the delivery to them, during a certain period, of a certain quantity of coals, to be carried by them for hire, to be paid by A., and in A.'s wagons; the company to have the right to detain any wagons of A. on certain defaults on his part. In order to complete this agreement, A. agrees with B. to supply a portion of the quantity of coals to be sent on to the line, in wagons which had been hired, for a term, from A. by B., but now relet for hire, by him to A., for this purpose. A. having made default, the company seize and detain the wagons then on the line as being A.'s, but they are, in fact, wagons sent on by B., under his agreement with A. The company cannot retain them against B. *North* v. *The Great Northern Railway Company*, 926

LIFE ASSURANCE.

Avoidance of Policy by Untrue Answers to Questions.

One T. effected a policy on his own life, with a condition thereon endorsed, that, "in case any fraudulent *or untrue* statement was contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy should be void."

Among the documents referred to was one called a "personal statement," which contained, amongst others, the following questions:—"4. Whether had, since infancy, any and what other disease (than those enumerated in a preceding question) requiring confinement?" "8. How often has medical attendance been required?" "9. How long did such attendance continue?" "10. For what disease or diseases?" "11. For what period confined to the house or bed?" "12. How long is it since these circumstances occurred?" "13. Name and address of the medical attendant or attendants employed on occasion of such disease?"

The answers to these questions were as follows,—To the 4th, "No;" to the 8th, "Two years ago;" to the 9th, "About one week;" to the 10th, "Disordered stomach;" to the 11th, "A week;" to the 12th, "One year;" and to the 13th, "Dr. R., Rock Ferry."

It appeared that the attendance of Dr. R. was in December, 1855; that, in January, 1856, the assured had had a relapse, when he was attended by one Dr. C.; and that, in February, while at Birmingham, he had another severe illness, when his life was despaired of, and on which occasion he was attended by *three* other medical men:—

Held, that the *untruth* of the above answers avoided the policy, notwithstanding the jury found that no *material* information had been withheld from the insurers, and it was conceded that there was no intentional fraud. *Cazenove* v. *The British Equitable Assurance Company*, 437

LIGHTING-RATE.

Under 18 & 19 *Vict. c.* 120, *s.* 158.

The 158th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts that "every vestry and board shall distinguish in their orders sums required for defraying expenses connected with sewerage, and also, where the Lighting Act, 3 & 4 W. 4, c. 90, or any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this act, distinguish, as regards such parish or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this act."

The board of works of the Wandsworth district made an order upon the overseers of the parish of Battersea, under the above section, to levy a certain sum for lighting one of the four districts into which that parish was divided, called the "out district," and also to levy certain other distinct sums for lighting the three other districts.

Neither the 3 & 4 W. 4, c. 90, nor any other act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted

from being rated in respect of such expenses, was in force in the "out district" at the time of the passing of the 18 & 19 Vict. c. 120, though the first-mentioned act was in force at that time in two of the other districts, and a private lighting act in the fourth district: and for these three districts a similar order for the levying of distinct sums for lighting expenses was at the same time made:—

Held, that the order, and the rate made in pursuance thereof, were valid. *St. James's Westminster*, app., *St. Mary Battersea*, resp., 877

LIST OF VOTERS.

See PARLIAMENT.

LONDON UNION.

See POOR.

MEMORANDA.

Judges.

Resignation of the great seal by Lord Chelmsford, 637

Appointment of Lord Campbell to be Lord Chancellor, 637

Appointment of Cockburn, C. J., to be Lord Chief Justice of England, 638

Appointment of Erle, J., to be Chief Justice of the Common Pleas, 638

Appointment of Colin Blackburn, Esq., to be a judge of the Queen's Bench, 638

Law Officers.

Resignation of Sir Fitzroy Kelly and Sir Hugh M'Calmont Cairns, 638

Appointment of Sir Richard Bethell and Sir Henry Singer Keating, 638

Queen's Counsel.

John Hinde Palmer, Archibald John Stephens, and William David Lewis, 916

METROPOLIS LOCAL MANAGEMENT ACT.

See LIGHTING-RATE.

METROPOLITAN BUILDING ACT.

Construction of.

A landlord is justified, under the 83d section of the Metropolitan Building Act, 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85,—such tenant not being an "owner" within the interpretation clause, s. 3; and it is no objection that he has neglected to give the notice to the district-surveyor, required by s. 88. *Wheeler* v. *Gray*, 606

MINING COMPANY.

Whether a "Cost-Book Mine" is within 1 & 2 Vict. c. 110, s. 14.

1. *Quære*, whether a mining company on the cost-book principle is a "public company" within the meaning of the 1 & 2 Vict. c. 110, s. 14, so as to make shares therein liable to be charged with a judgment-debt? *Nicholls* v. *Rosewarne*, 480
2. An order under the statute having been made by a judge at Chambers,—the court confirmed it, on the ground that by setting it aside they would preclude the judgment-creditor from taking the opinion of a court of appeal. *Id.*
3. *Quære*, whether one who has sold his shares in such a company, and whose vendee has accepted the transfer, but has not caused it to be registered, is a person having shares "standing in his name in his own right" within the statute? *Id.*

And see FALSE REPRESENTATION.

MISTAKE.

See PARLIAMENT.

NAVIGATION.

See RAILWAY COMPANY, 6, 7.

NECESSARIES.

See HUSBAND AND WIFE, 2. INFANT.

NEGLIGENCE.

Of Master of Ship in Loading Goods,—See SHIPPING.

[*In not fencing in Railway Stations,—See* RAILWAY COMPANY, 8.]

NEW TRIAL.

See PRACTICE, 5.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE.

OFFICE-COPIES.

See PRACTICE, 7.

OWNER.

See METROPOLITAN BUILDING ACT

PARISH BOOKS.

See EVIDENCE, 3.

PARLIAMENT.

List of Voters.

1. This court has no general jurisdiction to interfere with the list of voters for members of parliament, in cases in which no appeal lies under the 6 & 7 Vict. c. 18. *In re John Thistlethwaite Allen*, 334

2. The name of a voter appeared in the list of voters for a borough, and also in the list for the county. His qualification in respect of the latter being objected to, and he not appearing to support his vote, the revising barrister, intending to strike his name out of the county list, by mistake expunged it from the borough list:—Held, that this court had no power to give him relief, or to make any order under the 6 & 7 Vict. c. 18, s. 67. *Id.*

PAROCHIAL DISTRICTS.

See LIGHTING-RATE.

PARTY-WALL.

See METROPOLITAN BUILDING ACT.

PLEADING.

Failure of Consideration.

1. The declaration stated, that, by deed,—reciting that the plaintiff had obtained a grant of letters patent for his invention of certain improvements in manufacturing and getting up wire rope,—*it was witnessed* that the plaintiff did thereby grant to the defendant full and exclusive license and authority to use, exercise, and put in practice the said invention, and to sell the wire rope so to be made by him, within a given district in England: And the defendant covenanted, amongst other things, "that he would well and truly pay to the defendant 1*l.* per ton for all wire rope manufactured by him by the aid of the machinery of the plaintiff under and by virtue of the said patent process," at the end of every three months; "that he would make and deliver to the plaintiff at the expiration of every three months a true statement in writing of the number of tons of rope so manufactured by him as aforesaid; and also should and would permit and suffer the plaintiff at all reasonable times to examine his books and accounts, for the purpose of ascertaining the accuracy of the statement thereby covenanted to be delivered:" And the plaintiff by the said deed also covenanted with the defendant, that during the continuance of the grant thereby made, he would not, without the consent in writing of the defendant, use, exercise, or put in practice, or vend, or grant to any other person or persons license or authority to use, exercise, or vend wire rope manufactured as aforesaid within the district thereinbefore mentioned, but "that within such limits the defendant should have and be entitled to *the exclusive right*, liberty, and privilege of manufacturing, vending, and disposing of wire rope made under and by virtue of the said patent process."

The breaches assigned were,—first, non-payment of the stipulated 1*l.* per ton,—secondly, non-delivery of tri-monthly accounts,—thirdly, refusal to permit the plaintiff to examine the defendant's books and accounts.

The defendant pleaded,—fifthly, that the plaintiff did not give, nor did the defendant take or have, such exclusive license within such district, as by the said deed provided for,—eleventhly, that the said invention was worthless, and of no public utility or advantage, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof; that the defendant never got or took any advantage or benefit under the said deed in regard to the said invention; and that, at the time of the making of the said deed, the plaintiff knew the matters aforesaid, and the defendant did not, and had no notice or knowledge thereof:—

Held, that the fifth plea was bad, as traversing the effect of the deed; and that the eleventh plea was also bad as a plea of failure of consideration, the license being by *deed*, and not amounting to a plea of fraud. *Smith* v. *Scott*, 771

Condition Precedent.

2. The general averment of readiness and willingness not sufficient in the case of a condition precedent. *Roberts* v. *Brett*, 633

Pleading and Demurring.

3. Quare impedit is within the 80th section of the Common Law Procedure Act, 1852. *Marshall* v. *The Bishop of Exeter*, 716

[*Allegation of Reasonable and Probable Cause.*—*See* TRIAL.]

POOR.

Call made by Guardians of Union.

By the 81st article of the Consolidated Order of the Poor Law Commissioners, 1837, it is provided that "the clerk shall, four weeks at least before the 25th of March and the 29th of September respectively in each year, refer to and ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half-year of the last year corresponding to the half-year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any

extraordinary charges to which the union may be liable in the coming half-year, *and he shall also estimate the probable balance due to or from the parish at the end of the current half-year*, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year," &c.

And the 82d article provides that "the guardians shall make orders on the overseers or other proper authorities of every parish of the union, from time to time, for the payment to the guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for any other expenses chargeable by the guardians on the parish," &c.

The guardians of the London Union made a contribution-order pursuant to the 82d article; but the clerk, in preparing it, disregarded the terms of the 81st article, inasmuch as, in computing the sum for which the parish of St. M. B. was to be ordered to contribute to the expenses of the union, he omitted to estimate "the probable balance due to that parish;" for, if he had taken that balance into account, it was so largely in its favour that no sum whatever would have been needed to meet the cost of the maintenance of its poor, and the other charges for which the order was made.

The reason for this omission was, that the balances in favour of that and several other parishes in the hands of the treasurer of the union had been fraudulently appropriated by an officer of the union who was employed to collect the rates for certain of the parishes forming the union, of which the parish of St. M. B. was not one:—

Held, that, as the guardians might by taking the proper steps,—either by orders apportioning the amount of the loss amongst the various parishes of the union, or by orders apportioning it exclusively amongst those parishes for which the defaulting officer was collector,—realize the balance due to the parish of St. M. B., they had no right to treat it as non-existing, and, consequently, that the order was illegally made, and could not be enforced. *Hale*, app., *The Guardians of the Poor of the City of London Union*, resp. 863

PORT-MONNAIES

See CARRIER, 3.

POWER.

See ESTATE ACT.

PRACTICE.

Inspection of documents under 14 & 15 *Vict. c.* 99, *s.* 6.

1. It is no objection to an order, under the 14 & 15 Vict. c. 99, s. 6, for the inspection of a document in the possession of a defendant, that its production will disclose his case, provided that it be satisfactorily shown that it also supports the plaintiff's case. *The London Gas-Light Company* v. *Chelsea Vestry*, 411

Inspection under the Court's General Jurisdiction.

2. In an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof.

The court refused to grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made, —the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him. *Shadwell* v. *Shadwell*, 679

Special Jury.

3. The court has no power to grant a rule for a special jury before issue joined, even where, in consequence of the defendant's being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial. *Dresser* v. *Norman*, 427

4. The proviso at the end of the 44th rule of Hilary, 1853, applies to the six days' notice. *Id.*

Motion for New Trial.

5. A cause was tried on the last day but two of Easter Term. The court refused to allow a motion for a new trial to be suspended until the first day of Trinity Term, on the ground that the attorney had not had time since the trial to prepare himself with affidavits of surprise. *Cooper* v. *Lloyd*, 519

Intituling Orders.

6 An order for enlarging the time for making an award as to matters in difference, was intituled in a cause in the Queen's Bench which was at an end: Held, that the title was mere surplusage, and did not invalidate the order. *Oldfield* v. *Price*, 539

Omission to take Office-Copies of Affidavits.

7. That office copies of affidavits upon which a rule is moved have not been taken, is not an objection which this court will entertain after the argument has been allowed to commence. *Mason* v. *Haddan*, 526

Attachment under the Common Law Procedure Act, 1854, s. 61.

8. A mere verdict in an action of contract for unliquidated damages is not a "debt owing or *accruing*," so as to be attachable under the 61st section of the Common Law Procedure Act, 1854. *Dresser* v. *Johns*, 429

9. A. obtained a verdict against B. for 100*l.* on the 21st of February, but judgment was not signed until the 8th of March. On the 4th of March, C., who had an unsatisfied judgment against A., obtained an order nisi under the 61st section of the Common Law Procedure Act, 1854, to attach the 100*l.* in the hands of B., upon which an absolute order was made on the 11th:—Held, that the order was invalid, there being no debt "owing or accruing" when the order nisi was obtained. *Id.*

Staying Proceedings,—See INDIAN INSOLVENT DEBTORS ACT.

Charging stock, &c., under 1 *&* 2 *Vict. c.* 110, *s.* 14,—*See* MINING COMPANY.

[*How Evidence under Plea to be left to Jury. See* TRIAL.]

PREPAYMENT.

See PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY.

Surety, how discharged.

1. A material variation of the terms of the contract with the principal discharges the surety. *The General Steam Navigation Company* v. *Rolt*, 550

2. A. contracted with B. to build a ship for him for a given sum, to be paid by instalments as the work reached certain stages; and C became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments; and B. becoming bankrupt before the ship was finished, A. was compelled to expend a larger sum of money than the unpaid portion of the purchase-money in completing her.

In an action by A. against C. (the surety) to recover the excess and also a stipulated sum by way of damages for the delay in the completion of the ship, C. pleaded that the prepayments were made to B. without the knowledge or consent of C., and that, by making such payments without his consent, A. materially and prejudicially altered his position as surety. To this A. replied that the advances so made by him to B. were made with the knowledge, authority, and consent of C., and at his request, or for his use and benefit, and on his account:—

Held, that the plea afforded a primâ facie answer to the action, and that the onus lay upon A. to prove that the advances were made with the knowledge and assent and at the request of the surety. *Id.*

Affirmed on appeal by the Exchequer Chamber, 484, 601.

PRIVATE ACT.

See ESTATE ACT.

PRIVILEGED COMMUNICATION.

See LIBEL.

[PROBABLE CAUSE.

See TRIAL.]

[PROMISSORY NOTE.

See BILL OF EXCHANGE.]

PROMOTIONS.

See MEMORANDA.

PROSPECTUS.

See FALSE REPRESENTATION.

PUBLIC COMPANY.

See JOINT STOCK COMPANY. MINING COMPANY.

QUANTUM MERUIT.

See EVIDENCE, 1.

QUARE IMPEDIT.

Double Pleading.

Quare impedit is within the 80th section of the Common Law Procedure Act, 1852. *Marshall* v. *The Bishop of Exeter*, 716

RAILWAY COMPANY.

Compensation for Lands taken or injuriously affected.

1. *Notice for special jury.*—By the 68th section of the Lands Clauses Consolidation Act, 8 &

9 Vict. c. 18, it is provided, that, if the party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed shall exceed the sum of 50*l.*, and the party so entitled desire to have such question of compensation settled by a jury, he may give the promoters notice of such his desire, and, unless they be willing to pay the amount so claimed, they shall, *within twenty-one days*, issue their warrant to the sheriff to summon a jury to settle the same: and s. 54 enacts that either party may have the question of compensation tried by *a special jury*, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking *before they have issued their warrant*:—

Held, that the service of a notice under s. 54 is not a waiver of a notice previously given under s. 68, so as to entitle the company to an extension of the period of twenty-one days for issuing their warrant. *Glyn* v. *The Aberdare Valley Railway Company*, 359

Motion under the Railway and Canal Traffic Act, 1854.

2. *Collection and delivery.*—A railway company has no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them. *In re Garton and the Bristol and Exeter Railway Company*, 639

3. The B. and E. Railway Company closed their goods station at B. at 5.15 p. m. against all persons except their agent W., who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8 p.m. For the conveyance of goods from the receiving-house to the station, W. charged 1*s.* 8*d.* per ton on all goods above 3 cwt., and 3*d.* for each package below that weight:—Held, upon the complaint of a rival carrier, that the refusal to receive goods sent by him to the station after 5.15, unless sent through the receiving-house of W., was imposing upon him an undue prejudice, within the 17 & 18 Vict. c. 31, s. 2,—although it was sworn on the part of the company that the goods so brought to the station by W. came there properly classified, weighed, and prepared for loading. *Id.*

4. *Undue preference.*—The general rate of charge for the carriage of goods from Bristol to Bridgewater and vice versâ was 6*s.* 8*d.* per ton for first-class, 8*s.* 4*d.* per ton for second-class, 12*s.* 6*d.* per ton for third-class, and 16*s.* 8*d.* per ton for fourth-class goods. The company had special contracts with certain grocers and ironmongers at Bridgewater, under which they agreed to carry all their grocery and ironmongery goods at a uniform rate of 6*s.* per ton, including delivery:—Held, an undue preference,—it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, or to meet competition from another railway or any other mode of carriage. *In re Garton and the Bristol and Exeter Railway Company*, 639

5. The Railway and Canal Traffic Act, 1854, was designed to afford a remedy against an undue preference or undue prejudice to a particular individual or class in respect of the traffic on the railway or canal; and was not intended to apply to the case of a breach or neglect by the company of a public duty which was already susceptible of redress by mandamus or by indictment. *Bennett* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 707

6. The Manchester, Sheffield, and Lincolnshire Railway Company were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock communicating with their railway. By act of parliament the company was authorized and required to maintain the Old Dock and the approach thereto of a given depth:—Held, that the failure to perform this duty, so that the dock and its approach became silted up, and the depth of water therein insufficient for vessels to get to the wharfs adjoining, was not the subject of redress under the Railway and Canal Traffic Act, 1854,—although it was suggested that the object of the company was to discourage the traffic to the Old Dock and to divert it to the new one. *Id.*

7. And *semble*, that the dock or haven was not a canal or navigation within the statute. *Id.*

[*Liability for Negligence.*

8. A railway company is bound so to fence a station that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest, to the station. *Burgess* v. *The Great Western Railway Company*, 923]

REFERENCE.

On s. 11, *of the Common Law Procedure Act*, 1854,—*See* ARBITRAMENT, 1, 2.

REGISTRATION.

See JOINT STOCK COMPANY, 1.

RINGS.

See CARRIER, 3.

ROMAN CATHOLICS.

Disabilities of,—*See* ESTATE ACT

SETTLEMENT.

See ESTATE ACT.

SHAREHOLDER.

See JOINT STOCK COMPANY, 4—6. MINING COMPANY, 3.

SHERIFF.

Fees on Arrest on a Ca. Sa.

Under the table of fees settled by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, the sheriff's officer is entitled to 1*l.* 1*s.* for arresting the defendant on a ca. sa., though within a mile of the officer's residence; but he is not entitled to charge 10*s.* "for conveying the defendant to gaol," or 5*s.* for an assistant, unless the necessity for an assistant is shown: and, where the officer has improperly received such charges, he will be ordered to refund the excess, with costs of the application,—under pain of an attachment. *Cooper* v. *Hill*, 703

SHIPPING.

Construction of Charter-Party.

1 By a charter-party it was agreed that the ship, then lying at Genoa, should sail "on or before the 30th of July, 1859," to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient despatch to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7*l.* per day; and then came the following provision,—"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid by the party delinquent to the party observant, at the above-named rate of demurrage or compensation."

The vessel did not leave Genoa until the 8th of September:—

Held, that this was not a detention during the "voyage," within the meaning of the penalty clause. *Valente* v. *Gibbs*, 270

Liability of Master for Negligence in Shipping and Stowing Goods.

2. *Semble*, that a merchant sending goods to be loaded on board a general ship is not entitled to assume, without inquiry, that they are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with the master, or wrong done by him or the crew, to insist upon holding the master liable for damage done to the goods in the loading thereof. *Blaikie* v. *Stembridge*, 894

3. In the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner of a ship, to receive and properly stow on board the goods to be carried; and, for any damage to the goods occasioned by negligence in the performance of this duty, the owner (and probably also the master, if the damage result from the neglect or misconduct either of himself or of those for whose acts he is responsible) is liable to the shipper. *Id.*

4. A ship was chartered by the owner to one A. for a voyage with cargo to Port Louis and back, for a stipulated rate of freight per ton on the homeward cargo,—the cargo to be taken to and tendered alongside at the charterer's risk and expense, the ship to be consigned to charterer's agents at ports of loading and discharge, and *a stevedore for the outward cargo to be appointed by the charterer, but to be paid by and to act under the captain's orders.* The charterer put up the ship as a general ship for Port Louis, and appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. The plaintiffs' agent arranged with the broker of the charterer for the freight and carriage to Port Louis of certain sugar-pans, and sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter *by the stevedore and his men*, two of them were by their negligence damaged:—

Held, that, under these circumstances, the stevedore was not the servant or agent of the master, so as to render him responsible. *Id.*

SHIRT-PINS.

See CARRIER, 3.

SILKS.

See CARRIER, 4.

SLAVES.

Sale of, by British subject abroad.

A sale of slaves by a British subject to a Brazilian subject, in the Brazils, where slavery is by law permitted, for the purpose of being used and employed as slaves in that empire, is rendered illegal by the 6 & 7 Vict. c. 98, though such slaves were acquired and were in the possession of the seller before the passing of that Act. *Santos* v. *Illidge*, 841

SMELLING-BOTTLES.

See CARRIER, 5.

SPECIAL CASE.

Setting down for Argument.

1. A verdict and judgment having been taken for the plaintiff, subject to a special case, to be settled by a barrister, and the referee having settled it, the defendant obtained a rule to set aside the judgment, on the ground that the plaintiff had neglected to take the necessary steps to set the case down for argument. Cause was shown upon an affidavit stating that the delay had arisen partly from the refusal of the defendant to pay a moiety of the referee's fees for settling the special case, and partly from the fact of the plaintiff's attorney having been until within two days of the application for the rule engaged in negotiations for obtaining a loan of money on mortgage for the defendant, to enable him to settle the plaintiff's claim:—The court discharged the rule, with costs. *Hawkins* v. *Bennet*, 386

Amendment of.

2 *Quære*, whether a special case can be amended after judgment, and writ of error brought, without consent? *Notman* v. *The Anchor Assurance Company*, 536

SPECIAL JURY.

See PRACTICE, 3, 4. RAILWAY COMPANY, 1.

STAY OF PROCEEDINGS.

INDIAN INSOLVENT DEBTORS ACT.

STEVEDORE.

Appointment and Duty of,—See SHIPPING.

SUBSCRIBER.

See JOINT STOCK COMPANY, 4–6.

SURETY.

See PRINCIPAL AND SURETY.

SURPRISE.

See PRACTICE, 5.

SURRENDER.

Of a Term, Effect of.

A lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant:—Held, that the mortgagees had a right to enter and sever the fixtures,—it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender. *The London and Westminster Loan and Discount Company* v. *Drake*, 798

And see COPYHOLD.

TENDER.

See COSTS, 2.

THAMES CONSERVANCY ACT.

License to erect Wharfs.

By the 53d section of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), it is enacted that "it shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a license to make any pier, jetty, &c., immediately in front of his land, and into the bed of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose."

And by s. 179, it is enacted that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, &c., are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made:";—

Held, that it was competent to the conservators under this act to grant to the owners of a wharf a license for the projection of a jetty or landing-stage into the bed of the river in front of their premises, although such erection might in some degree obstruct the enjoyment by the adjoining owners of the free navigation of the river,—such right of enjoyment by them in common with the rest of the public, not being a right contemplated by the saving clause. *Kearns* v. *The Cordwainers' Company*, 388

[TRIAL.

Partial Proof of Allegations of Plea.

It is the duty of a judge to tell the jury what allegations in a plea setting up the defence of reasonable and probable cause are sufficient to constitute such defence; and where evidence has been given in proof of allegations sufficient to constitute a good plea, but no evidence has been given in proof of other allegations in the plea, the case should be left to the jury upon those allegations in the plea of which evidence has been given, and which are by themselves sufficient to make a good plea. *Jones* v. *Williamson*, 9241

END OF VOL. VI.

H.L.GILLASPIE.